Southwestern Journal of International Law

Volume XXVI 2020 Number II

Published Two Times Annually by the Students of
Southwestern Law School
3050 Wilshire Boulevard
Los Angeles, CA 90010-1106
(213) 738-6857
lawjournal@swlaw.edu

Subscription Rates Commencing Volume Twenty-Six

$34.00 per year (domestic)
$38.00 per year (foreign)
Single Copies: $17.00 (plus $5.00 for foreign mailing)

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Manuscripts should be sent to the Editor-in-Chief, Southwestern Journal of International Law, 3050 Wilshire Boulevard, Los Angeles, California 90010.

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SOUTHWESTERN JOURNAL OF INTERNATIONAL LAW

VOLUME XXVI 2020 NUMBER 2

TABLE OF CONTENTS

FIGHTING IN THE LAW'S GAPS

NOTES & COMMENTS

SOUTHWESTERN JOURNAL OF INTERNATIONAL LAW

VOLUME XXVI 2020 NUMBER 2

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THE RIGHT TO INTERVENTION IN AN INTERNAL CONFLICT OF STATES: THE CASE IN YEMEN

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Abstract

The right to intervention has taken center stage in many internal crises across the globe. The conflict in Yemen is no different. What started as an intra-state conflict has now escalated into an international armed conflict with a Saudi Arabian-led coalition supporting the Yemeni government, and Iran supporting the Houthi group. International law has entrenched the principle of sovereignty and the codification of non-interference in both positive and customary international law. Yet, there are practical situations of endemic interference in member states' domestic affairs. Thus, this paper analyses the right to intervene in internal conflicts of states under international law in juxtaposition with the situation in Yemen. The interventions in Yemen offend the basic principles of positive and customary international law. Moreover, the interventions not only fail to resolve the conflict, but further escalated it, aggravating the humanitarian catastrophe and the gross human rights violations in Yemen. The situation has in fact become an international armed conflict with intermediates, prolonging it more than necessary. This paper suggests strategic steps that should be taken to settle the disputes amicably and peacefully in line with the dictates of Article 2(4) and Chapter 6 of the UN Charter.

I. INTRODUCTION

Generally, the term "intervention" in international law implies a situation in which one state interferes in another's intra-state affairs or engages in military operations within the other's territory in a way that compromises the state's sovereignty over its own people and territory. For many centuries, the right to intervene in domestic affairs has remained highly controversial and debatable,[1] primarily because sovereignty remains a very strong concept which defines the global political order.[2] The idea of sovereignty can be traced back to the Treaty of Westphalia[3] which, in 1648, put to an end the 30 Years' War. The Treaty also created a political order whereby states were able to territorially exercise exclusive control or sovereignty over their populations and political affairs. Scholars later developed the principle of non-interference which prohibits dabbling in

1. Foreign and Commonwealth Office, *Is Intervention ever Justified? UK Foreign Office Policy Document No. 148*, 57-1 BYIL 614 (1986); *see* Adam Roberts, *The So-Called Right of Humanitarian Intervention*, 3 Y.B. INT'L HUMANITARIAN L. 1, 14 (2009).

2. *See* NIKOLAOS K. TSAGOURIAS, JURISPRUDENCE OF INTERNATIONAL LAW: THE HUMANITARIAN DIMENSION 65-66 (2000).

3. *Peace of Westphalia*, ENCYCLOPAEDIA BRITANNICA (Jul. 20, 1998), https://www.britannica.com/event/Peace-of-Westphalia.

another states' domestic affairs.[4] The purpose was to reduce international conflict and provide order in areas that are prone to conflict. This aim was officially codified in the Charter of the United Nations, which clearly proscribes member states from meddling in another's internal affairs.

Despite the significance of the notion of sovereignty and the codification of principles of non-interference in international law, there are practical situations of endemic interference in member states' internal affairs.[5] After the Cold War, many argued that sovereignty and principles of non-interference should give way when a state is engaged in gross human rights violations.[6] This position appears to have generated much controversy in numerous interventions such as those in East Timor in 1974,[7] Kuwait in 1992,[8] the Bosnian civil war,[9] and the Kosovo war in 1999.[10] Central to this argument is the continued relevance of state sovereignty and non-interference principles in today's world, the right or obligation of states or the international community to intervene in internal crisis, and the positive impacts of intervention on states' peace and stability at reasonable costs.[11] In fact, since 2001, and after the United States' invasion of Afghanistan, the issue has turned to how these interventions can be made effective in a way that will not complicate the existing peace and stability of the states.

On the same note, the situation in Yemen is similar, if not worse. In March 2015, Saudi Arabia, under the pretext of halting the Houthi advances through Yemen, launched a military attack on Yemen. No one can deny that the Houthi are part of Yemeni society, as Houthis coexisted in peace with all Yeminis a long time ago. Intervention in Yemen's internal affairs became attractive when the Houthi became a threat to Saudi Arabia's plans for future expansion in Yemen. To properly coordinate an effective intervention, Saudi Arabia formed a coalition with countries such as Qatar, United Arab Emirates

4. Marcelo Kohen, *The Principle of Non-Intervention 25 Years After the Nicaragua Judgment*, 25 LIEDEN J. INT'L L. 157, 160 (2012).

5. HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND POLITICAL DILEMMAS (J.L. Holzgrefe & Robert O. Keohane eds., Cambridge Univ. Press 2003) [hereinafter HUMANITARIAN INTERVENTION].

6. *See* ANNE ORFORD, READING HUMANITARIAN INTERVENTION: HUMAN RIGHTS AND THE USE OF FORCE IN INTERNATIONAL LAW 20 (Cambridge Univ. Press 2003).

7. *Id.* at 22-23.

8. *Id*.

9. FERNANDO R. TESÓN, HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY 322-27 (Transitional Publishers, Inc. ed., 3rd ed. rev. 2005).

10. Nico Krisch, *Unilateral Enforcement of the Collective Will: Kosovo, Iraq, and the Security Council*, 3 MAX PLANCK UNYB 78, 80-81, 86 (1999).

11. *Id.*

(U.A.E.), Kuwait, Bahrain, Jordan, Sudan, Morocco, Egypt and Pakistan.[12] The Gulf Cooperation Council announced that the military intervention action occurred in light of Yemen President Hadi's request to leaders of Saudi Arabia,[13] Bahrain, Oman, Kuwait and Qatar, to engage in such military intervention. According to President Hadi, the purpose of the invention was to protect Yemeni citizens from Houthi aggression.[14] While the United Kingdom and the United States provide arms and military intelligence support to the Saudi-led intervention,[15] Iran allegedly supports the Houthi, who follow the same sect of Tehran (Shiite), with weapons, financial support, and military advice.[16]

Against this backdrop, this paper analyzes the right of intervention under international law, and then juxtaposes that right with the Yemini experience. To achieve this objective, this study examines the nature, evolution, and development of the power of intervention in internal conflicts of another state. This paper will also examine the legal standing of the Saudi-led intervention, the interventions by Iran in support of the Houthis group through the use of force, and the various legal issues that arise from the intervention in Yemen.

II. NATURE OF THE RIGHT TO INTERVENTION IN INTERNATIONAL LAW

The right of intervention through the use of force can be broadly normative, with historical and legal perspectives depending on a particular

12. Ryan Goodman, *Saudi Arabia's Misleading Email to Congress After Bombing of MSF Cholera Hospital*, JUST SEC. (June 25, 2018), https://www.justsecurity.org/58437/saudis-deceptive-email-congress-bombing-msf-cholera-hospital/.

13. It is primordial to mention that President Hadi was chosen after the thrown of former Yemeni President, Saleh, and supported by the government of Riyadh. He practices his authorities from his office in Saudi Arabia. *Yemen's President Ali Abdullah Saleh cedes power*, BBC NEWS (Feb. 27, 2012), https://www.bbc.com/news/world-middle-east-17177720.

14. *Yemen's Hadi Seeks UN Military Support to Deter Houthis*, AL JAZEERA (Mar. 25, 2015), https://www.aljazeera.com/news/middleeast/2015/03/yemen-hadi-seeks-military-support-deter-houthis-150324223355704.html.

15. Barbara Bodine et al., *The Trump Administration Must Extend Temporary Protected Status for Yemenis*, JUST SEC. (June 26, 2018), https://www.justsecurity.org/58459/trump-administration-extend-tps-yemenis/; *see generally* Albert Fox Cahn & Karin Bashir, *Carpenter Ruling Brings Us Back from Brink of Orwellian Surveillance State*, JUST SEC. (June 28, 2018), https://www.justsecurity.org/58607/carpenter-ruling-brings-brink-orwellian-surveillance-state/; Mohamad Bazzi, *America is Likely Complicit in War Crimes in Yemen. It's Time to Hold the U.S. to Account*, GUARDIAN (Oct. 3, 2019), https://www.theguardian.com/commentisfree/2019/oct/03/yemen-airstrikes-saudi-arabia-mbs-us.

16. Jonathan Saul et al., *Exclusive: Iran Steps Up Support for Houthi's In Yemen's War – Sources*, REUTERS (Mar. 21, 2017), https://www.reuters.com/article/us-yemen-iran-houthis/exclusive-iran-steps-up-support-for-houthis-in-yemens-war-sources-idUSKBN16S22R.

case and the practical changes over time.[17] Opinions on intervention have changed over many decades.[18] For example, beliefs took many shapes after the Cold War,[19] including the United States' position on the meaning of intervention in relation to foreign policy.[20] The debate has also centered around the conditions and requirements for a successful intervention.[21] In Europe and Asia, the leading issues revolved around the complex political challenges in deciding where, when, and how to intervene, the intervention's implications, and the implementation of policy changes to ensure effective interventions.[22]

Despite the above, the term intervention remains extremely vague in the context of international law, which fails to provide clarification on its restriction to humanitarian intervention.[23] As a result, there are both violent and non-violent interventions, which include the provision of food, clothing, and shelter.[24] The latter is better described as humanitarian aid, as the classical incarnation of intervention involves the use of force or threat of force by another state claiming to be motivated by humanitarian considerations.[25] This approach does not suggest any legal justification for the use of any type of force similar to the notion of self-defense, the United Nations Security Council's authorization, the protection of the foreign nationals, or military action upon actual consent of the aggrieved state.[26] Nonetheless, humanitarian intervention can be narrowly described as a

17. ELLERY C. STOWELL, INTERVENTION IN INTERNATIONAL LAW 317 (1921).

18. MARTHA FINNEMORE, THE PURPOSE OF INTERVENTION: CHANGING BELIEFS ABOUT THE USE OF FORCE 53 (Cornell Univ. Press 2003); *see generally* GARY J. BASS, FREEDOM'S BATTLE: THE ORIGINS OF HUMANITARIAN INTERVENTION (Random House Inc. 2008) (1969).

19. *See* MICHAEL C. DAVIS ET AL., INTERNATIONAL INTERVENTION IN THE POST-COLD WAR WORLD (M.E. Sharpe, Inc. 2004). [hereinafter DAVIS ET AL.].

20. *See id.*; *see* RICHARD N. HAASS, INTERVENTION: THE USE OF AMERICAN MILITARY FORCE IN THE POST-COLD WAR WORLD (1999).

21. PATRICK M. REGAN, CIVIL WARS AND FOREIGN POWERS: OUTSIDE INTERVENTION IN INTRASTATE CONFLICT 1 (Univ. of Mich. Press 2005) (2000); Penelope C. Simmons, *Humanitarian Intervention: A Review of the Literature* (Project Ploughshares, Working Paper No. 01-2), https://ploughshares.ca/pl_publications/humanitarian-intervention-a-review-of-literature-3/.

22. Pascal Boniface, *What Justifies Regime Change?,* 26.3 WASH. Q. 61, 70-71 (2003); BASS, *supra* note 18, at 354; DAVIS ET AL., *supra* note 19, at 7-8 .

23. P.H. Winfield, *The History of Intervention in International Law*, 3 BRIT. Y.B. INT'L L. 130, 130-31 (1922).

24. A non-violent intervention occurs when a state is providing food, clothing, and shelter to and within another country. QATAR INT'L LAW CONF. '94, INTERNATIONAL LEGAL ISSUES ARISING UNDER THE UNITED NATIONS DECADE OF LAW 891 (Najeeb Al-Nauimi & Richard Meese eds., Kluwer Law Int'l 1995).

25. Michael Wood, *The Law on the Use of Force: Current Challenges*, 11 SING. Y.B. INT'L L. 1, 3 (2007).

26. CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 13 (Oxford Univ. Press 2000).

situation where force is used to prevent endemic and gross human rights violations, especially when the aggrieved state is powerless or unwilling to act under the circumstance.[27] This description is also broad, as any military action can be deemed humanitarian intervention.[28] The term does not appear in any treaty, perhaps because its' boundaries have not been properly delineated.

III. EVOLUTION AND DEVELOPMENT OF INTERVENTION

The right of intervention dates back to Grotius' argument that if the punisher's hands are clean, war can be fought in order to punish the wicked, and on behalf of the oppressed.[29]

This is similar to Alberico Gentili's argument, although his argument was essentially premised on a moral duty, rather than a legal one.[30] Emmerich de Vattel later supported the right of intervention to save the oppressed when they revolted against their government but argued that intervention in internal affairs of other states is not allowed in any other circumstance.[31]

Prior to the U.N. Charter, an established state practice to justify intervention through the use of force did not exist. However, many notable interventions were supported by academics who justified humanitarian interventions.[32] As a result, the following interventions were justified on humanitarian grounds: interventions in defunct Ottoman Empire in the 19th century; the naval battle of Navarino in 1827 in backing the Greek rebellion, the French occupation of Lebanon and Syria in 1860 to 1861, and the United States' intervention in Cuba during the Cuba's war with Spain in 1898.[33] Nonetheless, history casts serious doubt that such interventions were indeed

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27. SEAN D. MURPHY, HUMANITARIAN INTERVENTION: THE UNITED NATIONS IN AN EVOLVING WORLD ORDER 8-12 (Univ. of Penn. Press 1996).

28. Antonio Cassese, *Ex Iniuria Ius Oritur: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?*, 10 EUR. J. INT'L L. 23, 27 (1999).

29. HUMANITARIAN INTERVENTION, *supra* note 5.

30. SIMON CHESTERMAN, JUST WAR OR JUST PEACE? HUMANITARIAN INTERVENTION AND INTERNATIONAL LAW 14 (Oxford Univ. Press 2001).

31. *See* HUMANITARIAN INTERVENTION AND THE UNITED NATIONS 135 (Richard B. Lillich ed., Univ. Press of Vir. Charlottesville 1973).

32. *See* TARCISIO GAZZINI, MELLAND SCHILL STUDIES IN INTERNATIONAL LAW: THE CHANGING RULES ON THE USE OF FORCE IN INTERNATIONAL LAW 114 (Manchester Univ. Press 2005).

33. Vaughan Lowe & Antonios Tzanakopoulos, *Humanitarian Intervention*, MAX PLANCK ENCYCLOPEDIAS OF PUB. INT'L L. 30-3 & 40 (Oxford Univ. Press 2011).

'humanitarian interventions' given the nexus between these interventions, colonial enterprises, and trade interest.[34]

The power of intervention has developed in the modern day due to the principle of collective security established under the U.N. Charter.[35] This principle has significantly changed the framework for imposing or invoking humanitarian intervention. In the provisions of Chapter VII, the U.N. is empowered to intervene in the crisis in any member state for humanitarian purposes, among others. As such, states' reservation under Article 2(7) of the U.N. Charter does not apply. However, this power is limited by Article 39 of the UN Charter to circumstances that amount to threat to international peace and security, act of aggression, or breach of peace. In practice, nonetheless, since the 1990s, the U.N. has interpreted the act of threat to peace to include gross human rights violations since such violations have trans-boundary effects on refugee flows and regional destabilization.[36]

The above principle of collective security is different from unilateral humanitarian intervention, which connotes situations where one or more states intervene in another states' crisis. The intervening state may act alone or through an international organization separate from the U.N., as seen with the North Atlantic Treaty Organization ("NATO") intervention in ex-Yugoslavia war, and the Organization of the African Unity ("OAU") intervention in Burundi, Côte d'Ivoire, Liberia, Congo.[37] States intervene on their own authority on the basis of 'humanitarian considerations.' Furthermore, when multiple states or international organizations intervene in another states' crisis, the action may still be regarded as unilateral intervention since such action is not authorized by the U.N. Notwithstanding the right to self-defense, the U.N. Charter reserves the power of authorization in the U.N., so any intervention without U.N. authorization is seen as unilateral.

IV. CONTEXT OF THE CONFLICT AND NUANCES OF INTERVENTION BY PARTIES IN YEMEN

There are currently many ongoing parallel and overlapping conflicts in Yemen that are non-international in nature. The notable examples include the conflict between the Saudi-led coalition, the government and the Houthis;

34. Nico Krisch, *Legality, Morality and the Dilemma of Humanitarian Intervention after Kosovo*, 13-1 EUR. J. INT'L L. 323, 330-1 (2002).

35. Fernando R. Tesón, *Collective Humanitarian Intervention*, 17 MICH. J. INT'L L. 323, 370 (1996).

36. Lowe & Tzanakopoulos, *supra* note 33, at 3.

37. Binaifer Nowrojee, *Africa on its Own: Regional Intervention and Human Rights*, HUM. RTS. WATCH WORLD REP. (Jan. 25, 2004, 7:00 PM), https://www.hrw.org/legacy/wr2k4/4.htm.

that between Al-Qaeda in the Arabian Peninsula ("AQAP") and the Government; and those between diverse armed groups as well as the Southern movements. It is difficult to regard Iran as being a member of the National Iranian American Council (NIAC) because Iranian support to the Houthis is nominal and will not substantially direct the decision-making process of the local alliances. With the absence of any large-scale army gift or support to the Houthis, there is no substantial evidence that the military support provided by Iran to the Houthis goes beyond the training Houthi members receive from Hezbollah.[38]

Formed in March 2015, the Saudi-led coalition is a major party in the conflicts. Due to the diplomatic crisis between Qatar and other coalition members, Qatar withdrew from the coalition in June 2017. Oman refused to join such a coalition.[39] In contrast, the U.A.E. played a major role in the coalition, operationally controlling the Aden and Mukallah, while Saudi Arabia controlled the Marib.[40] Yemen is another major party to the conflict despite having forces of approximately 43,500 with little training and equipment. The United States is also heavily involved, continuously carrying out both air and drone strikes against the AQAP in Yemen and supplying the Saudi-led coalition with a large scale of weapons, intelligence gathering, and logistics support.[41] However, the United States is not allowed to participate anymore in ground troop operations due to previous controversial ground operations in Yemen.[42] Today, the coalition is struggling to maintain a united front. When the UAE announced its withdrawal from Yemen,[43] its' agents, the southern Militias, followed a different trend in the conflict when they started to attack the legitimate government army and the legitimate transitional council fighters. The acts of the southern Militias gave the impression that the UAE was working against the Saudi representatives in Yemen.[44] The situation in mid-August 2019 proved that the conflict in Yemen was not only war through agents, but war of agents by sub-agents, or

38. Mareike Transfeld, *Iran's Small Hands in Yemen*, CARNEGIE ENDOWMENT FOR INT'L PEACE (Feb. 14, 2017), http://carnegieendowment.org/sada/67988.

39. Olivier Da Lage, *Coalition of the Unwilling,* GATEWAY HOUSE (Dec. 24, 2015), https://www.gatewayhouse.in/saudi-coalition-of-the-unwilling/.

40. U.N. Security Council, *Final Rep. from the Panel of Experts on Yemen*, ¶ 34-36, U.N. Doc. S/2018/594 (2018) [hereinafter *Final Reports from the Panel of Experts on Yemen*].

41. *Id.* at ¶ 69.

42. Leo Shane III & Joe Gould, *Should US Troops Be Involved in the Yemen Civil War?,* MIL. TIMES (Feb. 13, 2019), https://www.militarytimes.com/news/pentagon-congress/2019/02/13/should-us-forces-be-involved-in-the-yemen-civil-war/.

43. *Yemeni Official: UAE Won in Aden, Saudi Silent Over 'Slaughter,'* AL JAZEERA, (Aug. 11, 2019), https://www.aljazeera.com/news/2019/08/yemeni-official-uae-won-aden-saudi-silent-slaughter-190811144214211.html.

44. *Id.*

civil war inside civil war.[45] The United States faces backlash for the human tragedies caused by the American arms provided to the coalition,[46] and Saudi Arabia will continue to pressure Washington to fill in the gap caused by the UAE withdrawal. At the same time, the Houthis continue to see reduced support as a result of the American-European sanctions against Iran.[47]

Additionally, the Saleh aligned forces consist of military, political and tribal networks. The military network has enormously assisted the continued political influence of the Saleh alliance. The high-ranking officers appointed by Saleh during his reign as the President, are still loyal to him despite Hadi's reforms to unite the army.[48] The Houthis are also a major player in the conflict in Yemen. They are generally perceived as a Zayd Shia insurgent group based in Yemen. The Houthis take their name from Hussein Badreddin al-Houthi, who served as commander until 2004, when he was killed by Yemeni Soldiers.[49] The group is also known as Ansar Allah. From 2004 to 2010, there were about six rounds of conflicts, otherwise known as the six wars, which arose between the Houthis and Saleh regime.[50] In 2011, the group was heavily involved when the Houthis began an uprising which called for the regime to step down from power.[51] The Houthis drew many supporters during Yemen's uncertain transition and the subsequent power vacuum in the country. Then, the Houthis aligned politically and militaristically with Saleh forces in September 2014.[52] Together, the Houthi and Saleh forces took control of capital.[53] The Houthis rely on the militias for their military support.

The Southern Traditional Council, otherwise known as the Southern Movement, and the AQAP, are the other prominent players in the conflict in Iran. There are several military units loyal to former President Saleh, that

45. *Id.*

46. Thembisa Fakude, *Saudi Arabia's Dilemma as the UAE Pulls Out of Yemen*, MIDDLE EAST MONITOR (July 15, 2019 5:24 PM), https://www.middleeastmonitor.com/20190715-saudi-arabias-dilemma-as-the-uae-pulls-out-of-yemen/.

47. Abdulhadi Habtor, *Yemeni Official: US Sanctions on Iran Hit Houthis Hard*, ASHARQ AL-AWSAT (July 1, 2019, 6:00 AM), https://aawsat.com/english/home/article/1792441/yemeni-official-us-sanctions-iran-hit-houthis-hard%C2%A0.

48. *Final Reports from the Panel of Experts on Yemen*, *supra* note 40, at ¶ 64.

49. Saeed Al Batati, *Who are the Houthis in Yemen?*, AL JAZEERA (Mar. 29, 2015), https://www.aljazeera.com/news/middleeast/2014/08/yemen-houthis-hadi-protests-201482132719818986.html.

50. *Id.*

51. *Id.*

52. *Final Reports from the Panel of Experts on Yemen*, *supra* note 40, at ¶ 59.

53. Geneva Academy, THE ARMED CONFLICT IN YEMEN: A COMPLICATED MOSAIC: THE WAR REPORT 2017, at 6.

have joined forces with the Houthis since March 2015.[54] Hadi appointed Mohsin, Saleh's former ally, as the Deputy Supreme Commander of the armed forces, to gather military and local tribe support, but whether Yemini security forces will fully commit to Hadi is doubtful.[55] In 2009, the AQDP's Saudi and Yemeni groups emerged.[56] During the uprising, AQAP was internationally recognized as significant local insurgents interested in territory capturing.[57] In order to gain acceptance and distinguish itself from the international brand, the AQAP established Ansar Al-Sharia as a parallel body.[58] The group took advantage of a security breach in 2011 in order to take control of territories like Mukallah in the South but adversaries subsequently forced the group out in 2016.[59] Nonetheless, the group still experiments its local governance system in regions such as Abyan, Shabwa and Hadhramout.[60]

V. LEGAL STATUS OF THE INTERVENTIONS IN YEMEN UNDER INTERNATIONAL LAW

The UN Charter is most significant legal document guiding interventions in state affairs. The Charter not only establishes the principle of sovereign equality of all states,[61] but also obliges those states to settle disputes by peaceful means,[62] and prohibits the use of force.[63] The Charter emphasizes the principle of non-intervention in member states' domestic

54. ARAB CTR. FOR RES. & POL. STUD. POL. ANALYSIS UNIT, Assessment Report, *Operation Golden Arrow: The Prospects for a Resolution to the Yemeni Conflict in 2017,* (Mar. 8, 2017), https://www.dohainstitute.org/en/PoliticalStudies/Pages/Operation_Golden_Arrow_the_Prospects_for_a_Resolution_to_the_Yemeni_Conflict_in_2017.aspx.

55. *See* Yemen President Appoints Ali Mohsin as Deputy Supreme Commander, THE NEW ARAB (Feb. 23, 2016, 3:54 PM), https://www.alaraby.co.uk/english/news/2016/2/23/yemen-president-appoints-ali-mohsin-as-deputy-supreme-commander; *see also* Ryan Goodman & Alex Moorehead, *UAE, A Key US Partner in Yemen, Implicated in Detainee Abuse*, JUST SEC. (May 15, 2017), https://www.justsecurity.org/40978/uae-key-partner-yemen-implicated-detainee-abuse/; Nadwa Al-Dawsari, *Policy Brief - Breaking the Cycle of Failed Negotiations in Yemen*, PROJECT ON MIDDLE EAST DEMOCRACY (May 5, 2017), https://pomed.org/wp-content/uploads/2017/05/PolicyBrief_Nadwa_170505b-1.pdf.

56. *See generally Yemen's al-Qaeda: Expanding the Base,* INT'L CRISIS GRP. (Feb. 2, 2017), https://d2071andvip0wj.cloudfront.net/174-yemen-s-al-qaeda-expanding-the-base.pdf.

57. *Id.*

58. *Id*. at 6.

59. *Id*. at 9.

60. *Id*. at 26.

61. U.N. Charter art. 2, ¶ 1; Lowe & Tzanakopoulos, *supra* note 33, at 3.

62. U.N. Charter art. 2, ¶ 3; Lowe & Tzanakopoulos, *supra* note 33, at 3-4.

63. U.N. Charter art. 2, ¶ 4; Lowe & Tzanakopoulos, *supra* note 33, at 4.

affairs.[64] Despite the relatively weak legal power of the declaration in international law, these principles were reiterated and further developed in the Friendly Relations Declaration.[65] Thus, any intervention not in accordance with these principles or any of the exceptions has no legitimate legal basis under international law. The two major exceptions under Article 51 are self-defense and the authorizations of the U.N. Security Council.[66] Since use of force is prohibited as a general rule, any legal intervention must rest under these exceptions. The question now is what is the scope of Article 2(4), which prohibits the use of force?

Article 2(4) precludes "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."[67] Courts have subjected this language to many interpretations. In *Corfu Channel*,[68] the United Kingdom argued that the Article seeks to only restrict the use of force that is targeted at the political independence of a sovereign state or the force that might affect the territorial integrity of the state. Thus, when force is used for a limited purpose, these features are not affected. Another argument is that uses of force not inconsistent with the U.N.'s purposes, such as human rights promotion, are permissible.[69] This narrow interpretation of Article 2(4) has paved the way for many claims of intervention based on humanitarian purposes. This approach does not offend any provisions of the Article since the intervening state withdraws immediately after the catastrophe or danger, which initially provoked such intervention in the target state, is quelled. Since the purpose of this iteration of invasion is to avert sever and flagrant violation of human rights, it promotes the purpose of the UN.

However, *Corfu Channel* provided a different approach to the argument offered above. In *Corfu Channel*, the International Court of Justice ("ICJ") rejected British arguments that it did not violate Albania's territorial integrity and sovereignty when conducting a compulsorily sweep for mines in

64. U.N. Charter art. 2, ¶ 7. *See also* Maziar Jamnejad and Michael Wood, *The Principle of Non-Intervention*, 22 L.J. INT'L L. 345–82 (2009); V Lowe, *The Principle of Non-Intervention: Use of Force*, THE UNITED NATIONS AND THE PRINCIPLES OF INTERNATIONAL LAW: ESSAYS IN MEMORY OF MICHAEL AKEHURST (Routledge London 1994) 66–84; Coman Kenny & Sean Butler, *The Legality of 'Intervention By Initiation' in Situations of R2P Violations*, 51 N.Y.U. J. INT'L L. & POL. 135 (2018).

65. Lowe & Tzanakopoulos, *supra* note 33, at 4.

66. *Id.*

67. *Id.*

68. *Id*.; Corfu Channel Case (U.K. and N. Ir. v. Alb.), Merits, 1949 I.C.J. Rep 4, (Apr. 9) https://www.icj-cij.org/files/case-related/1/001-19490409-JUD-01-00-EN.pdf [hereinafter Corfu Channel Case].

69. U.N. Charter art. 1, 3, 55, 56; Lowe & Tzanakopoulos, *supra* note 33, at 4.

Albanian waters.[70] The court declared the U.K.'s intervention as a "manifestation of a policy of force."[71] Thus, in the view of the ICJ, the phrases "political independence," territorial integrity, and "in any other manner inconsistent with the purposes of the United Nations" reinforce the prohibition on the use of force.[72] This reassures smaller, less powerful states that the use of force is prohibited. In actuality, however, it does not qualify the scope of such prohibition under Article 2(4) of the U.N. Charter. In *Military and Paramilitary Activities in and Against Nicaragua*, the ICJ reiterated the unqualified proscription of compulsory intervention, and held that "the use of force could not be the appropriate method to monitor or ensure … respect" for human rights.[73] Thus, when the U.N. authorized the use of force for possible humanitarian purposes, such as protecting citizens in Libya[74] and in Côte d'Ivoire in 2011, it established that armed force will ordinarily have to target a ruling regime to justify the intervention.

Therefore, the narrow interpretation of Article 2 (4) is hostile to the U.N.'s purpose and structure to preserve international peace and security through a collective security system. One might argue that Article 2(4) prohibits any use of force beyond the limited number exceptions. This will be the focus of the following sections in this article.

It is clear that the military interventions in Yemen amount to an unlawful use of force under the spirit and letters of Article 2(4), which obliges the states to settle disputes through peaceful means.[75] This interpretation is consistent with the ICJ decisions in the cited cases above. Moreover, the interventions also violated Yemen's sovereignty. No invitation for use of force will absolve the intervening state's obligation to comply with the provisions of the Charter. Nevertheless, there are exceptions to the general rule. Iran's alleged financial and arms support of the Houthis is unlawful and at odds with Article 2(4). According to *Military and Paramilitary Activities in and Against Nicaragua*, any state that arms, trains, equips, or finances rebel forces or otherwise supports, encourages, or aids military and paramilitary activities in and against a state, has breached its obligations

70. Lowe & Tzanakopoulos, *supra* note 33, at 5.

71. Corfu Channel Case, *supra* note 68, at ¶ 35; Lowe & Tzanakopoulos, *supra* note 33, at 5.

72. Lowe & Tzanakopoulos, *supra* note 33, at 5.

73. Lowe & Tzanakopoulos, *supra* note 33, at 5.

74. Mehrdad Payandeh, *The United Nations, Military Intervention, and Regime Change in Libya*, 52 VA. J. INT'L L. 355 (2012).

75. Mehrdad Payandeh, *The United Nations, Military Intervention, and Regime Change in Libya*, 52-2 VA. J. INT'L L. 355 (2012).

under customary international law – obligations that imposes a duty not to intervene in another states' domestic affairs.[76]

One might argue that there is an armed conflict in Yemen. According to rebel leader Abdul-Malik Al-Houthi, the purpose is to occupy and invade Yemen.[77] However, it is doubtful whether this conflict can be regarded as international in scope. Assuming Iran has total control over the Houthi rebels, applying the test from the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia ("ICTY") in *Prosecutor v. Tadić* might show that the conflict is international if the rebels are deemed agents of Iran.[78] However, Iran's influence over the Houthi rebels does not meet this threshold. Therefore, the effective control test does not apply and there is no reason for speculating attribution of state responsibility. Since the separate Saudi-led and Iran-supported interventions do not come under the general rule, the question as to whether the interventions are justified must be analyzed through the exceptions.

A. *Exceptions to Forceful Intervention*

Although international law prohibits the use of force, there are exceptions to the rule against compulsory intervention.

1. U.N. Security Council Authorization

The use of force by the Military potentially falls under the so-called "UN Security Council-authorized collective humanitarian intervention" or simply "collective humanitarian intervention" under Chapter VII UN Charter.[79] Since 1990, and in order to maintain and restore international peace and security, the Security Council has interpreted "threat to the peace" to include pure intentional armed conflicts and gross human rights violations within a

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76. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 268 (June 27) [hereinafter Military and Paramilitary Activities in and Against Nicaragua]; *see also* Ryan Goodman & Michael Schmitt, *Having Crossed the Rubicon: Arming and Training Syrian Rebels*, JUST SEC. (Sept. 26, 2014), https://www.justsecurity.org/15660/crossed-rubicon-arming-training-syrian-rebels/.

77. *Id.*; Goodman & Schmitt, *supra* note 76; *see Yemen FM urges swift end to air strikes on Houthis*, BBC NEWS, (Mar. 27, 2015), https://www.bbc.com/news/world-middle-east-32082616.

78. Prosecutor v. Tadić, Case No. IT-94-1-T, Decision on the Defence Motion on Jurisdiction in the Trial Chamber of the International Tribunal, ¶ 70 (Int'l Trib. for the Prosecution of Persons Responsible for Serious Violations of Int'l Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991 Oct. 2, 1995) https://www.icty.org/x/cases/tadic/acdec/en/51002.htm.

79. Thomas M. Franck, RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS 136 (Cambridge Univ. Press 2002).

state and purely internal armed conflicts.[80] In fact, this was the practice in the aforementioned *Prosecutor v. Tadić* Case in 1995.[81] This interpretation is justified on the basis that such actions would lead to refugee flows which could destabilize regions and spark armed reaction from neighbouring states. However, the Security Council also recognized purely intra-state matters may qualify as threats to the peace, notwithstanding the marginal nature of transboundary consequences.[82] The Security Council may sanction States to take compulsory measures to halt human rights violations and prevent the humanitarian crises.[83] In these situations, the Security Council deems the use of force as humanitarian in nature and the States which heed the call by intruding on the global community engage in "humanitarian intervention." Examples of these armed U.N.-authorized interventions include the crises in Somalia,[84] Haiti,[85] Rwanda,[86] Bosnia and Herzegovina,[87] Albania,[88] and East Timor.[89] In each case, the Security Council authorized using "all necessary means" to deliver humanitarian assistance or to monitor the execution of the peace agreement.[90] Another example is when the U.N. Secretary General authorized France and the U.N. Operation in Côte d'Ivoire ("UNOCI") to forcefully engage with one of the warring parties to prevent the use of devastating weapons against non-combatants in Abidjan.[91] The French and UNOCI's actions conformed with the Security Council's directive to use "all necessary means" to protect non-combatants threatened with violence.[92]

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80. *See generally* Jost Delbruck, *A Fresh Look at Humanitarian Intervention Under the Authority of the United Nations*, 67 IND. L.J. 887 (1992) (noting that in 1990, after the Cold War era, the former American president, George Bush, talked for the first time about the new world order, which gives priority to human rights protection over state's sovereignty).

81. Prosecutor v. Tadić, Case No. IT-94-1-T, *supra* note 78, at ¶ 30.

82. Philip Alston, *The Security Council and Human Rights: Lessons to be Learned from the Iraq-Kuwait Crisis and its Aftermath*, 13 AUSTL. Y.B. INT'L L., 107, 133 (1992); Lowe & Tzanakopoulos, *supra* note 33, at 5-6.

83. Lowe & Tzanakopoulos, *supra* note 33, at 4.

84. G.A. Res. 794, (Dec. 22, 2007); Lowe & Tzanakopoulos, *supra* note 33, at 6.

85. S.C Res. 940 (July 31, 1994); Lowe & Tzanakopoulos, *supra* note 33, at 6.

86. S.C. Res. 929 (June 2, 1994).

87. S.C. Res. 836 (June 4, 1993); S.C. Res. 1031 (December 15, 1995); S.C. Res. 1088 (Dec. 12, 1996); Lowe & Tzanakopoulos, *supra* note 33, at 6.

88. S.C. Res. 1101, ¶ 5 (Mar. 28, 1997).

89. S.C. Res. 1264, ¶ 2 (Mar. 28, 1997).

90. *See generally* U.N. Dep't of Peacekeeping Operations (DPKO), *United Nations Peacekeeping Operations: Principles and Guidelines*, U.N. Doc., USG/DPKO (2008), https://www.refworld.org/docid/484559592.html.

91. Lowe & Tzanakopoulos, *supra* note 33, at 6.

92. S.C Res. 1933, ¶ 16-17 (June 30, 2010); S.C Res. 1975, ¶ 6 (March 30, 2011); S.C Res. 1739, 208 (Jan. 10, 2007); S.C Res. 1962, ¶ 17 (Dec. 20, 2010); Lowe & Tzanakopoulos, *supra* note 33, at 6.

Despite U.N. assurances that operations were to protect civilians under self-defense, contrary evidence revealed that the attacks were directed at one of the parties to the conflict.[93] Although the U.N.'s authorization to use excessive force in Libya was intended to protect "civilians…under threat of attack,"[94] the force was similarly directed at one party to the conflict. Thus, the scope of authorization, the covered targets, and the measures taken are questions of interpretation. This can only be done when the Security Council members do not hold bias against a party and remain neutral. In these circumstances, the use of force was authorized by the Security Council for questionable humanitarian reasons.

Furthermore, the Security Council has implicitly and retrospectively authorized interventions through several cases. In 1991, the U.K., France, and the U.S. intervened in Iraq to "alleviate" Kurdish, and later, Shia, civilian suffering.[95] In doing so, the intervening countries primarily relied on the U.N. Security Council Resolution[96] to support their intervening actions. The U.N. Member States' authorization to forcefully implement Security Council Resolutions[97] to restore peace and security in the country,[98] subsequent to Iraq's invasion of Kuwait, had already ceased, in line with U.N. Security Council Resolution 687 of April 3, 1991.[99] They argued that creating safe havens and no-fly zones were in line with Security Council Resolution 688. However, Chapter VII did not adopt this and did not comprise the shibboleth "all necessary means," which tacitly sanctioned the limited use of force to just for the limited purpose of protecting the Kurdish and Shiite civilians.

In the same vein, there are cases that highlight when intervening states sometimes act on implied authorization. The NATO's intervention in Kosovo is a prime example.[100] The implied authorization was meant to justify the NATO bombardments on the ground of a U.N. Security Council Resolution,[101] which stated the Security Council would consider extra

93. *See* U.N. Secretary-General, Letter dated Mar. 4, 2011 from the Secretary General addressed to the President of the General Assembly, U.N. Doc. SG/SM/1346 (Mar. 4, 2011).

94. S.C Res. 1973, ¶ 4 (March 17, 2011); Lowe & Tzanakopoulos, *supra* note 33, at 6.

95. They intervened by the creating safe havens and subsequent introduction of no-fly zones over the country [Iraq, Non-Fly Zones] which were kept in place until the 2003 Iraqi invasions, though France withdrew from their enforcement in 1998. GORDON W. RUDD, HUMANITARIAN INTERVENTION: ASSISTING THE IRAQI KURDS IN OPERATION PROVIDE COMFORT, 1991 (CMH Pub. 2004).

96. *See generally* S.C. Res. 688 (Apr. 5, 1991).

97. S.C. Res. 660, ¶ 3 (Aug. 2, 1990).

98. S.C. Res. 687 (Apr. 3, 1991).

99. Lowe & Tzanakopoulos, *supra* note 33, at 7.

100. INDEPENDENT INTERNATIONAL COMMISSION ON KOSOVO, THE KOSOVO REPORT: CONFLICT, INTERNATIONAL RESPONSE, LESSONS LEARNED (OUP OXFORD 2000), at 55-61.

101. S.C. Res. 1199, ¶ 2-3 (Sept. 23, 1998).

measures if the initial measures provided for in the resolution[102] were ineffective in curbing violence and terrorism. Similarly, France also construed this as implied authorization by the Security Council Resolution[103] when it found that further breaches of measures occurred. Also, it has been argued that the Security Council covertly, and retrospectively, gave authorization to use force against the then Federal Republic of Yugoslavia ("FRY").[104] To support this claim, proponents point out that the Security Council endorsed, rather than condemned, NATO's threat of force, which resulted in agreements between the FRY, NATO, and the Organization for Security and Co-operation in Europe ("OSCE") in 1998.[105]

Similarly, there are cases of retrospective *ex post facto* Security Council authorizations. One instance includes the subsequent ratification of the Economic Community of West African States' (ECOWAS) interventions in Sierra Leone and Liberia and also the Economic Community of West African States Monitoring Group's (ECOMOG) actions between 1990 and 1999. The Security Council not only commended such actions, but authorized it. Comparably, the Security Council approved and authorized French action in the Central African Republic in 1997.[106] Thus, the Security Council retrospectively authorizes and ratifies forceful inventions even when there are significant reservations due to the target State's right of self-defense against the use of force which is, at the material time, illegal, but retroactively authorized by the Security Council. On the contrary, no established *ex post facto* authorization was given to create the international civilian and military presence in Kosovo after the NATO bombardment.[107] Thus, forcible

102. S.C. Res. 1160, ¶ 6 (Mar. 31, 1998).

103. S.C. Res. 119, 1203 (Oct. 24, 1998).

104. Paul C. Szasz, *The International Legal Aspects of the Human Rights Programme of the United States*, 12 CORNELL INT'L. L. J. 161 (1979); M. Bossuyt, *Human Rights and Non-intervention in Domestic Matters*, 35-2 R. OF THE INT'L COMM'N OF JURIST 45-52 (1985); A. Rosen, *Canada's Use of Economic Sanctions for Political and Human Rights Purposes*, 51 UNIV. OF TORONTO FAC. L. R. 1 (1993); G. Arangio-Ruiz, *Human Rights and Non-intervention in the Helsinki Final Act*, 157 RCADI 195 (1977); G. Arangio-Ruiz, *Droits de l'homme et non-intervention: Helsinki, Belgrade, Madrid*, 35 LA COMMUNITÀ INTERNAZIONALE 453 (1980); A. Bloed and P. van Dijk, *The Conference on Security and Cooperation in Europe, Human Rights and Non-Intervention*, 5 LIVERPOOL L. R. 117 (1983); A. Rosen, *Canada's Use of Economic Sanctions for Political and Human Rights Purposes*, 51 UNIV. OF TORONTO FAC. L. R. 1 (1993); K. Zemanek, *Human Rights Protection vs. Non-intervention: A Perennial Conflict?*, in Lal Chand Vorah et al., MAN'S INHUMANITY TO MAN: ESSAYS IN HONOUR OF ANTONIO CASSESE (2003), 935; *see generally* Press Release, Security Council, Security Council Rejects Demand For Cessation of Use of Force Against Federal Republic of Yugoslavia U.N. Press Release SC/6997 (Mar. 26, 1999).

105. S.C. Res 1203, ¶ 1 (Oct. 24, 1998).

106. S.C. Res. 1136 (Nov. 6, 1997).

107. S.C. Res. 1244, ¶ 7 (June 10, 1999).

interventions, which the Security Council authorizes (even if *ex post facto*) under Chapter VII of the U.N. Charter, would establish a claim of collective enforcement action, which is legal under the U.N. Charter as an acceptable exception to the proscription of the use of force.[108] Such actions would not be regarded as justified unilateral intervention, nor support the right to involve in unilateral intervention. The Security Council's failure to act in similar situations, particularly when the invader is permanent member of the Security Council, cannot be hidden. For instance, the Security Council did not seriously examine the Russian intervention in Ukraine because the five permanent members (the Russian Federation, U.S., U.K., France, and China) enjoyed the veto right, which can paralyze Security Council resolution issuance.[109]

The case of Yemen presents an interesting scenario of intervention with the use of force. Since 2004,, there has been a steady crisis between the internationally recognized Government and the Houthi rebel group with respect to the Saada Province.[110] In September 2014, the crisis took a new dimension when the Houthis overtook Sanaa, the capital of Yemen, and extended their operation to Aden, Yemen's second-largest city.[111] In 2015, and to stem the tide, Saudi Arabia, together with nine other African and Middle Eastern States, intervened with military force in Yemen. Both the U.S. and U.K. intelligence communities support this coalition's actions. The Saudi-led coalition bombed Yemen in an attempt to depose or displace the rebel group.[112]

Despite the Saudi-led coalition's intervention, the Yemen crisis continued unabated. The situation worsened with violent air strikes and counter attacks by the rival group,[113] using Iranian technology.[114] Yemenis

108. U.N. Charter art. 43, ¶ 2.

109. Illia Ponomarenko, *Russia to Offer Citizenship to Residents of Occupied Donbas*, KYIV POST (Apr. 24, 2015, 5:28 PM), https://www.kyivpost.com/russia/russia-to-offer-citizenship-to-residents-of-occupied-donbas.html?cn-reloaded=1

110. K. Zemanek, *Human Rights Protection vs. Non-intervention*, *in* L. C. Vorah, MAN'S INHUMANITY TO MAN: ESSAYS IN HONOUR OF ANTONIO CASSESE (2003); JEREMY M. SHARP, CONG. RES. SERV. R43960, YEMEN: CIVIL WAR AND REGIONAL INTERVENTION (2019).

111. *Key Facts About the War in Yemen*, AL JAZEERA (Mar. 25, 2018), https://www.aljazeera.com/news/2016/06/key-facts-war-yemen-160607112342462.html [hereinafter *Key Facts*].

112. *Id*.

113. *See generally* Shavana Musa, *The Saudi-Led Coalition in Yemen, Arms Exports and Human Rights: Prevention Is Better Than Cure*, 22 J. CONFLICT & SEC. L. 433 (2017); Stephen J. Rapp, *Time for a Reckoning in Yemen*, JUST SEC. (July 5, 2018), https://www.justsecurity.org/58910/ time-reconing-yemen/. NGOs such as Amnesty International condemns such attacks.

114. Michael Knights, *The Houthi War Machine: From Guerrilla War to State Capture,* 11 CTC SENTINEL 15, 17 (2018).

and these airstrikes are responsible for nearly 67% of civilian deaths, a percentage which primarily includes women and children.[115] In contrast, the Houthi attacks caused minor casualties among civilians in the border cities of Saudi Arabia, and among the armed forces.[116]

The Security Council passed some resolutions after the Saudi-led intervention in Yemen. However, it is clear that there was no Security Council resolution in place when the Saudi-led coalition intervened in the crisis. The subsequent resolutions were passed in categories or phases. The first resolution expressed the Security Council's strong support of a political transition, and created sanctions against individuals and groups which threatened Yemen's security, peace, and stability.[117] Another resolution allowed for Yemen's sanction measures to extend until February 26, 2017 and authorized the Panel of Experts to expire March 27, 2017.[118] Another resolution placed an arms embargo on the Houthis, as well as on the forces loyal to former President Ali Abdullah Saleh.[119] Similarly, one resolution renewed the frozen assets and travel ban until February 26, 2016, and also extended the mandate of the Panel of Experts until March 25, 2016.[120] Another resolution of the Council strongly condemned the Houthis' actions when they disbanded Parliaments on February 6, 2015, taking over the institutions of government and urging that negotiations accelerate in order to have a consensus on the region's political impasse.[121] All of these resolutions show that there is no U.N. Security Council resolution that supports the interventions in Yemen. Thus, this exception does not weigh in favor of the interventions.

2. Self-Defense by Use of Force

International law vests the right to self-defense in states, but does not make it applicable to a sub-state entity consisting of a local population.[122]

115. *See Key Facts*, *supra* note 111; Bel Trew, *UK and US Bombs Caused Nearly 1,000 Civilian Casualties in Yemen, Damning Report Finds*, INDEPENDENT (Mar. 6, 2019, 7:10 AM), https://www.independent.co.uk/news/world/middle-east/yemen-war-uk-...n-casualties-mwatana-university-human-rights-network-a8809401.html

116. *Yemen War: Houthi Missile Attack on Saudi Airport 'Injures 26,'* BBC NEWS (June 12, 2019), https://www.bbc.com/news/world-middle-east-48608213; *5 UAE Soldiers Killed in Attack in Yemen,* MIDDLE EAST MONITOR (Nov. 24, 2018, 2:01 PM), https://www.middleeastmonitor.com/20181124-5-uae-soldiers-killed-in-attack-in-yemen.

117. S.C. Res. 2140, ¶ 1 (Feb. 26, 2014).

118. S.C. Res. 2266, ¶ 1 (Feb. 24, 2016).

119. S.C. Res. 2216, ¶ 1 (Apr. 14, 2015).

120. S.C. Res. 2204, ¶ 1 (Feb. 24, 2015).

121. S.C. Res. 2201, ¶ 1 (Feb. 15, 2015).

122. Richard B. Lillich, *Forcible Self-Help by States to Protect Human Rights*, 53 IOWA L. REV. 325, 326-27 (1967).

Thus, self-defense is not justified by a mere showing that it was meant to alleviate the local population's sufferings. An armed attack against a state must occur before self-defense is justified under international law.[123] In many cases, gross human rights violations may not reach the enormity verge of an armed attack. Even in cases where the oppression reaches the verge of an armed attack, the attack is against the state population with the inaction or support of state authorities, and not against the state. More so, oppression usually does not start in another state, but rather begins when a government acts against its own people.

In the North Atlantic Assembly, a proposal emerged to extend the right to self-defense to include situations such as "defense of common interests and values, including when the latter are threatened by humanitarian catastrophes, crimes against humanity, and war crimes."[124] However, international law does not currently support the proposition and it has not yet extended to cover these identified situations. The argument is that since defending a population is needed as as much as defending a political structure, the right to self-defense should extend beyond attacks on states to also cover attacks on the local population.[125] This argument will stretch the intention of Article 51 of the U.N. Charter far beyond its intended breaking point. This suggestion also lacks any basis in the practice and *opinio juris* of States.

When India intervened in the crisis in East Pakistan (now Bangladesh) in 1971, a similar argument was put forward, but the U.N. General Assembly rejected it.[126] India argued that there was "civil aggression" against the State resulting from the influx of millions of Bengali refugees fleeing Pakistani repression. This civil aggression was likened to an armed attack. The General Assembly overwhelmingly rejected this contention and India's other justifications and ultimately ordered India to stop the aggression and withdraw the armed forces.

However, intervening states have claimed the right to self-defense in situations where the intervening state argues that the target state attacked it in a traditional armed-attack, a manner of attack that is subsumed under Article 51 of the U.N. Charter. Vietnam used this to claim to justify its

123. U.N. Charter ch. 7 art. 51, ¶ 1.

124. North Atlantic Assembly, Resolution 283, ¶ 15(e) (Nov. 1998); *Recasting Euro-Atlantic Security: Towards the Washington Summit,* in Marialetizia Longo, *Legitimation of Interventions of International Organizations in Peacekeeping Operations*, https://www.nato.int/acad/fellow/99-01/longo.pdf (2001), at 17.

125. Ruth Wedgewood et al., *Editorial Comments: NATO's Kosovo Intervention, NATO's Campaign in Yugoslavia*, 93 AM. J. INT'L L. 829, 833 (1999).

126. Secretariat of the Int'l Comm'n of Jurists, *The Events in East Pakistan, 1971*, 57 (1972).

intervention in Democratic Kampuchea (Cambodia) in 1978.[127] Vietnam's intervention eventually ended the violent rule of Khmer Rouge.[128] In 1979, Tanzania also used this claim in order to justify its intervention when using force against Uganda.[129] The intervention later brought an end to the gross human rights violations of Idi Amin's regime.[130] Tanzania's reliance on the theory was not based on the humanitarian situation in Uganda, but under Tanzania's own right to self-defense within the traditional paradigm. Thus, the humanitarian consideration is not enough to justify self-defense under international law, except when the intervening state or its allies engage in collective self-defense in response to an armed attack.[131] Again, the self-defense exception only justifies the intervening state's use of force when countering the alleged attack, and not when the state is attempting to change the regime of the target state.

As described above, interventions cannot be justified on the grounds of self-defense. Since self-defense only applies to states within limited exceptions under international law, Saudi Arabia and Iran cannot claim they engaged in interventions in Yemen to protect the local population or their nationals abroad. Claiming these interventions as self-defense would expand the interpretation of Article 15 of the U.N. Charter beyond its intended boundaries.

3. Is Unilateral Humanitarian Intervention an Exception Under Customary International Law?

As described above, humanitarian intervention without the UN Security Council's authorization cannot justify intervention through the use of force. In addition, an armed attack against a state is necessary to justify intervention on ground of the right to self-defense. In view of the difficulty in justifying state interventions, arguments on new exceptions under customary international law seem to have emerged. States now want to re-interpret relevant provisions of the U.N. Charter[132] or introduce the emergence of supervening custom under new customary rule. For instance, some states,

127. Oscar Schachter, Editorial Comments, *The Legality of Pro-Democratic Invasion*, 78 AM. J. INT'L L. 645, 648 (1984).

128. *Pol Pot Overthrown,* HISTORY (July 28, 2019), https://www.history.com/this-day-in-history/pol-pot-overthrown.

129. W. Michael Reisman, *Editorial Comments Coercion and Self-Determination- Construing Charge Article 2(4)*, 78 AM. J. INT'L L. 642, 644 (1984).

130. *Ugandan Dictator Idi Amin Overthrown,* HISTORY (July 27, 2019), https://www.history.com/this-day-in-history/idi-amin-overthrown.

131. Reisman*, supra* note 129, at 645.

132. Vienna Convention on the Law of Treaties Vienna art. 31, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

under a new interpretation, may refer to Article 2(4) of the U.N. Charter's reference to "territorial integrity and political independence" as an exception to the proscription of the use of force.[133] States may claim that this interpretation gives effect to Article 108 and 109 of the U.N. Charter, but this will undoubtedly require acceptance by an overwhelming majority of U.N. Member States.

The other argument involves state practice and *opinio juris* as a new rule under customary international law. But can this be couched as an exception to the use of force that has gained the status of *jus cogens*? The answer is in the negative, as it must meet the requirement of a custom which has a *jus cogens* status, or must be even more exacting than the ones of ordinary custom.[134] In this regard, some states and authors have attempted to invoke this as evidence supporting a right to unilateral intervention as a way to put an end to humanitarian crises or gross human rights violations in a target state. The examples that states typically rely upon include India's intervention in East Pakistan in 1971, Tanzania's intervention in Uganda in 1978, Vietnam's intervention in Democratic Kampuchea in 1978, France's intervention in the Central African Empire (now the Central African Republic) in 1979, the United States' interventions in Grenada in 1983 and Panama in 1989, and ECOWAS/ECOMOG interventions in Liberia in 1990 and Sierra Leone in 1997. Other instances include the American, British, and French interventions in Iraq to "protect Kurdish and Shia" from 1991 to 2003, the interventions in Somalia in 1992, the interventions in Rwanda in 1994, the interventions in East Timor in 1999, and NATO's interventions in Kosovo in 1999.[135]

Thus, in order to demonstrate the emergence of new customary law, states must show that their forceful interventions are lawful on a humanitarian basis. *In Military and Paramilitary Activities in and Against Nicaragua,* the ICJ stated that no one has "authority to ascribe to States legal views which they do not themselves advance."[136] Some proponents argue that states may take actions if they believe they are entitled to do so and can later justify their actions. This argument is weak, and the practice is itself limited as it would allow recalcitrant states to act unjustly because of their belief in

133. U.N. Charter ch. 1 art. 2, ¶ 4.

134. Vienna Convention, *supra* note 132, at art. 53.

135. U.K. House of Commons Select Committee on Foreign Affairs, *Fourth Report (Kosovo)* (2000), https://publications.parliament.uk/pa/cm199900/cmselect/cmfaff/28/2802.htm; M Kohen, *L'emploi de la force et la crise du Kosovo: vers un nouveau désordre juridique international* 32 L. REV. BELGE DETROIT INT'L 122–48 (1999); G Nolte, Kosovo und Konstitutionalisierung: Zur humanitären Intervention der NATO-Staaten 59 ZaöRV 941–60 (1999).

136. Lowe & Tzanakopoulos, supra note 33, at 11; Military and Paramilitary Activities in and Against Nicaragua (Nicar. V. U.S.), Judgment, 1986 I.C.J. Reports 1986, ¶ 207 (June 27).

their actions, which will only later be deemed illegal. Hence, no *opinio juris* that might support a new customary law exception can be inferred on the U.N. Charter's prohibition by states that receive the U.N. Security Council's authorization. Various interventions cited above, such as the ECOWAS/ECOMOG interventions in Liberia and Sierra Leone, received the Security Council's authorization. A claim based on *opinio juris* can only be made when there is no Security Council authorization. Even so, many of the aforementioned states did not justify their actions on any new customary law rule which allowed humanitarian interventions. In fact, many of the intervening states, such as India, Tanzania, and Vietnam, justified their interventions as self-defense against border incursions and other acts or threat of force.[137] These intrusions attracted wide condemnation from the international community, notwithstanding that of Tanzania, where the international community remained silent.[138]

Moreover, some states described above relied on the Security Council's implied authorization to justify their use of force, rather than on a new customary rule. For instance, in 1991 and 1992, those who forcefully created the Iraqi safe havens and no-fly zones claimed to have received an implied Security Council resolution.[139] In 1993, the U.S. forcefully implemented no-fly zones on the basis of self-defense against threats of attacks on the coalition's zone patrolling aircraft.[140] Nonetheless, these arguments also require justification. France and the U.K. have also claimed implied authorization of the Security Council.[141] In many instances involving the use of force, such as the U.S. interventions in Grenada and Panama, the U.S. justified intervention on the basis of rescuing U.S. nationals abroad, on the premise that a legitimate government invited the intervention, or on a claim of restoring democratic governance.[142] U.N. General Assembly resolutions condemned these justifications.[143] Thus, there are no examples of states that solely claimed humanitarian intervention as the only justification for

137. *See* Julia Brower et al., *Historical Examples of Unauthorized Humanitarian Intervention*, YALE L. SCHOOL (Aug. 26, 2013), https://law.yale.edu/sites/default/files/documents/pdf/cglc/GLC_historicalExamples.pdf.

138. *Id.* at 6-7.

139. S.C. Res. 688, ¶ 1 (Apr. 5, 1991).

140. *"The No-Fly Zone War" (U.S./U.K.-Iraq Conflict) 1991-2003*, HIST. GUY, https://www.historyguy.com/no-fly_zone_war.html (last visited Nov. 15, 2019).

141. *See* Marc J. Bossuyt, *Human Rights and Non-Intervention in Domestic Matters*, 35 INT'L COMM'N OF JURIST 45 (1985).

142. Andrew Glass, *United States Invades Grenada, Oct. 25, 1983*, POLITICO (Oct. 25, 2017), https://www.politico.com/story/2017/10/25/united-states-invades-grenada-oct-25-1983-244072; Andrew Glass, *United States Invades Panama, Dec. 20, 1989*, POLITICO (Dec. 20, 2018), https://www.politico.com/story/2018/12/20/united-states-invades-panama-1989-1067072.

143. G.A. Res. 44/240, ¶ 1 (Dec. 29, 1989); G.A. Res. 38/7, ¶ 1 (Nov. 2, 1983).

intervention. The claims were combined with some other exception, such as self-defense or the express or implied authorization of the U.N. Security Council.

Notwithstanding the law prior to 1999, it is unlikely that the requisite *opinio juris* and state practice can be inferred from NATO's intervention in the FRY to constitute an exception to the prohibition of the use of force in a humanitarian intervention. The reason is that some intervening states expressly denied that the Kosovo Campaign established their right to act under international law.

In fact, in October 16, 1998, the German Foreign Minister before the German Parliament acknowledged that NATO's decision to intervene with airstrikes in the FRY "must not become a precedent."[144] The major debate in the German Parliament relates to the denial of precedential values to NATO's decision on FRY.[145] Similarly, in a U.N. General Assembly session on September 26, 1999, Belgium stated that Security Council Resolution 1244 achieved "a return to legality," and that it hoped states would not resort to force without the Security Council's authorization as a precedent.[146] The U.S.' argument is similar, and is well connected with the German view.[147] All of these views reveal the absence of any *opinio iuris* with respect to a unilateral right to humanitarian intervention. Additionally, non-NATO states overwhelmingly argued there was no legal basis for the Kosovo bombing campaign.[148] Furthermore, half of the U.N. Member States, or the Non-Aligned Movement ("NAM"), clearly condemned NATO's use of force against the then F.R.Y.[149] Thus, based on these situations, it is clear that the right to forceful humanitarian intervention has yet to emerge as a rule under customary international law.

Some authors argue that the motive for the interventions in the aforementioned examples are in fact humanitarian, and notwithstanding the legal justification which the states offer, it can still amount to state practice which favors the right to such humanitarian intervention. However, this perspective is contrary to the clear ICJ decisions on custom formation, in which both state practice and *opinio juris* are required. The requirement for *opinio juris* is interested in the reason, not the motives. The two are obviously

144. Regierungsentwurf, DEUTSCHER BUNDESTAG: DRUCKSACHEN [BT] 13/248, http://dip21.bundestag.de/dip21/btp/13/13248.pdf (Ger.).

145. Bruno Simma, *NATO, The UN and the Use of Force: Legal Aspects*, 10 EUR. J. INT'L L., 1, 12-13 (1999).

146. Lowe & Tzanakopoulos, supra note 33.

147. Wedgwood et al., *supra* note 125, at 829.

148. Louis Henkin, *Kosovo and the Law of "Humanitarian Intervention,"* 4 AM. J. INT'L L. 825 (1999).

149. Lowe & Tzanakopoulos, *supra* note 33, at 12.

different. Moreover, states which rebut the presumption of *opinio juris* and justify their actions on a legal basis further illustrates that it is not state practice. Again, the fact that many intervening states are extremely reluctant to place reliance on a right of humanitarian intervention shows that it is extremely difficult to find any properly countable *opinio juris* upon which a right of humanitarian intervention can be established.

Furthermore, the post-Kosovo practice does not show a reasonable reliance on a right of humanitarian intervention. The 2011 Libyan crisis saw applied force after the Security Council adopted a resolution[150] to protect the civilians. The Council authorized the U.N. Member States to ensure protection by "all necessary means" of Libyan "civilians and civilian populated areas under threat of attack"[151] and to ensure enforcement of a no-fly zone.[152] When the time for a resolution approached, many states, such as the U.K., the U.S., and NATO Member States, jointly emphasized the need for U.N. Security Council authorization before using any armed force in Libya.

Based on the analysis above, it is clear that the interventions in Yemen are unilateral interventions, and were never supported by the Security Council's resolutions related to Yemen.[153] Currently, unilateral humanitarian interventions, through the use of force, are not supported by the international customary law. There are no state practices and *opinio iuris* to support this unilateral intervention.

VI. THE ROLE OF U.N. GENERAL ASSEMBLY IN AUTHORIZING INTERVENTION

As previously noted, unilateral humanitarian intervention has no place in customary international law.[154] The U.N. Security Council must authorize interventions or intervening states must act in self-defense. However, the absence of UN Security Council authorisation is not a final word in determining the legality of an intervention. The U.N. General Assembly has a role to play as well. The direct involvement of the U.K. and the U.S. (as permanent members) in the armed conflict in Yemen, to support the Saudi-led coalition, prevents the Security Council from undertaking its' designated role, which is to maintain peace and security.[155] This is because although the

150. S.C. Res. 1973, ¶ 3 (Mar. 17, 2011).

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

152. S.C. Res. 1973, ¶ 8 (Mar. 17, 2011).

153. S.C. Res. 2481, ¶ 4 (July 15, 2019).

154. Lowe & Tzanakopoulos, *supra* note 33, at 13; Legal Consequences of the Construction of a Wall in the Occupied Palestinian State, Advisory Opinion, 2004 I.C.J. 136 ¶ 162 (July 9).

155. *See generally* Musa, *supra* note 113.

Security Council has a duty to maintain and restore international peace and security,[156] it cannot exercise that power to the exclusion of the U.N. General Assembly. The U.N. General Assembly laid down a procedure, created under the Uniting for Peace Resolution (1950),[157] which enables it to act if the Security Council cannot act due to the exercise of the veto power under the Charter. Thus, in situations where the UN Security Council is paralyzed, states that intend to intervene would prefer to take the matter to the U.N. General Assembly to authorize the intervention instead of engaging in unilateral intervention.

NATO believes that it will stand ready "to act should the U.N. Security Council be prevented from discharging its purpose of maintaining international peace and security."[158] However, such a position is problematic. The issue is how can the Security Council be prevented from doing its job. Is it when the Council fails to have the requisite majority or when they simply refuse to act? Can it also be as a result of the recalcitrant attitude of a permanent member of the Council? The answers to these questions require proof. At any rate, the UN General Assembly can get a two-third majority of the Member States in line to unite for peace resolution.[159] In Yemen, there is no evidence to show that the interventions received the support of Member states, let alone the two-third majority support of the Member States.

VII. PUBLICISTS' CONDITIONS FOR RECOURSE TO HUMANITARIAN INTERVENTION

Undoubtedly, the right to unilateral humanitarian intervention is not grounded in international law. Some commentators have specified conditions that must be fulfilled before recourse can be made to seek unilateral humanitarian intervention. According to these commentators, states may unilaterally intervene without the Security Council's authorization when these conditions are fulfilled. What is equally important here is how the conditions are met and who determines whether such conditions are fulfilled.

Although the conditions are not sacrosanct, and the legality is doubtful, some writers have stated that the conditions include: (i) a humanitarian "emergency, disaster, crisis, catastrophe, necessity, or tragedy" that is generally related to the prevalent and gross human rights violation of a

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

157. G.A. Res. 377 (V), at 1 (Nov. 3, 1950).

158. North Atlantic Assembly, Resolution 283, ¶ 15 (Nov. 1998); Lowe & Tzanakopoulos, *supra* note 33, at 13.

159. Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10 EUR. J. OF INT'L LAW, 1, 17 (1999).

State's population (or any part thereof) or the commission of serious international crimes;[160] (ii) a territorial State unwilling or unable to act under the circumstance;[161] (iii) the exhaustion of all possible remedies, including recourse to the Security Council or U.N. General Assembly and all other peaceful remedies;[162] and (iv) that the use of force is limited in scope and time and only for humanitarian objectives while respecting the rule of proportionality.[163] Still, the issue remains as to who determines whether the substantive conditions have been sufficiently fulfilled.

The procedure for determining these conditions are significant.[164] Nonetheless, under Article 39, the Security Council can objectively determine whether a humanitarian catastrophe amounts to a "threat to international peace and security."[165] This does not resolve how other conditions will be addressed, and the task may not be easy. It is likely to reduce the U.N. Security Council's power of actual authorization of the use of force to merely determining the first substantive condition. Yet, unilateral intervention will not be permitted without any condition because it will clearly contradict the prohibition of the use of force.

Furthermore, actions arising to unilateral humanitarian intervention will fail to meet at least one condition. Yet, states continue to assert a right to intervention without proper articulation on the criteria for such intervention. Hence, states' responses are sometimes met with silence by the international community. The international community sometimes condemns these interventions. Despite this, the international community may sometimes tolerate or withdraw a response depending on how efficient the breach is.

The notion of responsibility to protect, as it relates to intervention, requires further study.[166] After the Kosovo crisis, some states and authors argued that since the right to unilateral humanitarian intervention is unknown to positive international law, a law needs to be developed to cater to instances of gross human rights violations.[167] Canada led such an initiative and created

160. Barry M. Benjamin, *Unilateral Humanitarian Intervention: Legalizing the Use of Force to Prevent Human Rights Atrocities*, 16 FORDHAM INT'L L.J. 120, 138 (1992).

161. *Id.*

162. Mona Fixdal & Dan Smith, *Humanitarian Intervention and Just War*, 42 MERSHON INT'L STUD. REV. 283, 302 (1998).

163. *Id.*

164. Ian Brownlie & C.J. Apperley, *Kosovo Crisis Inquiry: Memorandum on the International Law Aspects*, 49 INT'L & COMP. LAW Q. 878, 899 (2000).

165. 328 Parl Deb HC (1999) col. 617 (UK).

166. INT'L COMM'N ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT 11 (Gareth Evans & Mohamed Sahnoun et al. eds Int'l Dev. Res. Ctr. 2001) [hereinafter THE RESPONSIBILITY TO PROTECT].

167. Christopher Greenwood, *Humanitarian Intervention: The Case of Kosovo*, 10 FIN. Y.B. INT'L LAW 141, 174 (2002).

the International Commission on Intervention and State Sovereignty.[168] This commission created the responsibility to protect report,[169] with an objective to create a fine balance between effectively responding to humanitarian crises and maintaining an effective legal framework for responding to such crises.

Moreover, the report does not allow unilateral humanitarian intervention under current international law. In fact, in 2005, at the 60th anniversary of the U.N., the General Assembly re-established the traditional method to the use of force for humanitarian purposes, subjecting it to Chapter VII powers of the Security Council, without making reference to a unilateral right of humanitarian intervention.[170] This shows that states are reluctant to recognize a right of humanitarian intervention separate from the U.N. Charter's provisions, as well as, the procedures for collective response therein created.

Therefore, gross human rights violations continue to occur. As such, humanitarian law remains a matter of public concern, beyond the control of states. Issues arise when the U.N. apparatus refuses or neglects to act in deserving situations to avert humanitarian consequences. However, it appears that states are unwilling to commit financial or material support and resources for such interventions. The states are also reluctant to be involved in some situations linked with the deficient U.N. constitutional structure. Based on state responses, it is also apparent that states are not willing to forgo the prohibition of the use of force as well as the U.N. machinery in support of the unilateral right to intervention. States even agree that in rare humanitarian emergency, that despite the intervention's significance, the U.N. is unable to take action. Accordingly, states may accept some humanitarian reflections in order to mitigate the intermittent violation of the prohibition of the use of force and put a limit to their reactions. In any case, the Security Council should not be excluded, should demand to be updated as to the developments of the situation, and consequently be allowed to use its authority to seize control when an intervention presents a threat to international peace and security.

The interventions in Yemen have not met all of the conditions laid down by the opinions of the publicists. Even if it is assumed that that these conditions were met, the legality of these conditions in view of the stands of positive international law is doubtful. The responsibility to protect would have solved the situation in Yemen. However, based on the analysis above, it still does not cover situations involving unilateral intervention through the use of force.

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168. *See generally* THE RESPONSIBILITY TO PROTECT, *supra* note 166, at VII.

169. *See generally* THE RESPONSIBILITY TO PROTECT, *supra* note 166, at VIII.

170. G.A. Res. 60/1, ¶ 1 (Sept. 16, 2005).

Today, the humanitarian interventions are the main causes of human tragedy in Yemen, including civilian and military causalities, poverty, sickness, and environmental contamination. Essentially, the humanitarian interventions caused and furthered humanitarian crises. Additionally, the money spent on the interventions' costs, if used to build rather than destroy, could raise each of Yemen's, Saudi Arabia's, and Iran's industrial structures to that of developing countries.

VIII. CONCLUSION

The entire international legal architecture supports the prohibition of the use of force, except when force is used in a manner consistent with the purpose of the U.N. Charter. In analyzing the legal framework, Article 2(4) and Article 51 of the U.N. Charter take center stage. While the former prohibits the use of force, the latter allows for exceptions in situations in which disputes can be settled through the use of force. Thus, under international law, the intervention must be predicated on the U.N. Security Council's authorization, which may be either implied or explicit. Some states have justified their interventions on either explicit or implicit authorization of the U.N. Security Council. The other exception is the right of self-defense, which applies to states and not the civil population, and cannot be asserted to protect nationals abroad. Similarly, authors and states have attempted to justify interventions under customary law, but state practices and *opinio juris* do not support the assertion. The ICJ decisions also do not support unilateral intervention in internal crises. The U.N. General Assembly's role in authorizing interventions is important because it can authorize intervention with a two-third majority of Member States, a seemingly better approach than unilateral interventions, which is why states are reluctant to endorse unilateral intervention. Although commentators attempt to establish conditions which would allow for unilateral interventions, the legality of such conditions is doubtful.

Thus, international law principles do not support either the Saudi-led or Iran-backed interventions in Yemen. The two major interventions in Iran are not legally equivalent, in part, because the intervention of Iran is very limited when compared to the Saudi-led interventions. Nonetheless, both interventions are not lawful, as they are not supported by the general rule under Article 2(4) of the U.N. Charter, nor do the interventions fall within any of the exceptions outlined in Article 51. Additionally, neither the U.N. General Assembly nor Security Council authorized either intervention, and the actions of Saudi Aribia and Iran cannot be justified on the ground of self-defense. Furthermore, customary international law cannot support either intervention because state practice and *opinio juris* do not favor unilateral

interventions. More so, the interventions have not solved the problem, but instead, have exacerbated human rights violations in the Country. What started as an internal armed conflict seems to have graduated to an international armed conflict with intermediaries for over four years. The interventions and their consequences will remain until all involved states take urgent steps toward amicably and peacefully settling the disputes, as established in Article 2(4) of the U.N. Charter.

Although the Security Council did not authorize such interventions, this does not prevent it from intervening at any time itself today to save human lives. Each day the interventions are ongoing, the repercussions gets harsher. If allowed to continue, these interventions will grow into a direct war between Saudi Arabia and Iran Riyadh and Tehran.

The Security Council did not permit such intervention from the very beginning, but it can still intervene today to save human lives. Every day, this intervention gets harsher, and without a decisive intervention from the Security Council, this war will probably turn into a direct war between Saudi Arabia and Iran, and move from Yemen to Riyadh and Tehran.

MODERN(IZING) ART: THE NEED FOR A CENTRALIZED REGISTRY

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I. INTRODUCTION

The art world is one of the largest, least regulated, and most obscure industries in the world,[1] making art and 'cultural property'[2] protection of the

1. *See generally* Leila Amineddoleh, *The Role of Museums in the Trade of Black Market Cultural Heritage Property*, 18 ART ANTIQUITY & L. 227 (2013).

2. Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, art. 1, 823 U.N.T.S. 231; UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (with annex), June 24, 1995, 2421 U.N.T.S. 457 (The terms "cultural property" and "cultural heritage" are often used interchangeably, as the former conveys a sense of ownership, while the latter illustrates generational passing. However, the 1970 UNESCO Convention and 1995 UNIDROIT Convention uniformly define "cultural property" as follows:

"(a) Rare collections and specimens of fauna, flora, minerals and anatomy, and objects of paleontological interest; (b) property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artist and to events of national importance; (c) products of archaeological excavations (including regular and clandestine) or of archaeological discoveries; (d) elements of artistic or historical monuments or archaeological sites which have been dismembered; (e) antiquities more than one hundred years old, such as inscriptions, coins and engraved seals; (f) objects of ethnological interest; (g) property of artistic interest, such as:(i) pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles decorated by hand); (ii) original works of statuary art and sculpture in any material; (iii) original engravings, prints and lithographs; (iv) original artistic assemblages and montages in any material; (h) rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.) singly or in collections; (i) postage, revenue and similar stamps, singly or in collections; (j) archives, including sound, photographic and cinematographic archives; (k) articles of furniture more than one hundred years old and old musical instruments.")

See also Robert L. Tucker, *Stolen Art, Looted Antiquities, and the Insurable Interest Requirement*, 29 QUINNIPIAC L. REV. 611, 628 (2011) (*citing* Art law Handbook §6.02[A], at 391 (Roy S. Kaufman, ed., 2000)) (explaining that "cultural property" is a broad term meant to include "objects of great artistic importance," much like fine art).

utmost importance to both society and those who create and enforce its law. Not only are art and cultural property invaluable, basic elements to civilization,[3] vesting in past, present, and future generations, but art and cultural property are also testamentary to civilizations' history and progress.[4] Preserving art and cultural property allows humanity to continuously examine and reflect on evolutions within society, politics, science, and symbolic ethnic and religious identifiers.[5]

The few who benefit from illicit art and cultural property deprive artistic value from the world and future generations. Further, promoting art and cultural property as a commodity serves as a basis for monetary and educational capital for organizations and countries to derive wealth.[6] It is necessary to track and regulate the art and cultural property market, through a centralized registry, to deter and defend against art-rocities.[7] Regulating assets as a method of protection is not a new concept, however, the outcomes of regulating art and cultural property are unpredictable as such regulations and asset valuations, or lack thereof, vary between countries. Although international entities have spent years passing various treaties and declarations to safeguard art and cultural property, each instrument fails to strictly bind signatories. At its core, a centralized art registry will provide a wealth of transparent knowledge and continuity within art ownership and sales throughout the world. Essentially serving as a one-stop-shop for rightful owners and heir, buyers, sellers, auction houses, museums, and inquisitive minds, the centralized art registry would reduce art-rocities and reinforce international repatriation and restitution efforts.

In Part I, this note summarizes notable historic and current crimes against art and cultural property which continue to shape international and domestic art law. Part II illustrates how support for creating a centralized registry is derived from international art and cultural property laws and treaties, technological developments, and societal demands for moral changes in the art market. Finally, Part III discusses the logistics, concerns, and incentives behind establishing a centralized art and cultural property registry.

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3. Final Act of the Intergovernmental Conference on the Protection of Cultural Property in the Event of Armed Conflict, pmbl., May 14, 1954, 249 U.N.T.S. 215 [hereinafter 1954 Hague Convention].

4. Amineddoleh, *supra* note 1, at 227.

5. Amineddoleh, *supra* note 1, at 227.

6. States are expected to ratify and implement supporting legislation to enforce the international agreements within their borders.

7. "Art-rocities" is the Author's own play on the word "atrocities" to describe crimes against art and cultural property. *See* Amineddoleh, *supra* note 1, at 228.

II. HISTORY OF CRIMES AGAINST ART AND CULTURAL PROPERTY: FROM ALEXANDER THE GREAT TO CHINA'S ROUGE RECLAMATION OF ITS LOOTED PAST

Crimes have always been committed crimes against art and cultural property.[8] As looting and technology progressed over centuries and through continents, the looting of art and cultural property has devastatingly increased.[9] Traditionally, secrecy surrounding buyers and sellers shrouded such objects' provenance from the art market, thereby allowing illicit trading to flourish[10] and paving the way for art crime to finance additional criminal activities.[11] Although the world perceives and adapts to each art-rocity differently, from ancient Greek plunders to recent terrorist organizations' raids, the market for looted works and antiquities has remained constant.[12]

Victors used to enjoy a "right to booty"[13] over people and objects seized during conflicts. Historically, armies saw looting and pillaging as a matter of course;[14] and occasionally, even as the sole reason for a country to start a war. Thus, under customary or international law, there is no existing remedy to demand the return of objects looted prior to the late nineteenth century.[15] Further, there is no statute of limitations that allows someone to recover objects plundered during the fifteenth through sixteenth centuries.[16]

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8. HERODOTUS, THE PERSIAN WARS, BOOK VIII - URANIA ¶ 33 (George Rawlinson trans., 1942) (Greek historian, Herodotus, denounced the Persian Army's temple destruction in 480 B.C. "At the last-named place there was a temple of Apollo … adorned with a vast number of treasures and offerings … This temple the Persians plundered and burnt … for the purpose of … conveying to King Xerxes the riches where were there laid up.")

9. Sandro Calvani, *Frequency and Figures of Organized Crime in Art and Antiquities*, ORGANIZED CRIME IN ART AND ANTIQUITIES 28 (Setfano Manacorda, ed. 2009), www.academia.edu/887647/Organized_crimes_in_Art_and_Antiquities.

10. Paul M. Bator, *An Essay on the INT'L Art Trade*, 34 STAN. L. REV. 275, 360 (1982).

11. *See* CRIMINOLOGY AND ARCHAEOLOGY: STUDIES IN LOOTED ANTIQUITIES, 1, 16-17, 34-35, 50-51, 152, 158, 160 (Penny Green & Simon Mackenzie, eds., 2009).

12. Laura de la Torre, *Terrorists Raise Cash by Selling Antiquities*, GOV'T SEC. NEWS, Feb. 20, 2006, at 10.

13. JIŘÍ TOMAN, THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT 3 (1996).

14. Often, stealing civilian property, such as crops and livestock, was the only way for armies to survive. Further, to offset their less than desirable pay and commemorate victories, soldiers would loot cultural treasures. *See generally* Colin Woodard, *The War Over Plunder: Who Owns Art Stolen In War?*, *in* MHQ: THE QUARTERLY JOURNAL OF MILITARY HISTORY (2010).

15. *Id*.

16. *Id.*

Anything restituted or repatriated from that long ago is done so on the basis of political cooperation or morality, rather than on a legal basis.[17]

The early twentieth century marked a "grey period"[18] spanning between the two major Hague Conventions in 1899[19] and 1954,[20] during which a legal remedy for demanding the return of looted objects was available but, due to its ambiguities, was rarely used.[21] The world began seeing major developments in international art and cultural property law as moral attitudes regarding war-loot evolved. War-loot, a concept once viewed as acceptable, yet disgraceful, is now explicitly prohibited as wartime-plunder.[22] Even so, laws in colonies and territories regarding repatriations and restitution remain complicated since claims over objects plundered during occupations may be dismissed on the legal basis that a colony is an immune sovereign territory.[23]

A. *Alexander the Great*

Born in 356 B.C.E., Alexander the Great's most notable legacy is the impact he left on the world's cultural centers. With military prowess and a passion for supremacy, Alexander conquered lands, people, and destroyed or stole their art and cultural property, thereby amassing an enormous empire to demonstrate his superiority.[24] His most infamous plunder was the looting and burning of Persepolis and its great palace,[25] which housed the Persian Empire's treasures, literary works, art, and spoils, including those from the

17. *Id.*

18. *Id.* (referring to the fact that the twentieth century was a period with high uncertainty as to what legal remedies could be pursued to recover or seek damages for seized objects).

19. Hague Convention Regulations Respecting the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803 (forbidding most civilian property from being confiscated, but showing that a legal remedy was an unreliable forum in which recovery was in the victor's hands and a claim had to be brought in State courts where the object resided, and thus, the 1899 Hague Convention did not provide a viable opportunity to hold violators accountable).

20. 1954 Hague Convention, *supra* note 3 (authorizing States to act against other States who violated international laws protecting art and cultural property).

21. Woodard, *supra* note 14, at 10.

22. Woodard, *supra* note 14, at 10.

23. *Sovereign Immunity*, BLACK'S LAW DICTIONARY, ("A government's immunity from being sued in its own courts without its consent.").

24. Margaret M. Miles, *War and Passion: Who Keeps the Art*, 49 CASE W. RES. J. INT'L L. 5, 8 (2017).

25. *See* Joshua J. Mark, *Alexander the Great & the Burning of Persepolis*, ANCIENT HISTORY ENCYCLOPEDIA (Feb. 23, 2011), https://www.ancient.eu/article/214/alexander-the-great--the-burning-of-persepolis/; *see also* FRANK L. HOLT, THE TREASURES OF ALEXANDER THE GREAT: HOW ONE MAN'S WEALTH SHAPED THE WORLD 85 (2016) (describing the impact of Alexander's plunders and trades on the economy).

Parthenon in Athens.[26] Written accounts describe the treasures as falling prize to the victors who could not satisfy their wants.[27] After Alexander's armies loaded 3,000 camels and other pack animals with gold, silver, and art, they burned what remained in and of the palace in retribution for the 480/479 B.C.E Persian invasions in Greece.[28]

Ironically, it is said that Alexander repatriated iconic Greek works 'recovered' from Persepolis and later expressed regret for destroying a place of such ancient art and culture.[29] Alexander the Great's looting practices laid the foundation for royalty living during the Hellenistic Period to increase their private ownership of art and cultural property, who were especially fond of antiquities and books.[30]

B. *Napoleon*

As Napoleon Bonaparte rose to power and expanded his empire, in the late 1790s, he too looted art and antiquities. Napoleon, wanting to serve as in inspiration to the French, planned a "universal museum," to be named after himself, to house the best art and treasures the world had to offered.[31] Napoleon's crusades in Egypt brought new fashions and excitement to Europe, however, his subsequent campaigns in Belgium, Italy, Prussia, and the Netherlands garnered disapproval.[32]

Napoleon strategically amassed collection displayed in Paris included mosaics from Cyprus, objects from the Parthenon, Italian alter-paintings cut from churches, private and public panel paintings, sculptures seized from historic collections, geological specimens, and Papal archives.[33] Following Napoleon's defeat in Waterloo, the Duke of Wellington commanded the repatriation and restitution of fifty-five percent of Napoleonic loot.[34] However, victors' plunders reigned, and much of Napoleon's collections

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26. Joshua J. Mark, *Alexander the Great & the Burning of Persepolis*, ANCIENT HISTORY ENCYCLOPEDIA (Feb. 23, 2011), https://www.ancient.eu/article/214/alexander-the-great--the-burning-of-persepolis/.

27. *Id.*

28. Miles, *supra* note 24, at 7.

29. Mark, *supra* note 26.

30. The Greek social norm was to give surplus to the gods and public temples, but there was now a shift to private consumption and display. Miles, *supra* note 24, at 8-9; *see also* Colette Hemingway & Sean Hemingway, *Art of the Hellenistic Age and the Hellenistic Tradition*, METROPOLITAN MUSEUM OF ART (Apr. 2007), https://www.metmuseum.org/toah/hd/haht/hd_haht.htm.

31. Miles, *supra* note 24, at 15.

32. Miles, *supra* note 24, at 15.

33. Miles, *supra* note 24, at 15.

34. Miles, *supra* note 24, at 16.

found their way to the British Museum instead. This paved the way for the race between Britain and Western Europe to collect and house "universal museums"[35] for nationalistic and academic power.[36] In 1793, the Louvre finally opened its doors so that patrons could inspect collections belonging to the world's citizens.[37]

C. *World War II and Nazi-Loot*

During World War II, the Nazis perpetrated one of the greatest art heists in modern history[38] using widespread, systematic looting to remove unprecedented amounts of art and cultural property throughout Nazi-occupied zones.[39] In doing so, Adolf Hitler intended to repatriate German works that spent years under foreign ownership and establish the Fuhrermuseum in his hometown of Linz, Austria,[40] to house the 'recovered' works and other superior European works of art and cultural property.[41] Works and objects identified as degenerate were either destroyed, displayed separately, or used as bargaining chips to recover other works.[42] While exact numbers will never be known, some research estimates the Nazis pillaged about one-fourth to one-third of Europe's art,[43] while others claim that the

35. Margaret M. Miles, *Still in the Aftermath of Waterloo: A Brief History of Decisions about Restitution, in* CULTURAL HERITAGE, ETHICS, AND THE MILITARY 29, 29-42 (Peter G Stone ed., 2011) (stating that the British Museum opened in 1759 to educate and entertain the general public).

36. Miles, *supra* note 24, at 17.

37. Miles, *supra* note 24, at 17.

38. However one must not disregard the recent ISIS-looting and destruction, nor early British colonialism plunders in Asia, Africa, Afghanistan, and India, Napoleon's looting and transfer of Italian art to the Louvre, Spanish Empire's plunder in Latin and South America, Crusaders pillage in Constantinople; Sweden's looting of the Prague Castle during Thirty Years' War, Russian and Prussian looting in Poland, plunders of Genghis Khan and Alexander the Great; United States colonialism plunders of native and indigenous people. *See* Donald S. Burris, *From Tragedy to Triumph in the Pursuit of Looted Art: Altmann, Benningson, Portrait of Wally, von Saher and Their Progeny*, 15 J. MARSHALL REV. INTELL. PROP. L. 394, 397-98, n.13 (2016).

39. Sue Choi, *The Legal Landscape of the International Art Market After Republic of Austria v. Altmann*, 26 NW. J. INT'L L. & BUS. 167, 168 (2005).

40. *Id*.

41. Hitler sought out works by Vermeer, Rembrandt, Van Eyck, and Durer. Emily A. Graefe, *The Conflicting Obligations of Museums Possessing Nazi-Looted Art*, 51 B.C. L REV. 473, 473 n.3 (2010).

42. Works or artists which portrayed Jews or condemned Germany, such as Van Gogh, Chagall, and Picasso, were considered degenerate. *Id*.

43. David Wissbroecker, *Six Klimts, a Picasso, & a Schiele: Recent Litigation Attempts to Recover Nazi Stolen Art*, 14 DEPAUL-LCA J. ART & ENT. L. & POL'Y 39, 40 (2004).

value of Nazi-loot was more than all the works within the U.S. during 1945 combined.[44]

In an effort to keep prized objects and works away from the Nazis, World War II saw the largest ever migration of art and cultural property, with many works and objects traveling across both Europe and the world. However, because policies at the time enabled Nazi-confiscation as a means to persecute and disenfranchise European Jews and others the Nazis viewed as inferior, a vast majority of art and cultural property found its way into Nazi hands.[45] Litigation on behalf of Holocaust survivors and their heirs has made it is well-known that, rather than destroying confiscated items, Nazi officers and sympathizers repossessed the seized objects and works, whereby they started their own collections[46] which have been passed down through generations,[47] only to be discovered in museums around the world years later.[48]

D. *Illicit, Black Market Antiquities and Terrorism*

Both the Islamic State of Iraq and Syria (ISIS) and the Taliban have revived some of the original looting and destruction concepts whereby they use plunder as a means to finance terrorism and to cleanse modern culture.[49] In Iraq, the Taliban deliberately destroyed the Bamiyan Buddhas[50] and three different groups ransacked approximately 14,000 to 15,000 fine antiquities

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44. Lawrence M. Kaye, *Avoidance and Resolution of Cultural Heritage Disputes: Recovery of Art Looted During the Holocaust*, 14 WILLAMETTE J. INT'L L. & DISP. RESOL. 243, 243-44 (2006).

45. Benjamin E. Pollock, *Out of the Night and Fog: Permitting Litigation to Prompt an International Resolution to Nazi-looted Art Claims*, 43 HOUS. L. REV. 193, 196 (2006).

46. Sophie Gilbert, *The Persistent Crime of Nazi-Looted Art*, ATLANTIC (Mar. 11, 2018), https://www.theatlantic.com/entertainment/archive/2018/03/cornelius-gurlitt-nazi-looted-art/554936/ (detailing the February 2012 discovery of over 1,500 Nazi-looted works in Cornelius Gurlitt's Munich apartment, which included artists such as Picasso, Matisse, Monet, Liebermann, Chagall, Durer, and Delacroix; these works were likely passed down by Hildebrand Gurlitt, Cornelius's father, who was notoriously known as a Nazi art dealer).

47. *Id.*

48. Nazis obtained a Camille Pissarro painting in 1939 when Lilly Cassirer was forced to trade it for freedom, and in 2010 the painting had been discovered inside of Madrid's Museo Nacional Thyssen-Bornemisza, after passing through many private hands, including a NYC art dealer, a Swiss art collector, and finally to the Spanish government. Joel Rubin, *Nearly 80 Years Ago, Nazis Stole a Family's Painting. Now an American Judge will Decide if it Should be Returned,* L.A. TIMES (Dec. 03, 2018), https://www.latimes.com/local/lanow/la-me-nazi-art-trial-20181203-story.html.

49. Sarah Cascone, *Nearly Destroyed by ISIS, the Ancient City of Palmyra Will Reopen in 2019 After Extensive Renovations*, ARTNET (Aug. 27, 2018), https://news.artnet.com/art-world/syria-isis-palmyra-restorations-1338257.

50. Miles, *supra* note 24 at 18.

from the Iraq Museum.[51] The well-preserved Greco-Roman, Persian, and Islamic ruins became endangered when ISIS came to power at the start of the 2011 Syrian Civil War.[52]

ISIS has since destroyed the ancient city of Palmyra, a UNESCO Heritage Site since 1980, but not before beheading eighty-two year old Khalid al-As'ad, the head of the site's antiquities, when he refused to disclose where priceless statues were hidden.[53] ISIS also destroyed or looted other ancient sites, such as the Temple of Bel, Temple of Baal Shamin, the Arch of Triumph, the Valley of the Tombs columns, and the City of Homs and its 2,000-year old central market.[54] Although plunder in the Middle East sparked new import and export freezes and legislation, art markets are still acquiring illicit antiquities through the black market.[55]

E. *"Reclaiming" Chinese History*

Western imperialism engulfed China from 1840 to 1949, a period which the Chinese dubbed as the "Century of Humiliation."[56] In 1860, French and British armies looted and destroyed Beijing's Summer Palace. [57] As a result, the palace's treasures spread throughout the world's most prominent museums and private collectors.[58] Chinese cultural heritage has become a focal point for the China Poly Group, a state-run organization which funded a delegation in 2009 to identify Chinese objects in museums outside of China.[59]

In 2010, the Drottningholm Palace in Stockholm reported that burglars set fires and stole Chinese objects.[60] Shortly after the Chinese treasure-hunting delegation published their findings in 2015, perpetrators stole twenty-two objects, originally from Beijing's Summer Palace, which had

51. Mark V. Vlasic & Helga Turku, *Protecting Cultural Heritage as a Means for International Peace, Security and Stability: The Case of ISIS, Syria and Iraq*, 49 VAND. J. TRANSNAT'L L. 1371, 1405 (2016).

52. Cascone, *supra* note 49.

53. Cascone, *supra* note 49.

54. Cascone, *supra* note 49.

55. Amineddoleh, *supra* note 1 at 252-53.

56. Sarah Cascone, *Is China Going Rouge to Reclaim Its Looted Art? A Recent String of Museum Heists Is Raising Suspicions*, ARTNET (Aug. 17, 2018), https://news.artnet.com/art-world/chinese-art-being-stolen-around-the-world-1334294.

57. *Id*.

58. *Id.*

59. *Id*.

60. Alex Palmer, *The Great Chinese Art Heist,* GENTLEMEN'S Q. (Aug. 16, 2018), https://www.gq.com/story/the-great-chinese-art-heist.

since been housed in Chateau de Fontainbleau.[61] Another theft occurred at the KODE Museum in Norway when twenty-two artifacts disappeared from their China collection;[62] one artifact was later exhibited at the Shanghai International Airport.[63]

Because Chinese intellectual property laws are different and Chinese collectors take pride in displaying such artifacts, no matter their provenance, countries have been slow to react to the Chinese heists.[64] Moreover, the Chinese government does not consider these 'repatriated' artifacts stolen, but rather identifies such items as belonging in and to China.[65] Another reason many countries have not criticized the Chinese-looting is fear that pressure to return these looted artifacts would likely disrupt that country's relations with China.[66]

III. SUPPORT FOR CREATING A CENTRALIZED ART REGISTRY

A. *Existing Laws and Best Practices Impliedly (or Expressly) Call for a Central Registry*

The first art and cultural property laws and best practices transpired at a time when a central registry was not only unforeseeable, but technologically impossible. However, interpretations of many such early provisions and modern conventions impliedly allowed or expressly called for a centralized art registry.

1. 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict[67]

The Hague Convention calls for Parties to undertake appropriate measures to safeguard and respect cultural property in chapter I, arts. 2 and 3:

> "For the purposes of the present Convention, the protection of cultural property shall comprise the safeguarding of and respect for such property.[68] The High Contracting Parties undertake to prepare in time of peace for the *safeguarding of cultural property* situated within their own

61. *Id*.
62. *Id*.
63. *Id*.
64. *Id*.
65. *Id*.
66. *Id*.
67. 1954 Hague Convention, *supra* note 3.
68. 1954 Hague Convention, *supra* note 3, Ch. I, at art. 2 (emphasis added).

> territory against the foreseeable effects of an armed conflict, *by taking such measures as they consider appropriate*."[69]

Rather than writing within a textualist context, it is clear that the drafters intended this basic language to withstand time to be pliable enough to adapt with modernization. As such, a centralized art registry is clearly an "appropriate measure."

Provisions creating and allowing for UNESCO Blue Shield's International Register of Cultural Property Under Special Protection were formed in chapter II of the Hague Convention:

> "There may be placed under special protection a limited number of refuges intended to shelter movable cultural property in the event of armed conflict, of centres containing monuments and other immovable cultural property of very great importance[70]… *Special protection is granted to cultural property by its entry in the 'International Register of Cultural Property under Special Protection*.'[71]
>
> *An 'International Register of Cultural Property under Special Protection' shall be prepared …* [*UNESCO] shall maintain this Register*… The Register shall be divided into sections … sub-divided into three paragraphs, headed: Refuges, Centres containing Monuments, Other Immovable Cultural Property.[72]
>
> [UNESCO] shall cause to be entered in the Register, under a serial number, each item of property for which application for registration is made, provided that he has not received an objection."[73]

The Hague drafters foresaw the need to identify, register, and track particular sites and objects.[74] However, no one could foresee that digital technologies would allow for the real-time monitoring of the effects of pollution, urbanization, and terrorism on such Special Protection sites. The Hague's allowance for the Blue Shield Registry suggests that the drafters and signatories would not oppose utilizing digital technology to its greatest extent, forming a central registry for all art and cultural property, rather than only for the selected few enumerated in 1954.

In Chapter VII, art. 23, the Hague expressly named UNESCO as the agency which would oversee and assist State Parties in creating technology to protect art and cultural property:

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69. 1954 Hague Convention, *supra* note 3, Ch. I, at art. 3 (emphasis added).
70. 1954 Hague Convention, *supra* note 3, Ch. II, art. 8, at ¶1 (emphasis added).
71. 1954 Hague Convention, *supra* note 3, Ch. II, art. 8, at ¶6 (emphasis added).
72. 1954 Hague Convention, *supra* note 3, Ch. II, art. 12, at ¶1-3 (emphasis added).
73. 1954 Hague Convention, *supra* note 3, Ch. II, art. 15, at ¶1 (emphasis added).
74. 1954 Hague Convention, *supra* note 3.

> "The High Contracting Parties may call upon the [UNESCO] for technical assistance in organizing the protection of their cultural property, or in connection with any other problem arising out of the application of the present Convention or the Regulations for its execution."[75]

Not only did the Hague drafters intend that future, unknown technology would be an effective means for carrying out some of the Convention's goals,[76] but also identified the entity they believe would be able to fund, facilitate, and enforce the creation and use of such technology.[77] Almost anticipating the 1970 UNESCO Convention, Article 23 also shows that the Hague intended Parties would minimally maintain national catalogs of art and cultural property within their borders and institutions.

2. 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property[78]

As of this writing, 140 Parties[79] have given notice of succession, ratified, or accepted the 1970 UNESCO Convention.[80] The Convention specifically discusses the movement of cultural objects and was the international response to the looting by newly-independent African states in the 1960s.[81] Africa had long-standing issues with pillaging, but the increase in demand for pre-colonial antiquities and colonial artifacts during post-colonialization prompted international reaction.[82] Designed to control the art and cultural property market and to prevent illicit trade,[83] the Convention focused on the resulting damage to the origin state or culture, and deprivation from the world's current and future generations.[84]

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75. 1954 Hague Convention, *supra* note 3, Ch. VII, art. 23, at ¶1 (emphasis added).

76. *See* 1954 Hague Convention, *supra* note 3.

77. *See* 1954 Hague Convention, *supra* note 3.

78. Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, art. 1, 823 U.N.T.S. 231 [hereinafter 1970 UNESCO Convention].

79. UNESCO, Convention on the Means of Prohibiting and Preventing Transfer of Ownership of Cultural Property, http://www.unesco.org/eri/la/convention.asp?KO=13039&language=E (last visited Nov. 1, 2019) (listing the states that have ratified, including Yemen, ratifying most recently on June 3, 2019).

80. 1970 UNESCO Convention, *supra* note 77.

81. Folarin Shyllon, *Looting and Illicit Traffic in Antiquities in Africa*, CRIME IN THE ART AND ANTIQUITIES WORLD: ILLEGAL TRAFFICKING IN CULTURAL PROPERTY, 135 (Stefano Manacorda & Duncan Chappel eds., 2011).

82. Clemency Chase Coggins, *United States Cultural Property Legislation: Observations of a Combatant*, 7 INT'L J. CULTURAL PROP. 52, 52-54 (1998).

83. *See* 1970 UNESCO Convention, *supra* note 77.

84. 1970 UNESCO Convention, *supra* note 77, at art. 2.

> "Considering that interchange of cultural property … increases the knowledge of the civilization, enriches the cultural life of all peoples and inspires mutual respect and appreciation among nations … *that its true value can be appreciated only in relation to the fullest possible information regarding its origin, history, and traditional setting … as cultural institutions, museums, libraries, and archives should ensure that their collections are built in accordance with universally recognized principles* … the protection of cultural heritage can be *effective only if organized both nationally and internationally among States working in close co-operation*."[85]

Although the 1970 UNESCO Convention's language does not expressly petition for an international centralized registry, it can be interpreted as a call to States and institutions within States' borders to openly share information about national collections on an ongoing prophylactic basis as a means to meet the Convention's goals.

> "To ensure the protection of their cultural property … *the States Parties … undertake … to set up* … for the protection of the cultural heritage, with qualifying staff sufficient in number for the effective carrying out of the following: … *establishing and keeping up to date, on the basis of a national inventory of protected property, a list of important public and private cultural property* whose export would constitute an appreciable impoverishment of the national cultural heritage; *promoting the development or establishment of scientific and technical institutions* (museums, libraries, archives, laboratories, workshops…) *required to ensure the preservation and presentation of cultural property*; … seeing that appropriate publicity is given to the disappearance of any items of cultural property …"[86]

Following the Hague's lead, Article 5 expressly requests Parties maintain national inventories. This provision is the first to address the need for art and cultural property in both public and private sector collections to be inventoried. The provision also specifically names the institutions which should manage such records.

> "States Parties … undertake: To introduce an appropriate certificate in which the exporting State would specify that the export of the cultural property in question is authorized. The certificate should accompany all items of cultural property exported …[87]
>
> States Parties … undertake: to restrict …movement of cultural property illegally removed from any State Party … as appropriate for each country, *oblige antique dealers, subject to penal or administrative sanctions, to*

85. 1970 UNESCO Convention, *supra* note 77, at pmbl. (emphasis added).
86. 1970 UNESCO Convention, *supra* note 77, at 5 (emphasis added).
87. 1970 UNESCO Convention, *supra* note 77, at 6 (emphasis added).

> *maintain a register recording the origin of each item or cultural property, names and addresses of the supplier, description and price of each item sold and to inform the purchaser of the cultural property of the export prohibition to which such property may be subject*."[88]

Articles 6 and 10 offer ways for States Parties to begin tracking and maintaining national inventories in the form of export certificates. Not only would the exporting State Party know what is leaving from its territories, but the importing State Party would also know that it could receive the item without fear because the export was already authorized. Under a slightly nuanced interpretation of Article 6 and 10, it is evident that the drafters intended export certificates to serve as the basis for gathering information for a central registry.

3. 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects[89]

By 1995, international communities understood utilizing registries and technology could serve as a basis for Parties to share information about art and cultural property within their borders.

> "Acknowledging that implementation of this Convention should be accompanied by other effective measures for protecting cultural objects, such as the development and use of registers, the physical protection of archeological sites and technical co-operation."[90]

The 1995 UNIDROIT Convention reveals that the drafters intended Parties to create sharing methods for information on national registries to better document and protect art and cultural property throughout the world's museums and collections, both public and private.

4. 1998 Washington Conference Principles of Nazi-Confiscated Art[91]

Although the Washington Principles are non-binding, forty-four countries have signed on to voluntarily adhere to its eleven principles, three of which specifically called for:

> "Relevant records and archives should be open and accessible to researchers …"[92]

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88. 1970 UNESCO Convention, *supra* note 77, at 10 (emphasis added).

89. UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (with annex), June 24, 1995, 2421 U.N.T.S. 457 [hereinafter 1995 UNIDROIT Convention].

90. *Id.* at pmbl. (emphasis added).

91. U.S. DEP'T OF STATE, WASHINGTON CONFERENCE PRINCIPLES ON NAZI-CONFISCATED ART (1998).

92. *Id.* at princ. 2 (emphasis added).

> Every effort should be made to publicize at that is found to have been confiscated by the Nazis and not subsequently restituted in order to locate its pre-War owners or heirs …[93]
>
> Efforts should be made to establish a central registry of such information …"[94]

The preamble to the 1995 UNIDROIT Convention posited that developing registries would aid in implementing the Convention's goals, Principle 6 in the Washington Conference was the first international provision to explicitly call for a central registry. Over the years, both Parties to the Conference and individual private entities have attempted to comply with the call and, as a result, a multitude of stolen Holocaust object databases now crowd the internet, making it difficult for anyone to know where to start searching.[95] The overwhelming good faith sentiment indicates the vast support for such a database, but scattered the relevant and necessary information needed to fill in provenance gaps.[96]

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93. *Id.* at princ. 5 (emphasis added).

94. *Id.* at princ. 6 (emphasis added).

95. The following sources are just some of the many registries that can be found online. *See generally* THE CENTRAL REGISTRY OF INFORMATION ON LOOTED CULTURAL PROPERTY 1933-1945, https://www.lootedart.com/search2.php (last visited Oct. 17, 2019) (containing information about over 25,000 Nazi-looted objects); NAZI-ERA PROVENANCE INTERNET PORTAL, http://www.nepip.org (last visited Oct. 17, 2019) (addressing U.S.-based museum collections for item that changed hands in Continental Europe during 1933-1945); ART DATABASE OF THE NATIONAL FUND, https://www.kunstdatenbank.at/home.html (last visited Oct. 17, 2019); DATABASE OF WORK OF ART FROM THE PROPERTY OF VICTIMS OF THE HOLOCAUST, http://www.restitution-art.cz/ (last visited Oct. 17, 2019) (containing the Czech Republic database); CATALOGUE OF THE MUSEES NATIONAUX RECUPERATION, http://www2.culture.gouv.fr/documentation/mnr/pres.htm (last visited Oct. 17, 2019) (outlining French government lists of works retrieved from Germany after WWII which have never been claimed); LIST OF THE NON-RESTITUTED WORKS OF ART FROM THE ADOLPHE SCHLOSS COLLECTION, https://www.diplomatie.gouv.fr/sites/archives_diplo/schloss/collection.html (last visited Oct. 17, 2019); *Database on the Sonderauftrag Linz*, DEUTSCHES HISTORISHES MUSEUM, https://www.dhm.de/datenbank/linzdb/indexe.html (last visited Oct. 17, 2019) (detailing a German database for paintings, sculptures, furniture, porcelain, and tapestries purchased or confiscated for the planned Linz Museum and other collections between 1930s and 1945).

96. The following list of Nazi-looted art databases is in no way exhaustive, it is clear that the extensive amount of information, scattered across numerous databases, desperately need to be consolidated into a singular, centralized art registry. *See generally Lost Art Internet Database,* DEUTSCHES ZENTRUM KULTURGUTVERLUSTE, http://www.lostart.de/Webs/DE/LostArt/Index.html (last visited Oct. 17, 2019) (documenting lost private and public cultural property with more than 2,200 unclaimed works); BUNDESAMT FÜR ZENTRALE DIENSTE UND OFFENE VERMÖGENSFRAGEN, FEDERAL OFFICE FOR CENTRAL SERVICES AND UNRESOLVED PROPERTY ISSUES, http://www.badv.bund.de/EN/Home/start.htmlL (last visited Oct. 17, 2019) (revealing Restbestand Central Collecting Point's objects and works, collected for the planned Linz Museum, and part of Hermann Goring's collection); *Collection,* HERKOMST GEZOCHT ORIGINS UNKNOWN, http://www.herkomstgezocht.nl/en/collection (last visited Oct. 17, 2019) (listing about 5,000 objects from the Netherlands Art Property Collection

5. International Council of Museum Code of Ethics for Museums and Red Lists

The International Council of Museums (ICOM)[97] is a non-governmental organization with members consisting of museums and museum professionals. ICOM is recognized as the leading voice for the international museum community and maintains partnerships with UNESCO and INTERPOL. The ICOM Red Lists[98] serve as a minimum standard guide and reference for the international museum community, whereby museums "have the duty to acquire, preserve and promote their collections as a contribution to safeguarding the natural, cultural and scientific heritage. Their *collections are significant public inheritance, have a special position in law and are protected by international legislation. Inherent in this public trust is the notion of stewardship that includes rightful ownership, permanence, documentation, accessibility* and responsible disposal."[99]

To prevent illegal sales or exports, ICOM publishes Red Lists,[100] which identify and classify threatened art and cultural property around the world. Rather than acting as a list for stolen objects, ICOM Red Lists depict inventories from recognized institutions' collections to identify the variety of objects most susceptible to illicit transactions. INTERPOL and the World Customs Organization distribute ICOM Red Lists internationally to police, customs officials, museums, auction houses, and art dealers. To date, ICOM has published 18 Red Lists describing protected and threatened works of art and cultural property from China, Yemen, Africa, Libya, Iraq, Syria, Dominican Republic, Egypt, Colombia, Haiti, Central America and Mexico, Cambodia, Peru, Afghanistan, and Latin America.[101]

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and works reported missing after WWII); MINISTRY OF CULTURE AND NATIONAL HERITAGE, THE DIVISION FOR LOOTED ART, http://lootedart.gov.pl/en/product-war-losses (last visited Oct. 17, 2019) (including a Polish database with information about lost cultural property within its post-1945 boarders); MINISTRY OF CULTURE OF THE RUSSIAN FEDERATION, THE SUMMARY CATALOGUE OF THE LOST CULTURAL VALUABLES OF THE RUSSIAN FEDERATION, http://www.lostart.ru/catalog/en/ (last visited Oct. 17, 2019) (publishing the losses of Russian museums, libraries, and archives during WWII).

97. *See* INT'L COUNCIL OF MUSEUMS, ICOM CODE OF ETHICS FOR MUSEUMS (2004) https://icom.museum/wp-content/uploads/2018/07/ICOM-code-En-web.pdf [hereinafter ICOM CODE OF ETHICS].

98. *See* INT'L COUNCIL OF MUSEUMS, ICOM RED LISTS (2000-2018), https://icom.museum/en/activities/heritage-protection/red-lists/ [hereinafter Red Lists] (listing ICOM Red Lists for the following areas and countries: Afghanistan, Cambodia, China, Central America, Mexico, Colombia, Dominican Republic, Haiti, Peru, Latin America, Iraq, Libya, Syria, Yemen, Egypt, and West Africa).

99. ICOM CODE OF ETHICS, *supra* note 97, at 9 (emphasis added).

100. Red Lists, *supra* note 98.

101. Red Lists, *supra* note 98.

6. INTERPOL Database of Stolen Works of Art[102] and FBI Art Theft Program[103]

Just as there are a multitude of existing databases and registries for art and cultural property stolen during the Holocaust, there are many governmental databases ~~that~~ which track recent and ongoing thefts. The INTERPOL Database, only fully accessible to authorized users and law enforcement agencies, was established in 2015 ~~in~~ as a response to the prevalent illicit trading of Iraqi and Syrian art and cultural property.[104] Since then, INTERPOL has partnered with UNESCO, ICOM, other international organizations, and police services to exchange information regarding recovered, yet unclaimed objects, and to track wanted objects.[105]

The equivalent in the United States is the FBI Art Theft Program, which established a 16-agent, Art Crime Team in 2004 responsible for pursuing cases against art and cultural property and assisting international investigations.[106] The Team also maintains the National Stolen Art File ("NSAF"), an online database for stolen art and cultural property.[107]

B. *Technological Developments*

The first art law drafters never foresaw what technology would become today, but the language they used gave rise to impliedly allow for the creation of such registries. Ever evolving technology has led the art world to a place where creating an international centralized art registry is entirely achievable. The existence of all the aforementioned registries, archives, databases, and international resources are proof there must be a consolidation of both information and technology. Combining inter-governmental and organizational data and resources is the last essential step toward finally creating a proficient provenance research, restitution, and reparation process. Recent cloud-based data systems can be used to operate an international centralized registry, allowing information to be submitted and retrieved.[108] In

102. *Stolen Works of Art Database*, INTERPOL, https://www.interpol.int/en/Crimes/Cultural-heritage-crime/Stolen-Works-of-Art-Database (last visited Oct. 17, 2019) [hereinafter INTERPOL Database].

103. *Violent Crime: Art Theft*, FBI, https://www.fbi.gov/investigate/violent-crime/art-theft [hereinafter FBI's Art Theft Program].

104. INTERPOL Database, *supra* note 102.

105. INTERPOL Database, *supra* note 102.

106. FBI's Art Theft Program, *supra* note 103.

107. *National Stolen Art File*, FBI, https://www.fbi.gov/investigate/violent-crime/art-theft/national-stolen-art-file.

108. *See generally* Zohar Elhanani, *How Blockchain Changed the Art World In 2018*, FORBES (Dec. 17, 2018),

accordance with article 23 of The Hague, UNSECO can assist in funding, creating, and maintaining the international centralized art registry.

C. *Societal Demands for Moral Changes*

The black market for art and cultural property and other art derived crimes, including theft, loot, and fraud, is second only to the narcotics trade in funding sources for terrorism. Increased art and cultural property crime, looting, fraudulent transactions, and international organized crime, prevent illicit objects from being recovered or protected. In a somewhat modern trend, European countries are coming to terms with their colonial pasts and have begun returning colonial-loot to their patrimonial homes. Through an agreement between London museums and Benin, Nigeria will soon establish a permanent loan for the Benin Kingdom's bronzes treasures that British forces looted in 1897. Furthermore, in November 2017, French President, Emmanuel Macron, spoke at the University of Ouagadougou about his five-year plan to temporarily or permanently restitute African cultural property obtained while Africa was under French-colonial rule and since held in French museums.[109]

1. Germany

Whether by monetary reparations agreements[110] or public condemnation, Germany has had to reconcile actions its citizens and government took during WWII. However, Germany, like many other countries possessing Nazi-looted works, historically resisted restituting property to Holocaust survivors and their heirs.[111] Recent discoveries and social interest has somewhat flipped the script with additional public German

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https://www.forbes.com/sites/zoharelhanani/2018/12/17/how-blockchain-changed-the-art-world-in-2018/#46d6c93074; Samuel Miller, *Blockchain and the Art Market: A Match Made in Heaven?,* MEDIUM (Dec. 18, 2018), https://medium.com/aerum-technolgies/blockchain-and-the-art-market-a-match-made-in-heaven-d6b1fd61a409; Anneli Botz, *Is Blockchain the Future of Art? Four Experts Weigh In*, ART BASEL, https://www.artbasel.com/news/blockchain-artworld-cryptocurrency-cryptokitties (last visited Oct. 17, 2019); *FAQ*, ARTOLIN, https://artolin.org/faqs/ (last visited Oct. 17, 2019); Sam Mire, *12 Startups Using Blockchain to Transform the Art Industry*, DISRUPTOR DAILY (Dec. 25, 2018), https://www.disruptordaily.com/blockchain-market-map-art/; MAECENAS, https://www.maecenas.co (last visited Oct. 17, 2019).

109. Annalisa Quinn, *After a Promise to Return African Artifacts, France Moves Toward a Plan*, N. Y. TIMES, (March 6, 2018).

110. German restitution payments schemes include: Hardship Fund, Article 2 Fund, Child Survivor Fund, Orphan Fund, ZRBG, BEG, GGWP, and others. *Compensation Payment Programs*, CLAIMS CONFERENCE, http://www.claimscon.org/what-we-do/compensation/background/ (last visited Oct. 17, 2019).

111. Vineberg v. Bissonette, 548 F.3d 50 (1st Cir. 2008).

funds being allocated to the German Lost Art Foundation for provenance research.[112]

The Zeppelin Museum uses the funds to look into their "degenerate" collection, the culmination of which has created an extraordinarily transparent, first-of-its-kind exhibition.[113] "The Obligation of Ownership: An Art Collection Under Scrutiny" classifies the Zeppelin's collections with green, yellow, orange, and red stickers to identify an object's "looting danger" and describes the ongoing research to fill the provenance gaps.[114]

2. France

Partially modeled from Germany's restitution to Holocaust victims, France founded a collaborative commission, which includes art historians, economists, artists, activists, collectors, and experts from Africa and Europe.[115] Since President Macron's 2017 speech, the commission has worked to identify objects in French national museum inventories which rightfully belong to Africa.[116] The Quai Branly-Jacques Chirac Museum, which houses indigenous art from the Americas, Asia, Oceania, and Africa, has identified 5,142 Senegalese objects and Benin's treasures in its collection.[117] However, similar to issues which Holocaust victims and their heirs face in their claims for restitution, not all the identified items of African cultural property were illicitly obtained under colonial rule or through unfair purchases.[118] Even while Senegal asserts that seemingly mundane objects, such as Senegalese fishnets, have little value while out-of-context in French museums, there remains a hesitancy to restitute such objects. However, the Senegalese fishnets are filled with ancient mathematical code that are essential to Senegal's technological heritage.[119]

112. J.T.J., *A German Museum Put the Questionable Provenance of its Art on Display*, ECONOMIST (May 25, 2018), https://www.economist.com/prospero/2018/05/25/a-german-museum-puts-the-questionable-provenance-of-its-art-on-display; Deutsche Welle*, Berlin Exhibition Spotlights Issue of Art Looted by Nazis*, DW NEWS (Nov. 26, 2018), https://www.dw.com/en/berlin-exhibition-spotlights-issue-of-art-looted-by-nazis/av-46454026.

113. *Id.*

114. *Id.*

115. Ilaria Sala, *France is Preparing to Return African Artifacts looted in its Colonial Era*, QUARTZ AFRICA (July 2, 2018), https://qz.com/africa/1317376/france-to-return-african-artifacts-from-senegal-benin-dahomey-mali-others/.

116. *Id*.

117. *Id*.

118. *Id*.

119. *Id*.

3. United States

Congress enacted the Holocaust Expropriated Recovery Act of 2016[120] to prevent a statute of limitations from unfairly barring claims to Nazi-loot.[121] As noted in Congress' findings, Nazis misappropriated an enormous amount of art and cultural property and, in an effort to seek relief, Holocaust victims and their heirs "must painstakingly piece together their cases from fragmentary historical records ravaged by persecution [and] war."[122] Public policy has historically ensured that the United States would not become a safe-harbor for unlawful owners to obtain and transfer legal title to stolen cultural property.

After applying Spanish law in Cassirer v. Thyssen-Bornemisza Collection Found,[123] the Court found the Spanish museum as the legal owner of a priceless, Nazi-looted, Camille Pissarro painting. Lilly Cassirer inherited the painting and, in 1939, traded the work in exchange for safe passage from Germany. Sixty years after the initial forced sale, a family friend recognized the painting hanging in the Thyssen-Bornemisza, and the subsequent transactions involving the painting were finally brought to light. There were various accounts of the painting being bought and resold after the Cassirer family fled from Germany and, in 1976, a dealer from the United States sold the panting for $300,000 to Baron Hans-Heinrich Thyssen-Bornemisza, who exhibited the painting in his Spanish museum. Although the judge noted the Pissarro paintings were immediately suspect due to their long histories with European Jewish collectors and Nazi looters, the Judge determined Thyssen-Bornemisza did not actually know of the painting's looted past, although there were numerous red-flags such as missing and torn provenance labels, which should have given rise to additional investigation into the painting's title. Further the judge vigorously criticized both the museum and Spain for not abiding by international moral agreements.

IV. IMPLEMENTING A CENTRALIZED ART REGISTRY

A. *Logistics and Consolidating Data Efforts*

Because of its powerful partnerships and breadth of its database, INTERPOL is the foremost international entity when it comes to regulating and tracking stolen art and cultural property. As a result, the INTERPOL

120. Holocaust Expropriated Recovery Act of 2016, Pub. L. No. 114-308, § 3 (2016), https://www.congress.gov/114/plaws/publ308/PLAW-114publ308.pdf.

121. *Id*.

122. *Id*. at §2[6].

123. Cassirer v. Thyssen-Bornemisza Collection Found., 862 F.3d 951 (9th Cir. 2017).

Database should be expanded to host the international centralized registry for art and cultural property. Further, because a majority of private collections, museums, and educational institutions already self-regulate their collections in accord with minimum international standards, the relevant information for the central registry is already prepared and merely needs to be submitted.

B. *Incentives*

The existence of an international centralized registry would deter crimes against art and cultural property because information on the registry will easily allow law enforcement to identify objects, fill provenance gaps, and determine the circumstances under which the looting occurred. The international central registry will also serve as a supplement to litigation for good faith purchasers. As environmental and terrorist threats grow, the central registry can also serve as a conservation method.[124] Individuals, museums, and countries which submit to the international central registry in good faith should enjoy immunity and grants to assist and encourage continued registration. Demand and prices for objects on the transparent international central registry market will rise, while stifling the black market for art and cultural property.

V. CONCLUSION

The seemingly weak and underutilized, existing art and cultural property laws and best practices are strengthened when interpreted and utilized to create an international centralized registry. In the past, each time crimes were perpetrated against art and cultural property, societies renewed their efforts to shield such objects by increasing protections through art and cultural property laws. Major art-rocities were the motivating factors for adapting art and cultural property laws, shifting social morals with regard to loot and plunder, and spurred technological changes.[125] Although critics may argue an international centralized registry is too impractical to create or enforce, a

124. Neil Asher Silberman, *From Cultural Property to Cultural Data: The Multiple Dimensions of Ownership in a Global Digital Age*, 21 I.J.C.P. 365, 367 (2014) ("Destruction of cultural property will be beyond the power of the international community to stop has led to preemptive efforts by the UNESCO World Heritage Centre, a variety of university computer science departments in both eastern and western hemispheres, and private initiative such as the silicon-valley based CyArk 500 to proactively laser scan heritage and cultural properties that may someday be destroyed.")

125. Technology manipulated the art world twofold: how crimes were being perpetrated and how information was being stored.

centralized art registry has never been more plausible since public policy demands a moral society and encourages modern technological advancements. Thus, critics' concerns are far outweighed by the incentives, solutions, and possibilities which an international centralized art registry generates. Creating and utilizing an international central registry, to the extent that current and future technology allows, will reduce art and cultural property crimes and increase the repatriation and restitution of illicit art and cultural property.

#MORALSTOO: THE FILM INDUSTRY MUST IMPLEMENT AN INTERNATIONAL MORALS CLAUSE

Allyn Davidson[*]

I. INTRODUCTION

Employers across multiple industries have incorporated morals clauses into their employment contracts since Universal Film Manufacturing Company, now Universal Pictures, invoked the first morals clause in a talent contract in 1921.[1] Morals clauses became especially popular in the 1940s and 1950s after Hollywood abandoned the studio system.[2] While the morals clause hit its height of popularity during McCarthyism, it remains highly

[*] J.D. Candidate, 2020, Southwestern Law School. To Mom, Dad, Ben, and Jim for their unwavering love and support; and to Haley for her brilliant suggestions, including but not limited to the topic and title of this note.

1. Caroline Epstein, *Morals Clauses: Past, Present and Future*, 5 N.Y.U. J. INTELL. PROP. & ENT. L. 72, 76 (2015).

2. Sally Helppie & Amy E. Mitchell, *Off-screen Behavior Matters: Morals Clauses for Performers*, S. BY SW CONTINUING LEGAL EDUC. 2 (Mar. 15, 2018, 11:00 AM), https://www.sxsw.com/wp-content/uploads/2018/03/SXSW-2018-Morals-Clauses-Presentation.pdf.

popular among studios today.[3] As a response to the #metoo movement, film studios have increased implementation of morals clauses.[4] However, bargained-for clauses often render morals clauses moot, as they create more lenient repercussions. Therefore, the entertainment industry must reconsider its approach to the morals clause, specifically in the context of sexual misconduct and violence.

When studios remove morals clauses from contracts, they expose themselves to liability, public contempt, and monetary loss.[5] Furthermore, when studios terminate contracts without morals clauses, studios must pay the individual despite the party's bad acts.[6]

Studios must implement a morals clause with a narrow focus on sexual misconduct and violence because (i) sexual misconduct is an international issue and the entertainment industry's international nature requires consistency and (ii) bargained-for provisions alone fail to address the sexual morality issue as effectively as an *international* morals clause.[7]

The current system surrounding morals clauses creates multiple problems. First, studios forfeit significant amounts of money paying out 'immoral' actors. Second, particularly famous or desirable talent[8] can negotiate away morals clauses by leveraging extraordinary industry standing and unequal bargaining power. This sends a message to the public and to the talent that they can buy the right to act immorally, then receive a contract's full benefit after doing so. Furthermore, the collective bargaining agreements for the Writers Guild of America and the Directors Guild of America prohibit the inclusion of morals clauses in member contracts.[9] Finally, there is no

3. Epstein, *supra* note 1; 2 THOMAS D. SELZ ET AL., ENTERTAINMENT LAW: LEGAL CONCEPTS & BUSINESS PRACTICES § 9:105 (3d ed. 2018).

4. Tatiana Siegel, *#MeToo Hits Movie Deals: Studios Race to Add 'Morality Clauses' to Contracts*, HOLLYWOOD REP. (Feb. 7, 2018, 6:50 AM), https://www.hollywoodreporter.com/news/metoo-hits-movie-deals-studios-race-add-morality-clauses-contracts-1082563.

5. *See id.*

6. Seth Fiegerman, *Kevin Spacey Cost Netflix $39 Million*, CNN BUS. (Jan. 22, 2018, 8:45 PM), https://money.cnn.com/2018/01/22/media/netflix-kevin-spacey-cost/index.html.

7. In this paper, I refer to an *international(ized) morals clause*, an *international(ized) clause*, or *the clause*. These phrases are meant to indicate an *international(ized) morals clause focused on sexual misconduct and violence*, but I use the aforementioned phrasing both to lend sensitivity to the issue of sexual misconduct and act as a shorthand.

8. The term *talent* is used in throughout the various sections of this Note, and refers to all levels of talent in the industry, including producers, directors, actors, crew members, and writers.

9. *Theatrical and Television Basic Agreement*, WRITERS GUILD AMERICA, art. 54 (2017), https://www.wga.org/uploadedfiles/contracts/mba17.pdf; *Basic Agreement of 2014*, DIRECTORS GUILD AM., § 17-123 (2014), https://www.dga.org/-/media/E98E71412E1F4BB5B94AE0843C5CD8DE.pdf.

single international approach to the issue of morals clauses, despite the entertainment industry's substantial international presence.

II. BACKGROUND

On October 5, 2017, Ashley Judd took the world by storm when she accused film production mogul, Harvey Weinstein, of sexual assault in a New York Times article.[10] Three days later, the Weinstein Company fired Weinstein, its co-founder, in light of further allegations of misconduct.[11] The company was in financial trouble before the allegations surfaced and floundered in the following months.[12] In March 2018, the company filed for bankruptcy and released victims or witnesses of misconduct from unusually restrictive nondisclosure agreements.[13] The bankruptcy proceedings continue today, sixteen months later.[14]

After the Weinstein scandal, sexual assault stories spread throughout Hollywood. On October 15, 2017, actress Alyssa Milano reignited the #metoo movement, started by Tarana Burke in 2006.[15] Milano provoked a worldwide conversation about sexual harassment and assault when she tweeted, "If you've been sexually harassed or assaulted write 'me too' as a reply to this tweet."[16] This conversation spurred sexual misconduct and violence claims throughout the world and the entertainment industry in particular.

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10. *See* Jodi Kantor & Megan Twohey, *Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades*, N.Y. TIMES (Oct. 5, 2017), https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html?hp&action=click&pgtype=Homepage&clickSource=story-heading&module=a-lede-package-region&region=top-news&WT.nav=top-news.

11. Megan Twohey, *Harvey Weinstein is Fired After Sexual Harassment Reports*, N.Y. TIMES (Oct. 8, 2017), https://www.nytimes.com/2017/10/08/business/harvey-weinstein-fired.html?module=inline.

12. Scott Mendelson, *The Weinstein Company was in Trouble Prior to Sex Abuse Revelations*, FORBES (Oct. 25, 2007, 3:00 PM), https://www.forbes.com/sites/scottmendelson/2017/10/25/weinstein-sex-abuse-revelations-destroyed-his-company/#5a97a5ebb493.

13. Brooks Barnes, *The Weinstein Company Files for Bankruptcy and Revokes Nondisclosure Agreements*, N.Y. TIMES (Mar. 19, 2018), https://www.nytimes.com/2018/03/19/business/weinstein-company-bankruptcy.html.

14. Bankruptcy proceedings remain in progress at the time this article was authored. Dade Hayes, *Weinstein Co. Bankruptcy Hearing Pushed Again as Creditors and Accusers Await Resolution*, DEADLINE (Jun. 28, 2019, 10:14 AM), https://deadline.com/2019/06/weinstein-co-bankruptcy-hearing-pushed-again-as-creditors-and-accusers-await-resolution-1202638108/.

15. *#MeToo: A timeline of events*, CHICAGO TRIBUNE (Sep. 27, 2019 3:20 PM), https://www.chicagotribune.com/lifestyles/ct-me-too-timeline-20171208-htmlstory.html.

16. Alyssa Milano (@Alyssa_Milano), TWITTER (Oct. 15, 2017, 1:21 PM), https://twitter.com/alyssa_milano/status/919659438700670976?lang=en.

Actor, Anthony Rapp, in an October 30, 2017 interview, claimed that actor, Kevin Spacey, sexually assaulted him at a party when Rapp was only fourteen years old.[17] In the days following, Netflix halted production of the show *House of Cards* starring Spacey, talent agency, Creative Artists Agency (CAA), dropped Spacey as a client, Netflix cancelled a Gore Vidal biopic starring Spacey, and director, Ridley Scott, removed Spacey altogether from the major motion picture *All the Money in the World* a mere month before its slated theatrical release.[18] Luckily, in the instance of *All the Money in the World*, contractual stipulations covered most reshooting costs.[19] Unfortunately for Netflix, however, the decision to cancel production on *House of Cards* and terminate Spacey's employment resulted in an unexpected $39 million hit. While part of that sum went towards sunk costs into the project, a large part of it included a pay-out to Spacey, in part because Spacey was not bound by a morals clause.[20] While one of Spacey's victims dropped the civil suit against him, Scotland Yard has recently questioned the actor about other sexual misconduct allegations.[21]

However, moral reprehensibility affecting studios' content and economy is not new. The first prominent instance dates back ninety-seven years to the studio-system era and the adored silver screen comedic actor, Roscoe "Fatty" Arbuckle.[22] In response to Arbuckle's public backlash, Universal Film Manufacturing Company became the first studio to adopt a morals clause even though Arbuckle was with Paramount Pictures.[23] Today's account of this old story leaves readers with two interpretations of events.

In one version, up-and-coming silent film star, Arbuckle, was in the wrong place at the wrong time.[24] While celebrating the impending release of his new film, party guests witnessed fashion designer, model, and aspiring

17. *Kevin Spacey Timeline: How the Story Unfolded*, BBC News (July 18, 2019), https://www.bbc.com/news/entertainment-arts-41884878.

18. *Id.*

19. *See* Brooks Barnes, *Purge of Kevin Spacey Gives 'All the Money in the World' a Pay Problem*, N.Y. TIMES (Jan. 10, 2018), https://www.nytimes.com/2018/01/10/business/media/spacey-whalberg-williams-all-the-money-in-the-world.html.

20. Fiegerman, *supra* note 6.

21. Gene Maddaus, *Kevin Spacey Sexual Assault Accuser Drops Civil Suit*, VARIETY (July 5, 2019, 9:05 AM), https://variety.com/2019/biz/news/kevin-spacey-drop-civil-suit-1203260058; Stewart Clarke, *Kevin Spacey Questioned by Scotland Yard Over Sexual Assault Allegations (EXCLUSIVE)*, VARIETY (July 6, 2019, 5:22 AM), https://variety.com/2019/film/news/kevin-spacey-met-police-scotland-yard-questioned-1203260470.

22. *See* Gilbert King, *The Skinny on the Fatty Arbuckle Trial*, SMITHSONIAN (Nov. 8, 2011), https://www.smithsonianmag.com/history/the-skinny-on-the-fatty-arbuckle-trial-131228859/.

23. Epstein, *supra* note 1.

24. *See* King, *supra* note 21.

actress, Virginia Rappe, tucked away in a separate room, sprawled across a bed, moaning in pain.[25] Rappe later died of a ruptured bladder and Maude Delmont, a brothel owner, claimed Arbuckle sexually assaulted and murdered Rappe.[26] Arbuckle, cooperative throughout the booking, investigation, and trial process, endured three separate trials for Rappe's death.[27] Eventually, the third jury acquitted Arbuckle, but his decimated reputation ensured he would never star in a film again.[28]

In the other version of events, Rappe was a victim of sexual assault whose reputation was tarnished by rampant sexism even after her tragic death.[29] Rappe allegedly encountered Arbuckle alone during a party while she was in search of a bathroom; he locked her in a hotel room, threw her on the bed, and fell on top of her, knocking her unconscious.[30] Four days later, she died of a ruptured bladder in the hospital.[31]

Arbuckle's attorney ensured Rappe received as much negative press as Arbuckle. Arbuckle's defense team painted Rappe as an irresponsible party girl who had numerous illegal abortions.[32] Arbuckle changed his story about the events multiple times and dismissed Rappe as "hysterical."[33] Even decades after Arbuckle's acquittal, the media still portrays Rappe as "an alcoholic prostitute" with sexually transmitted infections and implies she brought her death upon herself.[34]

Regardless of which story is correct, the fallout from the Arbuckle scandal lost Paramount millions of dollars.[35] Before the party where Rappe was mortally injured, Arbuckle signed a $1 million contract with Paramount for three motion pictures that were never produced.[36] Further, theaters stopped playing Arbuckle's film, *Crazy to Marry*, the cause for celebration at the party gone wrong.[37] The scandal sent other studios reeling and, as a

25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *See* Gabrielle Bellot, *Hollywood's First Major Harassment Case, 96 Years Before Weinstein*, CUT (Nov. 29, 2017), https://www.thecut.com/2017/11/before-harvey-weinstein-virginia-rappe-roscoe-fatty-arbuckle.html.
30. *Id.*
31. *Id.*
32. *See id.*
33. *Id.*
34. *Id.*
35. *See* King, *supra* note 22.
36. *Id.*
37. *Id.*

direct result, Universal adopted the very first morals clause.[38] Universal attorneys created the clause to protect the studio from moral disrepute and to disincentivize talent from committing immoral acts, reassuring the public that morally reprehensible conduct is impermissible.[39]

Shortly after Universal implemented the first morals clause, other studios and industries followed suit. For example, in an attempt to curb his alcohol consumption and stop his late night partying, the New York Yankees introduced a morals clause in George Herman "Babe" Ruth's playing contract in 1922.[40] Morals clauses became even more popular during McCarthyism in the 1940s and 1950s when studios invoked the clauses to terminate contracts based on alleged communist affiliations.[41] Academics claim morals clauses have increased in popularity since the 1980s.[42] However, empirical data on the number of morals clauses used since their inception is nonexistent.

Today, producers, financers, and developers are quick to remove morals clauses from contracts, supporting the adage that any publicity is good publicity.[43] Furthermore, morals clauses remain broad, with varying limitations on conduct.[44] Finally, the Writers Guild of America and the Directors Guild of America prohibit morals clauses in contracts for any guild member.[45] Because morals clauses are commonly subject to removal, the remaining clauses are vague and overbroad. This and the fact that guilds protect members from morals clause implementation means the film industry

38. *Morality Clauses for Films*, N.Y. Times, Sept. 22, 1921, at 8, https://timesmachine.nytimes.com/timesmachine/1921/09/22/98743776.html?pageNumber=8.

39. *Id.* ("The actor (actress) agrees to conduct himself (herself) with due regard to public conventions and morals and agrees that he (she) will not do or commit anything tending to degrade him (her) in society or bring him (her) into public hatred, contempt, scorn or ridicule, or tending to shock, insult or offend the community or outrage public morals or decency, or tending to the prejudice of the Universal Film Manufacturing Company or the motion picture industry. In the event that the actor (actress) violates any term or provision of this paragraph, then the Universal Film Manufacturing Company has the right to cancel and annul this contract by giving five (5) days' notice to the actor (actress) of its intention to do so.")

40. Porcher L. Taylor, III. et al., *The Reverse-Morals Clause: The Unique Way to Save Talent's Reputation and Money in a New Era of Corporate Crimes and Scandals*, 28 CARDOZO ARTS & ENT. 65, 75 (2010) [hereinafter Taylor] (requiring Ruth to not drink any alcohol and to be in bed by 1:00am every night during baseball playing season).

41. *Id.*at 77; Epstein, *supra* note 1 at 76-78.

42. Taylor, *supra* note 40 at 78; Daniel Auerbach, *Morals Clauses as Corporate Protection in Athlete Endorsement Contracts*, 3 DEPAUL J. SPORTS L. 1, 3-4 (2005).

43. *See* SELZ ET AL., *supra* note 3 § 9:108.

44. *Id.* at § 9:107 (demonstrating, "(a) is not 'with due regard' to 'social conventions and public morals and decency'; (b) 'shocks, insults or offends' the community; or (c) 'reflects unfavorably' on the person, the financer, the producer, the employer, or the distributor.").

45. *Theatrical and Television Basic Agreement*, *supra* note 8; *Basic Agreement of 2014, supra* note 8.

sends a negative message that individual talent may act immoral without repercussions.

Contemporary instances of individuals' misconduct coupled with studios' elimination of morals clauses show that the current system fails to address specific issues of morality the clause should protect against. The contractual provision exists to protect studios and deter negative conduct, yet studios currently fail to draft contracts that include the stipulation resulting in substantial monetary loss, public unrest, and international inconsistency. The entertainment industry must adopt a morals clause that is (i) implemented by an international body (such as the Motion Picture Association) and (ii) accepted by film industry guilds. Such a clause would benefit national and international economies and resolve the issues that arise from power differences in bargained-for provisions.

III. SEXUAL MISCONDUCT AND VIOLENCE IS AN INTERNATIONAL ISSUE

The film industry must implement an international morals clause in response to widespread sexual misconduct within the industry both domestically and internationally. The language of the clause should not focus on convictions, however, because that would render the clause wholly ineffective. Rather, the clause must call for reasonable investigation by an independent party after victims make credible accusations of sexual misconduct or violence. Investigative efforts are paramount because criminal justice systems often fail to investigate and convict perpetrators of sexual crimes.

In the United States, fewer than one half of sexual assault victims report sexual assault to authorities.[46] Another study reported that out of every one-thousand (1,000) sexual assaults that occur, only two-hundred thirty (230) are reported, only forty-six (46) result in arrests, and a mere five (5) lead to a felony conviction.[47] Only six tenths of a percent (0.6%) of sexual assaults actually lead to incarceration.[48]

The public, especially men in positions of power, criticize victims that come forward and demand protection against false accusations. Statistics regarding false accusations, however, are highly contested. Studies show that

46. Jennifer L. Truman & Lynn Langton, *Criminal Victimization,* U.S. DEP'T JUST. (Sept. 29, 2015), https://www.bjs.gov/content/pub/pdf/cv14.pdf.

47. *The Criminal Justice System: Statistics*, RAINN, https://www.rainn.org/statistics/criminal-justice-system (last visited Nov. 5, 2019).

48. Andrew Van Dam, *Less Than 1% of Rapes Lead to Felony Convictions. At Least 89% of Victims Face Emotional and Physical Consequences.*, WASH. POST (Oct. 6, 2018, 4:00 AM), https://www.washingtonpost.com/business/2018/10/06/less-than-percent-rapes-lead-felony-convictions-least-percent-victims-face-emotional-physical-consequences/.

the rate of false reporting is between two and ten percent (2-10%).[49] This, however, is a false representation because law enforcement agencies often categorize reports as false because of insufficient evidence, delayed reporting, lack of cooperation, or inconsistencies in victim statements.[50] However, there are numerous reasons a victim may be reluctant to cooperate. Sexual assault is a traumatic experience and expecting victims to come forward immediately imposes additional societal hurdles on victims of violent crimes.[51]

Regardless of when victims report sex crimes, structural obstacles consistently prevent victims from receiving justice. Perpetrators of assault often repudiate victims' evidence and, because perpetrators in the film industry often enjoy substantially more bargaining power, claims of sexual assault often disappear.[52] For this reason, men like Johnny Depp, Roman Polanski and Woody Allen are still prominent in the industry despite allegations of violent crime, pedophilia, and sexual assault.[53]

Following the Weinstein accusations, the Los Angeles Police Department (LAPD) received over one-hundred reports of sexual assault in response to the #metoo movement.[54] Over the first few months of 2018, California saw an eighty-three percent (83%) increase in sexual harassment complaints while New York experienced a sixty percent (60%) jump.[55] While

49. NAT'L SEXUAL VIOLENCE RES. CTR., FALSE REPORTING 3 (2012), https://www.nsvrc.org/sites/default/files/2012-03/Publications_NSVRC_Overview_False-Reporting.pdf.

50. *Id.*

51. Jacey Fortin, *#WhyIDidntReport: Survivors of Sexual Assault Share Their Stories After Trump Tweet,* N. Y. TIMES, (Sept. 23, 2018), https://www.nytimes.com/2018/09/23/us/why-i-didnt-report-assault-stories.html.

52. Kantor & Twohey, *supra* note 10; Kim Severson, *Asia Argento, a #MeToo Leader, Made a Deal With Her Own Accuser*, N. Y. TIMES (Aug. 19, 2018), https://www.nytimes.com/2018/08/19/us/asia-argento-assault-jimmy-bennett.html.

53. Dylan Farrow, *Why has the #MeToo Revolution Spared Woody Allen?*, L.A. TIMES (Dec. 07, 2017, 3:00 AM), https://www.latimes.com/opinion/op-ed/la-oe-farrow-woody-allen-me-too-20171207-story.html; Dano Nissen, *Woody Allen: 'I've Done Everything the #MeToo Movement Would Love to Achieve*,*'* VARIETY (Sept. 6, 2019, 11:30 AM), https://variety.com/2019/film/news/woody-allen-metoo-1203326247; Rory Carroll, *Johnny Depp: How Hollywood's Biggest Star fell from Grace*, GUARDIAN (May 4, 2018, 12:06 PM), https://www.theguardian.com/film/2018/may/04/johnny-depp-hollywood-star-actor-fall; Scott Roxborough, *Roman Polanski's 'J'Accuse' is Filmmaker's First in the Post-#MeToo Era*, HOLLYWOOD REP. (Sept. 28, 2018, 10:29 AM), https://www.hollywoodreporter.com/news/roman-polanskis-jaccuse-is-his-first-film-metoo-era-1147851.

54. Gene Maddaus, *Many Accused, None Prosecuted: Why #MeToo Hasn't Let to a Single Criminal Charge in L.A.*, VARIETY (Sept. 25, 2018, 6:45 AM), https://variety.com/2018/biz/news/metoo-legal-los-angeles-criminal-charges-1202955008/.

55. *Id.*

the accusations brought awareness to the issue of rampant sexual assault in Hollywood and beyond, the accusations only yielded one arrest: Harvey Weinstein's.[56]

This underwhelming result is a symptom of a larger systemic issue: the American criminal justice system fails to take sexual assault and misconduct seriously. Justice is rarely served for those who come forward with the truth, and the trend is magnified with the film industry's elite.

However, the problem of injustice extends beyond the American criminal justice system. In the United Kingdom, the Crime Survey for England and Wales (CSEW) estimates that twenty percent (20%) of women and four percent (4%) of men have experienced some type of sexual assault since the age of sixteen, which is equivalent to an estimated 3.4 million female and 631,000 male victims.[57] From March 2016 to March 2017, an estimated three and one tenths of a percent (3.1%) of women (510,000) and eight tenths of a percent (0.8%) of men (138,000) aged 16 to 59 experienced sexual assault.[58] The CSEW showed that around five in six victims did not report the assault to police.[59] Of the cases that women choose to prosecute, less than half result in convictions.[60] Fewer than one third of young men accused of sexual assault are convicted; and approximately forty-seven percent (46.9%) of middle-aged men accused of sexual assault are convicted.[61] However, according to a report published by the Fawcett Society, over fifty percent (51%) of young women and fifty-eight percent (58%) of young men say they were more willing to challenge unacceptable behavior or comments after the revelations of the #metoo movement.[62]

In Japan, one in fifteen women claim they have experienced sexual violence at some time in their lives.[63] Japan's Cabinet Office, Gender Equality Bureau, conducted a recent study where less than eight percent

56. *Id.*

57. OFFICE FOR NAT'L STATISTICS, SEXUAL OFFENCES IN ENGLAND AND WALES: YEAR ENDING MARCH 2017, 3 (2018).

58. *Id.*

59. *Id.*

60. *See* Alexandra Topping & Caelainn Barr, *Revealed: Less Than a Third of Young Men Prosecuted for Rape are Convicted,* GUARDIAN (Sept. 23, 2018, 12:00 PM), https://www.theguardian.com/society/2018/sep/23/revealed-less-than-a-third-of-young-men-prosecuted-for-are-convicted; *See also* CROWN PROSECUTION SERV., VIOLENCE AGAINST WOMEN AND GIRLS REPORT 10 (2018) [hereinafter CPS].

61. Topping & Barr, *supra* note 60; CPS, *supra* note 60, at 9.

62. FAWCETT SOC'Y, #METOO ONE YEAR ON – WHAT'S CHANGED? 8 (2018).

63. Motoko Rich, *She Broke Japan's Silence on Rape*, N.Y. TIMES (Dec. 29, 2017), https://www.nytimes.com/2017/12/29/world/asia/japan-rape.html.

(7.8%) of women reported forced sexual intercourse in their lifetime.[64] The Japanese study represents a stark difference to numbers in the United States.[65] Insight into the Japanese criminal law system suggests that this discrepancy is not merely due to cultural differences, but is the product of narrowly defined and poorly prosecuted criminal conduct in Japan.[66]

In Australia, two in five people aged eighteen years or older experienced an incident of physical or sexual violence since the age of fifteen.[67] Additionally, about seventeen percent (17%) of Australian women experienced sexual harassment.[68]

One in eight French women has been raped and around forty-three percent (43%) of French women have reported non-consensual sexual touching.[69] French women have even developed their own hashtag congruent to the #metoo movement: "balance ton porc," which means "rat on your pig."[70] Those who participated in the French hashtag faced backlash from over 100 women, including film star Catherine Deneuve, who wrote an open letter.[71] The letter accused participants of the hashtag movements of turning liberation on its head, placing people unwittingly amongst the ranks of sexual offenders.[72]

The film industry in Nigeria is second only to India in terms of the volume of films produced annually.[73] One in four Nigerian girls experience sexual violence before the age of eighteen.[74] Only thirty-eight percent (38%) of those girls told someone, and a mere five percent (5%) sought help.[75] The subject of sexual assault and harassment remains taboo, and as a result, many

64. GENDER EQUAL. BUREAU, SURVEY ON VIOLENCE BETWEEN MEN AND WOMEN 16 (2018).

65. Rich, *supra* note 63 (highlighting that one in five U.S. women report sexual violence).

66. *Id.*

67. AUSTRALIAN BUREAU OF STATISTICS, PERSONAL SAFETY SURVEY 1 (2016).

68. *Id.*

69. *One French Woman in Eight has been Raped, Study Says*, BBC NEWS (Feb. 23, 2018), https://www.bbc.com/news/world-europe-43167309.

70. *Id.*

71. *Id.*

72. Valeriya Safronova, *Catherine Deneuve and Others Denounce the #MeToo Movement*, N.Y. TIMES (Jan. 9, 2018), https://www.nytimes.com/2018/01/09/movies/catherine-deneuve-and-others-denounce-the-metoo-movement.html.

73. Deidre McPhillips, *Inside Nigeria's Prolific Film Industry*, U.S. NEWS & WORLD REPORT (Feb. 29, 2016, 12:05 PM), https://www.usnews.com/news/best-countries/articles/2016-02-29/inside-nigerias-prolific-film-industry.

74. Stephanie Busari & Torera Idowu, *The #MeToo Stories you Haven't Heard*, CNN (Mar. 3, 2018, 4:53 AM), https://www-m.cnn.com/2018/03/02/africa/nigeria-rape-survivors-metoo-asequals/index.html?r=https%3A%2F%2Fwww.google.com%2F.

75. *Id.*

victims suffer in silence.[76] While the #metoo movement is not prominent in Nigeria, women are starting to share their stories in an attempt to remove the stigma surrounding sexual assault.[77]

The World Bank estimates India's 2016 population at 1.325 billion people and the female population at 635.91 million.[78] According to the Crime in India report for 2016, only 38,947 women and girls reported rape.[79] That is less than six thousandths of one percent (0.006%) of the female population reporting violent sexual crimes. Additionally, there were 84,746 reports of assaults on women in 2016.[80] More than half the crimes in major cities like Mumbai and New Delhi go unreported—women regularly refrain from reporting sexual crimes because they do not want to get involved with the bureaucracy of reporting.[81] The reported numbers of sexual assault and rape in India are startlingly low and disproportionate to population size, which suggests that victims feel judicial and societal pressure to suffer in silence.

Analyzing statistics about sexual crimes and reporting rates demonstrates how rarely victims report sex crimes to law enforcement. Also, statistics highlight how rarely assailants are convicted. Therefore, the industry should not apply an international clause based on convictions because the clause would have no effect whatsoever. Even in the current climate where accusation rates have increased substantially, conviction rates remain abysmal. Instead, the clause must focus on a reasonable investigation by a third party, modeled after the Time's Up legal defense fund.

After months of breaking sexual assault and harassment stories, over three-hundred women in Hollywood and the National Women's Law Center formed the Time's Up initiative and legal defense fund.[82] To date, more than

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76. *Id.*

77. *Id.*

78. *Population, Female - India*, WORLD BANK (2016), https://data.worldbank.org/indicator/SP.POP.TOTL.FE.IN?locations=IN; *Population, Total-India*, WORLD BANK (2016), https://data.worldbank.org/indicator/SP.POP.TOTL?locations=IN.

79. NAT'L CRIME RECORDS BUREAU, CRIME IN INDIA 4 (2016), http://ncrb.gov.in/StatPublications/CII/CII2016/pdfs/NEWPDFs/Crime%20in%20India%20-%202016%20Complete%20PDF%20291117.pdf.

80. *Id.*

81. Rina Chandran, *Much Crime Unreported in Indian Cities, Sexual Harassment Complaints Ignored*, REUTERS (Apr. 28, 2016, 10:10 AM), https://www.reuters.com/article/us-india-women-harassment/much-crime-unreported-in-indian-cities-sexual-harassment-complaints-ignored-survey-idUSKCN0XP2CL.

82. Lexy Perez, *Time's Up Legal Defense Fund Releases Annual Report, Unveils $22M Donated in Fundraising*, THE HOLLYWOOD REP. (Dec. 18, 2018, 11:38 AM), https://www.hollywoodreporter.com/news/times-up-legal-defense-fund-celebrates-one-year-anniversary-1170467; *Our Story*, TIME'S UP NOW, https://timesupnow.org/about/our-story (last visited Nov. 5, 2019); NAT'L WOMEN'S LAW CTR, TIME'S UP LEGAL DEFENSE FUND ANNUAL REPORT (2018).

21,000 people from around the world have contributed over $22 million to the defense fund.[83] Since its inception, 3,755 people sought help from 792 attorneys in the network.[84] Time's Up has funded seventy-five cases so far, and committed $5 million to ongoing and future cases.[85] The defense fund responded to more than 3,700 people by providing access to attorneys for free initial consultations.[86] Time's Up is dedicated to the cultural transformation around sexual harassment and assault.

The Time's Up legal defense fund is a model of what third-party reporting and legal defense can offer to victims of sexual assault and misconduct. This article proposes implementation of a third-party to focus on instances of sexual assault and misconduct in the entertainment industry. This third-party, in addition to providing investigative and legal support, could have the ability to act as insurance for major studios. For example, the third-party could offer "morals insurance" to major motion picture studios, which the studios can purchase from the third-party on a project basis. Then, in the instance of a moral disrepute accusation (in this case, sexual misconduct or assault) against an individual involved in the studio's production, the third-party (insurer) would aid in covering costs toward investigation, legal fees, and repercussions of termination such as reshoots, recasts, or post-production modifications. This means studios would be more inclined to include morals clauses, victims may be more likely to come forward, and guilds may have an incentive to remove anti-morals clause provisions from their collective bargaining agreements.

One main argument against an international morals clause is that existing guilds in the entertainment industry prohibit morals clauses in their minimum basic agreements.[87] Before addressing guilds, unions, antitrust law, and how they interact, this article first seeks to remove a prohibition on morals clauses. Studios eliminate morals clauses with no regard for the financial consequences or impacts on victims' lives: multi-million-dollar payouts to bad actors, a negative public image for the studio, no victim support, and public reinforcement that powerful people can buy their way out of immoral conduct.

The Writers Guild of America and the Directors Guild of America, two of the most powerful guilds in the entertainment industry, must eliminate articles in their minimum basic agreements that prohibit the inclusion of

83. NAT'L WOMEN'S LAW CTR, *supra* note 82.

84. *Id.*

85. *Id.*

86. *Id.*

87. *See Theatrical and Television Basic Agreement, supra* note 8; *see also Basic Agreement of 2014*, *supra* note 8.

morals clauses. Instead, the guilds should adopt and implement an international clause through an international organization. The guilds seek to protect their members, so restricting members' conduct with a moral's clause may seem counterproductive at first. However, after examining the prevalence of sexual assault and misconduct in the industry, guilds should understand that the clause protects members' rights to be free from personal harm and enforces the public's current concerns regarding justice for victims.

The best way to implement a morals clause would be through an international organization such as the Motion Picture Association (the "MPA"). The MPA currently conducts national research on the entertainment industry, protects the intellectual property of the six largest motion picture producers and distributors, and promotes the international film economy.[88] The goals of the MPA closely align with the goals of implementing an international morals clause. Promotion and implementation of the clause through the MPA would mean member studios would have a baseline clause to implement knowing it was drafted with their interests in mind.

The Motion Picture Association reaches regions throughout the world with the MPA of America ("MPAA"), MPA – Canada ("MPAC"), MPA – Latin America ("MPALA"), MPA – Asia Pacific ("MPAAP"), and MPA – Europe, Middle East and Africa ("MPAEMEA").[89] Many of the MPA's goals are profit-oriented: maintaining a rating system for films,[90] preventing online piracy, and expanding the global entertainment market.[91] Recommending an international morals clause to all regional branches and member companies matches with the association's profit-expanding goals while also protecting people from sexual misconduct and violence.

If the MPA implemented the clause, it would become the industry standard. Because the clause is created as a response to private contracting and parties can freely sign away rights as a concept of private contracting, nations need not worry about statutory implementation or regulation. Further, the MPA's content producers and distributors of the would-be parties implementing the clause and independent legal parties could review any relevant circumstances surrounding invocation of the clause.

The Big Six, the six largest entertainment conglomerates in the world, are MPA members – Walt Disney Studios Motion Pictures, Paramount

88. *Who We Are*, MOTION PICTURE ASS'N, https://www.mpa-i.org/who-we-are (last visited Nov. 5, 2019).

89. *Id.*

90. Frank Pallotta, *How 'Indiana Jones' Finally Forced Hollywood to Create the PG-13 Rating*, BUSINESS INSIDER (Apr. 24, 2014, 8:13 AM), https://www.businessinsider.com/indiana-jones-and-the-temple-of-doom-created-pg-13-rating-2014-4.

91. *Who We Are*, *supra* note 88.

Pictures Corporation, Sony Pictures Entertainment Inc., Twentieth Century Fox Film Corporations (now affiliated with Disney), Universal City Studios LLC, and Warner Bros. Entertainment Inc. – as well as Netflix, Inc., which recently joined the MPA.[92] As conglomerates, each member of the Big Six owns several subsidiary film studios. If the Big Six and Netflix implement morals clauses into their contracts, including subsidiaries' contracts, most film industry contracts will have active morals clauses.

The MPA would draft the proposed clause, recommend member studios implement the clause, and make suggestions for changes periodically over time. The Big Six and Netflix would likely implement the clause en masse, as some have already made public statements about widely adopting morals clauses in the future. The more popular the clauses become in the film community, the more likely mini-major and independent studios will adopt them. Additionally, studios are more likely to adopt the clause if the MPA publicly recommends implementation, because the public would question why studios fail to implement an endorsed clause from an association that furthers the studios' best interests.

If the MPA accepts and regulates the clause, it would not violate antitrust provisions. Antitrust law is governed by three applicable statutes: the Sherman Antitrust Act, the Clayton Act, and the Norris-LaGuardia Act.[93]

Section 1 of the Sherman Antitrust Act requires "(1) concerted activity involving more than one actor, (2) an unreasonable restraint of trade, and (3) an effect on interstate or foreign commerce" to show an antitrust violation.[94] Even if creating an international morals clause was considered a concerted activity that is an unreasonable restraint on trade, with an effect on foreign commerce, Section 6 of the Clayton Act exempts lawful labor activity.[95] Furthermore, the United States Supreme Court has held that unions enjoy a statutory exemption from antitrust laws, so long as the union acts in its own self-interest.[96]

There are two types of antitrust violations under the Sherman Act: per se illegal and illegal by rule of reason.[97] Conduct that triggers per se illegality is narrowly defined and must be plainly anticompetitive.[98] Morals clauses simply do not fit into the category of plainly anticompetitive behavior, or per

92. *Id.*

93. STEVEN D. WHEELESS, ANTI-TRUST LAW LABOR EXEMPTIONS: THE LMRA'S DISTANT COUSINS 1-2 (2011).

94. *Id.* at 1.

95. *Id.*

96. *Id.* at 2.

97. *See* SELZ ET AL., *supra* note 3 at § 7:2.

98. *Id.*

se illegal, as they are not price fixing, a market division, or a group boycott.[99] The rule of reason analysis deems conduct illegal only if it unreasonably restrains competition.[100]

Morals clauses at their core do not restrain competition, but rather enforce a code of moral conduct and make certain conduct actionable. An international morals clause would not adversely affect competition as a whole, rather, the clause would benefit members of the MPA, guild members, and the public at large for reasons discussed above. Therefore, entertainment industry unions should accept and allow morals clauses in their minimum basic agreements. The shift toward accepting proactive contractual clauses is especially important considering the widespread industry changes after the #metoo movement revelations.

IV. WHY BARGAINED-FOR CONTRACTUAL PROVISIONS ALONE FAIL

The current morals clauses system relies entirely on bargained-for contractual provisions. As evidenced by earlier discussion in this note, bargained-for provisions have completely failed studios and victims in instances of misconduct. Individuals with substantial bargaining power can bargain away morals clauses, which results in monetary loss, immoral or illegal conduct, and victimization of third parties.

The cornerstone of private contracting is the ability to sign away rights at will.[101] Morals clauses represent instances of bargaining rights away. Many academics have criticized morals clauses as reprehensible, unenforceable, and ambiguous.[102] Fortunately, United States courts have repeatedly held that termination based on morals clauses is enforceable and valid.[103]

Critics of morals clauses often disapprove of the provision because studios can take advantage of individuals with minimal bargaining power.[104] That is true, and should be addressed, but this critique fails to recognize the reverse gap in bargaining power When individuals with extraordinary bargaining power, like Weinstein or Spacey, enter inter contracts with

99. *Id.*

100. *Id.*

101. *See* Patricia Sanchez Abril & Nicholas Greene, *Contracting Correctness: A Rubric for Analyzing Morality Clauses*, 74 Wash. & Lee L. Rev. 3, 32 (2017).

102. *Id.* at 46-48; Noah B. Kressler, *Using the Morals Clause in Talent Agreements: A Historical, Legal and Practical Guide*, 29 Colum. J. L. & Arts 1 (2005).

103. *See generally* Loew's, Inc. v. Cole, 185 F.2d 641 (9th Cir. 1950); *see generally* Twentieth Century Fox Film Corp. v. Lardner, 216 F.2d 844 (9th Cir. 1954); *See generally* Scott v. RKO Radio Pictures, Inc., 240 F.2d 87 (9th Cir. 1957); *see generally* Nader v. ABC Television Inc., 150 Fed.App'x 54 (2d Cir. 2005).

104. Abril & Greene, *supra* note 101 at 47.

studios, they can bargain away the inclusion of a morals clause. In fact, a morals clause is usually the first contract provision to get eliminated.[105]

When individuals with bargaining power remove morals clauses from contracts, they send the wrong message: parties with monetary or social power can bargain away the requirement to act morally. In the context of the #metoo movement, it sends the message that people with greater influence can buy rights to sexually assault people. To make matters worse, individuals who can bargain away morals clauses still get paid for their contracts after termination. Individuals with extraordinary bargaining power can leverage fame and fortune to act immorally or illegally, then receive inordinate amounts of money for doing so. There are multiple examples as to how bargained-for contractual provisions failed both studios and victims of sexual harassment.

Comedian Bill Cosby's sexual assault and rape scandal embodies the climate surrounding sexual assault and the recent change the #metoo movement has caused. In 2005, his former costar, Andrea Constand, reported to police that Cosby had drugged and sexually assaulted her.[106] The district attorney at the time did not prosecute the case and Cosby's career maintained its trajectory.[107] Ten years later, prior to the #metoo movement, however, when more victims came forward, the district attorney chose to prosecute Cosby.[108] The first jury in 2017 deadlocked.[109] On April 26, 2018, after a retrial, a new jury convicted Cosby and, on September 25, 2018, a judge sentenced Cosby to three to ten years in prison.[110] Cosby's sentencing marks the first criminal conviction since the resurgence of the #metoo movement but came ten years too late for Constand, the first victim to come forward.

In April 2018, the Board of Governors of the Academy of Motion Picture Arts and Sciences voted to expel both Bill Cosby and Roman Polanski from the Academy's membership ranks.[111] The Board acted in response to decades old pedophilia allegations against Roman Polanski and Bill Cosby's sexual

105. Epstein, *supra* note 1 at 90; Sarah D. Katz, *Reputations… A Lifetime to Build, Seconds to Destroy*, 20 CARDOZO J. INT'L & COMP. L. 185, 199-200 (2011).

106. Laura Benshoff & Bobby Allyn, *Bill Cosby Sentenced to at Least 3 Years in State Prison for Sexual Assault*, NPR (Sept. 25, 2018, 2:15 PM), https://www.npr.org/2018/09/25/651065803/bill-cosby-sentenced-to-at-least-3-years-in-state-prison.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. Kristopher Tapley & Gene Maddaus, *Film Academy Expels Bill Cosby and Roman Polanski From Membership*, VARIETY (May 3, 2018, 11:19 AM), https://variety.com/2018/film/awards/film-academy-expels-bill-cosby-and-roman-polanski-from-membership-1202797252/.

assault conviction.[112] Polanski's attorney stated: "It seems to be wrong to just expel someone and make a decision without knowing all the facts."[113] The Academy expelled Cosby because of jury convictions but could not base Polanski's expulsion on the same grounds because Polanski fled the United States to escape trial. When Polanski sued for reversal, accusing the Academy of not following proper protocol, the Academy stood behind its decision.[114] By acting with an independent committee, voting, and finally removing bad actors from positions of power, the Academy upheld its moral code of conduct.[115] The Academy's actions comport well with the solutions proffered by an international morals clause, but the Academy's expulsions are merely a response to instances where morals clauses were not used.

The case against Harvey Weinstein exemplifies the invasive nature of sexual assault in the entertainment industry. Notably, in October 2018, a judge dismissed a count against Weinstein because police failed to provide information to prosecutors.[116] While this would otherwise appear as negative news, the current case against Weinstein moves forward as a New York judge denied his motion to dismiss other counts.[117] Even though Weinstein's defense remains "confident" he will be "completely exonerated," his case continues on its path to trial.[118] His case, which has been delayed numerous times, was supposed to come to a head in July 2019.[119] However, Paz de la Huerta has added the Walt Disney Company, Michael Eisner, Bob Iger, Bob Weinstein, and Miramax to an amended $70 million claim against Weinstein.[120] It took decades, but the case against Weinstein continues to grow and change. The fact that this case moves forward symbolizes justice

112. *Id.*

113. *Id.*

114. Matt Donnelly & Brent Lang, *Academy Responds to Roman Polanski: 'Procedures Were Fair and Reasonable'*, VARIETY (April 19, 2019, 12:28 PM), https://variety.com/2019/film/news/roman-polanski-sues-film-academy-1203193579/.

115. *Standards of Conduct and Process for Submitting Claims of Misconduct*, ACAD. MOTION PICTURE ARTS & SCI., https://pmcvariety.files.wordpress.com/2018/01/standards-of-conduct-process.pdf (last visited Nov. 5, 2019).

116. Eriq Gardner, *Judge Rejects Harvey Weinstein's Motion to Dismiss Assault Case*, HOLLYWOOD REP. (Dec. 20, 2018, 6:51 AM), https://www.hollywoodreporter.com/thr-esq/harvey-weinstein-motion-dismiss-assault-case-rejected-by-judge-1171018.

117. *Id.*

118. *Id.*

119. Dominic Patten, *Harvey Weinstein's Latest New Lawyers Strike No Delay Deal with Judge Over Rape Trial Start Date*, DEADLINE (July 8, 2019), https://deadline.com/2019/07/harvey-weinstein-new-lawyers-new-york-rape-trial-date-remains-1202640490/.

120. Dominic Patten, *Disney to "Vigorously" Fight New $60M Harvey Weinstein Assault Suit from Paz de le Huerta*, DEADLINE (Aug. 27, 2019, 5:03 PM), https://deadline.com/2019/08/paz-de-la-huerta-sues-disney-harvey-weinstein-rape-claim-miramax-1202705695.

for the thousands of women who came forward during the #metoo and Time's Up movements.[121]

More recently, CBS avoided a $120 million payout to former executive Leslie Moonves.[122] The grounds for termination were based on "willful and material misfeasance, violation of company policies, and breach of his employment contract."[123] To terminate Moonves without paying severance, CBS would need to invoke the "for cause" section of his contract, which requires CBS to show that Moonves caused a "materially adverse effect" on the company.[124] Because of this clause, it would be difficult for CBS to show that Moonves' pattern of sexual harassment caused a materially adverse effect, but independent law firms still launched an investigation into his behavior as well as into company practices at CBS.[125] A report found that Moonves obstructed the investigation and obscured evidence of his sexual harassment, which allowed CBS to invoke the clause and avoid severance pay. The report further revealed that CBS's sexual harassment training was not as robust as training at other companies, and that executives could often forego the training altogether.[126] CBS was lucky that Moonves was so apparent in his cover-up and obstruction of the investigation; otherwise, they may not have been able to void his $120 million severance package.[127]

In March 2019, the Hollywood Reporter revealed that Warner Bros. CEO, Kevin Tsujihara, engaged in an extramarital affair with actress Charlotte Kirk.[128] The affair quickly broke down into casting demands from the actress.[129] Following an investigation into his relationship with Kirk,

121. *See* @timesupnow, INSTAGRAM (Dec. 20, 2018), https://www.instagram.com/p/BrnSq_NgrKn/.

122. Edmund Lee & Rachel Abrams, *CBS Says Les Moonves Will Not Receive $120 Million Severance*, N.Y. TIMES (Dec. 17, 2018), https://www.nytimes.com/2018/12/17/business/media/les-moonves-cbs-severance.html.

123. *Id.*

124. Elizabeth C. Tippett, *CBS is Incredibly Lucky to not pay Les Moonves his $120 Million Severance*, MARKET WATCH (Dec. 19, 2018, 11:44 AM), https://www.marketwatch.com/story/cbs-is-incredibly-lucky-to-not-pay-les-moonves-his-120-million-severance-2018-12-19.

125. Lee & Abrams, *supra* note 122.

126. *Id.*

127. *See* Rachel Abrams and Edmund Lee, *Les Moonves Obstructed Investigation into Misconduct Claims, Report says*, N.Y. TIMES (Dec. 4, 2018), https://www.nytimes.com/2018/12/04/business/media/les-moonves-cbs-report.html.

128. Tatiana Siegel & Kim Masters, *"I Need to Be Careful": Texts Reveal Warner Bros. CEO Promoted Actress Amid Apparent Sexual Relationship*, HOLLYWOOD REP. (Mar. 06, 2019, 1:40 PM), https://www.hollywoodreporter.com/features/i-need-be-careful-texts-reveal-warner-bros-ceo-promoted-actress-apparent-sexual-relationship-1192660.

129. *Id.*

Tsujihara stepped down.[130] While Tsujihara's affair is not an allegation of sexual assault, it concerns sexual misconduct and actions that morals clauses aim to prevent.

Eight women claimed allegations of rape, sexual abuse, and psychological manipulation suffered at the hands of screenwriter Max Landis.[131] Landis's manager dropped him as a client shortly afterwards.[132] Luckily, Landis had few to no projects on the horizon, so studios did not have to endure the termination process.[133] However, if Landis was working on any projects, a morals clause would have prevented monetary loss and an internationalized morals clause would have aided in the process of effectuating the clause.

Bryan Singer, the director of the Oscar-nominated picture *Bohemian Rhapsody*, denied new sexual assault allegations of underage boys in January 2019.[134] Singer was removed from *Bohemian Rhapsody* a mere two weeks before the end of production and was subsequently replaced on the upcoming film *Red Sonja*.[135] In June, Singer agreed to settle an ongoing suit with one victim for $150,000.[136] While Singer was not nominated for best director in the 2019 Oscars, he still received directorial credit for the film, as well as his full director's fee.

Unfortunately, the need for morals clauses expands beyond people directly involved in the entertainment industry's artistic endeavors. In August 2019, Steven Fabrizio, general counsel, and top executive at the MPAA, was fired after being charged with second-degree sexual abuse and blackmail.[137]

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130. Cynthia Littleton, *Kevin Tsujihara Out as Warner Bros. Chief amid Sexual Impropriety Scandal*, VARIETY (Mar. 18, 2019, 10:19 AM), https://variety.com/2019/biz/news/kevin-tsujihara-warner-bros-sexual-impropriety-1203165653/.

131. Gene Maddaus, *Max Landis Accused of Rape, Assault and Psychological Abuse*, VARIETY (June 18, 2019, 12:43 PM), https://variety.com/2019/film/news/max-landis-sexual-assault-accusation-1203246371/.

132. Dave McNary, *Max Landis Dropped by Manager Following Sexual Assault Allegations*, VARIETY (June 19, 2019, 11:30 AM), https://variety.com/2019/film/news/max-landis-dropped-manager-sexual-assault-allegations-1203247788/.

133. *See* Maddaus, *supra* note 131.

134. Gene Maddaus, *Bryan Singer Hit with Fresh Allegations of Sex with Underage Boys*, VARIETY (Jan. 23, 2019, 4:00 AM), https://variety.com/2019/biz/news/bryan-singer-allegations-sex-underage-boys-1203115090/.

135. *Id.*; Alex Stedman & Matt Donnelly, *Jill Soloway Replaces Bryan Singer as 'Red Sonja' Director*, VARIETY (June 21, 2019, 11:40 AM), https://variety.com/2019/film/news/jill-soloway-red-sonja-bryan-singer-1203250238/.

136. Gene Maddaus, *Bryan Singer to Pay $150,000 to Resolve Rape Claim*, VARIETY (June 12, 2019, 5:45 PM), https://variety.com/2019/biz/news/bryan-singer-sanchez-guzman-settlement-1203241557/.

137. Nate Nickolai & Matt Donnelly, *Top MPAA Executive Steven Fabrizio Fired Amid Sexual Abuse, Blackmail Charges*, VARIETY (Aug. 26, 2019, 10:12 PM),

The above instances prove just how necessary morals clauses are: they can save millions of dollars, protect victims, and bring perpetrators to justice.

V. CONCLUSION

Studios created and implemented morals clauses as a reaction to morally reprehensible conduct from talent. While the clause's use increased over time, studios failed to implement them in situations where talent had substantially more bargaining power. Failure to implement morals clauses in such circumstances sent the message that people of high power could bargain away the requirement to act morally, setting the stage for a moral crisis in the film industry. The #metoo movement revealed the dark inner workings of Hollywood, and later the state of film industries in the United Kingdom, China, India, Japan, and Australia. As a response, the film industry must effectuate an international morals clause to protect themselves and the public against immoral and illegal conduct.

Overall, the MPA should implement an international morals clause approved and accepted by guilds in the entertainment industry. Studios should invoke the clause in response to sexual misconduct or violence allegations. The effect of the clause need not be immediate termination, but, instead, suspension pending an independent investigation of the conduct. An independent legal body, modeled after the Times Up legal defense fund, should investigate alleged conduct and make a fair evaluation for suspension or termination based on the conduct alleged and the content of the clause. As discussed, the clause would not violate antitrust law and guild involvement with the clause would further protect against antitrust or competition claims.

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https://variety.com/2019/film/news/mpaa-steven-fabrizio-fired-sexual-abuse-blackmail-charges-1203315135

CYBER PILLAGE

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I. INTRODUCTION

In early 1258, the Mongols gathered outside the walls of Baghdad, then probably the largest and most advanced city in the world. On February 10, the Abbasid Caliph, al-Mustasim, made a late attempt to spare the city, but Hulagu Khan rejected this offer. After letting the city sit silent for three days, Hulagu then released his armies into the city, sparing only the Nestorian Christians. Hundreds of thousands of people were killed and many others sold into slavery. The pillage of the city and its citizens by the Mongol army was widespread and complete.[1] According to many historians, the sack of Baghdad signaled the end of the Muslim Golden Era.[2]

This is just one of the notorious historical examples of pillage, a common practice in armed conflict prior to the 19th Century.[3] Not until the 18th Century was there a general recognition that pillage was undesirable among professional armies,[4] as signaled by the Lieber Code that was issued by President Lincoln to the Union forces during the American Civil War, levying the potential punishment of death as a consequence to any who participated in this practice.[5]

Subsequent law of armed conflict ("LOAC") codifications embraced the new proscription and followed the illegalization of pillage. The Oxford Manual,[6] as well as the 1899[7] and 1907 Hague Conventions[8] prohibited

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1. *E.g.*, GEORGE F. NAFZIGER & MARK W. WALTON, ISLAM AT WAR: A HISTORY 75 (2003).

2. *E.g.*, SEBASTIAN R. PRANGE, MONSOON ISLAM: TRADE AND FAITH ON THE MEDIEVAL MALABAR COAST 17 (2018).

3. *See* TUBA INAL, DEVELOPMENT OF GLOBAL PROHIBITION REGIMES: PILLAGE AND RAPE IN WAR 4 (2008) ("Visigoths pillaged Rome in 409 and Vandals in 455, the Crusaders pillaged Belgrade, lots of villages and towns in the Asia Minor in 1096, Jerusalem in 1099 and Constantinople and the Greek islands in 1204, and the Napoleonic Armies looted Italian towns in 1805-1806 and in return the Russian Army looted the French countryside.").

4. U.S. DEP'T OF DEF., LAW OF WAR MANUAL ¶ 5.17.4.2 (2016) [hereinafter DOD LAW OF WAR MANUAL].

5. GEN. ORD. NO. 100: THE LIEBER CODE INSTRUCTION FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD art. 44 (Apr. 24, 1863) (defining the acceptable rules of conduct during hostilities for Union soldiers throughout the U.S. Civil War, the orders were issued by President Lincoln and are commonly known as the "Lieber Code," named after its main author, Francis Lieber) (originally issued as General Orders No. 100, Adjutant General's Office, 1863, Washington 1898: Government Printing Office) [hereinafter LIEBER CODE].

6. The Oxford Manual prohibited pillage, as unanimously adopted by the Inst. of Int'l Law, a scientific association composed of a fixed number of members and associates of different nations and whose mission is to aid the gradual and progressive codification of international law. Gustave Moynier, *Oxford Manual of the Laws of War on Land*, 5 ANNUAIRE DE L'INSTITUT DE DROIT INT'L 157, 164 (1881/82) [hereinafter Oxford Manual].

pillage. More modern instantiations not only prohibit the practice, but also attach both individual criminal liability[9] for participating in pillage and command responsibility for leaders that fail to prevent such conduct.[10] The prohibition is so settled that the International Committee of the Red Cross ("ICRC") has determined that the practice of pillage is prohibited in both international armed conflicts and non-international armed conflicts as a matter of customary international law.[11]

It seems clear at this point that pillage, or the taking of public or private property for private or personal use, is prohibited in armed conflict. This clarity notwithstanding, to address what appropriately has been dubbed "the greatest transfer of wealth in human history,"[12] many are calling for a mass expansion of the theory of pillage. In light of these calls and the rapid emergence of new technologies, it is not as clear how this prohibition will apply to new weapon systems such as those used in cyberspace. This article reviews the elements of pillage in light of cyber operations during armed conflict and argues that cyber pillage remains susceptible to prohibition, and additionally distinguishes between cyber activities that fall under the ban and those that do not.

In light of the public's increased use of the term "pillage" to describe various forms of cyber theft outside the context of an armed conflict, Part II of this paper elucidates the definitional terms applicable to pillage and applies them to cyber activities currently conducted outside the context of an armed conflict against the United States ("U.S.") and its citizens. Part III builds on Part II by describing cyber activities that, if conducted within the context of an armed conflict, would amount to pillage and therefore be prohibited by the LOAC. The article will conclude in Part IV.

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7. Laws of Customs of War on Land art. 28, 47, July 29, 1899, 32 Stat. 1803, T.S. No. 403 [hereinafter Convention (II)].

8. Laws and Customs of War on Land art. 28, 47, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539 [hereinafter Convention (IV)].

9. Prosecutor v. Ntaganda, ICC-01/04-02/06, Sentencing Judgment of Judge Fremr, Ozaki, Chung, ¶¶ 133, 143, 151 (Nov. 7, 2019).

10. *See* Prosecutor v. Delalić, IT-96-21-T, Judgment, ¶ 776 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998); TIMOTHY BROOK, THE NANKING ATROCITY, 1937-1938, 149 (Bob Tadashi Wakabayashi ed., 2017).

11. 1 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, 182 (2005) [hereinafter ICRC Rule 52].

12. *See* The Future of Warfare: Hearing Before the S. Comm. on Armed Serv., 114th Cong. 54-55 (2015) (statement of General Keith B. Alexander, USA, Ret., Former Commander, U.S. Cyber Command and Former Dir. Nat'l Sec. Agency) [hereinafter Statement of General Keith B. Alexander].

II. PILLAGE

As will be discussed further in the Part II(B), pillage is a legal term of art with a long history of being applied only under narrow conditions. For purposes of this paper, the authors will use the LOAC centered definition of "the non-consensual taking of public or private property by members of armed forces during armed conflict for private or personal use," noting that "armed forces" can include both state and non-state actors, or other agents of a Party to the conflict. Further, the authors will not make a distinction between pillage and "looting" or "plunder" as the majority of military manuals treat them as synonyms.[13]

However, contemporary use of the term "pillage" has expanded from its historical meaning. In today's cyber age, common use of the term pillage has transformed form a narrow application of a tactic in armed conflict to a broad description of the theft of digital information involving not only governments, but private actors such as individuals and corporations.[14] This Part examines the dichotomous usage of the two perspectives, concluding that the international law prohibition of pillage remains tied to the more traditional, narrow definition, requiring the existence of an armed conflict.

A. *Transforming Definition of Pillage*

The digital revolution has clearly initiated a transformative wave of growth and development across the entire human experience. Access to knowledge and the ability to collaborate have dramatically increased innovation and development in ways previously impossible. It is undisputed that the internet and its benefits have radically changed the world for the better and allowed progress in ways previously unimagined. However, it has also led to vulnerabilities and risks that can impact global economies and international security in ways its developers would never have predicted. One of the most prominent examples of these new vulnerabilities

13. *E.g.*, DOD LAW OF WAR MANUAL, *supra* note 4; *see also, e.g.*, DIRECTORATE OF LEGAL SERVICES (DLS), MANUAL OF ARMED FORCES LAW, DM 69, VOL. 4 LAW OF ARMED CONFLICT, ¶ 8.10.31 (2019) (N.Z.), http://www.nzdf.mil.nz/downloads/pdf/public-docs/dm_69_2ed_vol_4.pdf [hereinafter New Zealand LOAC Manual]; *see also, e.g.*, MINISTRY OF DEFENCE, MANUAL ON THE LAW OF ARMED CONFLICT, JSP 383, ¶ 15.23 (2013) (Eng.) [hereinafter UK LOAC Manual]; *see also* Prosecutor v. Delalić, IT-96-21-T, Judgment, ¶ 591 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998).

14. The authors recognize the two views are not mutually exclusive; some in the latter group are neither private individuals nor corporations. Indeed, some who share the view are government officials. Their views and statements, however, are not attributable to the official U.S. government position on the topic. Therefore, collectively the entire group holding this view will be referred to hereinafter as "the public."

is the cybertheft of intellectual property ("IP"),[15] currency,[16] and other electronic assets.[17]

IP rights deal with "creations of the mind"[18] and are so fundamental that the founding fathers felt compelled to include them in the U.S. Constitution by including, the Congress shall have power "[t]o promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."[19] Yet, cybertheft is the fastest growing category of crime in the U.S.,[20] occurring on a scale unequaled in the history of the world.

The severity of this new vulnerability is evidenced in the economic impact caused by the digital transfer of intellectual property from the U.S. to China. In testimony before the U.S. Senate, General Keith B. Alexander, then Director of the National Security Agency ("NSA") and United States Cyber Command ("USCYBERCOM"), described the theft as "the greatest transfer of wealth in human history."[21] By some estimates, the *annual* economic cost in counterfeit goods, pirated software, and theft of trade secrets in the U.S. alone exceeds $600 billion,[22] and the immediately identifiable and tangible minimum overall cost of IP theft in the U.S. is estimated to be as high as 5% of the U.S. Gross Domestic Product ("GDP") of $18 trillion.[23] These figures, however, include neither the nearly-impossible-to-ascertain costs associated with patent infringement,[24] nor those related to the impact of the job loss resulting from theft of IP, the ratio of which is estimated to be as high as 2.1 million full time jobs lost for

15. Emily Mossburg et al., *The Hidden Costs of an IP Breach*, 19 DELOITTE REV. 106, 108 (2016).

16. *Id.*

17. *Id.*

18. World Intellectual Property Organization, *What is Intellectual Property?*, WIPO PUBLICATION (2018), https://www.wipo.int/edocs/pubdocs/en/intproperty/450/wipo_pub_450.pdf.

19. U.S. CONST. art. I, § 8, cl. 8.

20. Nicolas P. Terry, *Will the Internet of Things Transform Healthcare*, 19 VAND. J. ENT. & TECH. L. 327, 338 (2016).

21. Statement of General Keith B. Alexander, *supra* note 12.

22. Militærmanual Om Folkeret for Danske Væbnede Styrker I Internationale Militære Operationer (Den.), *translated in*, MILITARY MANUAL ON INTERNATIONAL LAW RELEVANT TO DANISH ARMED FORCES IN INTERNATIONAL OPERATIONS ¶ 2.7 (Sept. 2016) (Den.) [hereinafter DANISH MILITARY OPERATIONS].

23. *Update to the IP Commission Report: The Theft of American Intellectual Property: Reassessments of the Challenge and United States Policy*, THE NAT'L BUREAU OF ASIAN RESEARCH 2 **(**Feb**.** 2017), http://ipcommission.org/report/IP_Commission_Report_Update_2017.pdf [hereinafter *IP Comm'n.*].

24. *Id.*

every $48 billion in IP theft.[25] Also excluded from the estimates are a number of intangible and much more difficult to identify costs to U.S. companies and consumers, such as those related to substantially higher expenditures on developing and implementing cybersecurity defenses,[26] which experts predict five-year cumulative spending forecasts will exceed $1 trillion in 2020.[27] Still, despite increased spending on security measures, experts predict the annual cost of cybercrime, including theft of IP, destruction of data, theft of funds, and the associated costs of remediating those harms, will surge to more than $6 trillion by 2021.[28]

The nature and staggering scale of cyber theft understandably causes concern over the unpredictable future impacts these thefts might have. Perhaps it is these impacts which have led some commentators to liken the perpetrators to pirates and to describe the thefts as pillage. U.S. Army scholars, Colonel David Wallace and Lieutenant Colonel Mark Visger, have argued:

> China has pillaged intellectual property from American companies through cyber espionage for decades resulting in the greatest transfer of wealth in human history. It is difficult to overstate the negative impact that such theft has had on American economic growth and prosperity and the ways in which it has undermined America's military and national security.[29]

This view is illustrative of how use of the word "pillage" has evolved from the historically narrower definition discussed in the next section, and how some are using the evolved definition to justify armed response against perpetrators. In order to better understand the way in which pillage has become so freely associated with theft of IP and why its application in that context is insufficient to implicate the LOAC, it is valuable to evaluate two

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25. The U.S. International Trade Commission estimates that 2011 put the employment loss associated with $300 million in IP theft at the equivalent of 2.1 million full time employees. *See* China: Effects of Intellectual Property Infringement and Indigenous Innovation Policies on the U.S. Economy, Inv. No. 332-519, USITC Pub. 4226 (May, 2011) (final). It is important to note that this estimate is likely on the low end of actual losses, as the USITC Report failed to include "less-IP intensive industries," and it did not have the participation of some of the most vulnerable U.S. companies. Additionally, the report probably vastly underestimated the impact of the theft of trade secrets, where many of the victims are ignorant of the theft or unwilling to report the information, and neither does it include the 5:1 ratio of support jobs created for every IP-intensive role created. *See IP Comm'n.*, *supra* note 23.

26. *IP Comm'n.*, *supra* note 23.

27. *See id.* at 2.

28. Steve Morgan, *2018 Cybersecurity Market Report*, CYBERSECURITY VENTURES (May 31, 2017), https://cybersecurityventures.com/cybersecurity-market-report/.

29. David Wallace & Mark Visger, *Responding to the Call for a Digital Geneva Convention: An Open Letter to Brad Smith and the Technology Community*, 6 J.L. & CYBER WARFARE 3, 47 (2018).

commonly held misconceptions about the concept of pillage. First, there is misconception of the legal meaning of the word "pillage." Second, there is misconception about when and how the intellectual property is stolen, both of which bear on the allowable responses.

1. The Rise of Domestic Pillage

Incorporating domestic theft of intellectual property by cyber means into the meaning of pillage is a view likely fueled by two common associations with another historically meaningful term – piracy. Piracy has long been associated with pillage. After all, in common parlance, pirates are known to "rape, plunder, and *pillage*."[30] Notwithstanding its historical meaning under international law,[31] which is closely linked to theft on the high seas, piracy has taken on a second definition in the last four decades, which associates piracy with infringing on copyrights.[32] It would be difficult to find someone in modern society who has not seen the now-infamous and ever present "FBI Anti-Piracy Warning" at the beginning of nearly every feature film.

Compounding the problem could be a recent change to Black's Law Dictionary's definition of pillage. Though Black's Law Dictionary is not a conclusive source of definitions for international law terms, the ICRC uses Black's Law Dictionary's Fifth Edition to define pillage for purposes of international humanitarian law. Under this definition, pillage is "*the forcible taking of private property by an invading or conquering army from*

30. *Man Knowledge: A Pirate Primer*, ART OF MANLINESS (Mar. 21, 2011), https://www.artofmanliness.com/articles/man-knowledge-a-pirate-primer/.

31. Article 101 of the 1982 UN Convention on the Law of the Sea defines piracy as consisting of any of the following acts:

> (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
>
> (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
>
> (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
>
> (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
>
> (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

See Convention on the Law of the Sea, Art. 101, Dec. 10, 1982, 1833 U.N.T.S. 397.

32. *See generally* FBI Anti-Piracy Warning Seal, FBI (ND), https://www.fbi.gov/investigate/white-collar-crime/piracy-ip-theft/fbi-anti-piracy-warning-sea (last visited Apr. 6, 2020).

the enemy's subjects."[33] In contrast, the eleventh, and most recent edition of Black's Law Dictionary, defines pillage as "*[t]he forcible seizure of another's property, esp. in war; esp., the wartime plundering of a city or territory*."[34]

It stands to reason some may see the change as a precursor to a change in customary international law. However, as will be discussed further in Part II(B), the new definition is wholly problematic and is supportable neither under current international law nor historic use of the term for the following reasons. First, "another's property" is too broad to be accurate. Military forces are permitted to take certain property under the LOAC,[35] so despite the property belonging to someone else, the taking of that property may not be pillage. Second, there is no requirement the property taken be converted for personal use, which is a determinative element under international law. Third, international law recognizes there are situations in which force is not a prerequisite to making a finding that pillage has occurred. Finally, and perhaps most important, the definition has no armed conflict requirement at all. "Especially in war" does not mean the same thing as "only in war," and international law requires the existence of an armed conflict to satisfy the elements of pillage. In other words, to accept the current Black's Law definition is to accept that any forcible theft of any property for any purpose by any person at any time is pillage. That is simply not supported in the law. No court has charged, let alone convicted, anyone of pillage outside the context of an armed conflict. What Black's current definition describes is basically robbery,[36] not pillage, and modern cybertheft seldom would rise to a level sufficient to trigger pillage.

Despite the long history of pillage under international law, conflation of the two definitions of pillage is not difficult to understand. Just as with piracy, the word "pillage" has taken on a second definition of its own – one used to describe the mass theft of digital information – and those who incorporate the theft of IP into the definition are not wholly wrong for it. Indeed, just as pillage has a long, binding history under international law, there is an alternate definition with a nearly equally long history that applies domestically. Not surprisingly, the elements of the war crime of pillage are

33. *See* ICRC Rule 52, *supra* note 11 (citing Black's Law Dictionary, at 1033 (5th ed. 1979)) (emphasis added).

34. *See Pillage*, Black's Law Dictionary (Bryan A. Garner, ed., 11th ed. 2019) (emphasis added).

35. *See* Convention (II), *supra* note 7, at art. 52; *see* Convention (IV), *supra* note 8, at arts. 28, 47.

36. *See Robbery*, Black's Law Dictionary (11th ed. 2019) (defining robbery as "[t]he illegal taking of property from the person of another, or in the person's presence, by violence or intimidation…").

not the same as those required to implicate the meaning of domestic pillage, as applied to the theft of IP.

When first used to define theft of intellectual property, pillage involved no armed conflict whatsoever. In this context, "pillage" carried its own unique meaning, one of a wholly domestic and civilly enforceable nature. Even after U.S. laws were modified in 1897 to categorize IP theft as a criminal matter,[37] pillage still was a domestic affair entirely, remedies for which required internal prosecution of offenders. Though IP theft has evolved from requiring a physical presence with the stolen property to an action that can be, and often is, carried out by an actor located outside the U.S., the crime remains a domestic criminal issue.

In *Morrison v. National Australia Bank*, the Supreme Court held, "[u]nless there is the affirmative intention of the Congress clearly expressed to give a statute extraterritorial effect a court must presume it is primarily concerned with domestic conditions… When a statute gives no clear indication of an extraterritorial application, it has none."[38] In other words, unless the specific law the actor violated clearly states its extraterritorial application, U.S. courts do not have the long-arm ability to reach out and grab the actor. Moreover, even if Congress constructed the statute to allow extraterritorial application, the host country of the actor would have to allow for extradition to the U.S. for prosecution, which is hardly the case with the countries that most prolifically conduct these types of attacks; neither China, Russia, North Korea, nor Iran are going to extradite to the U.S., especially when the actors are members of those States' own military or intelligence agencies. Understandably, this is frustrating for victims of IP theft, but international law does not allow escalated responses simply because domestic policy is insufficient to address those frustrations.

2. Other Considerations for Non-Application of Pillage

One of the chief concerns with continued fusing of the definitions is that of unintentional escalation to armed conflict in situations that do not otherwise warrant such response. International law provides two

37. *See* Copyright Act of Jan. 6, 1897, ch. 4, § 4966, 29. Stat. 481, 482 (1897) (criminalizing for the first time, as a misdemeanor, the "unlawful performances and representations of copyrighted dramatic and musical compositions" so long as the violation was "willful and for profit); *see also The Criminalization of Copyright Infringement in the Digital Age*, 112 HAR. L. R. 7, 1705, 1707 (1999) (explaining that the Copyright Act of 1909 greatly expanded the criminal penalties for copyright infringement, in an attempt to stem the increasing number of profit-seeking copyright pirates); *see also* Piracy and Counterfeiting Amendments Act of 1982, Pub. L. 97-180, 96 Stat. 91 (1982) (criminalizing as a felony the copyright infringement of audio and video recordings, punishable by both a $250,000 fine and five year imprisonment).

38. Morrison v. Nat'l Austl. Bank, 561 U.S. 247, 255 (2010) (citation omitted).

circumstances under which a state can resort to force. First, a state may use force when an armed attack has occurred or is imminent, pursuant to Article 51 of the United Nations ("UN") Charter.[39] However, the view that theft of intellectual property conducted by cyber means rises to the level of an armed attack, even at the levels previously described, has not been adopted by the international community.[40]

The second circumstance in which a state can resort to force is upon advisement to and direction of the United Nations Security Council ("UNSC"). Articles 39 and 42 of the U.N. Charter work in concert to authorize the UNSC to direct forceful actions if the UNSC believes (1) the offending act constitutes a threat to the peace, a breach of the peace, or an "act of aggression," and (2) no peaceable solution exists to resolve the conflict.[41] A subjective view of the current threats may suggest the severity of the actions constitutes a threat to, or breach of, the peace, and some may even argue the thefts are acts of aggression. This debate is, however, immaterial; any action authorized under these authorities requires concurrence of the five permanent members of the UNSC, including France, the United Kingdom, the Russian Federation, China, and the U.S.[42] Considering two of the largest offenders are Russia and China, there is little chance of the U.S. obtaining authorization under this mechanism.

Article 25 of the U.N. Charter requires states to comply with the decisions of the UNSC.[43] If the U.S. went against the UNSC decision and took unauthorized forceful action, the U.S. would be accountable for an unjustified armed attack against another nation. Not only would this cause severe deterioration of international alliances and generate costs far in excess of those recognized by IP losses, but also given the likely targets of such an attack, the action carries the distinct possibility of sparking World War III.

Make no mistake, anger over the theft of intellectual property is understandable, and neither the term applied to the theft, nor the means by which it was carried out, can assuage the anger felt by those who experienced the loss; this may be particularly true for someone who just lost the ability to capitalize on the invention of a lifetime. However, each misapplication of the term pillage elevates the risk of overreaction and,

39. U.N. Charter art. 51.

40. *See* TALLINN MANUAL 2.0 ON THE INTERNATIONAL LAW APPLICABLE TO CYBER OPERATIONS, 550-1 (Columbia University Press eds., 2nd ed. 2017) [hereinafter TALLINN MANUAL 2.0].

41. U.N. Charter arts. 39, 42.

42. U.N. Charter art. 25.

43. U.N. Charter art. 24, ¶ 1.

ultimately, of causing massive damage to the U.S. economy that could take years from which to recover. The facts surrounding the theft of IP must be carefully considered before deciding on a responsive course of action, and failure to consider those risks can have grave consequences.

B. *LOAC Application of Pillage*

In contrast to the evolving broad usage of the term, governments continue to view pillage as a narrow prohibition, applicable only to the taking of private property by armed forces for non-military purposes within the context of an armed conflict. For example, Denmark's Law of War Manual describes pillage as "when the members of the armed forces of a party to a conflict unjustifiably appropriate private property for the purpose of making a private gain."[44] The U.S. Law of War Manual defines pillage as "the taking of private or public movable property (including enemy military equipment) for private or personal use. It does not include an appropriation of property justified by military necessity."[45] Other states have similar definitions.[46]

1. Historical Development of the Prohibition on Pillage[47]

Historically, pillage "served as a form of compensation for private armies."[48] Over time, and generally as a matter of exercising discipline on professional armies,[49] pillage and looting were proscribed. The first major prohibition is detailed in the 1863 Lieber Code, promulgated by Francis Lieber, at the request of President Abraham Lincoln. Article 44 states:

> All wanton violence committed against persons in the invaded country, all destruction of property not commanded by the authorized officer, all

44. *See* DANISH MILITARY MANUAL, *supra* note 22, at ¶ 2.7 §407.

45. DOD LAW OF WAR MANUAL, *supra* note 4.

46. *See, e.g.*, AUSTRALIAN DEF. FORCE WARFARE CTR., AUSTRALIAN DEFENSE FORCE PUBLICATION 37 – LAW OF ARMED CONFLICT, ADDP 06.4, ¶ 7.46 (2006) (Austl.); *see also, e.g.*, CHIEF OF DEF. STAFF, LAW OF ARMED CONFLICT AT THE OPERATIONAL AND TACTICAL LEVELS, B-GJ-005-104/FP-021, ¶ 624 (2001) (Can.) (defining pillage as "the violent acquisition of property for private purposes," similarly to Australia); *see also, e.g.*, Manual i krigens folkerett (Nor.), *translated in* MANUAL OF THE LAW OF ARMED CONFLICT ¶ 9.40 (2016) (defining pillage as "taking possession of or stealing property for private purposes… [t]he prohibition applies to all enemy civilian property and effects, whether public or private"); *see also, e.g.*, UK LOAC Manual, *supra* note 13, at ¶ 5.35 2004 (defining pillage as "the obtaining of property against the owner's will and with the intent of unjustified gain").

47. *See* INAL, *supra* note 3, at 37-73 (offering a much more detailed discussion of the history of pillage, including the movement to its modern prohibition).

48. DOD LAW OF WAR MANUAL, *supra* note 4, at ¶ 5.17.4.2.

49. UK LOAC Manual, *supra* note 13, at ¶ 11.76.2; *see* INAL, *supra* note 3, at 24, 63-64.

> robbery, all pillage or sacking, even after taking a place by main force, all rape, wounding, maiming, or killing of such inhabitants, are prohibited under the penalty of death, or such other severe punishment as may seem adequate for the gravity of the offense.
>
> A soldier, officer or private, in the act of committing such violence, and disobeying a superior ordering him to abstain from it, may be lawfully killed on the spot by such superior.[50]

The prohibition on pillage was repeated in the 1874 Brussels Declaration[51] and the 1880 Oxford Manual on the Laws of War on Land.[52] Both the 1899 Hague Convention (II) with Respect to the Laws and Customs of War on Land[53] and its 1907 successor[54] embraced the prohibition on pillage. Both contained the same prohibitions – one, a clear statement that "[p]illage is formally forbidden,"[55] and the other, that "pillage of a town or place, even when taken by assault, is prohibited."[56]

After the massive destruction caused by World War II, the 1949 Geneva Conventions reiterated the prohibition on pillage. Article 16 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War requires the Parties to take steps to "search for the killed and wounded, to assist the shipwrecked and other persons exposed to grave danger, and to protect them against pillage and ill-treatment."[57] Echoing its Hague predecessors, article 33 of the same convention simply states "[p]illage is prohibited."[58]

While these documents only limit actions in international armed conflicts, Additional Protocol II to the 1949 Geneva Conventions[59] prohibits pillage in the context of non-international armed conflicts. Article 4, paragraph 2 states:

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50. *See* LIEBER CODE, *supra* note 5, at arts. 22, 37, 38, 47, 72.

51. Project of an International Declaration Concerning the Laws and Customs of War [Declaration of Brussels] (Brussels Conference on the Laws and Customs of War, No. 18) arts. 18, 39, Aug. 27, 1874, 4 Martens Nouveau Recueil (ser. 2) 219.

52. Oxford Manual, *supra* note 6, at art. 32.

53. *See* Convention (II), *supra* note 7.

54. *See* Convention (IV), *supra* note 8.

55. Convention (II), *supra* note 7, at art. 47.

56. Convention (IV), *supra* note 8, at art. 28.

57. Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 16, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

58. *Id.* at art. 33.

59. Protocol II Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts art. 4, June 8, 1977, 1977 U.S.T. LEXIS 465, 1125 U.N.T.S. 609.

> Without prejudice to the generality of the foregoing, the following acts against the persons referred to in paragraph 1 are and shall remain prohibited at any time and in any place whatsoever:
>
> g) pillage;[60]

In fact, the ICRC has concluded in its Customary International Humanitarian Law Study that the prohibition on pillage has developed into a current "norm of customary international law applicable in both international and non-international armed conflicts."[61]

This conclusion is confirmed by the International Tribunal for the Former Yugoslavia. In the *Celebici Camp* case, several of the defendants were charged with the "plunder of money, watches and other valuable property belonging to persons detained at the Celebici camp."[62] As part of the judgment, the Court determined that "it must be established that the prohibition of plunder is a norm of customary international law which attracts individual criminal responsibility."[63] In so finding, the Court stated "the Trial Chamber is in no doubt that the prohibition on plunder is also firmly rooted in customary international law."[64]

2. Elements of the Current Rule Prohibiting Pillage

While national military manuals differ slightly on the clarity with which they define and prosecute pillage, some examples are helpful. The U.S. Manual for Courts-Martial makes it an offense for a member of the armed forces to "quite his place of duty to plunder or pillage" when "before or in the presence of the enemy."[65] The Canadian LOAC Manual states that "[p]illage is theft, and therefore is an offence under the Code of Service Discipline."[66]

Perhaps most importantly, both the International Criminal Tribunal for Yugoslavia ("ICTY") and the International Criminal Court ("ICC") have added clarity with respect to the individual elements of pillage for prosecution in their jurisdictions. In the *Jelisic* case, the ICTY described

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60. *Id.* at art. 4.

61. ICRC Rule 52, *supra* note 11.

62. Prosecutor v. Delalić, IT-96-21-T, Judgment, ¶¶ 18, 28 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998).

63. *Id.*

64. *Id.*

65. In this context, the MCM defines pillage as "to seize or appropriate public or private property." Manual for Courts-Martial: United States (2019 Edition), JOINT SERV. COMM. ON MIL. JUST., at IV-34, ¶ 23.b.(2)(b), https://jsc.defense.gov/Portals/99/Documents/2019%20MCM%20(Final)%20(20190108).pdf?ver=2019-01-11-115724-610.

66. *See* ICRC Rule 52, *supra* note 11, at § A.

plunder as "the fraudulent appropriation of public or private funds belonging to the enemy or the opposing party perpetrated during an armed conflict and related thereto"[67] and accepted Jelisic's guilty plea based on his admissions that he "stole money, watches, jewellery [sic] and other valuables from the detainees upon their arrival at Luka camp by threatening those who did not hand over all their possessions with death."[68]

The ICC lists the elements of the war crime of pillaging in an international armed conflict as:

> 1. The perpetrator appropriated certain property.
>
> 2. The perpetrator intended to deprive the owner of the property and to appropriate it for private or personal use.
>
> 3. The appropriation was without the consent of the owner.
>
> 4. The conduct took place in the context of and was associated with an international armed conflict.
>
> 5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.[69]

Under the ICC statute, the elements of the war crime of pillaging in a non-international armed conflict are the same, except element 4 requires "[t]he conduct took place in the context of and was associated with an armed conflict not of an international character."[70] These elements have been applied in several cases[71] and will continue to play a key role in future trials.[72]

Assuming that these basic elements will continue to apply to future criminal trials, there are some key pieces of these elements that deserve more attention, particularly in anticipation of applying these elements to cyber activities discussed in Part III. The following paragraphs will analyze these key pieces.

a. Perpetrator

One of the key contrasts between the ICC elements and the definition as stated in some of the State military manuals is the ICC's use of the term

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67. Prosecutor v. Jelisić, Case No. IT-95-10-T, Judgment, ¶ 48 (Int'l Crim. Trib. For the Former Yugoslavia Dec. 14, 1999).

68. *Id.* at ¶ 49.

69. ICC Elements of Crimes, Art. 8(2)(b)(xvi) (2011), https://www.icc-cpi.int/resourcelibrary/official-journal/elements-of-crimes.aspx#article8-2b-xvi.

70. *Id.*

71. *See* Prosecutor v. Katanga, ICC-01/04-02/12, Judgment, ¶ 903 (Dec. 18, 2012); *see also* Prosecutor v. Gombo, ICC-01/05-01/08, Judgment, ¶¶ 113-125 (Mar. 21, 2016).

72. ICC, Kony et al. Case, https://www.icc-cpi.int/uganda/kony (listing the alleged crimes of Joseph Kony)*; see* Prosecutor v. Kony, ICC-02/04-01/05.

"perpetrator" as opposed to a reference to members of an armed force generally or, as in the case of New Zealand, members of their own armed forces.[73]

The ICC's more general application of pillage to any perpetrator is an important expansion. It clearly continues to cover members of armed forces, both those belonging to states and those belonging to non-state actors such as transnational terrorists and criminal organization. However, historical precedent from World War II suggests that the term "perpetrator" could also refer to both non-state actors and entities,[74] as well as corporations.[75] Indeed, calls are increasing for this expanded responsibility under the doctrine of pillage.[76]

In addition to members of any armed forces, corporations, terrorist organizations, and other non-state actors, the State itself may also be held accountable for pillage carried out by its forces. Tuba Inal makes this clear, referring to Nobel Prize winner, Louis Renault, and his comments after the 1907 Hague Conventions, where Renault argued that one of the innovations of the Convention was to make a State party "subject to penalties and responsible for all acts committed by the members of its armed forces, [and] gave rise to international liability and removed all doubts about the compulsory character of the Statute."[77] Article 3 of the 1907 Conventions states, "[a] belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces." Inal argues that this clear addition from the 1899 version of the Hague convention is a "recognition of the fact that violation of these rules gives rise to international liability."[78] Though not criminal liability,

73. New Zealand LOAC Manual, *supra* note 13, at ¶ 11.2.9.

74. *See* Updated Statute of the ICTY, art. 3(e), https://www.icty.org/en/documents/statute-tribunal (allowing the prosecution of "persons"); Menzel v. List, 267 N.Y.S. 2d 804 (Sup. Ct. 1966) (holding "'the Centre for National Socialist Ideological and Educational Research" is an organ of the Nazi Party responsible for pillage).

75. In the aftermath of WWII, the Nuremberg military tribunal prosecuted German corporations for pillage of the territory occupied by German forces, as seen in the treatment of the Krupp and Farben case. U.S. v. Pohl, TWC, Vol. II, Opinion and Judgment and Sentencing, 958 (Nov. 3, 1947); U.S. v. Krauch (Farben Case), TWC Vol. 8, 1081 (July 30, 1948); U.S. v. Krupp (Krupp Case), TWC Vol. IX, Judgment, 1327 (Aug. 17, 1947); U.S. v. Flick, TWC Vol. VI, Judgement, 1187 (Dec. 22, 1947).

76. *See, e.g.*, Open Society Foundations, *Why Corporate Pillage is a War Crime*, (May, 2019), https://www.opensocietyfoundations.org/explainers/why-corporate-pillage-war-crime (calling for prosecution as war criminals any corporation that knowingly buy, sell, or trade in pillaged goods).

77. *See* INAL, *supra* note 3, at 28.

78. *See id.* at 28-29.

the assignment of pecuniary liability to the State for pillage accomplished by state actors will be especially important in Part III.

b. Personal or Private Use

The ICC element of "for private or personal use" is not utilized by the ICTY, but still remains an element of most state military manuals that define pillage. It also is remains part of the historical underpinnings of the current prohibition.[79]

For example, the allowance for lawful requisition of private property is not unconditional. In fact, Article 52 of both the 1899 Hague Convention and the 1907 Hague Regulations specify that the requisition of private property must be for the necessities/needs of the army of occupation.[80] This is followed in state military manuals.[81] Indeed, one of the key elements which distinguishes lawful seizure or requisition from pillage is the purpose for which the property is taken. Invading and occupying armies have the right, in compliance with strict rules on compensation, to seize and/or requisition property based on military necessity. As stated in the *Gombo* trial decision:

> footnote 62 of the Elements of Crimes, which specifies, with reference to the requirement that the perpetrator intended to appropriate the items for "private or personal use", that "[a]s indicated by the use of the term 'private or personal use', appropriations justified by military necessity cannot constitute the crime of pillaging."[82]

Takings for private or personal use being proscribed, the key point of distinction between lawful and unlawful takings, therefore, is the existence or absence of military necessity.

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79. JOHN HENRY MERRYMAN, ALBERT E. ELSEN, AND STEPHEN K. URICE, LAW, ETHICS AND THE VISUAL ARTS 27 (4th ed. 2007) ("The principle based upon the Roman Law according to which property seized during a war is put on an equal footing with the property seized in the air, in the sea or in the earth, and which in a similar way becomes the property of the captor—since the right of war constitutes a just cause of acquisition—may be applicable to things liable or apt to be used for the needs of the army and belonging to the other belligerent. But it cannot be applied to private property which, if it has not become the object of requisition or sequestration, must be restored or compensated. The objects involved in the present case are private property which had not been requisitioned or sequestrated as it could not be used for the needs of the army. Their seizure must therefore be considered as having been effected by pillage.") (quoting the Venetian Court in *Mazzoni, as translated in*, ANNUAL DIGEST OF PUBLIC INTERNATIONAL LAW CASES 1927–1928, 564-565 (1931)).

80. *See* Convention (II), *supra* note 7; *see* Convention (IV), *supra* note 8.

81. *E.g.*, DOD LAW OF WAR MANUAL, *supra* note 4, at § 15.11.

82. Prosecutor v. Gombo, ICC-01/05-01/08, Judgment, ¶¶ 113-125 (Mar. 21, 2016).

c. Takings Without Consent

In order for a perpetrator to pillage, the taking must be without the consent of the owner of the property. The consent must be genuine, meaning not brought about by coercion or some other form of force. The Trial Court in *Gombo* explained that the lack of consent may be inferred from the facts.[83]

> Furthermore, in accordance with Article 30(3), the perpetrator must have been 'aware' of the fact that the property was appropriated without the consent of the owner. This is assessed in light of the general circumstances of the events and the entirety of the evidence presented. The Chamber considers that, in situations where the perpetrator appropriated property in the absence of the owner or in coercive circumstances, the perpetrator's knowledge of non-consent of the owners may be inferred.[84]

The victim's knowledge of the theft not being required for pillage to have occurred will be important in applying pillage to cyber activities in Part III.

d. Armed Conflict

Finally, for the charge of pillage under the LOAC, the taking must occur in the course of an armed conflict and the perpetrator must have knowledge of the armed conflict. As was previously discussed, common usage of the term "pillage" is not always confined to situations of armed conflict. However, as a historical matter, the crime of pillage could only occur during armed conflict, and international law continues to recognize the perpetrator's knowledge of the existence of armed conflict as an element of the crime.

C. *Conclusion to Part II*

Despite the current propensity for evolving the definition and applying pillage more broadly, as discussed in Part II(A), states continue to use a narrower definition in line with the elements outlined in Part II(B). Perhaps the most important aspect of this narrower definition is the limitation to armed conflict. States still require an armed conflict as a threshold determination before assessing either individual criminal responsibility or state responsibility. In light of this, Part III's application of pillage to cyber activities will draw from these elements, as states apply them.

83. Prosecutor v. Gombo, ICC-01/05-01/08, Judgment, ¶ 121 (Mar. 21, 2016).

84. *Id.*

III. CYBER PILLAGE

Given the definition of pillage as the non-consensual taking of public or private property by members of armed forces for private or personal use (noting that "armed forces" can include both state and non-state actors or other agents of a Party to a conflict), cyber pillage would be defined as such a taking by cyber means. As will be demonstrated below, many cyber actors are conducting a wide variety of action under various circumstances that might look like pillage. However, though many of these activities are harmful and often illegal under both international and domestic law, only a limited subset will qualify as cyber pillage. The following sections will apply the definitional elements of pillage to cyber actions and draw conclusions based on such analysis, including with respect to the impact of an evolved definition in line with current usage.

A. *Perpetrator*

As discussed above, the use of the term "perpetrator" is a purposeful expansion of who (or what) qualifies as an actor that can pillage. Though most states define pillage in terms of armed forces, it has been clear, at least since the 1907 Hague Convention, that other entities could also be perpetrators of pillage. This would include not only non-state actors, such as terrorist groups and transnational actors, but also individuals, corporations, and ultimately, even states. This entire breadth of actors is currently engaged in cyber activities that might meet the definitional elements of cyber pillage. The following sections will discuss these actors in detail.

1. Armed Forces

As history indicates, members of the armed forces are the traditional perpetrators of pillage. They are also the group universally agreed to be subject to the prohibition and to individual criminal liability for violation of the rule. Certainly, the armed forces of the state are precluded from engaging in cyber operations that amount to pillage. For example, soldiers who are members of the armed forces of an occupying power would absolutely be precluded from using cyber tools to steal intellectual property or trade secrets from civilian companies within the occupied territory and then sell those secrets for personal gain.

Similarly, members of other armed forces, including members of organized armed groups, that are Parties to the conflict would also be subject to the prohibition. This would be the case in both international

armed conflicts and non-international armed conflicts. In other words, all fighters in the armed conflict are prohibited from pillaging.

2. Terrorists and Transnational Criminal Groups

Terrorist organizations or transnational criminal groups that meet the requirements of being organized armed groups in an armed conflict would fall under the category listed above. However, terrorists or transnational criminal groups that do not meet this classification are also precluded from pillage in connection with an armed conflict. More will be said below concerning the importance of the nexus involving an armed conflict, but it is sufficient here to say that simply not being considered an "organized armed group" under the LOAC does not prevent a terrorist or a transnational criminal organization from being considered a perpetrator for the purposes of the elements of the crime of pillage.

The involvement of these groups in the cyber theft of IP and other items has contributed to the pressure on the traditional notion of pillage. However, under the ICC elements of pillage, these groups would certainly qualify as "perpetrators" for purposes of prosecution.

3. Individuals and Corporations

Individuals and corporations can pillage in the same way as armed forces or terrorists, simply by meeting the requirements as stated. For example, if a corporation provides services such as site security for military supplies in the area of armed conflict and decides to use cyber tools to redirect shipments of goods bound for a local business to its own supply points, the corporation would likely be in violation of the prohibition on pillage. Similarly, cyber actions by an individual who diverts resources or convertible goods from its rightful owner to another would mean that the individual meets the threshold qualification of pillage.

4. States

The use of cyber tools as a means of state craft is increasing at an astonishing rate. Numerous cyber events have been attributed to states over the past decade, many of which proved quite devastating, and some even resulting in death and destruction.[85] This has resulted in many states listing

85. Julie H. Davis, *Hacking of Government Computers Exposed 21.5 Million People*, N.Y. TIMES (Jul. 9, 2015), https://www.nytimes.com/2015/07/10/us/office-of-personnel-management-hackers-got-data-of-millions.html (describing the hacking of DoD's Classified network and OPM); Andy Greenberg, *The Untold Story of NotPetya, the Most Devastating Cyber Attack in History*, WEIRD (Aug. 22, 2018), https://www.wired.com/story/notpetya-cyberattack-ukraine-

cyber threats as among their top national security priorities.[86] It is absolutely clear that states are actively conducting cyber operations against both other states and other entities.

As a result of the increasing threat, several countries have created military commands focused on the application of cyber tools,[87] including the U.S.[88] The Commander of USCYBERCOM is tasked to "direct, synchronize, and coordinate cyberspace planning and operations to defend and advance national interests in collaboration with domestic and international partners."[89] Note that the mission includes both a defensive aspect and potentially an offensive aspect.

The U.S. Congress provided its sense of what it might mean to "advance national interests" in the 2019 National Defense Authorization Act when it stated:

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russia-code-crashed-the-world/ (expounding Russia's Notpetya attack that was intended for Ukraine, but spread around the world cause more than $10 billion worth of damages); John Leyden, *Hack on Saudi Aramco Hit 30,000 Workstations, Oil Firm Admits First Hacktivist-Style Assault to Use Malware?*, REGISTER (Aug. 29, 2012), https://www.theregister.co.uk/2012/08/29/saudi_aramco_malware_attack_analysis/ (describing Iran's malware attack that turned 30,000 of Saudi Aramco's computers useless); Ellen Nakashima & Joby Warrick, *Stuxnet was Work of U.S. and Israeli Experts, Officials Say*, WASH. POST (Jun. 2, 2012), https://www.washingtonpost.com/world/national-security/stuxnet-was-work-of-us-and-israeli-experts-officials-say/2012/06/01/gJQAlnEy6U_story.html (explaining U.S.'s use of Stuxnet to destroy nuclear centrifuges in Iran); David. E. Sanger & Nicole Perlroth, *U.S. Escalates Online Attacks on Russia's Power Grid*, N.Y. TIMES (Jun. 15, 2019), *https://www.nytimes.com/2019/06/15/us/politics/trump-cyber-russia-grid.html* (discussing U.S.'s hacking into Russia's power grid for their sabotaging of U.S. power plants, water supplies and other public necessities); Scott Shane & Mark Mazzetti, *The Plot to Subvert an Election: Unraveling the Russia Story so Far*, N.Y. TIMES (Sep. 20, 2018), https://www.nytimes.com/interactive/2018/09/20/us/politics/russia-interference-election-trump-clinton.html (reviewing Russia's known meddling in U.S. elections).

86. Peter Dutton, *Cybersecurity is a National Priority for Australia*, STRATEGIST (Nov. 18, 2019), https://www.aspistrategist.org.au/cybersecurity-is-a-national-priority-for-australia/; Zolan Kanno-Youngs, *Homeland Security Chief Cites Top Threat to U.S. (It's Not the Border)*, N.Y. TIMES (Mar. 18, 2019), https://www.nytimes.com/2019/03/18/us/politics/homeland-security-cyberthreats.html (explaining the U.S.' top concern is cyber threats); *National Security Threats*, CTR. FOR THE PROT. OF NAT'L INFRASTRUCTURE, https://www.cpni.gov.uk/national-security-threats (last visited Mar. 17, 2020) (listing Cyber security as one of the UK's top concerns).

87. Elias Chachak, *The Top 10 Countries Best Prepared Against Cyber Attacks*, CYBER RESEARCH DATABANK, https://www.cyberdb.co/top-10-countries-best-prepared-cyber-attacks/ (last visited Mar. 17, 2020) (listing the United States, Israel, Russia, Canada, United Kingdom, Malaysia, China, France, Sweden, and Estonia as the countries most prepared for cyberattacks); Donald J. Mihalek & Richard M. Frankel, *Cyberspace is the New Cold War: Analysis*, ABC NEWS (June 21, 2019), https://abcnews.go.com/US/cyberspace-cold-war-analysis/story?id=63872848.

88. JAMES M. INHOFE, NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2020, S. REP. NO. 116-48, at 155 (116th Sess. 2019).

89. U.S. CYBER COMMAND, https://www.cybercom.mil/About/Mission-and-Vision/ (last visited Mar. 23, 2020).

> It shall be the policy of the United States, with respect to matters pertaining to cyberspace, cybersecurity, and cyber warfare, that the United States should employ all instruments of national power, including the use of offensive cyber capabilities, to deter if possible, and respond to when necessary, all cyber attacks or other malicious cyber activities of foreign powers that target United States interests…[90]

This authority implicates both *jus ad bellum* and *jus in bello*, and makes it clear that Congress intends for cyber tools to be an important part of any future armed conflicts. In the course of employing such tools, the state could become liable for cyber pillage.

In addition to taking actions directly themselves, states have used proxies to conduct their operations. For example, it now seems clear that in 2007, Russia used Nahsi, a Russian youth organization, to conduct the cyber operations against Estonia.[91] These proxies can be guilty of pillage themselves, as discussed above. However, they can also implicate state responsibility. Articles 4, 5, 6, and 8 of the Articles on Responsibility of States for Internationally Wrongful Acts provide methods by which the actions of a non-state can be attributed to the state for the purposes of determining responsibility for wrongdoing.

Article 4[92] allocates state responsibility for *de jure* elements of the government and also *de facto* organs of the government, generally determined by checking for "complete dependence" by the non-state organization. [93] Article 8 also states that in cases of individuals or corporations that do not fit under Article 4, their actions can still be attributable to the state when the group or actor "is acting on the instructions of, or under the direction or control" of the state.[94] This is a very high standard to meet but is certainly possible in the cyber context.

Thus, a state that works through a proxy organization and provides significant assistance – that which amounts to more than simply providing training or supplies – and directs the day-to-day operations, can be liable, at least monetarily to victims of the pillage, since the actions of that organization can be attributed to the state.

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90. National Defense Authorization Act for Fiscal Year 2020, § 394, 10 U.S.C. § 1636(a) (2019).

91. Juhan Tere, *The Financial Times: Kremlin-backed Group Behind Estonia Cyber Blitz*, BALTIC COURSE (Mar. 11, 2009), http://www.baltic-course.com/rus/_analytics/?doc=10962&ins_print.

92. *See* U.N. Secretary-General, *Report of the International Law Commission on the Work of Its Fifty-Third Session*, at 40, U.N. Doc. A/56/10-S/10 (Aug. 2004) [hereinafter ILC Report].

93. Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 43, 205 (Feb. 27) (quoting Nicaragua v. U.S., Merits, Judgement, 1986 I.C.J. 14, at ¶ 110).

94. *Id.*

5. Conclusion to Part III(A)

The use of the term perpetrator by the ICC reflects a change to the law of pillage that states have not yet fully embraced, as states still mostly limit actors who can commit pillage to armed forces or other battlefield fighters. However, not only does the ICC reflect the views of at least Party States to the Treaty which formed the ICC itself, but also seems to take account of the increasing complexity of the modern battlefield. Under the ICC's statue, basically any person or entity could be a pillager and subject to some form of liability for actions that amount to pillage.

Additionally, this expanded definition recognizes the impact of the previous discussion on the more modern interpretation of cyber pillage. Allowing any perpetrator to commit the crime will hopefully increase not only criminally liability when deserved, but also act as a deterrent to those potentially contemplating the crime.

B. *Personal or Private Use*

Given the extremely broad category of "perpetrator" – basically anyone or any entity that can conduct cyber operations – the next element of the definition provides a significant limitation to the commission of pillage. Ultimately, the true gravamen of the offense of pillage is that the goods taken are put to personal or private use. As mentioned earlier, if used to support the army of occupation or if taken without consent but remunerated, the element of personal or private use is not achieved.

In addition to the normal limitation, this element is completely devoid of a cyber-specific additive, such as the taking of cyber tools like code, programs, and cyber infrastructure, including servers or computers, as well as other "cyber" tools for an authorized use, and the subsequent use of these tools in addition to that approved use. The making of unauthorized copies of digital tools and applying them to personal use should also meet the elements of cyber pillage.

For example, assume a soldier requisitions computer hardware to assist in running the occupation.[95] Such a requisition would be completely lawful if done in accordance with Articles 46 and 52 of the Hague Regulations.[96] However, assume that the soldier takes some of the requisitioned computer hardware and uses it to operate his private business. Of course, and as already stated, a soldier who uses cyber tools to steal intellectual property

95. Note that one of the authors was also a member of the Group of Experts that wrote the Tallinn Manual. *See* TALLINN MANUAL 2.0, *supra* note 40 (discussing the difficulty in determining the difference between public and private cyber property).

96. *Id*.

and convert it to the soldier's personal use would be in violation of the prohibition of pillage. This would be true even under the expanded definition of pillage in common usage.

C. *Taking Without Consent*

Pillage, by its definition, requires a taking. With tangible artifacts, such as precious metals, currency, artwork, and other objects that have historically been the subject of pillage, the definition may seem quite simple to discern. However, as discussed in the Tallinn Manual 2.0,[97] with respect to digital information or data, what constitutes a taking is not always an easy question.

Initially, the question of whether a cyber activity is a taking requires a classification of the property. As discussed in the Tallinn Manual:

> A distinction must be made between use of the terms 'confiscation' and 'requisition' in this Rule. The Occupying Power may 'confiscate' State movable property, including cyber property such as computers, computer systems, and other computing and memory devices, for use in military operations. Private property may not be confiscated. 'Requisition' by the Occupying Power is the taking of private goods or services with compensation. Such taking is only permissible for the administration of occupied territory or for the needs of the occupying forces, and then only if the requirements of the civilian population have been taken into account.[98]

This would include the requisition of cyber property.

In addition to the examples provided, digital property would also be subject to taking, such as computer software and other digital data. For example, the digital records of personnel that worked at a local private utility would presumably be subject to requisition in order to facilitate the administration of the utility. On the other hand, if those personnel records were sold by a soldier to a digital vendor, the act would constitute pillage.

When considering the expanding definition of pillage discussed in Part II(A), the massive theft of trade secrets and IP by a non-state actor would also count as a taking, even if only digital copies of data were stolen. However, the next requirement for criminal responsibility under the LOAC would preclude such takings from criminal liability in most circumstances.

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97. *Id*.

98. *Id*. at 200.

D. *Armed Conflict*

Finally, criminal liability under international law for cyber pillage can only take place in the context of an armed conflict. In contrast, much of the cyber interaction between states as catalogued above has been in the context of *jus ad bellum*, and not armed conflict. Similarly, much of the cyber activity described as "cyber pillage" has taken place between private parties during times of peace. At least with respect to cyber pillage that leads to criminal liability under the LOAC, such activity can only take place in the context of an armed conflict.

Though not accounted for as the majority of cyber actions thus far, cyber tools have already played an important role in armed conflicts in Georgia,[99] Ukraine,[100] Israel,[101] and in the fight against ISIS.[102] Given the trend of states to prepare their militaries for cyber activities during armed conflict, it is almost certain that cyber activities will not be a part of every future armed conflict. Therefore, though the requirement of armed conflict works as a significant limitation to the common usage of the term, it certainly does not preclude future criminal prosecutions for cyber pillage.

E. *Conclusion to Part III*

Given the elements of pillage as announced by the International Criminal Court and the general acceptance of this restrictive view by states, it is only a narrow set of cyber actions that will lead to criminal responsibility. Despite the seemingly expanding definition of pillage, particularly as reflected by the newest edition of Black's Law Dictionary and opinions of commentators, states have not endorsed this view.

One of the most important reasons for states maintaining the narrow view of pillage is the potential consequences of taking a different approach,

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99. John Markoff, *Before the Gunfire, Cyberattacks*, N.Y. TIMES (Aug. 12, 2008), https://www.nytimes.com/2008/08/13/technology/13cyber.html.

100. Julian Coman, *On the Frontline of Europe's Forgotten War in Ukraine*, GUARDIAN (Nov. 12, 2017), https://www.theguardian.com/world/2017/nov/12/ukraine-on-the-front-line-of-europes-forgotten-war.

101. Erica D. Borghard & Jacquelyn Schneider, *Israel Responded to a Hamas Cyberattack with an Airstrike. That's Not Such a Big Deal*, WASH. POST (May 9, 2019), https://www.washingtonpost.com/politics/2019/05/09/israel-responded-hamas-cyberattack-with-an-airstrike-thats-big-deal/.

102. Zac Doffman, *New Cyber Warning: ISIS or Al-Qaeda Could Attack Using 'Dirty Bomb'*, FORBES (Sep. 13, 2019); https://www.forbes.com/sites/zakdoffman/2019/09/13/cyber-dirty-bomb-terrorist-threat-is-real-warns-us-cyber-general/#776196b9679f; David E. Sanger, *U.S. Cyberattacks Target ISIS in a New Line of Combat*, N. Y. TIMES (Apr. 24, 2016), https://www.nytimes.com/2016/04/25/us/politics/us-directs-cyberweapons-at-isis-for-first-time.html.

at least under international law. If states were to accept the most recent Black's definition, virtually all of the cyber actions catalogued in this article would amount to pillage and give rise to potential criminal liability under international law. Such a determination would also mean that each act of pillage under the expanded definition would amount to a violation of international law, allowing states to respond to such cyber actions with countermeasures.[103]

Countermeasures are otherwise illegal acts in response to an initial illegal act, but excused under international law when conducted in order to bring the offending state back into compliance with international law.[104] The acts must be tailored to the initial wrong, proportionate, reversible, and not amount to a use of force.[105] Countermeasures, which have been so narrowly tailored to limit such use, carries a real threat of escalation between states if utilized. Elevating the status of otherwise non-qualifying cyber actions under international law to an illegal act is simply a move that states currently seem unwilling to make.

Therefore, the current limitation of pillage to the elements as generally laid out by the ICC serves to contain the legal consequences of cyber activities in accordance with the current desires of states.

IV. CONCLUSION

The historical underpinnings of the crime of pillage continue to influence states when considering modern cyber activities. In continuing to adhere to the definition of pillage as the non-consensual taking of public or private property for private or personal use during armed conflict, states have elected to exclude a vast array of current cyber actions, conducted both by states and by non-state actors, from conduct that is illegal under the LOAC.

Instead, states limit cyber pillage to the taking of property for private or personal use in the context of an armed conflict. While this is a significant limitation, it still provides an important constraint on the activities of cyber actors during armed conflict, particularly in an age where cyber activities are becoming increasingly key to military operations.

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103. ILC Report, *supra* note 92, at art. 22.

104. Denis Alland, *Countermeasures of General Interest*, 13 EUR. J. INT'L L. 1221, 1221 (2002).

105. ILC Report, *supra* note 92, at art. 49-54.

SAYING "I DON'T" TO CHILD MARRIAGE: CREATING A FEDERAL MINIMUM MARITAL AGE REQUIREMENT THROUGH THE TREATY POWER

Caylin Jones

I. INTRODUCTION

"I was sixteen years old and pregnant, so in my mind that should have been evidence of a rape."[1] The father of the child was twenty-eight years old, but instead of being prosecuted for statutory rape, the State of Nevada

1. Charlotte Alter, *Child Marriage Survivor: I Was Introduced to Him in the Morning and Handed Over That Night*, TIME MAGAZINE (June 6, 2017), http://time.com/4807611/us-child-marriage-survivor-story/.

issued the couple a marriage license and sent them on their way.[2] Typically, child marriage is viewed as an issue only prevalent in developing countries. Though the majority of child marriage does occur in such places, child marriage also transpires far too often in some of the world's most developed nations.[3] Between 2000 and 2015, the United States saw more than 207,000 married minors.[4] While the number of people in the U.S. marrying before the age of eighteen fell by sixty-one percent between 2000 and 2010, there are still gaps in the law that currently allow thousands of minors, some as young as the age of twelve, to be forced into marriage each year.[5]

While the general age of marriage in the U.S. is eighteen, most states allow for exceptions to the rule under parental consent, judicial consent, pregnancy, or a combination thereof.[6] In total, twenty-six U.S. states have no minimum age requirement, meaning there are twenty-six states where no age is too young to marry.[7] Concerned citizens have called on their states to establish a minimum marital age, but so far, only New Jersey and Delaware have passed laws banning marriage for individuals under the age of eighteen.[8] In many states, legislators face opposition from conservative and religious groups.[9] Recently, Kentucky legislators introduced a bill that would prohibit anyone aged sixteen or under from marrying and prevent any seventeen-year old from marrying without the approval of a judge.[10] The judge must be convinced that the minor is mature, self-sufficient, and not being coerced into marriage.[11] Despite seemingly strong support for a reasonable law, the vote was delayed due to heavy opposition from the Family Foundation of Kentucky, a conservative lobbyist group.[12]

2. *Id.*

3. *Children in a Digital World*, UNICEF (Dec. 2017), https://www.unicef.org/publications/files/SOWC_2017_ENG_WEB.pdf

4. Anjali Tsui, et al., *Child Marriage by the Numbers*, FRONTLINE (July 6, 2017), http://apps.frontline.org/child-marriage-by-the-numbers/ (Minor being any individual under 18).

5. *Id.*

6. *Id.*

7. *See* Sheri Stritof, *State-by-State Legal Age Marriage Laws*, SPRUCE (Oct. 31, 2018), https://www.thespruce.com/legal-age-marriage-laws-by-state-2300971.

8. Andrea Cavallier, *New Jersey Becomes Second State to Fully Ban Child Marriage*, PIX11 (Jun. 22, 2018, 3:51 PM), https://pix11.com/2018/06/22/new-jersey-becomes-second-state-to-fully-ban-child-marriage/.

9. Judith Vonberg, *Kentucky: Child Marriage Ban Delayed After Opposition from Conservative Group*, INDEPENDENT (Mar. 5, 2018, 11:58 PM), https://www.independent.co.uk/news/world/americas/kentucky-child-marriage-ban-delayed-vote-conservative-group-opposition-lawmakers-us-a8240121.html.

10. *Id.*

11. *Id.*

12. *Id.*

Eventually the bill was passed, but not without dissent.[13] While some states are successful in their quest to end child marriage, others are not.[14] Tennessee, for example, tried to pass a law in 2019 that would require both parties to be at least eighteen years old to marry, but the effort was quickly shut down by conservative groups.[15]

Congress, however, has the power to end the problem with a federal minimum marital age requirement. Admittedly, the most common sources of Federal authority do not apply to this subject matter. The Supreme Court has not ruled that the Fourteenth Amendment applies to this area, and it would be far outside the scope of the Commerce Clause.[16] Therefore, the most expedient and constitutional method to establish a minimum marital age falls under the Treaty Power by utilizing Article 23 of the Covenant on Civil and Political Rights ("Covenant") as the basis for legislation. Article 23 of the Covenant states that "[n]o marriage shall be entered into without the free and full consent of the intending spouses."[17] Full consent means a person must have the capacity to consent and be free from compulsion.[18] It is well-founded that people under the age of eighteen lack the legal capacity to consent to a serious contract such as marriage, but many children are still forced into marriage for the purposes of religion or custom. These children have not "full[y] consent[ed]," as required by the provision.[19] Therefore, the U.S. may implement Article 23 and establish a national minimum marital age of eighteen to combat the dangers posed to children from underage marriage and to reconcile their lack of capacity to fully understand the implications of consent and the consequences of marriage. Establishing a minimum age requirement for marriage allows the U.S. to implement the

13. Deborah Yetter, *Bill to Limit "Child Brides" in Kentucky Advances, but 3 Senators Don't Hold Their Peace*, LOUISVILLE COURIER JOURNAL (Mar. 7, 2018, 7:04 PM), https://www.courier-journal.com/story/news/2018/03/07/kentucky-child-marriage-bill-passes-senate/404486002/; KY SB48, 2018 S., Reg. Sess. (Ky. 2018), BILL TRACK 50, https://www.billtrack50.com/BillDetail/909562.

14. Zack Ford, *Tennessee Conservatives Kill Child Marriage Bill to Keep Fighting Same-Sex Marriage*, THINK PROGRESS (Mar. 8, 2018), https://thinkprogress.org/tennessee-child-marriage-anti-gay-4c56c32cb3ab/.

15. *Id.*

16. The Commerce Clause allows Congress "to regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3.

17. International Covenant on Civil and Political Rights art. 23, Dec. 16, 1966, 999 U.N.T.S. 171.

18. Casey Swegman, *The Intersectionality of Forced Marriage with Other Forms of Abuse in the United States*, NAT'L ONLINE RESOURCE CTR. ON VIOLENCE AGAINST WOMEN (Feb. 2016), https://www.tahirih.org/wp-content/uploads/2016/02/AR_ForcedMarriage.pdf.

19. *Determining the Legal Age to Consent to Research*, WASH. U. IN ST. LOUIS (Jul. 26, 2012), https://hrpo.wustl.edu/wp-content/uploads/2015/01/5-Determining-Legal-Age-to-Consent.pdf.

current requirements of Article 23 with the constitutional authority conferred on the Federal Government through the Treaty Power. As evidenced in the following sections, child marriage has horrific consequences and can be dealt with constitutionally through the Treaty Power. Contrary to the position held by the opposition, child marriage should not be viewed as a fundamental right or a protected exercise of religious belief, meaning it should not limit the arm of the Treaty Power or any rights held by individuals.

II. CHILD MARRIAGE AND ITS DETRIMENTAL EFFECTS

Although child marriage is an issue that affects both girls and boys, girls are overwhelmingly the target of underage marriage and comprise eighty-seven percent of underage marriage.[20] Further, the majority of underage marriage is between a child and an adult, and not two children marrying one another.[21] As the evidence shows, child marriage is traumatic to a child's physical, mental, and emotional well-being.[22]

By forcing children into adulthood by marriage, child spouses are often deprived of their fundamental rights to health, education, and safety.[23] Child spouses are neither physically nor emotionally ready to give birth and as a consequence, child brides face higher risks of death during childbirth and are particularly vulnerable to pregnancy-related injuries.[24] Child spouses are also more likely to suffer from mental health disorders such as depression, anxiety, and bipolar disorder.[25] A recent study suggests the rates of mental health disorders among child spouses are so high that child marriage should be considered a catalyst for major psychological trauma.[26] In addition, child

20. Tsui, *supra* note 4.

21. *Id.*

22. INT'L PLANNED PARENTHOOD FOUND., ENDING CHILD MARRIAGE A GUIDE FOR GLOBAL POLICY ACTION 14 (2006), https://www.unfpa.org/sites/default/files/pub-pdf/endchildmarriage.pdf.

23. A. V. Chari et al., *The Causal Effect of Maternal Age at Marriage on Child Wellbeing: Evidence from India*, 127 J. OF DEV. ECON. 42, 43 (2016) (finding that delayed marriage results in significantly better child health and educational outcomes).

24. Some pregnancy related injuries include Obstetric fistula, which is a hole between the vagina and rectum or bladder that is caused by prolonged obstructed labor, leaving a woman incontinent of urine or feces or both. Getting pregnant enduring childbirth under the age of 18 makes this condition more likely because the girl's body is not developed enough to handle the birth. NANCY WILLIAMSON, UNITED NATIONS POPULATION FUND, MOTHERHOOD IN CHILDHOOD 19 (Richard Kollodge et al. eds., 2013).

25. YANN LE STRAT ET AL., CHILD MARRIAGE IN THE UNITED STATES AND ITS ASSOCIATION WITH MENTAL HEALTH IN WOMEN, 128 OFFICIAL J. OF THE AMERICAN ACAD. OF PEDIATRICS 524, 525 (2011).

26. *Id.* at 530.

spouses often face limited access to education and economic opportunities, leaving them significantly more likely to live in poverty.[27]

Families subject their children to underage marriage for a variety of reasons, with the most common being cultural customs or to save family honor when a girl is impregnated out of wedlock or is found having premarital sex.[28] Conservative advocates encourage pregnant teens to marry because it is what they view as best for the baby.[29] Although statistics show that children are better off when raised in a home with married parents, marriages between individuals under the age of eighteen are more likely to end in divorce, which negates the alleged benefit.[30] Further, evidence repeatedly shows that divorce negatively affects both the parents and the children in the home.[31] Teenage marriage and divorce are closely related. The stresses associated with marrying young, especially when dealing with the additional factor of pregnancy, often causes marriages to fail.[32] Thus, it is false hope to believe that child marriage as a result of premarital sex or a teen pregnancy will help create a better environment for the teen and child. In reality, the marriage is unlikely to succeed and the potential divorce will cause more turmoil in the family and prolong psychological trauma to both spouses and their child.

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27. INT'L PLANNED PARENTHOOD FOUND., *supra* note 22, at 14.

28. V.v.B., *Why America Still Permits Child Marriage*, ECONOMIST (Jan. 3, 2018), https://www.economist.com/the-economist-explains/2018/01/03/why-america-still-permits-child-marriage; Swegman, *supra* note 18.

29. Nicholas Syrett, *Child Marriage is Still Legal in the US*, CONVERSATION (Dec. 11, 2017), https://theconversation.com/child-marriage-is-still-legal-in-the-us-88846; Mary Parke, ARE MARRIED PARENTS REALLY BETTER FOR CHILDREN? WHAT RESEARCH SAYS ABOUT THE EFFECTS OF FAMILY STRUCTURE ON CHILD WELL-BEING 8, (Ctr. for Law and Soc. Policy, 2003), https://www.clasp.org/sites/default/files/public/resources-and-publications/states/0086.pdf ("Compared to children who are raised by their married parents, children in other family types are more likely to achieve lower levels of education, to become teen parents, and to experience health, behavior, and mental health problems. And children in single- and cohabiting-parent families are more likely to be poor. This being said, most children not living with married, biological parents grow up without serious problems.").

30. Vivian E. Hamilton, *The Age of Marital Capacity: Reconsidering Civil Recognition of Adolescent Marriage,* 92 BOSTON UNIV. L. REV. 1817, 1818 (2012) (discussing the social, mental, and health costs of early marriage).

31. Paul R. Amato & Christopher J. Anthony, *Estimating the Effects of Parental Divorce and Death with Fixed Effects Models*, 76 J. MARRIAGE & FAM. 370, 382 (2014).

32. See Kay Hymowitz et al., Knot Yet: The Benefits and Costs of Delayed Marriage in America, THE NATIONAL MARRIAGE PROJECT (2013), http://nationalmarriageproject.org/wordpress/wp-content/uploads/2013/04/KnotYet-FinalForWeb-041413.pdf.

Sometimes children are abused under the guise of marriage.[33] For example, in 2006, the Colorado Court of Appeals validated a marriage between a thirty-four-year-old man, Willis, and a fourteen-year-old girl, Jamie, under the common law.[34] Jamie was three years old when she first met Willis, who was then thirty-three years old.[35] Willis was a convicted drug dealer who was twice divorced and Jamie grew up in a broken home with a drug-addicted mother who neglected her, leaving her a vulnerable target in search for love.[36] In 2002, Jamie and Willis began living together when she was fourteen years old and he was thirty-four years old.[37] Soon after they cohabitated, Jamie became pregnant, and in 2003, the couple applied for a marriage license.[38] The legal age to marry in Colorado was eighteen, but at sixteen, a child could get married with parental consent, or judicial consent if parental consent was unavailable.[39] Although Jamie was not sixteen years old, and therefore not legally allowed to marry, her application slipped through the cracks, and the marriage was ultimately approved.[40] In 2004, the Department of Human Services ("DHS") realized there had been a mistake when they discovered that a fifteen-year-old girl was pregnant and married to a man almost twenty years older.[41] DHS sought to declare the marriage invalid, take custody of Jamie, and charge Willis with child molestation.[42] Willis' defense to the charge was that he could not have molested Jamie because she was legally his wife under the common law,[43] a legal concept recognized by eight states, including Colorado, and the District of Columbia.[44] Under the common law, marriage between two people creates a valid marital relationship, even without a legal marriage ceremony performed in accordance with statutory

33. Ettie Bailey-King, *Stop Stealing Her Childhood: Girls Not Brides Members Demand Action from World Leaders to End Child Marriage*, GIRLS NOT BRIDES (Oct. 15, 2019), https://www.girlsnotbrides.org/stop-stealing-her-childhood-girls-not-brides-members-demand-action-from-world-leaders-to-end-child-marriage/; Chari, *supra* note 23, at 43.

34. *In re* Marriage of J.M.H., 143 P.3d 1116, 1119 (Colo. App. 2006).

35. *See generally* Kirk Mitchell, *She was 14. He was 34.*, DENVER POST (Sep. 9, 2007, 6:43 PM), https://www.denverpost.com/2007/09/09/she-was-14-he-was-34/.

36. *See generally* Karen Schwartz, *In Colorado, Children of Any Age Can Get Married. A Former Child Bride Thinks that Should Change*, COLORADO SUN (Nov. 19, 2018, 6:00 AM), https://coloradosun.com/2018/11/19/jamie-rouse-child-marriage/.

37. *Id.*

38. *Id.*

39. *J.M.H.*, 143 P.3d at 1117.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

requirements.[45] These requirements usually consist of the couple living together for a period of time and holding themselves out as married to friends, family, and the community.[46] Though both parties must also have the capacity to marry, which would normally be possible at eighteen years old, the age of consent under the common law is fourteen for males and just twelve for females.[47]

Since Jamie was over twelve years old and the couple had lived together and held themselves out as married, the couple met the requirements of common law marriage and the court was required to hold the marriage as valid.[48] Following this case, the Colorado legislature held an emergency meeting and changed the common law age of marriage to eighteen. Regrettably, the results of this case did little to stop the continued exploitation of children cloaked in the guise of marriage, as the problem still persists across America today.[49]

III. MINORS LACK THE ABILITY TO GIVE "FREE AND FULL CONSENT" TO MARRIAGE

Any marriage that lacks consent violates Article 23, and thus, Congress has the ability to use Article 23 to prevent marriages that do not satisfy the requirements of the treaty.[50] There are three primary reasons children cannot consent to marriage: (1) they are a target for coercion leaving them vulnerable to being manipulated into the act, (2) they do not have the capacity to consent, at least based on legal principles; and (3) they are psychologically incapable of understanding the true ramifications of marriage. Black's Law Dictionary describes knowing consent as "a person's agreement to allow something to happen, made with full knowledge of the risks involved and the alternatives."[51] The three reasons argued as to why children cannot consent also demonstrate why parental consent and judicial bypasses are ineffective.

45. *What is Common Law Marriage?,* FINDLAW, https://family.findlaw.com/marriage/common-law-marriage.html (last visited Jan. 8, 2020).

46. *Id.*

47. *J.M.H.*, 143 P.3d at 1119.

48. *Id.* at 1120.

49. Mitchell, *supra* note 35.

50. International Covenant on Civil and Political Rights, *supra* note 17, at 179.

51. *Informed Consent,* BLACK'S LAW DICTIONARY (11th ed. 2019).

A. *Children are a Target for Coercion, Leaving Them Vulnerable to Being Manipulated or Forced into Marriage*

Commentators would agree that problems arise when a minor is forced into marriage given the inability of children to truly give consent. The U.S. Department of State "considers the forced marriage of a minor child to be a form of child abuse, since the child will presumably be subjected to non-consensual sex."[52] Although not every forced marriage involves a child, there is much overlap between forced marriage and child marriage due to the vulnerability of children.[53]

Forced marriages happen for a variety of reasons, but they most often occur as a byproduct of cultural customs, or in situations where a family forces a child to marry when the child becomes pregnant out of wedlock, or when children are found to be having sex out of wedlock.[54] In some occasions, marriage is forced through either physical abuse or death threats, and often times, through coercion and economic threats.[55] Some of these threats include withholding food from the child, isolating the minor by taking them out of school, cutting off social ties, and threatening to kick the child out of the home, leaving the child with nowhere to go.[56]

It is often believed that only children in their early teens are subject to forced marriage. This erroneous belief catapults the false idea that a problem does not exist as long as states do not allow children younger than sixteen or seventeen years old to be married since older children are the less likely to be coerced. However, youth that are older than sixteen years old suffer a higher risk of forced marriage.[57] Moreover, older children are more likely to fall through the cracks of child protection, and if the children do not seek further help, law enforcement is more likely to dismiss any claims of abuse as dramatic behavior.[58] To make matters worse, a child that reports a forced marriage is frequently left without assistance since child protection authorities are often constrained by a limited mandate which allows them to investigate abuse and neglect by parents, but not by spouses.[59]

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52. 7 U.S. DEP'T OF STATE, Foreign Affairs Manual § 1741 (2005), https://fam.state.gov/FAM/07FAM/07FAM1740.html.

53. Swegman, *supra* note 18, at 3.

54. Loretta M. Kopelman, *The Forced Marriage of Minors: A Neglected Form of Child Abuse*, 44 J. L. MED. & ETHICS 173, 174 (2016).

55. *Id.* at 175.

56. *Id.*

57. *Id.*

58. *Id.* at 175-76.

59. *Id.*

Moreover, children forced into marriage often cannot hire an attorney due to their age and financial limitations. They also cannot resort to confiding in shelters or with the police without having their parents notified since authorities are legally obligated to bring them home. This leaves minors extremely vulnerable to forced marriage with no viable option of escape. This is why parental consent, especially on its own, will never be a sufficient indicator of a child's true consent to marriage since parents can easily physically and emotionally abuse a child into the marriage. Requiring merely a parental signature as a safeguard to ensure children are consenting to marriage only continues the cycle of forced marriage.[60] Indeed, not all parents who consent to their child marrying are forcing them to do so, but states that only require a parent signature to allow a child to get married create an environment where exploitative parents or would be spouses can manipulate the situation. Requiring parental consent does not translate to the child's consent but rather invites the abuse of children.

B. *Legal Principles Indicate That Children Do Not Have the Ability to Consent*

In an effort to address the issue of parental coercion and ensure the child gives adequate consent, many states require judicial consent in addition to parental consent. However, those restrictions, too, fail to ensure true consent. Even if the minor agrees to the marriage free from any direct force, they are incapable of consenting to such a serious legal contract. The U.S. places legal limitations on a minor's right to contract.[61] Generally, a minor cannot enter into a contract under the age of eighteen.[62] The policy reasons for these restrictions is to protect minors from entering into contracts that involve responsibilities and obligations which they may not understand.

Every state recognizes an age of consent for an individual to engage in sexual relations, with the youngest age at sixteen and the oldest age at eighteen.[63] States effectuate this requirement into law because they recognize that regardless of what children may want, children are unable to make thoughtful and fully consensual decisions to engage in sexual relations at a younger age. As a society, the U.S. takes this idea so seriously

60. *See* Kopleman, *supra* note 54.

61. Richard Stim, *Who Lacks the Capacity to Contract?*, NOLO, https://www.nolo.com/legal-encyclopedia/lack-capacity-to-contract-32647.html (last visited Jan. 22, 2020).

62. *Id.*

63. *United States Age of Consent Map*, AGEOFCONSENT, https://www.ageofconsent.net/states (last visited Jan. 22, 2018).

that people may be charged with statutory rape for having sex with a minor who is not of the age to consent to the act.[64] Though sex is not a traditional contract, it is an agreement that can have serious consequences. There is no logical reason we should believe that if a minor cannot consent to sex, then he or she can consent to marriage, especially when marriage entails so much more than sex.

The U.S. also limits the activities that children are permitted to partake in, primarily under the notion that children are not mature. For example, laws do not allow minors to smoke tobacco until the age of eighteen, drink alcohol until the age of twenty-one, and drive until the age of sixteen.[65] All of these restrictions are based on the idea that below a set age, an individual does not have the emotional and physical maturity to handle the activity. In Florida and California, minors cannot purchase cough syrup given the likelihood of drug abuse, yet these states entrust sixteen-year-old children to handle marriage.[66] Legislators set many restrictions on minors for everyday activities with the recognition that minors are unable to responsibly undertake certain activities not restricted to adults. Yet, states allow minors to marry, expecting them to understand the responsibilities and consequences of marriage. Marriage is perhaps the most important legal contract of an individual's life and thus, requires a level of consent that is greater than what a child can manage.

Statutory rape, a criminal charge that is recognized in all fifty states, is another example of how the law recognizes that minors cannot consent.[67] The legal age of consent varies between states, from sixteen to eighteen years old.[68] Shockingly, in all of the forty-eight states that allow child marriage, marriage is a defense to statutory rape.[69] In other words, it is illegal for an adult to have sex with an individual under the age of consent because a minor is legally unable to consent. However, if the adult marries

64. Eugene Volokh, *Statutory Rape Laws and Ages of Consent in the U.S.*, WASH. POST (May 1, 2015, 8:17 AM), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/05/01/statutory-rape-laws-in-the-u-s/?utm_term=.5430d3a12b3e.

65. FDA, *Selling Tobacco Products in Retail Stores* (2019), https://www.fda.gov/tobacco-products/retail-sales-tobacco-products/selling-tobacco-products-retail-stores (last visited Jan 14, 2020); FED. TRADE COMM'N, CONSUMER INFORMATION, *21 is the Legal Drinking Age* (2013), https://www.consumer.ftc.gov/articles/0386-21-legal-drinking-age (last visited Jan 14, 2020).

66. Erin Schumaker, *New Law Bans Sale of Specific Cough Medicine to Minors*, HUFFINGTON POST (Jan. 4, 2017, 8:09 AM), https://www.huffpost.com/entry/new-law-bans-sale-of-specific-cough-medicine-to-minors_n_586be307e4b0de3a08f9a5a4.

67. SANDRA NORMAN-EADY, ET AL., *STATUTORY RAPE LAWS BY STATE*, CONN. GEN. ASSEMBLY OFFICE OF LEGISLATIVE RESEARCH (Apr. 14, 2003), https://www.cga.ct.gov/2003/olrdata/jud/rpt/2003-R-0376.htm.

68. *Id.*

69. 18 U.S.C. § 2243 (2007).

the minor, the sexual act is no longer recognized as statutory rape and is ultimately allowed under the law. Marriage is, without a doubt, a far more serious act than just sex. There is no logical reason that legislatures would recognize a minor is incapable of consenting to sex but also agree that the minor is capable of consenting to marriage. Further, this loophole invites a legal form of sexual abuse, as described in the Colorado case previously mentioned.[70]

C. *Children are Psychologically Incapable of Understanding the True Ramifications of Marriage*

Minors are incapable of giving proper consent since minors lack the developed brain functions that they would have upon reaching adulthood. Neurophysiological imaging studies repeatedly show that the brain's overlapping control systems for reasoning, problem solving, reward and punishment conceptualization, self-regulation of behavior, and decision-making, all influence how a person formulates consent.[71] These areas of the brain continue to develop into the early and mid-twenties.[72] This science suggests that children are unable to control impulses, regulate emotional responses, and make reasoned and appropriate choices the same way adults do.[73] The areas of the brain that help humans form responsible and reasonable choices are some of the last to develop.[74] These neurological differences are why increased risk-taking behaviors, such as experimentation with risky sexual practices, drugs, alcohol, and gambling, are more common among minors.[75]

When individuals consent to a contract, society requires them to have the cognitive ability to understand what they are consenting to. Medical research often shows that because of the time it takes for the human brain to develop, minors do not have this ability.[76] It was once thought that the human brain finished developing by puberty, but the past decade of scientific research shows that the brain is not fully developed until the mid-

70. *J.M.H.*, 143 P.3d at 1119.

71. Laurence Steinberg, *Does Recent Research on Adolescent Brain Development Inform the Mature Minor Doctrine*, 38 J. MED. & PHIL. 256, 263 (2013).

72. *Id.* at 259.

73. *Id.* at 260-61.

74. *Id.* at 264.

75. *Id.*

76. *Id.* at 263.

twenties.[77] As scientific evidence expands our understanding of how the brain develops and the role that it has in decision-making behavior, the law must change to reflect what we have come to understand. Centuries ago, society considered thirteen to be the age of adulthood and therefore accepted that people of such age could willingly enter into marriage.[78] With a better understanding of child development, society ought to no longer accept that minors can consent to the life changing choice of marriage.

Though even eighteen-year-old people do not have completely developed brains, they are universally allowed to marry. While statistics reflect that marriages are healthier and less likely to end in divorce when the parties wait to marry until their late-twenties and older,[79] society must draw a line. In the early stages of human life, the brain is a rapidly developing organ. Though reasoned choices are best made when the brain is fully developed, and even though eighteen-year-old brains are not fully developed, the brain of an eighteen-year-old is significantly better able to understand the consequences of marriage when compared to that of a sixteen-year-old.[80] The growth the human brain experiences in that two-year difference is substantial, making the legal age of marriage at eighteen more than just an arbitrary number.[81] The U.S. also recognizes eighteen as the age when an individual can vote, enter into a binding contract, and buy or lease property.[82] The U.S does not usually allow sixteen-year-old minors to undertake such tasks because they are not likely to understand the depth of their decision, including the responsibilities associated. Socially and legally, eighteen is the age where individuals are more likely to understand the depths of their decisions.[83]

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77. Sara B. Johnson, et al., *Adolescent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy*, 45 J. ADOLESCENT HEALTH 216, 216 (2009).

78. *See* Anjali Tsui, *Married Young: The Fight Over Child Marriage in America*, FRONTLINE, (Sept. 14, 2017) https://www.pbs.org/wgbh/frontline/article/married-young-the-fight-over-child-marriage-in-america/.

79. *See* Theresa E. DiDonato, *These Are the Best (and Worst) Ages to Get Married,* PSYCHOLOGY TODAY, (June 1, 2016), https://www.psychologytoday.com/us/blog/meet-catch-and-keep/201606/these-are-the-best-and-worst-ages-get-married.

80. *See generally* Laurence Steinberg, *Should the Science of Adolescent Brain Development Inform Public Policy?* ISSUES IN SCI. AND TECH., 28, n. 3 (2012).

81. *See id.*

82. CAL. BAR ASS'N, WHEN YOU TURN 18: A SURVIVAL GUIDE FOR TEENAGERS 2 (2014).

83. *See* Richard Monastersky, *Who's Minding the Teenage Brain?*, CHRON. HIGHER EDUC., Jan. 12, 2007, 53 Issue 19, at A14; *see generally* Amanda Schaffer, *Head Case: Roper v. Simmons Asks How Adolescent and Adult Brains Differ*, SLATE (Oct. 15, 2004, 5:50 PM), https://slate.com/technology/2004/10/how-do-adolescent-and-adult-brains-differ.html.

In *Roper v. Simons*, the Supreme Court held that a boy who committed robbery and murder at the age of seventeen could not be sentenced to the death because, at the age of seventeen, children experience diminished culpability, where they display a "lack of maturity and an underdeveloped sense of responsibility," which are characteristics more often found in youth than in adults.[84] These qualities often result in children making impetuous and ill-considered decisions."[85] Therefore, the Court reasoned that sentencing an adolescent to death constitutes cruel and unusual punishment.[86] This case demonstrates that the law recognizes the scientific evidence that shows the inability of children to fully understand the choices they make. These recent discoveries in child brain development underline the importance of applying scientific knowledge to child marriage to enforce a minimum age requirement.

The significance of cognitive ability in the issue of consent is also reflected in cases involving those with special needs and mental illness.[87] In the context of contract law, if an individual suffers from mental illness or is mentally disabled and thus, is unable to understand the gravity of a contract that he or she is signing, then the contract may be deemed void or voidable.[88] The policy underlying this situation is directly tied to why this nation should not allow minors to enter into the serious contract of marriage. Minors, similar to those with mental illness or disabilities, are medically incapable of making informed decisions to enter into such a major contract. Critics may argue that the law allows those with mental illness or disabilities to enter into contracts with a guardian and thus, society should allow the same for minors in the context of marriage.[89] However, as previously stated, allowing parental consent to be the safeguard of marriage, especially when it is the only safeguard, is risky, and

84. Roper v. Simmons, 543 U.S. 551, 569 (2005).

85. *Roper*, 543 U.S. at 569.

86. *Roper*, 543 U.S. at 578-79.

87. *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 12, 15 (AM. LAW INST. 1981).

88. *Id.*; *See generally* Laurence Steinberg, *Adulthood: What the Brain Says About Maturity*, N.Y. TIMES, (May 29, 2012, 3:09 PM), https://www.nytimes.com/roomfordebate/2012/05/28/do-we-need-to-redefine-adulthood/adulthood-what-the-brain-says-about-maturity; Valerie Reyna, The Adolescent Brain: Learning, Reasoning, and Decision Making, Lecture at Cornell University, (Mar. 1, 2012), https://media.library.cornell.edu/media/The+Adolescent+BrainA+Learning%2C+Reasoning%2C+and+Decision+Making/1_p4kl4ol9 (at 35:00-45:00); Coalition for Juvenile Justice, *What are the implications of Adolescent Brain Development for Juvenile Justice?* (2006), https://www.juvjustice.org/sites/default/files/resource-files/resource_134.pdf.

89. *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 12, 15 (AM. LAW INST. 1981); *see generally* Laurence Steinberg, *Adulthood: What the Brain Says About Maturity*, N.Y. TIMES, (May 29, 2012, 3:09 PM), https://www.nytimes.com/roomfordebate/2012/05/28/do-we-need-to-redefine-adulthood/adulthood-what-the-brain-says-about-maturity.

opens the door for forced marriage and abuse. It is inexcusable morally, legally, and scientifically, to conclude that minors have the ability to consent to marriage.

IV. TREATY POWER AND THE COVENANT

Treaties are the mechanism by which domestic law interacts with international law. The Supremacy Clause states that "all treaties made… under the authority of the United States, shall be the supreme law the supreme law of the land."[90] This means that treaties preempt inconsistent state law.[91] Domestically, treaties work in two ways. Some treaties are self-executing, meaning they automatically have the effect of domestic law, and others are non-self-executing, which "constitute international law commitments," but "do not by themselves function as binding federal law."[92] Non-self-executing treaties are enforceable only after additional legislation or judicial action.[93]

The Treaty Power sparks fierce debate amongst scholars, as some believe that the Treaty Power should be limited by the scope of the enumerated federal powers and the Tenth Amendment.[94] However, the Supreme Court adopts a different interpretation of the Treaty Power. Treaties are not limited by subject matter or by the Tenth Amendment's reservation of power to the states.[95] As Professor Lori Damrosch of Columbia Law School stated, "Constitutional law is clear that treaty-makers may make supreme law binding on the states to any subject, and notions of states' rights should not be asserted as impediments to the full implementation of treaty obligations."[96] Although some scholars believe that the Treaty Power is limited in scope, the Restatement Third of Foreign Relations Law of the United States declares that there is "no definitive authority for such a rule."[97]

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90. U.S. CONST. art. 6, cl. 2.

91. Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 392 (1998).

92. Ted Cruz, *Limits on the Treaty Power*, 127 HARV. L. REV. F. 93 (2014).

93. *See id.*

94. *Id.* at 103-04.

95. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S., § 302 (AM. LAW INST. 1987).

96. Bradley, *supra*, note 91 at 393 (quoting Lori Fisler Damrosch, *Role of the United States Senate Concerning Self-Executing and Non-Self-Executing Treaties*, 67 CHI.-KENT L. REV. 515, 530 (1991)).

97. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S., § 111 cmt. I.

The primary case which interprets the Treaty Power is *Missouri v. Holland*.[98] In *Missouri v. Holland*, Congress enacted a statute to regulate the hunting of migratory birds to implement a treaty that the President entered into with Great Britain.[99] The statute was challenged under the premise that it infringed upon the States' Tenth Amendment rights.[100] The Supreme Court acknowledged that the Migratory Bird Treaty Act perhaps could not be created under Congress' commerce powers but nonetheless held the act to be valid.[101] The Court ruled that a law which infringes the rights reserved to the States under the Tenth Amendment may nevertheless be considered valid if it is passed to implement a treaty made under the authority of the Federal Government, and is therefore the supreme law of the land.[102] This means if a treaty is valid in its creation, any statute made to implement it is also necessarily valid under Article 1, Section 8 of the U.S. Constitution.[103] Article 1, Section 8 of the U.S. Constitution permits all legislative acts that are necessary and proper to execute the powers granted to the Federal Government, including the Treaty Power.[104]

The U.S. adopted and ratified the Covenant in 1992, and by doing so, the U.S. agreed to comply with and implement the provisions of the Treaty just as it would any other international obligation, subject to Reservations, Understandings, and Declarations ("Reservations").[105] One of the Reservations attached by the U.S. Senate to the Covenant is a "non-self-executing" declaration. Thus, the Covenant does not by itself function as domestic law but can still be used as a mechanism to establish domestic federal law, such as a minimum age for marriage.[106]

Using the Treaty Power and the Covenant to establish a minimum marital age may seem straight-forward by acknowledging the connection between the lack of a minor's inability to consent to marriage and the Covenant's clear requirement for marriage to be consensual, but the Treaty Power is still constantly debated.[107] Critics of *Missouri v. Holland* have repeatedly called for the Supreme Court to overturn the decision, in part because, almost 100 years after the decision, the Supreme Court has ruled

98. Missouri v. Holland, 252 U.S. 416 (1920).

99. Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 Harv. L. Rev. 1867, 1871-73, nn.19-25 (2005).

100. *Holland*, 252 U.S. at 431.

101. *Id.* at 434.

102. *Id.*

103. *Id.* at 435.

104. U.S. CONST. art. I, § 8, cl. 18.

105. *See generally* International Covenant on Civil and Political Rights, *supra* note 17.

106. International Covenant on Civil and Political Rights, *supra* note 17, at 173-74.

107. Bradley, *supra* note 91, at 392.

only on a handful of cases involving the Treaty Power.[108] In a recent article, Professors Sloane and Glennon asserted that *Bond v. U.S,* a recent Supreme Court case on the Treaty Power, limits *Missouri v. Holland,* but these claims are unfounded.[109]

In *Bond v. U.S,* Defendant Bond learned that another woman was pregnant with her husband's child.[110] In an effort to retaliate, Bond acquired toxic chemicals and spread those chemicals around the woman's home.[111] Bond was charged with possession and use of a chemical weapon in violation of the Chemical Weapons Implementation Act ("CWA").[112] The CWA prohibits the possession or use of any chemical that can cause death and temporary or permanent harm to another if not intended for a peaceful purpose.[113] The CWA was enacted to implement the Chemical Weapons Convention, a treaty created to prohibit the development and use of chemical weapons.[114] Similar to the Covenant, the Chemical Weapons Convention is also a non-self-executing treaty.[115] Thus, Congress passed the CWA in order to implement the Chemical Weapons Convention.[116] The Supreme Court overturned Bond's charge under the CWA, reasoning that clear proof of congressional intent that the CWA applies to the States is necessary before a statute can be interpreted in such a way.[117] The policy behind the Chemical Weapons Convention Treaty is to combat war and terrorism, not minor assaults among individual citizens within states.[118] Thus, without clear congressional intent that the CWA applies to the States, coupled with the policy reasons that the CWA was founded upon, the Court held that the CWA did not apply to Bond.[119]

The Supreme Court did not specifically rule on the CWA's constitutionality as it pertained to Bond, but instead narrowly ruled that the CWA did not apply to the case.[120] However, it is worth noting that the concurring Justices in the *Bond* opinion asked that *Missouri v. Holland* be

108. Bradley, *supra* note 91, at 442.

109. Robert Sloane & Michael Glennon, *The Sad, Quiet Death of Missouri v. Holland: How Bond Hobbled the Treaty Power*, 41 YALE J. INT'L L. 51, 52 (2016).

110. Bond v. U.S, 572 U.S. 844 (2014).

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.* at 848.

115. *Id.* at 850.

116. *Bond*, 572 U.S. at 851.

117. *Id.* at 866.

118. *Id.* at 863.

119. *Id.*

120. *Id.* at 855.

expressly overruled and the majority chose not to.[121] Whether the majority in *Bond* implicitly affirmed *Missouri v. Holland* is open to interpretation. Nevertheless, *Missouri v. Holland* remains a valid precedent.

Another criticism of the Treaty Power under *Missouri v. Holland* is that it grants the executive branch too much power to create law. This interpretation is mistaken for three reasons. First, a non-self-executing treaty requires a law to be created and passed in order to take effect domestically.[122] In order for the bicameral legislative branch to pass a law, a majority of the House of Representatives and the Senate must pass the bill in question.[123] Thus, when dealing with a non-self-executing treaty such as the Covenant, two branches of government must be involved, significantly limiting the power that the executive branch has in implementing treaties. Involving the Senate also ensures a level of state involvement.

In *Medellin v. Texas*, the Supreme Court affirmed limits on the use of non-self-executing treaties, emphasizing that non-self-executing treaties require the approval of Congress in order to apply to the States.[124] In *Medellin v. Texas*, Medellin was convicted of rape and murder and claimed that as a foreigner, the Vienna Convention required the State to inform him of his right to have the consular personnel notified.[125] He further asserted that a memorandum by the President citing an international court case regarding a criminal's right to contact their consulate meant that state courts must uphold the international case.[126] The Court rejected the argument and held that state courts are not required by the U.S. Constitution to provide review and reconsideration of a conviction, and are not required to show regard to state procedural default rules as required by a memorandum by the President.[127] The Presidential Memorandum at issue was an attempt by the executive branch to enforce a non-self-executing treaty, but without congressional action, it had no binding authority on state courts. The holding assures that a non-self-executing treaty will not be thrust upon states unless Congress takes action to implement the required legislation.

Aside from the fact that the U.S. Constitution gives the executive branch the authority to enter into treaties and the legislative branch to make all laws that are necessary and proper to execute the power given to the Federal Government, any laws that may be passed are still subject to

121. *Bond*, 572 U.S. at 894.
122. Medellin v. Texas, 552 U.S. 491, 525-26 (2008).
123. *Id.*; *see* U.S. CONST. art. II, § 2, cl. 2.
124. *Medellin*, 552 U.S. at 526.
125. *Id.* at 501.
126. *Id.* at 498.
127. *Id.* at 511.

judicial review. The Supreme Court ruled on the construction of a treaty as a proper subject for judicial review, even when the treaty may relate to foreign affairs.[128] Therefore, the judicial branch acts as another check on the Treaty Power so that it is not abused to take away enumerated rights of the people.

The Treaty Power is an enumerated power given to the Federal Government while the powers left to the States under the Tenth Amendment are "the powers not delegated to the United States by the Constitution."[129] Therefore, it is undisputed that the Tenth Amendment overrides the enumerated treaty power given to the U.S. government. The Tenth Amendment encompasses whatever powers were not granted to the Federal Government; it does not act to restrict the powers given to the Federal Government. In the realm of treaties, the powers of the Federal Government are restricted by the checks and balances of all three branches. Further, if the Federal Government was limited to making all treaties fall within an enumerated power of Congress, then Congress would not have the power to make treaties dealing with cross-border child abductions or extradition because there is no enumerated power to make such treaties.

Another argument against the Treaty Power is that a treaty must involve a subject of international concern. While how a country treats its people is certainly of international concern, the argument could be used to discredit certain human rights treaties because unlike international trade treaties, some human rights treaties generally do not involve subjects crossing border lines. On that note, child marriage is possible if subjects move away from a state banning child marriage to a state that allows it. It is important to consider that if the U.S. eradicates child marriage, then citizens may run to other countries to marry children. This is not to suggest that eradicating child marriage laws in the U.S. or creating a minimum age law for marriage is pointless. Rather, it is to point out that in order to fully eliminate the issue, the world must come together and disallow it. We start to fix the problem by starting at home. Without international agreements in place, many nations will continue to engage in human rights violations. Indeed, it is naïve to say that treaties eradicate human rights abuses, but surely, the implementation of treaties for the issue of child marriage will help monitor nations and enforce mechanisms to stop and prevent such abuses.

128. Cruz, *supra* note 92, at 111-12.

129. U.S. CONST. amend. X.

V. WHY CHILD MARRIAGE IS NOT PROTECTED UNDER THE RIGHT TO MARRY AND WHY CURRENT SAFEGUARDS ARE INEFFECTIVE

Proponents of child marriage may argue that the issue of consent can be solved if states allow a judge to ensure that a minor has sufficient capacity to understand what they are agreeing to. In reality, judicial discretion opens the door for personal bias and can never be implemented in a fail-proof manner. If states require judicial approval for a minor to marry, a variance of the "best interests of the minor" standard will be utilized in the context of child marriage.[130] The standard is a loose one that allows for an enormous amount of judicial discretion. While I would not suggest that all or even most judges would abuse discretion, some undoubtedly will.

Another issue with judicial approval is that even if the judge does his or her best to ensure the minor is not being forced into the marriage, the minor may feel obligated or threatened by their family or spouse to consent. For example, in California, parental and judicial consent is required for a minor to marry.[131] Nevertheless, Sara Tasneem was forced into marriage and impregnated at fifteen.[132] Tasneem is now an advocate against child marriage and tells her story of how she was forced into the marriage by her father and abused sexually and physically by her husband.[133] Her husband was almost twice her age, and she first met him on the day they were married.[134] A California judge approved this marriage.[135]

Other judges may impose their religious or moral values upon a minor when approving a marriage. For example, if the minor is a pregnant female and the judge has a strong belief that parents need to be married since marriage is best for children, then the judge may conclude that the marriage is in the best interests of the minor, even though it may not be. This judicial safeguard offers no safety at all for the child.

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130. Rachel L. Schuman, *State Regulations are Failing Our Children: An Analysis of Child Marriage Laws in the United States*, 60 WM. & MARY L. REV. 2337 (2019); *Marriage Age Laws*, NATIONAL CONFERENCE OF STATE LEGISLATURES, https://comm.ncsl.org/productfiles/94723912/NCSL-Marriage-Age-Requirements.pdf (last visited Dec. 19, 2018).

131. Cal. Fam. Code § 302 (West 2019).

132. Sara Tasneem, *Child Marriage Laws in CA Act as Loopholes That Allow for Statutory Rape*, DAILY CALIFORNIAN (May 30, 2017), http://www.dailycal.org/2017/05/30/child-marriage-laws-ca-act-loopholes-allow-statutory-rape/.

133. *Id.*

134. *Id.*

135. David Whiting, *California Lacks Minimum Marriage Age, Puts Children in Danger*, THE ORANGE COUNTY REGISTER (June 15, 2017), https://www.ocregister.com/2017/06/15/california-lacks-minimum-marriage-age-puts-children-in-danger/.

Another criticism of banning marriage under the age of eighteen is that it infringes upon religious freedom. Marrying young or marrying due to an unplanned pregnancy is often seen as a part of conservative values, but conservative values should not be confused with religious morals. There is no known religion that requires the marriage of children.[136] Some religions may require an individual to be a virgin before marriage, which many equate to marrying young, but there is no requirement under any religion that an individual must be under eighteen years old in order for the union to be valid.[137] There may be customs within religious groups that create an environment where minors are encouraged to marry, but these customs are not truly a part of the religious teachings. No religious group has argued that banning child marriage is a restriction on religious freedom. Further, even if it were a requirement for an individual of a certain religious sect to marry as a child, the requirement should not be used as an excuse to allow minors to be victimized. Religion does not negate the fact a minor cannot consent to marriage. Any law passed preventing minors from getting married in their youth would be a law of general application and held constitutional under *Employment Division v. Smith.*[138] Further, Mormonism originally encouraged polygamy as part of the practice of the religion yet all fifty states have restricted the right to marry as a union between only two people. In 1879, the U.S. Supreme Court upheld the federal law banning bigamy and concluded that restricting marriage to a union between only two people did not infringe upon religious freedom.[139]

The biggest criticism of banning marriage under the age of eighteen is the fact that marriage is a fundamental right.[140] In *Loving v. Virginia*, Chief Justice Warren wrote, "the freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."[141] However, restricting marriage to persons eighteen years old and older is not a removal of a fundamental right, but rather a qualification requirement that allows individuals to engage in that right. Marriage as a fundamental right does not mean that the government cannot

136. *8 Child Marriage Myths That Need to Go*, GIRLS NOT BRIDES (Dec. 18, 2017), https://www.girlsnotbrides.org/8-child-marriage-myths-bust-international-womens-day-2017/.

137. *Id.*

138. Employment Div., Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872, 879 (1990); *see also* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 521 (1993).

139. Reynolds v. U.S, 98 U.S. 145, 165 (1878).

140. *14 Supreme Court Cases: Marriage is a Fundamental Right*, AM. FOUND. FOR EQUAL RTS., http://afer.org/blog/14-supreme-court-cases-marriage-is-a-fundamental-right/ (last visited Dec. 19, 2018).

141. Loving v. Virginia, 388 U.S. 1, 12 (1967).

impose restrictions, but instead means that the restriction of the right is subject to review under a certain level of scrutiny.[142] In this case, marriage is subject to strict scrutiny.[143] For a law to pass strict scrutiny, it must further a "compelling governmental interest" and be narrowly tailored to achieve that interest.[144]

Currently, states restrict marriage in a variety of ways. Most states require couples to submit legal paperwork to enter into a marriage and all states require legal paperwork to end a marriage.[145] All forty-eight states that allow child marriage impose qualifications on the marriage, such as parental and judicial consent.[146] In addition, every state has laws against incest and polygamy.[147] Further, New Jersey and Delaware have already banned marriage under the age of eighteen without exceptions, and thus far, the law has not been challenged as infringing upon the fundamental right to marry.[148] Of course, all of these examples involve the state regulating marriage since marriage is an issue typically left to the states to resolve, but nonetheless, they also demonstrate the many ways that the U.S. already restricts marriage.

In the context of restrictions on child marriage, a similarly positioned restriction is voting. Voting is a well-established fundamental right also subject to strict scrutiny.[149] Voting in the U.S has always been restricted by age. Prior to 1971, an individual had to be twenty-one years old to vote until the Twenty-Sixth Amendment lowered the age requirement to eighteen.[150] The policy behind requiring a person to be the age of eighteen to vote is fueled by the idea that society does not trust an individual

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142. *Fundamental Right*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/fundamental_right (last visited Dec. 19, 2018).

143. *Strict Scrutiny*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/strict_scrutiny (last visited Dec. 19, 2018).

144. *Id.*

145. States that do not allow common law marriage require a license. *See generally Common Law Marriage*, NAT'L CONF. OF ST. LEGISLATURES, https://www.ncsl.org/research/human-services/common-law-marriage.aspx.

146. *Marriage Laws*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/table_marriage.

147. Susan D. Ross, *Should Polygamy Be Permitted in the United States?*, AM. BAR ASS'N (Apr. 1, 2011), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/human_rights_vol38_2011/human_rights_spring2011/should_polygamy_be_permitted_in_the_united_states.

148. Curan Mehra, *NJ and DE: Pioneering States that are the First to Ban Child Marriage*, UNICEF (Jul. 6, 2018), https://www.unicefusa.org/stories/nj-and-de-pioneering-states-are-first-ban-child-marriage/34529.

149. *Marriage laws*, *supra* note 146.

150. Jocelyn Benson & Michael T. Morley, *The Twenty-Sixth Amendment*, THE NAT'L CONST. CTR, https://constitutioncenter.org/interactive-constitution/interpretation/amendment-xxvi/interps/161 (last visited Dec. 19, 2018); U.S. CONST. amend. XXVI.

younger than eighteen years old to have the ability to make such an important decision. We do not believe that a person under the age of eighteen has the cognitive ability to make such life-altering choice. The same policy should apply to marriage. Children continue to develop cognitive abilities well into adulthood, and given that minors are vulnerable to coercion, a child should not be afforded the responsibility and the legal ability to consent to a marriage.

Of course, some individuals under the age of eighteen are mature and developed enough to vote or marry, but that is not how the law works with voting. It is easy to see that if we put into place a test or mechanism to determine if an individual under the age of eighteen is mature enough to vote, the test or mechanism would surely fail. Some children who are not mature enough to vote would likely fall through the cracks and be allowed to do so. Further, creating such a test without inserting bias would be impossible. We avoid these problems by establishing a blanket age at which a person can vote. Requiring an individual to be eighteen years old to marry would produce the same results.

Currently the judicial and parental safeguards for child marriage fail to actually safeguard children. Judicial safeguards are tests that can be easily influenced with bias. Parental consent fails all together since parents do not always have the child's best interests in mind. Although there could be a child who is developed enough to consent and understand what marriage entails, he or she would be in the minority. There is no functional way to ensure that all children are actually consenting to marriage because of the flaws with judicial and parental consent. Thus, creating a blanket age requirement of eighteen to marry is the most narrowly-tailored way to ensure that the person is actually consenting to the marriage. Requiring individuals to be eighteen years old to marry does not take away an individual's right as a whole, but merely restricts it due to the lack of meaningful consent that he or she can give.

There may be a connection between abortion and marriage because they are both fundamental rights, and may require parental or judicial consent if the child is under the age of eighteen.[151] However, the restriction of child marriage and the allowance of a child to abort a birth achieve the same goal, which is the health interests of the minor. People who marry under the age of eighteen are more likely to have a plethora of physical and mental health issues.[152] Further, similar to minors who have children, minors who marry are more likely to live in poverty and receive less

151. *Parental Involvement in Minors' Abortions*, GUTTMACHER INST. (Dec. 1, 2018), https://www.guttmacher.org/state-policy/explore/parental-involvement-minors-abortions.

152. LE STRAT, *supra* note 25.

education.[153] This is not to suggest that a minor who gets pregnant must have an abortion, since the decision to abort a child belongs to that individual alone. The reason we sometimes leave such a decision to the child is rooted in the difference between marriage and sex. Specifically, a person cannot accidentally get married, but even by undertaking precautions, an individual can accidentally get pregnant. Abortion is a corrective measure, whereas marriage is an affirmative act. With abortion, society allows a girl who may not have wanted to get pregnant, or even worse, was the victim of rape, to end the pregnancy. Further, abortion and pregnancy are biological, while marriage is a legal aspect and a social construct. Marriage is completely beholden to humanity's rules, whereas pregnancy is a force of nature. An abortion can provide positive health benefits while an underage marriage only provides health detriments.[154]

Further, the Federal Government can already constitutionally restrict fundamental rights, such as voting, as wells as other rights, such as abortion.[155] Voting is restricted to U.S citizens who are aged eighteen and older and the right can be taken away if an individual commits a felony.[156] In addition, states may implement restrictions on abortions as long as they do not place an undue burden on the woman.[157] These restrictions are allowed because even though the country believes that voting and abortion are rights that should be available to all, the public recognizes that there is good reason to limit these activities in certain circumstances. Restricting marriage until the age of eighteen is a similarly situated restriction that serves in the best interests of protecting children, and if a right as fundamental as voting can be legitimately limited to those over the age of eighteen, then such a restriction can easily be implemented for a less stringent right, such as marriage.

VI. CONCLUSION

Although some state legislatures are making the effort to raise the minimum marital age requirement, it appears to be a slow and difficult process to independently implement laws in all fifty states. Lobbyists fighting against bills and states being resistant to change only adds to this

153. *See* INT'L PLANNED PARENTHOOD FOUND., *supra* note 22, at 14-15.

154. LE STRAT, *supra* note 25, at 525.

155. *See* Planned Parenthood v. Casey, 505 U.S. 833, 833-34 (1992); *Equal Protection and The Right to Vote*, U. OF MO. - KAN. CITY, http://law2.umkc.edu/faculty/projects/ftrials/conlaw/righttovote.html.

156. Richardson v. Ramirez, 418 U.S. 24, 25 (1974).

157. *Casey*, 505 U.S. at 833-34.

struggle.[158] As we wait for states to pass these laws and protect their children, pedophiles are eluding a charge of statutory rape under the guise of marriage. As a country, the U.S. claims to stand for the epitome of human rights and for the protection of people of all ages, genders and races, but it has failed to live up to its responsibilities in this area of law.

The evidence is clear as to why minors are unable the consent to marriage, and the Covenant clearly requires consent to enter into a marriage. Therefore, the legislative branch must use its powers to do what is necessary and proper to uphold the Covenant and create a law that requires an individual to be at least eighteen years of age to marry.

158. *See generally* Judith Vonberg, *Kentucky: Child Marriage Ban Delayed After Opposition from Conservative Group*, INDEPENDENT (Mar. 5, 2018), https://www.independent.co.uk/news/world/americas/kentucky-child-marriage-ban-delayed-vote-conservative-group-opposition-lawmakers-us-a8240121.html.

FIFTY YEARS ON: THE NORMALIZATION OF UNITED STATES MILITARY OPERATIONS IN CAMBODIA (1969-1973) AS A MIRROR OF FIGHTING IN THE LAW'S GAPS

Joshua Kastenberg*

Pulitzer-Prize winning journalist, Barbara Tuchman (1912-1989), authored – among her many historical works – *A Distant Mirror: The Calamitous Fourteenth Century*, in which she detailed the political, military, economic, religious, and social life of a distant time in France and then challenged her readers to see the strands of that time in our present. It is, concededly, difficult to imagine a current democratically elected head of state executing his or her chief law enforcement officer as a means to ensure that planned war with an enemy state will occur without legal interference.[1] It is also, perhaps, difficult to imagine that a current chief of state would order his or her law enforcement officials to evict a political rival from his or her home and then torture the remaining family members

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1. BARBARA TUCHMAN, A DISTANT MIRROR: THE CALAMITOUS FOURTEENTH CENTURY 126-128 (1978) (describing the newly crowned Jean II, King of France having the Constable of France murdered).

after confiscating their wealth for personal gain.[2] In the medieval world, with its attendant chivalry and rules for just war, one might ponder how often the Augustinian, and later, just war theory tenets, were actually adhered to given the violence of that age.[3] This symposium article, however, is not a study in the just war doctrine (*jus ad bellum*), nor is it a study of rules for limiting the effects of war by codifying acceptable conduct for its participants *jus in bello*.[4] Rather, it is an examination of the liabilities of American service-members in the "law's gaps" through an understudied, yet important politically and legally controversial event of the last half century which was cloaked in secrecy.

Between February 9 and August 15 in 1973, the United States Air Force dropped more bomb tonnage in Cambodia than its predecessor, the Army Air Forces, had dropped on Japan in World War II.[5] The 1973 aerial assault on Cambodia's communist forces, the Khmer Rouge, demonstrates just how deep the United States waged "war in law's gaps" almost fifty years ago. That campaign also shapes how the United States, in spite of its legal institutions, can conduct modern warfare without political restraint. In Operation Freedom Deal, between January 27 and August 15 in 1973, the United States Air Force and Naval aviation dropped a higher tonnage of bombs on neutral-Cambodia than it did in all of the missions flown over Germany in World War II.[6] The period between June 27 and August 15, 1973 is important to the conduct of law in war for several reasons, namely, that it constituted significant military operations without congressional sanction with its United States participants still fully amenable to the law of war as well as United States law.

On January 27, 1973, the United States, the Republic of Vietnam ("South Vietnam") and the Democratic Republic of North Vietnam ("North Vietnam"), signed an agreement ending hostilities after roughly two decades of conflict.[7] Article 20 of the peace agreement required all three signatories to respect the neutrality and territorial integrity of Cambodia as

2. *Id.* at 496 (describing the arrest and seizure of Pierre Craon after the attempted murder of France's Constable in 1392).

3. *See, e.g.*, MAURICE KEEN, CHIVALRY 45-46 (1984).

4. *See. e.g.*, MICHAEL WALZER, ARGUING ABOUT WAR 87-99 (2004) (describing the concepts of jus ad bellum and jus in bello).

5. WILLIAM SHAWCROSS, SIDESHOW: KISSINGER, NIXON, AND THE DESTRUCTION OF CAMBODIA 272-277 (2002).

6. Although military operations were conducted in Laos, this article does not analyze that aspect of the war. ARNOLD R. ISAACS, WITHOUT HONOR: DEFEAT IN VIETNAM AND CAMBODIA 217 (1983). More than 250,000 tons of bombs were dropped on Cambodia between February and August 1973. *Id.*

7. Ending the War and Restoring Peace in Vietnam, Jan. 27, 1973, 24 U.S.T. 1675 [hereinafter Paris Peace Accords].

established by the 1954 Geneva Agreement on Cambodia (the Paris Agreement also required the signatories to respect the territorial integrity of Laos).[8] Neutrality law, as based on the 1907 Hague Conventions, protects states not participating in an armed conflict from unduly suffering as a result of the conflict.[9] While it is true that neutrality places a duty on a government not to aid or assist any of the belligerent forces, it is also true that the neutral government – that of Cambodia – did not have the capacity to enforce neutrality.[10] The United States continued to conduct military operations in Cambodia through a series of aerial bombardment missions. This article explores the legal legacy of the Nixon administration's actions in Cambodia between 1969 and 1973, with particular emphasis placed on the last year. In doing so, the article ties together the conduct of the federal judiciary, Congress, as well as the administration, to bring light to a continuing concept of war without declaration: that war-fighters are less protected by law, while the administration sending forces into conflict have heightened legal protection.

The article, by necessity a shorter synopsis as it is a symposium piece, is divided into two sections. The first section details the Nixon administration's reasoning and secrecy for conducting military operations in Cambodia from 1969 to the Paris Agreements. The section also details how, during 1969 to January 27, 1973, the administration had a relatively "free hand" to order military forces into Cambodia while subjecting its service-members to an uneven and arbitrary enforcement of military law in the sense that service-members were subjected to a statutory court-martial scheme with no opportunity to avail themselves of questioning the legality of military operations or the conduct of the administration. The second section details Operation Freedom Deal and the Nixon Administration's treatment of service-members that challenged being ordered to commit to military operations contrary to congressional restraint. The section also dissects *Holtzman v. Schlesinger* as a means for evidencing that judicial remedies are non-existent for opponents of an administration's use of force in contemporary and future conflicts.

8. *Id.* at 58.

9. *See* Dietrich Schindler, *Neutrality and Morality: Developments in Switzerland and in the International Community*, 14 AM. U. INT'L L. REV. 155, 162 (1998).

10. John Hart Ely, *The American War in Indochina, Part II: The Unconstitutionality of the War They Didn't Tell Us About*, 42 STAN. L. REV. 1093, 1144 (1990); *contra* Timothy Guiden, *Defending America's Cambodian Incursion*, 11 ARIZ. J. INT'L & COMP. LAW 215, 220-221 (1994).

I. SECRECY IN AN UNPOPULAR WAR: NEUTRAL CAMBODIA, 1969-1972

On May 9, 1969, staff-journalist, William Beecher, in a New York Times article reported that the United States Air Force had bombed North Vietnamese and Vietcong targets within the neutral country of Cambodia.[11] The bombing missions were part of a secretive military campaign to destroy communist supply routes through Cambodia to South Vietnam, and the Nixon administration denied any orders to conduct military operations outside of Vietnam.[12] Moreover, because the North Vietnamese military had traversed its forces through a neutral country, their government, along with the Chinese and Soviet Union's governments, did not respond to the article or make an international protest against the Air Force strikes.[13] However, the New York Times article led to Nixon demanding Kissinger, among others in the cabinet, to discover who had leaked information to the journalist.[14] After meeting with FBI director, J. Edgar Hoover, Kissinger agreed to clandestinely wiretap several individuals including one of his assistants, Morton Halperin.[15] While the legal travails of Halperin are well-recorded in appellate decisions, the administration's conduct evidenced that there was doubt as to the legal efficacy of the bombing operations.[16]

The bombing campaign in Cambodia was, at a minimum, a signal to the North Vietnamese government that the United States' government's prior respect for Cambodian neutrality was premised on a reciprocal respect from North Vietnam.[17] The decision to use ground forces against Cambodia in 1970 was cloaked in secrecy. Nixon did not seek Congress'

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11. William Beecher, *Raids in Cambodia by U.S. Unprotested,* N.Y. TIMES (May 9, 1969); LUKE A. NICHTER, RICHARD M. NIXON: IN THE ARENA, FROM VALLEY TO MOUNTAINTOP 173 (2014).

12. Seymour M. Hersh, *Senators Are Told U.S. Bombed Cambodia Secretly After Invasion in 1970,* N.Y. TIMES (Aug. 8. 1973), https://www.nytimes.com/1973/08/08/archives/senators-are-told-us-bombed-cambodia-secretly-after-invasion-in.html; WALTER ISAACSON, KISSINGER: A BIOGRAPHY 174-177 (1992); SHAWCROSS, *supra*, note 5, at 93.

13. Hersh, *supra* note 12.

14. *See e.g.*, RAY LOCKER, NIXON'S GAMBLE: HOW A PRESIDENT'S OWN SECRET GOVERNMENT DESTROYED HIS ADMINISTRATION 38 (2016).

15. *Id.* Kissinger's actions led to several decisions including Halperin v. Kissinger, 606 F.2d 1192 (CA DC 1979), aff'd, 452 U.S. 713 (1981). *See also* STALEY I. KUTLER, THE WARS OF WATERGATE 108-119 (1990).

16. SEYMOUR HERSH, THE PRICE OF POWER: KISSINGER IN THE NIXON WHITE HOUSE (1984); EDWARD R. DRACHMAN, PRESIDENTS AND FOREIGN POLICY: COUNTDOWN TO 10 CONTROVERSIAL DECISIONS 143-157 (1997).

17. President Lyndon Johnson had considered Cambodia a neutral country and feared that United States military escalation into Cambodia would make it more likely that China and the Soviet Union would become further involved in the war. ADRIAN R. LEWIS, THE AMERICAN CULTURE OF WAR: THE HISTORY OF U.S. MILITARY FORCE FROM WORLD WAR II TO OPERATION IRAQI FREEDOM 229 (2007); DRACHMAN, *supra* note 16 at 152.

approval, though he did confer with Senators Barry Richard Russell (D-GA) and John Stennis (D-MS), as well as Representatives Gerald Ford (R-MI) and Leslie Arends (R-IL).[18] Nixon and Kissinger deliberately excluded Secretary of Defense Melvin Laird and Secretary of State William Rogers from taking part in planning the invasion.[19] Laird and Rogers had earlier presciently warned Nixon that the widening of the war into Cambodia would lead to domestic upheaval, and news leaks over "Operation Menu" caused Nixon to suspect them of undermining his administration.[20] Thus, when Rogers informed Congress, several days prior to the invasion of Cambodia, that no plans for an invasion existed, he did so to the best of his knowledge that an invasion was unthinkable.[21]

Three days before announcing the use of military forces in Cambodia, Bryce Harlow, one of Nixon's counselors, informed Congress that Nixon's poll numbers had increased following an April 20 address in which Nixon described the success of Vietnamization and reductions in the number of service-members in Vietnam.[22] After the invasion of Cambodia became public, mass demonstrations across the nation, including on college and high school campuses, grew so immense as to shut down the government.[23] Nixon's outreach to the public failed to produce stability until July, when the forces that had invaded Cambodia were withdrawn.[24] In early May, counter-protesters in New York, known as the "Hard Hat Rebellion," attacked anti-war demonstrators.[25] Although by no means the only two

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18. RICHARD A. HUNT, MELVIN LAIRD AND THE POST-VIETNAM MILITARY 150 (2015).

19. The combined US – ARVN operation into Base Area 352/353 has been under preparation by MACV for several weeks but until now, Secretary Laird has not been aware of the likelihood of it being approved and opposition can be anticipated from him as well as from the Secretary of State. Kissinger to Nixon, April 26, 1970 [RN].

20. *See* DAVID L. ANDERSON, THE COLUMBIA GUIDE TO THE VIETNAM WAR 70-73 (2002); DALE VAN ATTA, WITH HONOR: MELVIN LAIRD WAR AND POLITICS 260 (2008).

21. *See* Seymour Hersh, *Rogers Said 'Our Hands Are Clean' on Cambodia*, N.Y. TIMES (July 25, 1973), https://www.nytimes.com/1973/07/25/archives/rogers-said-our-hands-are-clean-on-cambodia-although-in-on-raid.html.

22. Bryce Harlow to Anderson, April 27, 1970 [CPA/368]. In a standard letter Harlow sent to members of Congress, he claimed:

> I am sure you would want to know the results of an authoritative private poll which we have just received – based on a complete national sample taken two days after the President's April 20 TV address on Vietnam. Approval of the way Richard Nixon is handling his job as President has moved from the pre-speech Gallup rating of 55% to 62%.

23. *See* JASMINE FARRIER, CONSTITUTIONAL DYSFUNCTION ON TRIAL: CONGRESSIONAL LAWSUITS AND THE SEPARATION OF POWERS 1 (2019); *see* TIM WEINER, ONE MAN AGAINST THE WORLD: THE TRAGEDY OF RICHARD NIXON 87-92 (2016).

24. RICK PERLSTEIN, NIXONLAND: THE RISE OF A PRESIDENT AND THE FRACTURING OF AMERICA 496-498 (2008).

25. *Id.* at 91.

examples of public anger leading to violence, students at Kent State University in Ohio and Jackson State University were killed by Ohio and South Carolina National Guard units while demonstrating against the Cambodian invasion.[26]

A. *Administration Rationale*

On April 30, 1970, President Richard Nixon announced on national television that combined United States and Republic of South Vietnam military forces had entered into Cambodia with the intention of destroying North Vietnamese and Vietcong bases and munitions storage areas.[27] Nixon justified the use of military force in a neutral nation as a means to stop North Vietnam's use of Cambodia's territory as "a major Communist staging and communications area," and to ensure the success of Vietnamization.[28] In reviewing his administration's reasons for launching a secretive air war in Cambodia beginning in 1969, and then ordering a ground invasion without the express consent of Congress, Nixon, over a decade removed from his presidency penned:

> When Johnson intervened in Vietnam, he had to deal with the war as he found it. It was being fought in South Vietnam with guerrilla tactics, and the government in Saigon was near collapse. Our first priority was to stop our ally's slide toward defeat at the hands of the Communist guerillas. Our second priority should have been to blunt North Vietnam's invasion through Laos and Cambodia. And because our forces would eventually be withdrawn, our third priority should have been to prepare South Vietnam to defend itself against both the internal and external forces it faced.[29]

On June 4, 1970, the National Broadcasting Company's syndicated news program, "Meet the Press," hosted Secretary of Defense Melvin Laird, along with General Earle G. Wheeler, the Chairman of the Joint Chiefs of Staff.[30] Laird and Wheeler were followed by Senators Frank

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26. STANLEY KARNOW, VIETNAM: A HISTORY, THE FIRST COMPLETE ACCOUNT OF VIETNAM AT WAR 625-26 (1997); *see* CHARLES DEBENEDETTI, AN AMERICAN ORDEAL: THE ANTIWAR MOVEMENT OF THE VIETNAM ERA 279-280 (1990).

27. DEBENEDETTI, *supra* note 26, at 279-80; Robert B. Semple Jr, *Nixon Sends Combat Forces to Cambodia to Drive Communists from Staging Zone*, N.Y. TIMES (May 1, 1970), https://www.nytimes.com/1970/05/01/archives/nixon-sends-combat-forces-to-cambodia-not-an-invasion-president.html.

28. Semple Jr., *supra* note 27; ARTHUR J. DOMMEN, THE INDOCHINESE EXPERIENCE OF THE FRENCH AND AMERICANS: NATIONALISM AND COMMUNISM IN CAMBODIA, LAOS, AND VIETNAM 741-43 (2001).

29. RICHARD NIXON, NO MORE VIETNAMS 79 (1985).

30. *Meet the Press,* (NBC television broadcast June 4, 1970) (transcript on file with the Library of Congress in Lawrence Spivak Papers) [hereinafter *Spivak*].

Church (D-ID) and Charles Goodell (R-NY).[31] In addition to the recent United States and South Vietnam military incursion into neutral Cambodia as the singular focus of the program, one of the other many noteworthy aspects was that New York Times journalist, William Beecher, served as one of the four moderators. One year earlier, Beecher had "broken" the news story that Nixon had launched a secretive aerial bombing campaign into Cambodia to disrupt the transit of North Vietnamese military forces into South Vietnam.[32] For several years, the North Vietnamese military and the Vietcong forces of South Vietnam had violated Cambodian and Laotian neutrality along the so-called Ho-Chi Minh Trail in an effort to bring sufficient forces to topple the South Vietnamese government and military in the south and evade United States forces while doing so.[33]

The "Meet the Press" episode covered the larger debates over the use of military forces, including whether President Nixon had unlawfully – or unconstitutionally – expanded the war beyond Congress' limits, violated international law by sending forces into a neutral country, or whether the decision was strategically sound.[34] At the same time, mass anti-war demonstrations had gripped the nation during the preceding month and national guardsmen had fired on campus demonstrators in two instances.[35] Laird claimed that the incursion was necessary to protect the safety of South Vietnam and to ensure that Vietnamization succeeded, and noted that by the end of 1970, he expected that U.S. force numbers in Vietnam would be down to 384,000 from the peak in early 1969 of almost 600,000.[36] General Wheeler, in response to whether there could be another incursion into Cambodia, noted that as long as the North Vietnamese and Vietcong used Cambodia or Laos as a means for transporting forces and supplies, the United States would respond with air strikes against their forces.[37]

Laird admitted that the administration had not predicted the possibility of widespread domestic opposition to the Cambodian invasion. Laird insisted, "[w]ell first I want to say that it was never anticipated by anyone

31. *Id.*

32. Although not the subject of this article, Beecher's reporting led (then) National Security Advisor Henry Kissinger to ask FBI director, J. Edgar Hoover to place wiretaps and phone interception devices on the National Security Staff. Beecher, *supra* note 11; *see*, *e.g.*, HUNT, *supra* note 18, at 150. In turn, Kissinger's actions led to several decisions, including Halperin v. Kissinger, 606 F.2d 1192 (CA DC 1979), aff'd, 452 U.S. 713 (1981).

33. John Norton Moore, *Legal Dimensions of the Decision to Intercede in Cambodia, in* THE VIETNAM WAR AND INTERNATIONAL LAW, VOL 3: THE WIDENING CONTEXT 70-71 (Richard A. Falk, ed., 1972).

34. *Spivak*, *supra* note 30.

35. *Id.* at 15.

36. *Id.* at 7.

37. *Id.* at 7-8.

that there would be a Kent State or a Jackson State situation developing and that was indeed an unfortunate tragedy in both cases," before returning to the theme that the invasion bolstered the administration's credibility not only in Vietnam but in the world as a whole.[38] In contrast to Laird and Wheeler, Goodell argued that since Cambodia was a neutral country, Nixon's use of U.S. forces without Congressional approval – let alone consultation with Congress – was unconstitutional.[39] Church, on the other hand, advocated limiting the president's ability to conduct further military operations by restricting the use of funding after December.[40]

B. *Judicial and Congressional Reaction*

In response to the Cambodian incursion, a May 20, 1970 Congressional Research Service ("CRS") publication titled, *The Power of the President to Commit American Armed Forces Abroad without Congressional Authorization*, was submitted to Congress. Created in 1914 as a bipartisan research arm of the legislative branch to educate legislators on a myriad of questions, the CRS was designed as a non-partisan "think tank" belonging to Congress. Early on, the CRS analysis pointed out that at the beginning of the nation's history, there was a general consensus that Congress alone had the authority to declare wars and approve the use of the military in overseas conflicts.[41] In addition to the Cooper-Church Amendment, there were indications in the legislative branch that Nixon did not enjoy widespread support over the use of forces in Cambodia. Senator Clinton Presba Anderson (D-NM), who had initially supported the use of United States forces in Vietnam in 1966, noted, "[m]y New Mexico mail on Cambodia, for instance, is running heavily against President Nixon's policy," before adding that he opposed "widening the war" into Cambodia.[42]

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38. *Id.* at 15.

39. *Id.* at 21-22.

40. *See id.* at 37; WILLIAM R. TANSILL, LEGIS. REFERENCE SERV., THE POWER OF THE PRESIDENT TO COMMIT AMERICAN ARMED FORCES ABROAD WITHOUT CONGRESSIONAL AUTHORIZATION – THE PROBLEM AND SOME PROPOSALS 1 (May 20, 1970) (passing measure in Senate preventing funding for military operations in Cambodia after December 1, 1970, known as the Cooper-Church Amendment); s*ee* ROBERT DAVID JOHNSON, CONGRESS AND THE COLD WAR 164-67 (2006); *President vs. Cooper-Church*, N.Y. TIMES (July 18, 1970), https://www.nytimes.com/1970/07/18/archives/president-vs-cooperchurch.html.

41. TANSILL, *supra* note 40, at 4 (citing Bas v. Tingy, 4 U.S. 37, 43 (1800)); Talbot v. Seeman, 5 U.S. 1, 28 (1801).

42. Senator Clinton P. Anderson to Raymond G. Kroker (June 1, 1970) (on file with Library of Congress).

Senator Edwin Brooke (R-MA), in a public address claimed, "the President has undertaken an extremely hazardous policy," before demanding that the military "be withdrawn to South Vietnam."[43] Congressman Gilbert Gude (R-MD), along with seventeen other representatives, called for an end to funding for operations in Cambodia by the end of June.[44] Senator Barry Goldwater (R-AZ), the leader of the conservative Republicans, noted "the President's decision to send American troops together with South Vietnamese forces into Cambodia came as a surprise to the general American public, but for those of us who have followed this war closely, it was the only decision he could make."[45] In May, Senators Church and John Sherman Cooper (R-KY) introduced a bipartisan amendment to an appropriations bill to prohibit the use of military funds against any further military operations in Cambodia after June 30, 1970.[46] Although Nixon was reelected by a large margin in 1972, the use of force in Cambodia remained controversial because, at no time, did Congress approve such use. In 1971, Congress repealed the Gulf of Tonkin Resolution to deprive Nixon of the colorable argument that his conduct was constitutional.[47]

On April 30, 1970, Nixon announced that American forces would bomb Cambodia. That night, Chief Justice Warren Burger visited the White House to offer Nixon his support. Burger delivered a personal letter, which read, "[v]ery properly, the White House lines and all Western Union lines are blocked with loyal Americans who wish to express their support for your courageous decision. Whatever comes, there is no substitute for courage in a time of crisis and you have shown that tonight."[48] The chief justice also favorably compared the president's resolve against

43. Senator Edwin W. Brooke, Public Address on Cambodia (May 1, 1970) (transcript on file with the Library of Congress).

44. Resolution to Stop Funds for War in Cambodia and Laos, H.R Res.984, 91st Cong. (1970).

45. Form Letter, Senator Barry Goldwater (May 22, 1970) (on file with Arizona State University Library).

46. *See* Amending the Foreign Military Sales Act, S. Rep. No. 91-865, at 9-10 (1970); *see also,* LEWIS L. GOULD, THE MOST EXCLUSIVE CLUB: A HISTORY OF THE MODERN UNITED STATES SENATE 258 (2005). Church later argued in favor of protecting Congress' ability to declare war, lamenting, "[t]he real issue is to preserve the dignity and integrity of the constitutional role of Congress… We stand up now or roll over and play dead." John W. Finney, *Nixon is Rebuffed by Senate, 52-47, on Cambodia Issue*, N.Y. TIMES (June 12, 1970), https://www.nytimes.com/1970/06/12/archives/nixon-is-rebuffed-by-senate-5247-on-cambodia-issue-it-rejects-byrds.html.

47. Amendment to the Foreign Military Sales Act, Pub. L. No. 91-672, § 12, 84 Stat. 2053, 2055 (1971).

48. Letter from Chief Justice Warren Burger to President Richard Nixon (Apr. 30, 1970) (on file with the Richard Nixon Presidential Library).

the press to Presidents George Washington and Abraham Lincoln.[49] A year later, Nixon thanked Burger for backing the administration.[50] Berger seemed unmoved by the idea that there was a substantial likelihood that the Supreme Court would decide appeals on the legality of the incursion, and to the first amendment assertions of the news media and war protesters. Within the Judicial Branch, Burger was by no means alone in supporting Nixon's decision to send forces into Cambodia. On May 11, 1970, Roger Robb, a judge on the Court of Appeals for the District of Columbia, penned to Deputy Attorney General Richard Kleindienst not only a historical justification for the Cambodian operation but also the basis for an administration official's potential public speech. Robb wrote, "[a]s a student of the Civil War, I have been impressed by several parallels between the events of the spring and summer of 1864 and what is happening now," and added, "[t]his look at history strengthens my confidence that Mr. Nixon's courageous and decisive actions in Vietnam and Cambodia will be vindicated by the results."[51]

Although Burger possessed only one of nine votes in the Court, his conduct might be emblematic of the tone expressed by the Court of Appeals for the District of Columbia's decision, *Mitchell v. Laird*.[52] Issued on March 20, 1973, the decision informed the thirteen members of the House of Representatives who sued the executive branch that the question of whether a declaration of war was necessary to conduct military operations was inherently political and therefore outside of the judicial branch's competency.[53] One year earlier, in *Orlando v. Laird*, the Court of Appeals for the Second Circuit, determined that by appropriating money for the conflict in Southeast Asia, the military could order service members to fight in Vietnam or Cambodia.[54] In *Commonwealth of Massachusetts v. Laird*

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49. President Richard Nixon to Chief Justice Warren Burger (May 12, 1971) (on file with the Richard Nixon Presidential Library).

50. *Id.*

51. Robb finished his letter by writing:

> "Of course Mr. Lincoln did not have critics urging that General Grant refrain from crossing the Rapidan, or that General Sherman remain in Chattanooga to avoid the risk of escalation; but in many ways the troubles of 1864 resembled the ones we have today. I predict that the historical parallel will continue with success in Cambodia and Vietnam bringing us fair skies "if our people at home will be but true to themselves." Letter from Judge Roger Robb to Deputy Attorney Gen. Richard Kleindienst [POF/HW-RN/6] (May 11, 1970) (on file with the Richard Nixon Presidential Library).

52. Mitchell v. Laird, 488 F.2d 611 (D.C. Cir. 1973).

53. Interestingly, the majority indicated that Congress had never implicitly sanctioned the war in Cambodia, of, for that matter, Vietnam. However, that question would not have a bearing on the decision. *Id.* at 615-616.

54. Orlando v. Laird, 443 F. 2d 1039, 1043 (2d Cir. 1971).

(1971), the Court of Appeals for the First Circuit determined that service-members – as represented by their state legislature – could likewise not be protected against being sent to Southeast Asia and subjected to military jurisdiction because Congress had not acted to render the conflict devoid of its support.[55]

C. *Jurisdiction over Service-Members in Law's Gaps*

In 1918, President Woodrow Wilson ordered American military forces to take part in allied operations in Russia to prevent the German military from capturing Russian military stockpiles and to protect the military forces of a Czechoslovakian ally.[56] A number of legislators, including those who voted to declare war on Germany in 1917, protested that Wilson had violated the Constitution in committing military forces into an undeclared war.[57] Several service-members were court-martialed for offenses under the Articles of War, and, in one instance, an argument to the Court arose as to whether the military could prosecute service-members for alleged offenses in a foreign conflict where Congress had not declared war.[58] That particular argument had been raised a decade earlier.

In 1912, former Secretary of War Elihu Root testified, "[i]n my judgment, there is no law which forbids the President to send troops of the United States out of this country into any country where he considers it to be his duty as Commander in Chief of the Army to send them, unless it be for the purpose of making war, which, of course, he cannot do."[59] Although Root – a noted lawyer in his time who had defended William Marcy "Boss" Tweed and represented the United States in the 1899 and 1907 Hague Conventions – did not comment on the effect that such presidential power might have on the accountability of United States military personnel, it should not be missed that whether one examined courts-martial from the two decades after this statement, or from the present, when presidents send

55. Commonwealth of Massachusetts v. Laird, 451 F. 2d 26, 28 (CA 1, 1971).

56. JOSHUA E. KASTENBERG, TO RAISE AND DISCIPLINE AN ARMY: MAJOR GENERAL ENOCH CROWDER, THE JUDGE ADVOCATE GENERAL'S OFFICE AND THE REALIGNMENT OF CIVIL AND MILITARY RELATIONS IN WORLD WAR I 242 (2017); Erick Trickey*, The Forgotten Story of the American Troops Who Got Caught Up in the Russian Civil War*, SMITHSONIAN MAGAZINE (Feb. 12, 2019), https://www.smithsonianmag.com/history/forgotten-doughboys-who-died-fighting-russian-civil-war-180971470/; IAN C.D. MOFFAT, THE ALLIED INTERVENTION IN RUSSIA, 1918-1920: THE DIPLOMACY OF CHAOS 40 (2015).

57. KASTENBERG, *supra* note 56.

58. *Id.*

59. 48 CONG. REC. 10,929 (1912).

military forces anywhere in the world and for any reason, the nation's service-members remain subject to the military's jurisdiction.[60]

Although one could point to *Collins v. McDonald* to discover the first discernable comment in the Supreme Court that service-members were amenable to military jurisdiction in undeclared wars, the first clear decision occurred almost two decades before the Court issued that opinion from an appeal arising out of the so-called Boxer Rebellion.[61] In 1899, after decades of European and Japanese encroachment into China, a segment of the Chinese population rebelled and besieged the embassies in Beijing, while the Dowager Empress Cixi determined not to intervene.[62] In response, the United States government, along with the governments of Great Britain, Japan, Germany, Austria-Hungary, Italy, and Russia sent a combined military force in relief.[63] In sending over five-thousand soldiers into China without seeking Congress' approval, President McKinley, for the first time in United States history, committed American soldiers into an overseas conflict without a formal declaration of war.[64]

In 1905, the United States District Court of the District of Kansas, in *Hamilton v. McClaughry*, determined that the Army maintained jurisdiction over soldiers who were sent overseas into conflicts regardless of whether Congress had issued a formal declaration of war.[65] On February 4, 1901, a

60. United States v. Solorio, 483 U.S. 435 (1987).

61. In *Collins*, the Appellant raised as a secondary issue the fact that he was ordered to Vladivostok in a mission not directly a part of the war against Germany, and therefore because Congress had not declared war against Russia as it had against Germany, he was prosecuted in a foreign land without a declaration of war. Although the Court did not directly address this challenge, Justice Clarke, in writing for the majority, called it "trivial." Collins v. McDonald, 258 U.S. 416, 421 (1922); *see* KASTENBERG, *supra* note 56, at 242.

62. For the origins of the uprising, particularly the effect of imperialism on China, *see, e.g.*, JOSEPH ESHERICK, THE ORIGINS OF THE BOXER UPRISING 68-97 (1987); *see generally* VICTOR PURCELL: THE BOXER UPRISING: A BACKGROUND STUDY 57-83 (1963) (illustrating the origins of the uprising, particularly the effect of imperialism on China).

63. On President William McKinley's decision to send forces into China, *see* 34 CONG. REC. 2 (1900) (detailing the statement of President William McKinley). McKinley claimed that his orders were necessary to protect American lives and property in China. *Id.* However, there was a political aspect in the sense that McKinley's motives were driven, in part, by the fact that 1900 was a presidential election year, and he intended to win a second term. *See, e.g.*, ARTHUR M. SCHLESINGER, THE IMPERIAL PRESIDENCY 88-89 (1973); MERLO PUSEY, THE WAY WE GO TO WAR 60 (1969).

64. DIANA PRESTON, THE BOXER REBELLION: THE DRAMATIC STORY OF CHINA'S WAR ON FOREIGNERS THAT SHOOK THE WORLD IN THE SUMMER OF 1900, 253 (1999).

65. Hamilton v. McClaughry, 136 F. 445 (C.C. Kan. 1905). Although Hamilton was convicted of murder in violation of the Fifty-Eighth Article of War, he was also convicted of a general disorder for "throwing rags into his night bucket." *See* Record of Hamilton, U.S. Penitentiary, October 3, 1902 [NA RG 153 PC 29 Case 22806]. For unknown reasons, this was not listed in the federal case record.

court-martial convicted Private Fred Hamilton – a regular Army solider – of murdering a fellow soldier, and sentenced him to life in prison.[66] After being transported to the United States Disciplinary Barracks (USDB) in Fort Leavenworth, Kansas, Hamilton sought a writ of habeas in the District Court, arguing that that the sentence was invalid under the Articles of War because the crime occurred at a time where no war had been declared and no insurrection had taken place.[67]

While the district court recognized that Private Hamilton had a basis for seeking collateral review of his conviction and sentence, military law incorporated a basic international law premise that when a military force transits through a foreign sovereign, it maintains jurisdiction over its forces.[68] This tenet of international law, however, did not answer the constitutional question of whether the mere stationing of military forces in a foreign nation to protect United States interests during a period of internal hostilities not specifically directed against the United States constituted a state of war. The District Court found two aspects of the Boxer Rebellion dispositive in finding that a "state of war" existed in China. First, Congress had allocated pay rates for the soldiers serving in China as though there had been an actual war.[69] Second, because the aim of the so-called Boxers was

66. *Hamilton*, 136 F. 445, at 446.

67. The district court recognized that the Fifty-Eight Article of War under which Hamilton had been prosecuted read:

> In time of war, insurrection or rebellion, larceny, robbery … murder … shall be punishable by the sentence of a general court-martial, when committed by persons in the military service of the United States, and the punishment in any such case shall not be less than the punishment provided for the like offense by the laws of the state, territory, or district in which such offense may have been committed. *Id.* at 447.

There was another matter which impacted on the fairness of Hamilton's court-martial. The court-martial sentenced Hamilton to thirty years in prison. However, the reviewing judge advocate advised the court-martial that the sentence was illegal because under the Fifty-Eighth Article of War, the minimum limit a court-martial could sentence an accused soldier to, was the minimum sentence in the territory or country in which the court-martial occurred. Had Hamilton been prosecuted in a consular court – which the judge advocate stated could have been the case had the court-martial occurred in a time of peace – the sentence of thirty years would have been sustainable. But, as a result of a treaty with China and given that the court-martial was held in a time of war, the minimum sentence facing Hamilton should have been life in prison. As a result, the court-martial was ordered to be reconvened so that a lawful sentence could be adjudged. *See* Adjutant General's Review, Jan. 25, 1901 [NA RG 153 PC 29 Case 22806].

68. *Hamilton*, 136 F. 445, at 448 (citing Coleman v. Tennessee 97 U.S. 509 (1878)). The district court also found it persuasive that in Dow v. Johnson, 100 U.S. 158 (1879), the Court determined that soldiers operating in the rebelling states during the Civil War were not amenable to the jurisdiction of those state's civil courts. *Hamilton*, 136 F. 445, at 170.

69. *Id.* at 451.

to remove foreigners from Peking, and had, indeed, fired weapons on United States forces, a "state of war" existed, regardless of a declaration.[70]

As a matter of *Hamilton's* continuing influence, in 1966, in *United States v. Mitchell*, the Court of Appeals for the Second Circuit determined that a claim of "unlawful war" could not serve as a defense for failing to report to a military duty.[71] One year later, in *Luftig v. McNamara*, the Court of Appeals for the District of Columbia issued a similar ruling.[72] Decided on June 19, 1970, the Court of Appeals for the Second Circuit, in *Berk v. Laird*, heard a service-member's challenge to the executive branch's authority to order him to Cambodia.[73] Berk argued that because Congress had not declared war or authorized the Cambodia incursion, he could not be constitutionally ordered to serve in Cambodia.[74] The court of appeals determined, however, that the political question doctrine militated against judicial review of the appeal.[75]

Although service-members were not able to argue that they could not be prosecuted for violations of law in Cambodia, it is helpful to note that the nature of military discipline had changed after 1969. The Court, in *O'Callahan v. Parker*, significantly curtailed the military's court-martial jurisdiction in the continental United States.[76] On the leave of Nixon's presidency, military discipline in Vietnam had eroded, perhaps, commensurate with the national dissatisfaction with the war itself.[77] Two military prisons in Vietnam experienced prisoner uprisings.[78] From January 20, 1969, the date of Nixon's inauguration, until the announcement of

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70. *Id.* at 450.

71. United States v. Mitchell, 369 F.2d 323, 324 (2d Cir. 1966).

72. Luftig v. McNamara, 373 F.2d 664, 665 (D.C. Cir. 1967). Unlike Mitchell, Luftig was already in uniform but argued that the military could not send him to Vietnam, the appellate court noted:

> "it was difficult to think of an area less suited for judicial action than that into which the private would have the court intrude. The court held that the fundamental division of authority and power established by the United States Constitution precluded judges from overseeing the conduct of foreign policy or the use and disposition of military power. Those matters were plainly the exclusive province of Congress and the executive". *Luftig*, 373 F.2d 664, at 664.

73. Berk v. Laird, 429 F.2d 302, (7th Cir. 1970); Berk v. Laird, 317 F. Supp. 715, 718-724 (E.D.N.Y. 1970).

74. *Berk*, 429 F.2d 302, at 304.

75. *Id.* at 306.

76. O'Callahan v. Parker, 369 U.S. 258, 273 (1969); *see, e.g.,* Joshua E. Kastenberg, *Cause and Effect: The Origins and Impact of Justice William O. Douglas's Anti-Military Ideology from World War II to O'Callahan v. Parker*, 26 T. M. COOLEY L. REV. 163, 242-254 (2009).

77. *See e.g.*, DEBENEDETTI, *supra* note 26, at 232-33.

78. RICHARD MOSER, THE NEW WINTER SOLDIERS 51-53 (1996).

ground operations in Cambodia, the (then) Military Court of Appeal determined that while the charge of desertion to avoid hazardous duty was a crime under the UCMJ, a service-member had to be found guilty of the specific intent to avoid the hazardous duty, rather than merely be proven that the avoidance of the hazardous duty was a consequence of the desertion.[79] In another decision, the CMA held that a service-member who left his unit in Vietnam and traveled to Saigon, but continued to wear his military uniform, was not guilty of desertion.[80]

D. *Airmen in dissent*

In 1969, the Court of Military Appeals issued a decision which upheld the conviction of a fighter pilot who argued that the conflict in Vietnam was "unjust," and therefore ruled that orders to train pilots to fly in combat over Vietnam were unlawful.[81] The reasoning in the decision mirrors that of the Court of Appeals for the Ninth Circuit in *United States v. Mottola*. Issued in 1972, the federal appellate court determined that military reservists lacked standing to challenge the use of forces in Cambodia.[82]

Although the New York Times reported on B-52 strikes into Cambodia, the public and Congress were largely unaware as to the extent of the continual aerial campaign encompassed as Operation Menu. In fact, between March 18, 1969 and May 1, 1970, there were over 3,500 secretive bombing missions which unleashed over 105,000 tons of bombs.[83] Shortly after Operation Menu commenced, Major Hal Knight, an Air Force officer stationed at Ben Hoa Air Base in the Republic of Vietnam, became concerned that he falsified reports at the direction of senior officers for the

79. United States v. Stewart, 41 C.M.R. 58 (1969). In this appeal, a Marine pled guilty to desertion in Vietnam, but only conceded that a consequence of his desertion was that he would not participate in search and destroy missions. *Id.* at 59.

80. United States v. Jones, 41 C.M.R. 618 (CMA 1969). The offense of Absent Without Leave found in Article 86, UCMJ (codified at 10 USCS § 886) is, and was, the lesser included offense of desertion. See e.g.., United States v. Boswell, 24 C.M.R. 369 (CMA 1957).

81. United States v. Noyd, 40 C.M.R. 1995 (CMA 1969). The decision was obliquely upheld, but on a different basis, in Noyd v. Bond, 395 U.S. 683 (1969).

82. Mottola v. Nixon, 464 F.2d 178 (CA 9, 1972). The reservists argued that the expansion of the conflict into Cambodia, without congressional authorization, made it more likely that they would be called to active duty. *Id.* at 182. However, because no specific call-up had occurred, the reservists could not prove injury. *Id.*

83. *Statement of Information: Hearings Before the House Comm. on the Judiciary, House of Representatives, Pursuant to H. Res. 803, A Resolution Authorizing an Directing the Committee on the Judiciary to Investigate Whether Sufficient Grounds Exist for the House of Representatives to Exercise Its Constitutional Power to Impeach Richard M. Nixon, Present of the United States of America*, 93rd Cong. Sess. 6-7 (1974) [hereinafter Impeachment Report].

purpose of deceiving Congress.[84] Knight's military duties in Vietnam included compiling radar data for prior military missions and while doing so, he, as well as others, were instructed to have the data appear so that B-52 strike missions had occurred in Vietnam, rather than in neutral Cambodia.[85] He later testified to the Senate that he believed the falsification of records was done to thwart Congress from investigating clandestine military operations ordered by Nixon.[86] Knight believed that in doing so, he had violated the UCMJ, which expressly prohibited the signing of false records with the intent to deceive.[87] However, he also believed he was caught in a quandary because he feared being court-martialed for failing to obey orders.[88] Knight's testimony was later used in the House' consideration as to whether the Cambodian operation constituted impeachable conduct.[89] Equally important, it served as an example for the dynamic that questionable conflicts only heighten the liability for the service-member participants.

II. 1973: MILITARY OPERATIONS BEYOND CONGRESSIONAL INTENT

On January 12, 1973, the New York Times had as one of its front page headlines, "B-52 Pilot Who Refused Mission Calls War not Worth the Killing."[90] Air Force pilot, Captain Michael Heck, was, in fact, only one of several military pilots who questioned the legality of the United States' use

84. Bombing in Cambodia: Hearings Before the Comm. on Armed Services, 93rd Cong. 2, Sess. 1 (1973) (testimony of Hal Knight, Jr) [hereinafter Bombing in Cambodia]. Knight testified on July 16, 1973. *Id.*; *see also* EARL TILFORD JR., CROSSWINDS: THE AIR FORCE'S SETUP IN VIETNAM 126 (1993).

85. SHAWCROSS, *supra* note 5, at 30-31.

86. Bombing in Cambodia, *supra* note 84, at 5, 9 (statement of Hal Knight Jr.).

87. *Id.* at 5-6, 32. Knight wrote to Senator William Proxmire:

> While I was in SVN, the falsification of strike reports was a common practice. I prepared at least a dozen myself. I got the impression the practice had been going on for several years prior to the time I got there in February 1970. All the reports I personally faked were B-52 strikes into Cambodia. (This was some time before the Cambodian incursion.) The procedure we used to fake the reports was rather complicated but the end result was that we had reported strikes in SVN when they were actually in Cambodia. *Id.*

88. *Id*. at 5-6.

89. *Statement of Information: Hearings on H.R. 803 Before the House Comm. on the Judiciary*, 93rd Cong 57 (1974) (forward by Hon. Peter W. Rodino, Jr., Chairman, Committee on the Judiciary).

90. George Esper*, B-52 Pilot Who Refused Mission Calls War Not Worth the Killing*, N.Y. TIMES (Jan. 12, 1973), https://www.nytimes.com/1973/01/12/archives/b52-pilot-who-refused-mission-calls-war-not-worth-the-killing.html.

of military forces in ostensibly neutral Cambodia.[91] Heck was not alone in his doubts as to the legality of the use of forces without Congress' express sanction or the means of achieving an illusory victory under the secrecy of an administration's military policies.[92] One author observed that Air Force personnel in Guam assigned to fly or maintain the B-52 tried to find a means to avoid participating in the mission.[93] Several airmen determined to refrain from supporting missions into Cambodia yet remained subject to a court-martial for their conduct.[94] Reports of refusal to comply with military orders remain one of the difficult aspects of fighting a war in laws gaps, because, after January 27, 1973, the United States was no longer technically in a war.

On January 27, 1973, the United States, South Vietnam, and North Vietnam, signed an Agreement ending hostilities after roughly two decades of conflict.[95] Article 20 of the Peace Agreement required all three signatories to respect the neutrality and territorial integrity of Cambodia as established by the 1954 Geneva Agreement on Cambodia (the Paris Agreement also required the signatories to respect the territorial integrity of Laos).[96] Although, in theory, the war in Vietnam ended with the Paris Peace Accords, the continuation of the aerial campaign against Cambodian Khmer Rouge evidences the difficulty in challenging presidential authority in military operations conducted without a declaration of war. In January 1973, the White House prepared to respond to reporters' inquiries on the continued bombing missions in Cambodia after the cease-fire with North Vietnam and the Vietcong forces. Initially, the White House counsel, Fred Buzardt, drafted a statement of justification that the North Vietnamese had not withdrawn their forces from Cambodia, and therefore, the Paris Accords

91. *Id.*; *see e.g.*, *An Accused Pilot Being Sent to the U.S.*, N.Y. TIMES (July 17, 1973) (detailing the refusal of Captain Donald E. Dawson to fly bombing missions over Cambodia).

92. Esper, *supra* note 90.

93. Carolyn Eisenberg, *Dissenting Airmen*, *in* WAGING PEACE IN VIETNAM: U.S. SOLDIERS AND VETERANS WHO OPPOSED THE WAR 152, 152 (Ron Carver, David Cortright & Barbara Doherty eds., 2019); Terry H. Anderson, *The GI Movement and the Response from the Brass*, *in* GIVE PEACE A CHANCE: EXPLORING THE VIETNAM ANTIWAR MOVEMENT 93, 106-110 (Melvin Small & William D. Hoover eds., 1992); Richard Halloran, *The War Is Suddenly Grim for the B-52 Fliers on Guam*, N.Y. TIMES (Dec. 30, 1972), https://nyti.ms/1iImBhA.

94. DAVID CORTRIGHT, SOLDIERS IN REVOLT: GI RESISTANCE DURING THE VIETNAM WAR 135 (1975); Harry W. Haines et al., *Gl Resistance: Soldiers and Veterans Against the War*, *in* 2 VIETNAM GENERATION 15, 59 (2011).

95. Paris Peace Accords, *supra* note 7, at 1676.

96. Geneva Conference doc. IC/43/Rev. 2, *reprinted in Final Declaration of the Geneva Conference on the Problem of Restoring Peace in Indochina*, 60 AM. J. INT'L L. 643, 643 (1954).

had not taken effect.[97] He stated, "[w]e believe that the President has the authority as Chief Executive in the conduct of foreign relations and as Commander in Chief to help bring an end to the various aspects of this conflict in which we have been involved as rapidly as may be possible consistent with our national interest in the peace and security of the area."[98] This resulted in a congressional challenge in the judiciary against Nixon's actions. Led by Congresswoman Elizabeth Holtzman (D-NY), several litigants, including B-52 pilots, claimed that the use of force violated both international law and congressional restraints.

On April 15, 1974, the Court denied *certiorari* to Holtzman's challenge against the use of the military in Cambodia without a declaration of war or Congress' approval. In a sense, the appeal was moot because aerial operations against the Khmer Rouge had ceased and Nixon's presidential tenure was in question.[99] Although Justice Douglas was the only member of the Court to have argued that the judicial branch could review Holtzman's claims, the traverse of the appeal to the Court is important to contextualize the broad expanse of presidential authority to order United States citizens into conflicts without congressional approval or the safeguards of international law. On May 15, 1973, the Senate Appropriations Committee voted 24-0 to cut-off all funds for continuing the bombing campaign over Cambodia.[100] Attorney General Elliot Richardson informed the Senate that if Congress were to adopt this cut-off into law, he believed that further military actions into Cambodia would be unlawful.[101]

On July 25, 1973, Holtzman, along with Donald Dawson and other military members, obtained a favorable ruling from Judge Orrin Judd, a United States District Court Judge in New York, enjoining the Nixon administration from continuing military operations as Congress had not authorized the use of force.[102] Judge Judd began his decision with a recognition that Holtzman et al. possessed standing to argue that the use of military forces without congressional sanction was unlawful based on the

97. The statement read, in pertinent part: "Article 20 of the Paris Agreement calls for the withdrawal of North Vietnamese troops from Cambodia. They have not been withdrawn." Draft Statement, 1973 [WHSF-SMOF/Fred Buzardt/50].

98. Press Statement, 1973 [WHSF-SMOF/Fred Buzardt/50].

99. Browndale Int'l Ltd v. Board of Adjustment, 416 U.S. 936, 936 (1974).

100. John W. Finney, *Senate Panel Votes 24-0 to Bar Cambodian Raids*, N.Y. TIMES (May 16, 1973), https://nyti.ms/1QVtjfT.

101. *Id.*

102. Holtzman v. Schlesinger, 361 F. Supp. 553, 565-66 (E.D.N.Y. 1973). William Shawcross writes: Donald Dawson was a young Air Force captain, a Christian Scientist, serving as a B-52 pilot at Utapao, Thailand. He had been flying B-52s since the end of 1971, but throughout 1972, he found it impossible to live with the consequences of his work. SHAWCROSS, *supra* note 5 at 291; *see also* LOUIS FISHER, PRESIDENTIAL SPENDING POWER 118 (1975).

harm of continuing presidential action to the military members, as well as to Congress. He then transitioned into the legislative history of funding for the war in Vietnam as well as presidential strategy statements, for the use of force in Cambodia, before determining that Nixon had, in fact, exceeded any grant of authority to the presidency.[103]

Judd's decision and Holtzman's victory were short-lived. On July 27, 1973, the Court of Appeals for the Second Circuit "stayed" Judge Judd's decision and calendared argument for August 13.[104] Thus, during that time, the military could continue military operations without judicial interference unless the Court intervened. Holtzman sought redress to Justice Thurgood Marshall in his circuit capacity in the hopes of reinstating Judge Judd's stay. On August 1, 1973, Justice Marshall, after being motioned by the Solicitor General of the United States, denied a motion to vacate the appellate court's stay order.[105] The next day, former Secretary of State William Rogers provided a sworn affidavit to Justice Marshall and the Second Circuit that if Judge Judd's order were reinstated, it would "imperil the safety of United States nationals in Cambodia," and undermine "the credibility of the United States."[106] On August 3, Justice Douglas, from his home in Goose Prarie, Washington, issued a stay against the Second Circuit's decision, in effect, reinstating Judge Judd's ruling.[107] The next day, Justice Marshall entered an order staying the district court's ruling. He noted that the other seven justices agreed with his decision. Some hours later, Justice Douglas filed a dissent against Justice Marshall's order, but by this time, the Court determined that it would not intervene in the appeal until the Second Circuit determined the merits of the appeal.[108]

Justice Marshall's August 1 order is insightful as to how a war in the shadows can become bereft of the protection of law. He began his order

103. Holtzman, 361 F. Supp. at 555-557. Judge Judd focused extensively on Section 20(a) of the Paris Conference on Vietnam effectively ending the war with North Vietnam as well as several fiscal appropriations to strengthen Cambodia's military which expressly stated that the United States was not obligated to the defense of Cambodia. *Id.* Equally importantly Judd considered that Secretary of State William Rogers statement to Congress on April 3, 1973, that the conflicts in Vietnam, Cambodia, and Laos were closely related as to create a singular conflict to be important to the question of a termination of hostilities with North Vietnam. *Id.* at 559.

104. However, the Second Circuit advanced the argument date to August 8.

105. Application to Vacate Stay, Holtzman. v. Schlesinger, 414 U.S. 1304, No. A-150 (Aug. 1, 1973).

106. *See Holtzman v. Schlesinger*, 484 F.2d 1307, 1310 n.1 (2d Cir. 1973) (noting the affidavit of William P. Rogers); *see Text of Rogers Affidavit to High Court on Cambodia*, N.Y. TIMES (Aug. 6, 1973), https://www.nytimes.com/1973/08/06/archives/text-of-rogers-affidavit-to-high-court-on-cambodia.html.

107. Order to Vacate Judgment, Holtzman v. Schlesinger, 484 F.2d 1307, No. 1132 (Aug. 8, 1973).

108. *Id.*

with the observation that "publicly acknowledged United States involvement in the Cambodian hostilities began with the President's announcement on April 30, 1970…" Justice Marshall also recognized that, since that time, congressional resistance to the use of United States military forces had increased to include the Fulbright Proviso, several limits on appropriations for the use of the military in Cambodia, and the outright prohibition of the use of ground forces in that Country.[109] Justice Marshall then noted that while in 1973, Nixon vetoed the Eagleton Amendment, which prohibited the use of any funds for Cambodia, and Congress had prohibited any funds for military operations in Vietnam, Laos, and Cambodia after August 15, 1973.[110] Although Justice Marshall realized that the actual substantive issue confronting him was whether Nixon had illegally ordered military forces into Cambodia, the immediate question was whether to dissolve the Second Circuit's stay of Judge Judd's order.

Justice Marshall took cognizance of the fact that if he upheld the Second Circuit, thousands of Americans and Cambodians could be killed.[111] At the same time, if he vacated the Appellate Court, the act would be a restriction on Nixon's authority as Commander in Chief, and this too, could hamper broader strategic efforts.[112] Yet, he conceded that after the Paris Peace Accords, it seemed implausible that the use of force could be constitutionally justified, since Congress had never allocated funding or otherwise permitted military operations to protect Lon Nol's government against internal enemies, and Cambodia could no longer be viewed as an extension of the Vietnam War.[113] Although he concluded that Nixon may have acted illegally, he also stated it would be a constitutional mistake for a single Justice serving in a circuit capacity to act in place of the full Court.[114]

Three days after Justice Marshall rebuffed *Holtzman*, other parties in the suit sought a similar avenue through Justice Douglas. Although Justice Douglas conceded that the judicial branch was the least competent of the three to weigh the nation's foreign policy goals, he provided a different result than Justice Marshall.[115] Justice Douglas compared the issue before

109. *Id.*

110. H.R.J. Res 636, 93rd Cong. (1973-74).

111. *Id.*

112. *Id.*

113. *Id.*

114. Marshall wrote, "[w]hen the final history of the Cambodian War is written, it is unlikely to make pleasant reading." *Id.*; Holtzman, 414 U.S. at 1315.

115. Justice Douglas recognized that Justice Marshall issued a denial to Holtzman, and he pointed out that until the Court as a whole heard the issues raised, he was nonetheless entitled to vacate the Second Circuit. *See* Holtzman, 414 U.S. at 1317.

him to a capital murder appeal.[116] And, even if a Justice were to vacate the Second Circuit, as in the case of a death sentence, the order to vacate in this instance would not be a ruling on the appeal itself, but rather provide a court more time to determine the substantive merits in an appeal.[117] He then observed that it was Congress' sole duty to declare war, and as for the question of justiciability, he noted the Court, during the Civil War and the Korean Conflict, determined that significant challenges to Commander in Chief authority were justiciable.[118] By the time the appeal came to the Court, the Nixon administration had abandoned its position that a Commander in Chief could, in fact, commit forces against an enemy without Congress. On August 4, Solicitor General Robert Bork argued to the Court that Justice Douglas had erred in his ruling. Bork insisted that Congress had merely refused monies to be spent on Cambodian operations in a single appropriations act but other appropriations acts had permitted the continuation of operations until August 15.[119]

III. CONCLUSION

Between July 16 and August 9, 1973, the Senate Armed Services Committee held hearings to investigate the secretive 1969 bombing campaign, during the very period the not-so-secretive and quite controversial bombing campaign against the Khmer Rouge was underway. Led by Senator Stuart Symington, the investigation concluded that the Nixon administration had engaged in clandestine operations and, in turn, lied to Congress.[120] The committee placed, in the very back of its report, a legal opinion issued by Brigadier General Harold Vague, the acting Judge Advocate General of the Air Force. Vague had advised the Department of Defense that it was permissible for the administration to report inaccurate information for "military reasons," and did not exempt Congress from this analysis.[121] He also insisted that regardless of whether the defense establishment reports accurate information to Congress, service-members

116. The present case involves whether Mr. X (an unknown person or persons) should die. They may be Cambodian farmers whose only sin is a desire for socialized medicine to alleviate the suffering of their families and neighbors. Mr. X may be an American pilot or navigator who drops a ton of bombs on a Cambodian village. The upshot is that we know someone is about to die.

117. *See* Holtzman, 414 U.S. at 1317.

118. Douglas also argued that Holtzman et al. had standing to challenge the President. *See id.* at 1318-19.

119. *See* Holtzman, 414 U.S. 1321; Robert Il Bork, Application for a Stay of Order of the United States District Court for the Eastern District of New York (Aug. 4, 1973).

120. Bombing in Cambodia, *supra* note 84, at 304 (statement of Stuart Symington, Sen.).

121. *Id*. at 511-12.

are required to conform to the orders of the Commander in Chief and his administration.[122]

On August 1, 1973, Congressman Robert F. Drinan (D-MA) introduced a resolution calling for the impeachment of Nixon.[123] Drinan specifically cited to the "totally secret air war in Cambodia for 14 months prior to April 30, 1970." Almost one year later, as the House Judiciary Committee debated articles of impeachment arising from the Watergate break-in, Congressman John Conyers (D-MI) introduced an article of impeachment essentially mirroring Drinan's.[124] However, the House Judiciary Committee determined that it would be unfeasible to pass an article criminalizing Nixon's actions, and if, for no other reason, it would narrow a president's future abilities to protect American lives in wartime.[125] Congress did not, apparently, consider that in enabling the possibility of another bombing campaign, the trend toward maximizing legal liabilities for the service-members taking part in operations while minimizing the liabilities and restraints against the executive branch would continue. This is problematic for today's members of military forces who, as volunteers, are required to assume – in the absence of unmistakable evidence – that operational policies and commands from the Chief Executive on down are, in fact, lawful.

The issue analyzed in this article provides an example of how a presidency may act without congressional approval to send service-members into foreign conflicts, and render the service-member amenable to the full range of legal liability while, at the same time, considering its own actions to be non-justiciable. In this regard, the service-member is placed in a heightened state of legal danger than in a conflict in which the executive branch seeks congressional approval. Perhaps this is an obvious statement. Yet, if there was a time in the last Century where Congress considered impeaching a president for unlawful uses of the military, it occurred as a result of Nixon's employment of forces into and above Cambodia. At no time did the courts of Congress appear to consider the jeopardy that service-members faced, caused by actions such as Nixon's.

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122. *Id.*

123. *See, e.g.*, Marjorie Hunter, *House Gets Impeach-Nixon Resolution*, N.Y. TIMES (Aug. 1, 1973), https://www.nytimes.com/1973/08/01/archives/house-gets-impeachnixon-resolution-littleused-provision-following.html (noting that the resolution failed in the judiciary committee); *see also* Drinan v. Nixon, 364 F. Supp. 854 (D. Mass. 1973) (holding that plaintiff was unsuccessful in their suit against Defendant Nixon over the Cambodia campaign).

124. David E. Rosenbaum, *2 Articles Fail, To Win in Panel,* N.Y. TIMES (July 31, 1974), https://www.nytimes.com/1974/07/31/archives/2-articles-fail-to-win-in-panel-taxes-and-bombing-issues-defeated.html; *see* FISHER, supra note 102, at 120); KUTLER, *supra* note 15, at 530.

125. SHAWCROSS, *supra* note 5 at 332.

To this time, there have been no statements from the executive branch in opposition to the advice of General Harold Vague, who opined, that even in a conflict of questionable legality, an order to maintain secrecy remains a lawful order.

EVOLVING ROLE OF THE JUDGE ADVOCATE IN THE 21ST CENTURY: FROM OPERATIONAL LAW TO NATIONAL SECURITY LAW

Michael W. Meier*

I. INTRODUCTION

The U.S. Army Judge Advocate's Generals Corps ("JAG Corps") saw a dramatic change in 1987. Although many may say (and when I say "many," I mean me) it was because I entered the JAG Corps that year, the better answer is that in 1987, Operational Law ("OPLAW") was formally introduced as a legal discipline. In July 1987, then Lieutenant Colonel David E. Graham heralded the advent of OPLAW and its effect on the JAG Corps.[1] He noted, "[l]est there be any doubt, OPLAW is a new concept. It is not simply a modified form of international law, as traditionally practiced by Army judge advocates, dressed up in a battle dress uniform and given a

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1. *See generally* David E. Graham, *Operational Law: A Concept Comes of Age*, *in* 27 THE ARMY LAWYER 9 (David R. Getz ed., 1987) (discussing the evolution of law related to the conduct of overseas military operations by the U.S.).

'catchy' name."[2] Over the next thirty-three years, OPLAW grew in importance within the JAG Corps, the U.S. Army, other military services, and the Department of Defense, and is now regarded as a core discipline.[3] OPLAW became such an integral part of the Army JAG Corps' practice that there was considerable consternation when, in April 2018, the Judge Advocate General and Deputy Judge Advocate General announced that Operational Law would officially be renamed to National Security Law.[4]

With the adoption of OPLAW, the role of the judge advocate evolved from undertaking primarily traditional tasks, such as military justice, to being intimately involved in all aspects of legal issues in military operations.[5] Judge advocates now realize that to be effective legal advisors, they must co-locate with their clients in operation centers and fully understand the weapons and missions their commanders and staff perform.[6] Even though judge advocates spent the last thirty-three years developing and successfully integrating the core discipline of OPLAW, there still are those who question the wisdom of changing the name of Operational Law to National Security Law. What necessitated the recent name change? Similar to the questions propounded by scholars in 1987, commentators today inquire whether National Security Law is just a catchy new name for OPLAW or truly a different and innovative concept.

This article will first look at the history of how OPLAW evolved from the conflict in Vietnam through the current conflicts in Afghanistan, Iraq, Syria, and other locations around the world. Second, the article will explore why the Army JAG Corps decided to shift from the concept of Operational Law to National Security Law. Finally, the article will address the evolving role of judge advocates moving forward as the United States shifts from focusing on counter-terrorism ("CT") and counter-insurgency ("COIN") operations to preparing for near-peer and peer-to-peer conflicts against states such as Iran, China, and Russia.

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2. *Id*.

3. GLOBAL SECURITY, OPLAW and Core Legal Disciplines Supporting Army Operations, https://www.globalsecurity.org/military/library/policy/army/fm/27-100/chap3.htm#3.1 (last visited Mar. 18, 2020); *see* JOHN N. MOORE & ROBERT F. TURNER, NATIONAL SECURITY LAW, at xxxvii (2d ed. 2005).

4. TJAG and DJAG Special Announcement 40-04, *Announcement on Decisions on Strategic Initiatives* (Apr. 20, 2018), www.jagcnet2.army.mil/Sites/jagc.nsf/homeDisplay.xsp?open&documentId=0480354BA3ADF9388525820F0057CFDB (also on file with the author).

5. *See* Charles N. Pede, *Evolving with the Threat – The Changing Nature of Our Practice*, ARMY LAW., 2019, at 2.

6. *Id.*

II. OPERATIONAL LAW FROM VIETNAM TO TODAY

Judge advocates have provided legal advice to commanders since the inception of the JAG Corps. In 1775, William Tudor, an attorney, was selected to serve as the Judge Advocate of the Continental Army.[7] Lieutenant Colonel Tudor joined General George Washington's staff and advised Washington on discipline and military justice matters.[8] The responsibilities held by current judge advocates, including the task of understanding diverse legal disciplines at a high level of legal intensity, far exceed the services and advice expected of the late William Tudor.[9] The evolved expectations of judge advocates is what validated OPLAW as a core legal discipline.[10] Although judge advocates still advise commanders on military justice matters and a full range of other legal issues, there has been a clear and dramatic change in how judge advocates support military operations.[11]

In 2001, Colonel Frederic L. Borch III[12] wrote *Judge Advocates in Combat: Army Lawyers in Military Operations from Vietnam to Haiti,*[13] which chronicled how the role of a judge advocate evolved from providing traditional legal services, including those involving military justice, claims, legal assistance, and administrative law, to today's practice of OPLAW, where judge advocates are directly involved in targeting and all relevant aspects of military law that affect the conduct of operations.

Borch noted that throughout most of the Army's history, the judge advocate's role during military operations centered on the practice of

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7. U.S. DEP'T OF THE ARMY, *William Tudor Judge Advocate General (1775-1777)*, 22 MIL. L. REV. iii (1963).

8. U.S. DEP'T OF THE ARMY, THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS, 1775-1975, at 8 (1975).

9. U.S. DEP'T OF THE ARMY, FIELD MANUAL 1-04 (FM 1-04), LEGAL SUPPORT TO THE OPERATIONAL ARMY ¶ 1-3 (Jan. 26, 2012) [hereinafter FM 1-04].

10. *Id*. at ¶ 1-5.

11. *Id*.

12. Frederic L. Borch is the Regimental Historian and Archivist for the Army Judge Advocate General's Corps. He served twenty-five years as an Army lawyer before retiring from active duty in 2005. The following year, he returned to the Army as a civilian and today, is the only full-time military legal historian in the U.S. government. Borch has history degrees from Davidson College and the University of Virginia, law degrees from the University of North Carolina, University of Brussels (Belgium), and The Judge Advocate General's School. He also has an M.A. from the Naval War College.

13. *See generally* FREDERIC L. BORCH III, JUDGE ADVOCATES IN COMBAT: ARMY LAWYERS IN MILITARY OPERATIONS FROM VIETNAM TO HAITI (2001) (providing an outstanding history of how judge advocates' roles of providing traditional legal services evolved to what is now regarded as the practice of operational law).

military justice.[14] This was certainly true at the start of Vietnam, but the paradigm began to shift in 1964 when the senior legal advisor[15] expanded the role of his judge advocates into OPLAW areas.[16] For example, judge advocates aided the South Vietnamese on prisoner of war issues, including advice on determining the status of captured enemy personnel by setting out procedures using "Article 5 tribunals,"[17] investigating and reporting of war crimes, and assisting the South Vietnamese with programs designed to help control government resources important to the enemy.[18] As a result of the robust legal support provided by judge advocates, the South Vietnamese military recognized that the conflicts with the Viet Cong and North Vietnamese were no longer considered an internal disturbance, but rather, an international armed conflict. Accordingly, the South Vietnamese military agreed to apply the provisions of the 1949 Geneva Conventions on Prisoners of War to classify captured personnel. Although some judge advocates took on operational roles during this time, the concept of OPLAW did not exist, at least with respect to how OPLAW is institutionally recognized and adopted today.

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14. *Id.* at vii.

15. The senior legal advisor is generally known in the U.S. Army as the Staff Judge Advocate ("SJA"). FM 1-04, *supra* note 9, at ¶¶ 4-21 to 4-22. "As TJAG's assigned representatives, the SJA has the responsibility to deliver legal services within a particular unit or command. The SJA is also responsible for his or her office of legal cadre, or the Office of the Staff Judge Advocate. This officer is responsible for planning and resourcing legal support, as well as conducting training, assignments, and the professional development of JAGC personnel assigned to the command and its subordinate units. In accordance with Article 6 of the UCMJ, the SJA is authorized to communicate directly with his or her representative TJAG and other supervisory SJAs of superior or subordinate commands as necessary. The SJA serves as the primary legal advisor to the commander exercising General Court Martial Convening Authority (GCMCA) as prescribed by UCMJ and the *Manual for Courts-Martial.* The SJA is a member of the commander's personal and special staff. In accordance with Article 6 of the UCMJ, at all times the commander and the SJA shall communicate directly on matters relating to the administration of military justice, including, but not limited to, all legal matters affecting the morale, good order, and discipline of the command. The SJA provides legal advice and support to the staff and coordinates actions with other staff sections to ensure the timely and accurate delivery of legal services throughout the command." Renn Gade, *The U.S. Judge Advocate in Contemporary Military Operations: Counsel, Conscience, Advocate, Consigliere, or All of the Above?*, *in* U.S. MILITARY OPERATIONS: LAW POLICY, AND PRACTICE 6 n.32 (Geoffrey S. Corn, Rachel E. VanLandingham, and Shane R. Reeves, eds., 2015); BORCH, *supra* note 13, at ix, 20-21 (noting that MACV judge advocates, particularly Colonel Haughney and his staff, outlined the first procedural framework for categorizing combatant captives using "so-called" Article 5 tribunals).

16. BORCH, *supra* note 13, at 12-13.

17. Geneva Convention Relative to the Treatment of Prisoners of War art. 5, Aug. 12, 1949, 75 U.N.T.S. 135.

18. BORCH, *supra* note 13, at ix, 20-21.

One of the most important aspects of the judge advocate's role in Vietnam was the adoption of the Department of Defense Law of War Program in 1974. The Program required judge advocates to communicate with commanders and staff, train personnel, and help ensure compliance of military operations with the law of war.[19] The adoption of the Program was a formal first step in allowing judge advocates to begin immersing themselves in operational planning.

In 1983, judge advocates deployed to Grenada as part of military operations. Over the next two-month period, judge advocates engaged in a wide variety of legal issues which, up to that point, were not considered part of their normal duties.[20] These activities broadened and redefined the roles held by judge advocates because, unlike before, they went beyond the mere application of the law of war to military operations.[21] Although judge advocates were responsible for assessing issues on the law of armed conflict ("LOAC") involving interpretations of the Hague Regulations and Geneva Conventions, particularly with respect to the detention and treatment of prisoners of war, judge advocates in Grenada were faced with different types of legal issues. For example, their duties involved drafting and reviewing Rules of Engagement ("ROE") and handling matters involved with payment of claims, contracting issues, treatment of private property, war trophies, and a wide range of civil affairs issues.[22] One judge advocate noted, "[y]ou can only tell the [Commander] he can't shoot prisoners so many times. You reach a point at which, when the boss has run out of beans and bullets, has certain equipment requirements, and has the locals clamoring to be paid for property damage; you have to be prepared to provide the best possible legal advice concerning these issues as well."[23]

After Grenada, the Army JAG Corps realized it was imperative to train and resource its judge advocates to provide advice on a broad range of legal issues surrounding military operations. Grenada was the catalyst for

19. *Id.* at 51.

20. *Id.* at 62-63 (detailing the expansion of "nontraditional" roles assumed by judge advocates during Operation Urgent Fury in 1983).

21. Graham, *supra* note 1, at 10 (defining Operational Law as domestic and international law dealing with military operations during times of peace and hostility, which "includes, but is not limited to, Law of War, law related to security assistance, training, mobilization, predeployment preparation, deployment, overseas procurement, the conduct of military combat operations, anti- and counter-terrorist activities, status of force agreements, operations against hostile forces, and civil affairs operations").

22. *Id.* at 11.

23. *Id.* at 10; BORCH, *supra* note 13, at 81 (quoting Colonel Richardson in his After Action Report regarding the evolution of the role of judge advocates in that they could no longer act within traditional peacetime legal functions) (citation omitted).

development of the JAG Corps' newest discipline, OPLAW, which came to fruition in 1987.[24]

The Judge Advocate General's School, U.S. Army ("TJAGSA") conducted a study in 1986 and made a series of recommendations for implementing an OPLAW program.[25] These recommendations included an agreed upon definition of Operational Law, development of the curriculum at TJAGSA, and the publication of an Operational Law Handbook.[26] There were five types of deployments initially identified for training, including: (1) U.S. forces stationed overseas (under a stationing agreement); (2) security assistance missions; (3) combat operations; (4) overseas exercises, and (5) deployment for COIN/CT missions.[27] The first proposed definition of Operational Law was the following:

> Domestic and international law associated with the planning and execution of military operations in peacetime or hostilities. It includes, but is not limited to, Law of War, law related to security assistance, training, mobilization, predeployment preparation, deployment, overseas procurement, the conduct of military combat operations, anti- and counter-terrorist activities, status of forces agreements, operations against hostile forces, and civil affairs operations.[28]

The rationale for OPLAW training was to incorporate, in one legal regime, relevant substantive aspects of international law, criminal law, administrative law, and procurement-fiscal law.[29] The goal of designating OPLAW as a core legal discipline was to provide a comprehensive and structured approach to the myriad of legal issues that may arise during a deployment to enable judge advocates to provide a wider range of legal advice to a commander and more effective contributions to mission success.

The new OPLAW concept was quickly tested with military operations in Panama in Operation Just Cause and in Iraq in Operation Desert Shield/Desert Storm in 1989 and 1990, respectively. In Panama, judge advocates prepared ROE and conducted predeployment training prior to operations.[30] In December 1989, Colonel Smith, a judge advocate, deployed

24. BORCH, *supra* note 13, at 81.

25. Graham, *supra* note 1, at 10.

26. *Id.*

27. Graham, *supra* note 1, at 10-11 (noting that the International Law Division developed a curriculum that focused on the diverse legal issues that arose with the various forms of overseas deployment).

28. *Id.*

29. *Id.*

30. *See* BORCH, *supra* note 13, at 106-07.

on the first plane to Panama with other members of the command team.[31] He entered Panama carrying only a pistol, six meals ready to eat ("MREs"), a microfiche of the Manual for Courts-Martial, a condensed versions of the Army regulations on military justice, war trophies, various claims, and the Army Field Manual 27-10, *The Law of Land Warfare.*[32] After the conflict between the American and Panamanian forces, judge advocates provided operational advice on targeting, detention and status of detainees, status and treatment of foreign diplomats, claims, and military justice.[33] Judge advocates were much better prepared to confront these issues than their colleagues in previous deployments because of the JAG Corps' emphasis on the "newly developed practice of operational law."[34] Judge advocates engaged in predeployment legal assistance programs, such as preparing wills and powers of attorney. In addition, they were more actively involved in operational planning and ROE.[35] Judge advocates became an integral component of a commander's combat team.[36]

Operation Desert Shield/Desert Storm quickly followed Panama. Colonel Ruppert, the staff judge advocate for U.S. Central Command ("CENTCOM"), stated Desert Storm was "the most legal war we've ever fought."[37] Building upon the experiences in Panama, judge advocates were even more involved in both legal and nonlegal matters related to operational planning, training, and warfighting. The development of OPLAW and the expanded roles held by judge advocates made this possible.[38] Commanders no longer viewed their judge advocates as holding limited roles of merely providing traditional legal support for military justice, legal assistance, and administrative law.[39] Rather, as the JAG Corps recognized OPLAW as a core mission, commanders began actively seeking out legal advice at every opportunity with the expectation that judge advocates deliver advice on fiscal law issues, combat contracting,

31. Colonel Smith was the first judge advocate to deploy to Panama from the U.S. with combat forces. *Id.* at 99.

32. *Id.*

33. *Id.* at 103.

34. *Id*. at 117 (emphasizing that the judge advocates in Operation Just Cause were better prepared than those previously deployed in Vietnam and Grenada primarily because, though both groups engaged in a variety of operational law activities, the latter group approached the challenges in an "unstructured manner, and as individuals").

35. BORCH, *supra* note 13, at 117.

36. *Id.*

37. *Id.* at 194; Steven Keeva, *Lawyers in a War Room*, 77 A.B.A.J. 52 (Dec. 1991).

38. BORCH, *supra* note 13, at 195.

39. *Id.*

intelligence law, and ROE, in addition to providing advice on traditional legal issues and the law of war.[40]

Judge advocates continued this integration of OPLAW into operations after Desert Shield/Desert Storm. In the 1990s, legal support became an even more important aspect of military operations as the U.S. military engaged in various politically sensitive military operations, with judge advocates deployed to locations such as Somalia, Haiti, the Balkans, and Southwest Asia.[41] The U.S. Army recognized the important and ever-expanding role of legal issues in operations. Judge advocates with OPLAW experience started working side-by-side with the operations staff as opposed to remaining sequestered in their legal office.[42] Training events and training centers began to inject legal issues into practice as judge advocate observers/controllers were assigned to the Army's combat training centers. The first OPLAW observer/controller was assigned to the Joint Readiness Training Center in 1995.[43] By 1996, as judge advocates returned from Haiti, OPLAW, as a core competency of the JAG Corps, was fully in place. It became common for judge advocates to use every aspect of the law to provide OPLAW support to operations. To that note, Borch opined that in the 21st Century, "the most significant future developments in the role of the Army lawyer will occur at the strategic level."[44] Judge advocates would need to focus on interagency coordination and cooperation with operators from other government agencies.[45] As it turns out, Borch was exactly right.

Following the terrorist attacks of September 11, 2001, judge advocates assumed an even greater role in combat operations.[46] Judge advocates were deployed to combat operations in Afghanistan, Iraq, Africa, Syria, and elsewhere,[47] and were relied upon heavily due to the complex nature of high-intensity combat, counter-terrorism, and counter-insurgency operations. The practice of OPLAW is now an essential element of U.S. military operations,[48] resulting in the high demand for judge advocates.[49] With the U.S. Army adopting a modular force design, which primarily focused on brigade combat teams and support brigades, came the brigade legal section headed by a judge advocate major. These brigade legal

40. *Id.*
41. FM 1-04, *supra* note 9, at ¶ 1-2.
42. *See* BORCH, *supra* note 13, at 324.
43. FM 1-04, *supra* note 9, at ¶ 1-2.
44. BORCH, *supra* note 13, at 326.
45. *Id*.
46. Gade, *supra* note 15, at 6.
47. *Id.*
48. *Id.*
49. *Id.*

sections offer legal capabilities that were once found only at the division level or higher. Commanders can now turn to organic legal assets for real-time advice and expertise in all the core legal disciplines instead of having to look for legal support at higher levels.[50]

The result is that from 1964 to the present, judge advocates have gone from focusing on tasks related to traditional legal disciplines, like military justice, to becoming intimately involved in all aspects of legal issues in military operations. Even with the development and successful integration of this core discipline of OPLAW in the last thirty years, many still question the wisdom of moving away from the term "Operational Law" to "National Security Law." Just as David Graham asked in 1987 with regards to the development of OPLAW, many are asking whether National Security Law is "simply a modified form of [operational] law … dressed up and given a "catchy" name?"[51]

III. MOVE FROM OPERATIONAL LAW TO NATIONAL SECURITY LAW

The Judge Advocate General of the Army established National Security Law as a legal function in April 2018 moving away from international and operational law. He stated:

> National Security Law is being established as a legal function because International and Operational Law does not adequately capture the breath [sic] of actual work being done by Judge Advocates (JAs). National Security Law will comprise legal practice fields formerly identified under International and Operational Law plus cyber and intelligence law. This change is more consistent with interagency and academia, which refer to the body of law as NSL. The term "Operational Law'' is understood by some to reflect practicing law in a deployed and/or wartime environment. However, the current operational environment stretches from peacetime garrison activities all the way to kinetic operations and encompasses everything in between. National Security Law better describes the practice area post 9/11. Practically, this change will be visible with the restructuring of OTJAG International and Operational Law Division and The Judge Advocate General's Legal Center and School's International and Operational Law Department to the National Security Law Division and the National Security Law Department, respectively.[52]

There are three primary rationales for changing the name of Operational Law to National Security Law: (1) Operational Law no longer reflects the full scope of work that judge advocates are doing in this area of

50. FM 1-04, *supra* note 9, at ¶ 1-11.

51. Graham, *supra* note 1, at 9.

52. TJAG and DJAG Special Announcement 40-04, *supra* note 4.

law, (2) National Security Law more closely aligns with the term used in academia and other government agencies; and (3) Operational Law was primarily viewed through the lens of a deployed and/or wartime environment.

In looking at the first rationale, OPLAW is often viewed as focusing on *jus in bello*.[53] National security law reflects the broad expansion of the traditional "operational and international law" practice that has come to light over the past two decades. It more accurately describes the strategic nature of a judge advocate's practice covering not just the traditional *jus in bello* concepts, but also the *jus ad bellum*[54] concepts, domestic operations, coalition interoperability, special operations, cyber and intelligence law both domestically and abroad, as well as the issues surrounding emerging technologies (e.g., artificial intelligence), changing doctrine (e.g., Multi-Domain Operations), and new threats (e.g., Counter-UAS).[55] Accordingly, the National Security Law discipline now incorporates cyber, intelligence, domestic operations, and information operations as foundational areas of practice for judge advocates. As noted by The Judge Advocate General, failure to implement these changes risk that they are continued to be viewed as areas of "niche practice."[56] These areas can no longer be viewed this way but need to be seen as fundamental pieces of judge advocates work.[57]

Second, the shift from Operational Law to National Security Law was also a way to align the practice in this area with others in the interagency as well as with academic partners by using a common language. For example, many law schools around the country have instituted national security law programs. As law school graduates consider careers in the JAG Corps, the name change helps with recruitment and talent management, which is critical to the future staffing of the JAG Corps. These graduates that have often studied national security law will enter the JAG Corps with a better understanding of the breadth of national security law challenges and therefore be better able to seamlessly transition into their roles. As noted by The Judge Advocate General, "building and sustaining expertise in a

53. *Jus in bello*, or "international humanitarian law" (IHL), is the law that governs conduct during warfare. IHL is sometimes regarded as independent from questions regarding the justifications for war or prevention of war. *See* INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S LEGAL CTR. & SCH., U.S. ARMY, OPERATIONAL LAW HANDBOOK 11 (2011).

54. *Jus ad bellum*, or the "law of armed conflict" (LOAC), is often regarded as synonymous with the "law of war." The terms LOAC and "armed conflict" are preferred over "law of war" in the legal military community. *Id.*

55. Pede, *supra* note 5, at 2.

56. *Id.*

57. *Id.*

manner that is persistent and deliberate" is critical to the JAG Corps' future success.[58]

Changing the name of Operational Law to National Security Law also "serves to create harmony with interagency and academic partners by using a common language."[59] It is not simply a matter of mirroring academia or the interagency, but an acknowledgment that this area has grown beyond just OPLAW. Importantly, it is not a move away from OPLAW, but an attempt to capture the true nature of the work judge advocates undertake in the 21st century.

Third, OPLAW was originally developed and instituted with the goal of providing a comprehensive, structured approach to the myriad of legal issues that may arise during a deployment. Judge advocates, as a result, now provide a wider range of legal advice to a commander and make more effective contributions to mission success. This was the right approach in 1987, but the environment is very different today. Judge advocates in the national security realm must now be proficient, both in a deployed environment and in a domestic setting when engaging in their normal course of duties. A judge advocate must be broadly skilled in various areas of the law such as constitutional law, the law applicable to cyberspace, intelligence law, international law and operational law, and special operations. For example, a judge advocate must be able to answer fundamental questions about the authorities to use military force under domestic law, which involve questions of constitutional law, the application of the War Powers Act, and interpretations of the Authorization for the Use of Military Force ("AUMF") passed by Congress.

Contrary to expectations in 1987, judge advocates are now being called upon to be proficient in a wider area of law. Within this broader aperture, national security law covers an incredibly comprehensive spectrum of fascinating and challenging legal issues. Importantly, under national security law, there are certain practice areas, such as cyberspace and electromagnetic operations, intelligence law, and special operations law, that are considered discrete legal tasks because these areas require specialized knowledge and practice that judge advocates will not experience when dealing with OPLAW.[60] Although these practice areas fall under national security law, they are not different legal disciplines, but rather a recognition that they involve different clients with different legal needs.

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58. *Id.*

59. *Id.*

60. *Id.; see also* U.S. DEP'T OF THE ARMY, FIELD MANUAL 1-04 (FM 1-04), SUPPORT TO OPERATIONS (2020 Draft) (on file with the author).

IV. THE EVOLVING NATURE OF NATIONAL SECURITY LAW FOR JUDGE ADVOCATES

Cyberspace[61] operations are the employment of cyberspace capabilities where the primary purpose is to achieve objectives in or through cyberspace. Cyberspace and Electromagnetic ("CEMA") operations will likely grow increasingly congested and contested, and will be critical to successful military operations. There are rapid developments in this area that will challenge operators and legal advisors.[62] There are three interrelated cyberspace missions: (1) Department of Defense Network operations ("DODIN"); (2) defensive cyberspace operations, and (3) offensive cyberspace operations ("OCO").[63] Unlike cyber operations, cyberspace-enabled activities use cyberspace to enable other types of activities, which employ cyberspace capabilities to complete tasks, but are not undertaken as part of one of the three cyber operation missions.[64] Information Operations can be a category of cyberspace-enabled operations when it includes the integrated employment of electronic warfare, computer network operations, psychological operations, military deception, and operations security, in concert with specified supporting and related capabilities to influence, disrupt, corrupt, or usurp adversarial human and automated decision making while protecting our own.[65]

The law applicable to cyberspace generally is not a unique body of law but requires the legal advisor to apply other national security law disciplines to cyberspace operations and cyberspace-enabled activities. The complex nature of cyberspace operations, including the highly classified tools and capabilities involved and the potential for political implications, means that approval and oversight requirements for cyberspace operations often remain at the most senior leadership levels. Cyberspace operations will often raise unique and complex factual and legal issues that test the application of existing national security law. This is especially challenging since much of the guidance and regulations are classified and judge

61. Cyberspace is a global domain within the information environment consisting of the interdependent networks of information technology infrastructures and resident data, including the internet, telecommunication networks, computer systems, and embedded processors and controllers. JOINT PUBLICATION 3-12[R], CYBERSPACE OPERATIONS, (5 Feb. 2013) [hereinafter JP 3-12(R)]; ARMY FIELD MANUAL 3-12, CYBERSPACE AND ELECTRONIC WARFARE OPERATIONS, 1-10 (April 2017). Army Field Manual 3-12 replaces FM 3-38, which outlined initial guidance in 2014.

62. ARMY FIELD MANUAL 3-12, CYBERSPACE AND ELECTRONIC WARFARE OPERATIONS, 1-10 (April 2017) [hereinafter FM 3-12].

63. *Id*. at ¶ 1-5.

64. *See id.*

65. *Id*. at ¶ 2-3.

advocates will need to know where to find the appropriate laws and regulations. When analyzing legal issues raised by cyberspace operations, judge advocates will first need to determine whether the activity is a cyberspace operation or whether it is a cyberspace-enabled activity.[66] Once judge advocates determine whether the activity is cyber operations or a cyberspace-enabled activity, they must determine the relevant legal authorities governing the activity.[67] Judge advocates will also require a basic understanding of cyber technology and capabilities in addition to having knowledge of constitutional, domestic, international, operational, and intelligence law.[68]

Judge advocates must advise the commander and staff with respect to cyberspace actions, particularly if cyberspace operations may affect civilians, and ensure they comply with applicable policies and laws.[69] Cyberspace operations will often raise challenging international law issues given the structure of the internet and the potential for a particular activity to affect third-party systems. Judge advocates must analyze whether the proposed operation would constitute a use of force versus a prohibited intervention into a State's domestic affairs.[70] Additionally, cyberspace operations often raise issues related to neutrality and sovereignty. While many cyberspace operations occur outside of armed conflict, the law of armed conflict will apply to those that occur in an armed conflict or rise to the level of an armed attack.[71] There is no shortage of legal issues that judge advocates and their operators will face on a daily basis and they must be prepared to quickly provide the correct legal advice.

The practice of intelligence law has evolved since the 1980s. When many senior judge advocates entered the Army, they did not hear about intelligence law in either their basic or advance courses.[72] By the mid-1990s, there may have been an hour or two of instruction, and as a result, many of the judge advocates that worked in this area had to learn on the

66. *See generally id.* at ¶ 3-31, Table 3-1 (outlining the tasks of the cyberspace electromagnetic working group).

67. *Id.*

68. *Id.*

69. *See What Limits Does the Law of War Impose on Cyber Attacks?*, ICRC (June 28, 2013), https://www.icrc.org/en/doc/resources/documents/faq/130628-cyber-warfare-q-and-a-eng.htm (last visited Mar. 27, 2020).

70. *Id.*

71. *Id.*

72. Richard M. Whitaker, *Intelligence* Law, *in* U.S. MILITARY OPERATIONS: LAW POLICY, AND PRACTICE 509, 550 (Geoffrey S. Corn, Rachel E. VanLandingham, and Shane R. Reeves, eds., 2015).

job, make mistakes, and then try to learn from them.[73] Thankfully, this is no longer the case since there is now a level of sophistication within the Army and other services. Still, it is important to ensure the next generation of judge advocates do not experience these same growing pains.

Intelligence activities are some of the most sensitive activities conducted by military forces. They are highly regulated and subject to intense scrutiny and oversight both within the Department of Defense, the interagency, as well as Congress.[74] This is particularly true when the intelligence pertains to U.S. persons.[75] Any information that is being collected, stored, disseminated, and analyzed on U.S. persons is fraught with legal issues. Judge advocates play a key role in the oversight of intelligence activities. Therefore, they not only require specialized training on the authority to conduct a particular intelligence activity, but also on any reporting requirements for questionable intelligence activities and significant or highly sensitive matters.

Judge advocates must intimately understand intelligence law because of the similarities between operational activities and intelligence activities. The means and methods employed for both are often similar, but authorities for operational activities versus intelligence activities are very different. This is particularly true with respect to using publicly available information and operational preparation of the environment, both of which are operational activities.[76] These activities are very closely related to open source intelligence and human intelligence activities, respectively. Although operational activities are conducted pursuant to different authority and with a different reporting and oversight process, they raise many of the same sensitive issues as the intelligence activities.[77] Judge advocates not assigned to intelligence units may not be familiar with these authorities or distinctions in the law, but judge advocates assigned to intelligence units must know the distinction to ensure that operational activities are not misidentified and misanalysed, but rather are approved and conducted pursuant to the appropriate authorities.[78] Judge advocates must understand

73. *Id.*

74. *See generally* Exec. Order No. 12,333, 3 C.F.R. § 1.1-3.6 (1981) (outlining the "activities, capabilities, plans, and intentions of foreign powers, organizations, and persons and their agents," all of which are essential to U.S. national security).

75. A U.S. person is defined as a U.S. citizen, a permanent resident alien, a corporation incorporated in the United States, or an association substantially composed of U.S. citizens or permanent resident aliens. *See* Exec. Order No. 12,333, 3 C.F.R. § 1.1-3.6 (1981), *as amended by* Exec. Order No. 13,470, 3 C.F.R. § 3.5(k) (2008).

76. Whitaker, *supra* note 72, at 551.

77. *Id.*

78. *Id.*

the importance of finding the correct legal authorities and where those authorities originate in order to provide the correct legal advice.[79]

Special operations are defined as "operations requiring unique modes of employment, tactical techniques, equipment and training often conducted in hostile, denied, or politically sensitive environments and characterized by one or more of the following: time sensitive, clandestine, low visibility, conducted with and/or through indigenous forces, requiring regional expertise, and/or a high degree of risk."[80] In addition to special operations conducting different types of missions than conventional operations, many of the domestic and international legal issues raised by the conduct of special operations will be different.

Examining this definition and the various activities they carry out underscore the diverse legal issues that can arise. Operations in denied or politically sensitive environments will often involve issues of sovereignty and intervention if they are carried out without the knowledge or consent of the host nation.[81] Operations by partners, in particular non-state armed groups, will raise questions regarding their legal status and targeting issues.[82] Finally, clandestine missions will raise legal questions on the status of special operation forces ("SOF").[83]

Legal advisors in special operations units face many of the same challenges as any other legal advisor. They must have competence in all the core disciplines of their peers, but what distinguishes legal advisors in special operations units is that they must also have the character and discipline to work with an organization that has the capacity to move at a faster rate than conventional military units. In other words, the law does not change, but the pace of decision-making increases exponentially, which will place incredible pressure on all members of elite organizations to perform.

As discussed above, special operations units often have authority to conduct certain operations with conventional forces working in areas that require extreme care. Judge advocates must guide SOF operators through tactical decisions with strategic implications. The moral courage to say "no" or "not that way" brings profound meaning to codes of professional responsibility. These organizations are also often working with a host

79. *Id.*

80. Matthew R. Grant & Todd C. Huntley, *Legal Issues in Special Operations*, *in* U.S. MILITARY OPERATIONS: LAW POLICY, AND PRACTICE 553, 555 (Geoffrey S. Corn, Rachel E. VanLandingham, and Shane R. Reeves, eds., 2015).

81. *Id*. at 556.

82. *Id*.

83. *Id*.

nation, which means the legal advisor must at least be proficient in local laws, customs, and practices to avoid jeopardizing operations. Finally, these organizations, because of the sensitivity of many of their missions, operate at highly classified levels, which means that a legal advisor has fewer colleagues to consult with as those colleagues will not have the need to know.

V. CONCLUSION

In 1987, the development of OPLAW caused a significant shift in the roles held by judge advocates. Today, approximately thirty years later, judge advocates are experiencing another significant shift in the way they provide legal advice to commanders in operations. The move to national security law reflects the reality of a judge advocate's role in today's changing military. OPLAW is still a vital component of national security law as a judge advocate must not only be experts on the law, but also must understand how certain weapons are used, and advise on the legality of certain proposed targets or the status of civilians taking part in hostilities. They must know and understand the intent of the commander and, when necessary, propose alternative scenarios that comply with the law. The changing nature of warfare with the advent of new technologies, complex operating environments, and the increasing impact of the law on military operations, means that areas of the law, such as intelligence, CEMA, and special operations, are vital to the success of missions. The shift from operational law to national security law means that judge advocates will be ready for these challenges.

THROUGH THE LOOKING GLASS: RE-IMAGINING LEGAL AND LEGITIMATE FORCE IN THE CONTEMPORARY OPERATING ENVIRONMENT

Thomas W. Oakley*

"Why, it's a Looking-glass book, of course!
And if I hold it up to a glass, the words will all go the right way again."[1]

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1. LEWIS CARROL, THROUGH THE LOOKING GLASS 31 (1897).

I. INTRODUCTION

On January 3, 2020, the United States conducted a unilateral attack near Baghdad International Airport, killing Iranian Major General Qassim Soleimani.[2] President Trump initially justified the attack by telling reporters from Mar-A-Lago that "Soleimani was plotting imminent and sinister attacks on American diplomats . . . ."[3] Days later, the United States transmitted a formal notification to the United Nations reporting the action as an exercise of self-defense under Article 51 of the United Nation's Charter.[4] Instead of claiming the action as a response to an imminent threat, this notification cited "an escalating series of armed attacks . . . by the Islamic Republic of Iran . . . against the United States."[5]

The United States' justification generated no shortage of commentary ranging from approval to condemnation of the attack as an illegal assassination.[6] Even some members of the United States Congress, after

2. Throughout this piece, there will be several footnote references to articles in which authors spell Iranian Major General Soleimani's full name differently, as either "Qassim Suleimani" or "Qasem Soleimani." Michael Crowley, Falih Hassan & Eric Schmitt, *U.S. Strike in Iraq Kills Qassim Suleimani, Commander of Iranian Forces,* N.Y. TIMES (Jan. 2, 2020), https://www.nytimes.com/2020/01/02/world/middleeast/qassem-soleimani-iraq-iran-attack.html.

3. Remarks by President Trump on the Killing of Qasem Soleimani, NAT'L SEC. & DEF. (Jan. 3, 2020), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-killing-qasem-soleimani/ (last accessed Mar. 23, 2020) [hereinafter President Trump Remarks, Jan. 3, 2020].

4. Letter from Ambassador Kelly Craft, U.S. Permanent Representative, to Ambassador Dang Dinh Quy, Pres. SCOR (Jan. 8, 2020) [hereinafter Ambassador Craft Letter, Jan. 8, 2020].

5. *Id*. (citation omitted).

6. *See* Oona A. Hathaway, *The Soleimani Strike Defied the U.S. Constitution,* ATLANTIC (Jan 4. 2020), https://www.theatlantic.com/ideas/archive/2020/01/soleimani-strike-law/604417/ (citing a lack of domestic and international legal basis for the strike and noting a disagreement amongst people regarding the legality of the strike); Agnes Callamard, *The Targeted Killing of General Soleimani: Its Lawfulness and Why It Matters,* JUST SECURITY (Jan. 8, 2020), https://www.justsecurity.org/67949/the-targeted-killing-of-general-soleimani-its-lawfulness-and-why-it-matters/ (arguing in part that the so-called "first shot" theory might justify this act under international law); Alan M. Dershowitz, *Easy Call: The Strike on Soleimani was Lawful,* WALL STREET J. (Jan 5. 2020, 5:06 PM), https://www.wsj.com/articles/easy-call-the-strike-on-soleimani-

receiving a classified briefing on the Soleimani strike, expressed skepticism, stating that the threat did not appear to be imminent.[7] However, a focus on imminence, as a requirement precedent to action, reveals a critical misunderstanding of the law regarding the use of force in self-defense. While the imminence of a potential attack is a relevant factor in an ex-ante assessment of a potential use of force in self-defense, the *necessity* of responding to a threat is the key factor.

A. *The Problem*

The confusions stems, in my estimation, from a flawed reading of the exchange between U.S. Secretary of State Daniel Webster and U.K. Special Minister Lord Ashburton in response to the 1837 *Caroline* incident. In an exchange of letters after British troops set afire and destroyed the United States flagged ship, the *Caroline,* Webster described the standard for use of force in self-defense as a "*necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment of deliberation.*"[8] In shorthand, this may be described as "imminence."[9]

Today, over-reliance on imminence hoists it to a level of necessary pre-condition to action. Editors Henry Shue and David Rodin, in the introduction to their excellent volume on preemption, call this imminence-required view the traditional "Websterian" view, and attribute it to Michael Walzer.[10] Unfortunately, while this view may be well-followed, I believe it diverts from the original meaning of Webster's statement. As Shue and Rodin note, even Walzer himself would likely condone action before a potential attack is imminent.[11]

The idea that imminence is a pre-condition to action is a dangerous proposition because as Yoram Dinstein explains, "imminence may mean

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was-lawful-11578261997 (arguing the killing was lawful as an authorized and proportionate response to the actions of a combatant).

7. *See* Rebecca Shabad & Mike Felan, *'Insulting and Demeaning': Two GOP Lawmakers Rip Trump Administration After Iran Briefing,* NBC NEWS (Jan. 8, 2020, 2:17 PM), https://www.nbcnews.com/politics/congress/insulting-demeaning-lawmakers-rip-trump-administration-after-iran-briefing-n1112596.

8. Letter from Daniel Webster, United States Secretary of State, to Mr. Fox, British Foreign Minister (Apr. 24, 1841), https://avalon.law.yale.edu/19th_century/br-1842d.asp [hereinafter Webster Letter, Apr. 24, 1841] (emphasis added).

9. *See* Ashley Deeks, *"Imminence" in the Legal Adviser's Speech,* LAWFARE (Apr. 6, 2016, 7:00 AM), https://www.lawfareblog.com/imminence-legal-advisers-speech (describing a speech by U.S. State Department legal advisor, Brian Egan, on the concept of imminence in self-defense).

10. Henry Shue & David Rodin, *Introduction*, *in* PREEMPTION: MILITARY ACTION AND MORAL JUSTIFICATION 1, 4 (Henry Shue & David Rodin, eds., 2007).

11. *Id*.

different things to different people: either too little or too much."[12] One might imagine an imminent threat that does not necessitate an immediate response, such as a mere border skirmish that offers no threat to national security. Conversely, some have argued that immediate military action might be authorized in response to non-imminent threats.[13] Yet imminence continues to permeate the intellectual landscape of self-defense.

What we need is a proverbial looking glass to make the words "go the right way again," with a renewed focus on the *necessity* of action as opposed to the imminence of a threat. In this article, I will argue that Article 51 of the U.N. Charter supplements the pre-existing customary international law of self-defense as embodied in the *Caroline Case.* While nearly 200 years old, the *Caroline* standard, when properly interpreted, allows for the use of force to address all contemporary needs under one coherent rule which accounts for pre-attack self-defense and comports with the U.N. Charter's purposes.[14]

B. *Why This Matters*

An over-reliance on the concept of imminence risks both over and under-inclusion of threats that trigger the right of self-defense. More importantly, a narrow view of imminent threats as the limiting factor may preclude potential uses of force that are necessary from a national security interest and simultaneously protect humanitarian interests. Without clear and delineated legal options, states may resort to using vague references to "national security interests" as convoluted attempts to justify action.

For example, on April 13, 2018, the United States, in conjunction with allies, including the United Kingdom and France, conducted a limited use of force attack against the Assad regime in Syria.[15] The United Kingdom justified its actions in a detailed memorandum, stating "[t]he legal basis for the use of force is humanitarian intervention."[16] The United States offered

12. YORAM DINSTEIN, WAR, AGGRESSION, AND SELF-DEFENCE 205 (5th ed. 2011).

13. *See generally* Ashley S. Deeks, *Taming the Doctrine of Pre-Emption*, *in* THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW 661, 662-63, 665-68 (Marc Weller, ed. 2015) (describing theories of self-defense to include anticipatory self-defense, preemptive self-defense, and preventative self-defense).

14. Article 1 of the U.N. Charter lists four purposes, which may be summarized as: to maintain international peace and security; to develop friendly relations; to achieve international co-operation and promotion of respect for human rights; and to harmonize the actions of nations in the attainment of these ends. U.N. Charter art. 1.

15. *International Response to Assad Chemical Weapons,* U.S. DEP'T OF DEF., https://www.defense.gov/News/Special-Reports/Syria/ (last visited May 3, 2018).

16. The UK explained that such humanitarian intervention is lawful when three conditions are met: (1) there is convincing evidence, generally accepted by the international community as a

no such legal justification, but Defense Secretary James N. Mattis opined that the strikes were an attempt to stop President Bashar al-Assad from using inhumane weapons, and to protect the national security interest of the United States.[17]

While the United Kingdom expressed definitively its legal authority to carry out the attack under a theory of humanitarian intervention, the question of its legality remains open on the international stage. Some international lawyers have expressed skepticism towards the concept of humanitarian intervention because it might be viewed as a violation of state sovereignty.[18] Indeed, during years of turmoil in the former Yugoslavia, the United Nations Security Council seemed ill-suited to act, perhaps due to uncertainty over the sovereignty issue, fueled by the lack of a discernable imminent threat to Member States.

As a general matter, doubt regarding the legal basis for the use of force may cause hesitation to use such force. Perhaps this is a good thing, but in critical situations, when the decision to act concerns a matter of moral imperative to humanity, hesitation may prove deadly. Louis Henkin, former President of the American Society of International Law and Professor at Columbia University, considered the issue of humanitarian intervention and argued that it would be "highly undesirable to have a new rule allowing humanitarian intervention, for that could provide a pretext for abusive intervention."[19]

Henkin wondered whether it would be "better to leave the law alone, while turning a blind eye (and deaf ear) to violations that had compelling moral justification . . . [or] push the law along to bring it closer to what the law ought to be?"[20] In his estimation, the concern of abuse in the form of

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whole, of extreme humanitarian distress on a large scale, requiring immediate and urgent relief; (2) it must be objectively clear that there is no practicable alternative to the use of force if lives are to be saved; and (3) the proposed use of force must be necessary and proportionate to the aim of relief of humanitarian suffering and must be strictly limited in time and in scope to this aim (i.e., the minimum necessary to achieve that end and for no other purpose). Prime Minister's Office, Syria Action – UK Government Legal Position, GOV.UK (Apr. 14, 2018), https://www.gov.uk/government/publications/syria-action-uk-government-legal-position/syria-action-uk-government-legal-position.

17. *See* Jim Garamone*, Mattis, Dunford Detail Attacks on Syrian Chemical Arsenal*, U.S. DEP'T OF DEF. (Apr. 13, 2018), https://www.defense.gov/News/Article/Article/1493636/mattis-dunford-detail-attacks-on-syrian-chemical-arsenal/ (stating the strike sends a "clear message" to Syria that "they should not perpetrate another chemical weapons attack," and that "allied forces are ready to continue the action if Assad continues to use these banned weapons").

18. Anthony F. Lang, Jr., *Introduction: Humanitarian Intervention – Definitions and Debates*, *in* JUST INTERVENTION 6 (Anthony F. Lang, Jr. ed., 2003).

19. Louis Henkin, Editorial Comments: *NATO's Kosovo Intervention: Kosovo and the Law of "Humanitarian Intervention,"* 93 AM. J. INT'L L. 824, 826 (1999).

20. *Id.* at 827 (citation omitted).

increased unilateral force justified states to "acquiesce in violation[s] considered necessary and desirable."[21]

Though Henkin's powerful voice provides noteworthy commentary, I believe a precedent of tolerable illegality is a dangerous one which should give reason for pause. Consider, for example, a situation in which the same justification is proposed on the subject of torture. In an essay proposing judicial warrants for torture, Alan Dershowitz argued that "unless a democratic nation is prepared to have a proposed action governed by the rule of law, it should not undertake, or authorize, that action."[22] His point is that "willful blindness" to torture without limits or standards may in fact increase the use of torture.[23]

Similarly, if actions deemed "humanitarian" are given no safe-harbor in legality, repeated acquiescence by the international community of so-called illegal acts carried out in the name of humanity might embolden states acting under a humanitarian mantle (e.g., Crimea) to take further "actions," which is a slippery slope problem in its own right. A requirement of showing imminence of attack against a third-party helping state increase the slope because such an attack is unlikely in crises of a humanitarian nature. By requiring only the demonstration of the necessity of action (with or without imminence), states may justify actions that benefit humanity with a plausible grounding in national security interests.

It is foreseeable that Security Council action in response to a humanitarian crisis may at times be restricted due to the veto power. In these moments, it seems far preferable to ground unilateral or even multilateral action in necessity of action to defend national security than to turn a blind eye to illegal uses of force, legitimizing their use.

Henkin's implicit suggestion is that there is a gap between lawful action and humanitarian need, but this itself is tortured logic (pun intended). It has been argued that the U.N. Charter, and by implication customary international law, includes "an element of ambiguity that enables some degree of reinterpretation based on changing international conditions."[24] With a renewed focus on necessity at the center of customary self-defense law, we can harmonize traditional uses of force under the U.N. Charter not

21. *Id.*

22. Alan Dershowitz, *Tortured Reasoning*, *in* TORTURE 257, 264 (Sanford Levinson ed., 2004).

23. *Id.* at 265 (stating that "without limitations, standards, principles, or accountability the use of such techniques will continue to expand").

24. AIDEN WARREN & INGVILD BODE, GOVERNING THE USE-OF-FORCE IN INTERNATIONAL RELATIONS: THE POST 9/11 U.S. CHALLENGE ON INTERNATIONAL LAW 12-13 (Stuart Croft ed., 2014) (explaining that the U.N. Charter is an "evolving organ," drafted in a way to allow for reinterpretation of its provisions based on changing circumstances).

only to protect national security interests, but also to assist in resolving humanitarian crises.

Such a coherent rule would enable the international community to defend humanity in the open. On the same note, but in connection with the United States' targeted killings program, Harold Koh stated, "a swift and thorough public explanation is needed, so that . . . others who will be affected can assure themselves that the government action is indeed justified under international law."[25] Necessity-based analyses allow for such justifications, and would provide legitimacy to the actions taken by states, and to the international legal regimes supporting them.

Part II will summarize the traditional theories for the use of force, as written in the U.N. Charter. This will set the stage for a discussion in Part III of the customary rule of self-defense, in which I will re-cast the customary self-defense analysis from the perspective of necessity. Additionally, Part III will also consider potential problems and objections to this proposed analytical tool. Part IV will discuss pre-attack self-defense and consider how a necessity-based analysis might help harmonize the various theories of pre-attack uses of force.

II. TRADITIONAL THEORIES FOR THE USE OF FORCE

Christine Gray once noted, "[t]he law on the use of force is one of the most controversial areas of international law and one where the law may seem ineffective."[26] Before delving into its potential inadequacies, it is important to take measure of the state of the law. Article 2(4) of the U.N. Charter prohibits the "threat or use of force against the territorial integrity or political independence of any state."[27] In essence, the sovereignty of states is protected against the use of force except in specific circumstances.[28]

25. Harold Hongju Koh, *The Legal Adviser's Duty to Explain,* 41 YALE J. INT'L L. 189, 195 (2016) (citation omitted). In the case of targeted killings, states may expand the concept of imminence to allow for action at the "last window of opportunity" before an enemy becomes untraceable and commences the preparations for an attack. *See* U.S. DEP'T OF J., *Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who is a Senior Operational Leader of Al-Qa'ida or an Associated Force* (Nov. 8, 2011), https://fas.org/irp/eprint/doj-lethal.pdf.

26. Christine Gray, *The Use of Force and the International Legal Order*, *in* INTERNATIONAL LAW 618, 618 (Malcolm D. Evans, ed., 4th ed. 2014).

27. U.N. Charter art. 2, ¶ 4.

28. GEORGE P. FLETCHER & JENS DAVID OHLIN, DEFENDING HUMANITY: WHEN FORCE IS JUSTIFIED AND WHY 36-37 (2008).

A. *U.N. Charter Self-Defense*

The only delineated exception is Article 51 of the U.N. Charter, which provides for the use of force in self-defense in at least two circumstances.[29] The Article is provided in full here as it will be frequently referenced in the following pages:

> 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, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.[30]

The first circumstance is the use of force to respond to an armed attack, or when an armed attack occurs. The right to use force lasts until the Security Council acts (or "takes measures") to maintain peace and security.

One might debate when an armed attack "occurs" for the purposes of Article 51. The strict textualist approach would seem to require an actual armed attack to have at least begun, suggesting a requirement to "take the first punch."[31] But in an era involving Weapons of Mass Destruction ("WMD"), absorbing the first volley of an attack certainly does not appear consistent with a state's "inherent" right to defend itself. And while nuclear war seems a distant and remote possibility, new technologies with massive destructive force may require similar analysis. For example, hypersonic weapons, currently under development, are difficult to stop once fired.[32]

Advocates of a broader right to self-defense might dismiss Article 51 as inept draftsmanship, but as Professor Dinstein opines, the language is "quite satisfactory once it is recognized that the right of self-defence is deliberately circumscribed to counter-force stimulated by an armed attack."[33] This is an instructive point, as it implies a difference between an armed attack and a *threat* of an armed attack. In Dinstein's learned

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29. *Id.* at 36.

30. U.N. Charter art. 51.

31. WARREN & BODE, *supra* note 24 at 28.

32. *See* Jen Judson, *Pentagon's Major Hypersonic Glide Body Flight Test Deemed Success,* DEFENSE NEWS (Mar. 21, 2020), https://www.defensenews.com/smr/army-modernization/2020/03/20/pentagons-major-hypersonic-glide-body-flight-test-deemed-success/ (last accessed Mar. 23, 2020).

33. DINSTEIN, *supra* note 12, at 198.

opinion, the right to use force begins once an attack is in its "incipient stage," meaning there is no need to wait for "bombs to fall."[34]

Interestingly, the French version of Article 51 (also considered official) triggers the right to self-defense where a state becomes the object of armed *aggression*, which might support a broader interpretation when aggression is considered something short of an attack.[35] The 1998 Rome Statute of the International Criminal Court envisioned a crime of aggression falling within the Court's jurisdiction, but the State parties could not agree initially on a definition.[36]

In 2010, during the first review conference for the Rome Statute held in Kampala, Uganda, State parties agreed on a definition of aggression that criminalizes state use of force that contravenes the U.N. Charter.[37] The second part of the definition provides a non-exclusive list of acts which would constitute aggression. It follows that when a state observes a listed act entering the "incipient state,"[38] it might be argued that the act then crosses the necessary threshold, from threat to attack, justifying the use of force in self-defense.

It should be noted that under Article 51 self-defense, the right to use force lasts only until the Security Council acts to maintain peace and security.[39] In other words, while the Charter acknowledges a state's sovereign right to defend itself from attack, the Charter vests in the Security Council, as the action arm of the United Nations, the authority to take whatever actions it deems necessary to *maintain and restore* international peace and security.[40]

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34. *Id.* at 200 (emphasis added).

35. WARREN & BODE, *supra* note 24 at 29 (translating the French text of Article 51, "dans le cas ou un membre… est l'objet d'une agression armee" to "in the case where a member … is the object of an armed aggression").

36. Article 5, Part 2 of the Rome Statute of the International Criminal Court states: "The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes: (a) The crime of genocide; (b) Crimes against humanity; (c) War crimes; (d) The crime of aggression." Rome Statute of the International Criminal Court art. 5, July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002).

37. *Id.* at art. 8 *bis*; *Report of Review Conference of the International Criminal Court: Kampala, 31 May – 11 June 2010*, COALITION FOR THE INT'L CRIM. CT. (2010), https://asp.icc-cpi.int/iccdocs/asp_docs/ASP9/OR/RC-11-Part.I-ENG.pdf [hereinafter Kampala Conference Report].

38. The term "incipient state" is a term borrowed from author, Yoram Dinstein. DINSTEIN, *supra* note 12, at 198.

39. U.N. Charter art. 51.

40. One note worth consideration: Article 51 contemplates a right of self-defense that is bounded/ended by Security Council action to *maintain* peace. It is interesting that the word "restore" is not included in this first clause, but is in included later in describing the Security

B. *Security Council Action to Maintain or Restore International Peace and Security*

The Security Council's power to act to maintain and restore peace and security stems from Chapter VII of the U.N. Charter. As originally conceived, the United Nations would have a standing army that the Security Council could call upon to respond to acts of aggression.[41] This idea obviously did not come to fruition but does not diminish the Security Council's role in maintaining peace.

Indeed, the articles falling within Chapter VII give tremendous power to the Security Council to respond to security concerns. A controversial topic regarding self-defense involves how soon a state may act before an actual attack. Interestingly, it is at least one author's opinion that the Security Council has no such limits.[42] Article 39 empowers the Security Council to "determine the existence of any threat to the peace, breach of the peace, or act of aggression and . . . decide what measures shall be taken . . . to maintain or restore international peace and security."[43]

Articles 41 and 42 grant the Security Council authorities to take non-armed and armed actions, respectively, to enforce its decisions.[44] When non-armed measures prove (or are determined to be) inadequate, the Security Council may authorize force. In modern usage, the typical language of a Security Council Resolution allowing force will call upon states to take "all necessary means" to achieve the stated goal.[45]

While it appears that state use of force under Article 51 (which falls within Chapter VII) is limited by a triggering attack or aggression, the use of force by the Security Council is not so limited. This is an important point. When arguing for an expansive right of state resort to force, it is worth noting that one interpretation sees the U.N. Charter as seemingly striking a balance: clear attacks or acts of aggression are left to states, but less-overt threats not amounting to attacks are reserved to the Security Council.[46] Other states disagree and see no gap between Article 2(4)

Council's plenary authority to "maintain and restore." Is this simply a scrivener's error or perhaps an intentional omission? Might the absence of "restore" indicate space in which customary law fills the void? I will leave this discussion for another time.

41. Gray, *supra* note 27 at 636.

42. WARREN & BODE, *supra* note 24, at 28.

43. U.N. Charter art. 39 (citation omitted).

44. U.N. Charter arts. 41, 42.

45. *See, e.g.*, S.C. Res. 678, ¶ 2 (Nov. 29, 1990).

46. It should be noted that there is disagreement regarding the language in arts. 2(4) and 51 of the U.N. Charter. While certain states believe the art. 2(4) language, "threat or use of force" is analogous to the art. 51 language, "armed attack," other states see them as distinct levels of force. It may be said that the latter states see a "gap" between the language.

threats/uses of force and Article 51 armed attacks. That said, there exist "deep divisions between States and between scholars as to where the right of self-defense" begins.[47] These divisions are due to actual or perceived gaps in the law and it is into those gaps we will now proceed.

III. CUSTOMARY SELF-DEFENSE

One point of disagreement involves whether Article 51 fully encapsulates the right of self-defense, or whether there exists outside of it some additional inherent right.[48] The teleological approach to treaty interpretation would consider the object and purpose[49] of the U.N. Charter in concluding that the drafters purposely "constructed the *jus ad bellum* regime so as to decrease the unilateral use-of-force…"[50] One might respond that it would be illogical to presume that the Charter's object and purpose would require a state to absorb a military strike before allowing for the right of self-defense to vest.[51]

The benefit of requiring an actual attack before allowing for lawful actions in self-defense is certainty. But this certainty comes at the cost of potential death and destruction, and a reduced chance that states will follow a rubric requiring such a cost. Conversely, allowing for force in self-defense absent some limiting principle would engender a sense of lawlessness contrary to the ideals of the U.N. Charter. To help sort out the contours of a customary right to self-defense, let us turn to the case that changed self-defense "from a political excuse to a legal doctrine."[52]

A. *The Caroline Incident*

The historical setting for the *Caroline* incident and the lessons we will draw from it places us in colonial Canada in 1837.[53] Geographically, the incident occurred in the border region between the United States and British

47. Gray, *supra* note 26, at 627, 639.

48. *Id.* at 628.

49. The Vienna Convention is a multilateral treaty created by the U.N. that codifies the customary international canons governing international agreements. In the article, I write "object and purpose," as dictated by art. 31, sec. 1 of the Vienna Convention, which states, "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose." Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, reprinted in 8 I.L.M. 679 (entered into force Jan. 27, 1980).

50. WARREN & BODE, *supra* note 24, at 31.

51. *Id.* at 32.

52. R.Y. Jennings, *The Caroline and McLeod Cases,* 32 AMER. J. INT'L. L. 82, 82 (1938).

53. *Id.*

Canada, in the vicinity of Niagara Falls.[54] Canadian rebels actively recruited support for their cause along the border with the United States. Given the relatively recent fight for independence from British rule in the United States, the rebels had little difficulty finding sympathy.[55]

An armed group of rebels captured a British possession called Navy Island and began shipping fighting men and supplies to the island via a ship named the "Caroline" from the territory of New York.[56] There is some indication that the British appealed to the Governor of New York for assistance in stemming the flow of support, but no such help came.[57] In response, Colonel McNab, then the commander of British forces, determined that "destruction of the Caroline would serve the double purpose of preventing further reinforcement and supplies from reaching the island, and depriving the rebels of their means of access to the mainland of Canada."[58]

On December 29, 1837, the *Caroline* made routine stops in Buffalo, Black Rock Harbor, and Navy Island, before stopping for the night in Fort Schlosser, in the United States.[59] That evening, British soldiers boarded the *Caroline* by force, lit her on fire, and set her adrift over Niagara Falls. The British claimed that the United States failed to assist the British when requested, and also failed to enforce its own laws in the border region.[60] In essence, the British claimed the incursion was necessary as a matter of self-defense.

B. *It is All About Necessity*

As one scholar, R.Y. Jennings, wrote in his analysis of *Caroline*, "the conception [of self-defense] was rescued from . . . an absolute primordial right of self-preservation . . . and was subjected to the limiting condition of necessity; and necessity is nowhere more carefully defined than in [Secretary of State] Webster's letter."[61] The diplomatic exchange that yielded this self-defense actually started before Webster's tenure, beginning

54. GARY D. SOLIS, THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR 176 (2d ed. 2016); *1837- Caroline Affair*, HISTORY CENTRAL, https://www.historycentral.com/Ant/caroline.html (last visited March 28, 2020).

55. Jennings, *supra* note 52, at 82.

56. *Id.* at 83.

57. *Id.*

58. *Id.* at 83-84.

59. *Id.* at 84.

60. *Id.* at 85.

61. *Id.* at 92 (citation omitted).

with an exchange between American Secretary of State John Forsyth and the British Foreign Minister, Mr. Fox.

Daniel Webster, succeeding John Forsyth, concluded the exchange in a letter presciently detailing the law of self-defense to the newly appointed special minister, Lord Ashburton.[62] Secretary of State Webster wrote:

> The Government of the United States . . . does not think that the transaction can be justified by any reasonable application or construction of the right of self-defence under the laws of nations. It is admitted that a just right of self-defence attaches always to nations, as well as to individuals, and is equally necessary for the preservation of both . . . and when its alleged exercise has led to the commission of hostile acts, within the territory of a power at peace, nothing less than a clear and absolute necessity can afford ground of justification . . . *It will be for that Government to show a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment of deliberation* . . . even supposing the necessity of the moment [they must show they] . . . *did nothing unreasonable or excessive; since the act justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it*.[63]

Webster left quite a bit of law to unpackage in this short statement. First, we will start with an assessment of imminence, what Webster meant by the term, and where certain modern interpretations have gone wrong. Second, we will turn to the concept of proportionality as it is embedded in this letter. Finally, we will return to our starting point to consider necessity as the driving force in the law of self-defense.

1. The imminence of a particular threat is important but not dispositive to a right to use force in self-defense

Months before becoming National Security Advisor, John Bolton penned an opinion editorial in the Wall Street Journal making the "legal" case for striking North Korea.[64] He argued, "[t]he threat is imminent, and the case against pre-emption rests on the misinterpretation of a standard…"[65] Bolton concluded that an American strike on North Korea would "[c]learly not" violate Webster's test.[66]

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62. *Id.* at 88.

63. Webster Letter, Apr. 24, 1841, *supra* note 8 (citation omitted) (emphasis added).

64. John Bolton, *The Legal Case for Striking North Korea First,* WALL STREET J. (Feb. 28, 2018, 6:59 PM), https://www.wsj.com/articles/the-legal-case-for-striking-north-korea-first-1519862374?ns=prod/accounts-wsj.

65. *Id.*

66. *Id.*

Bolton's analysis may prove to be an example of the risk presented by an over-reliance on the imminence standard. In his opinion editorial regarding the legality of striking North Korea first, Bolton claims, "[p]re-emption opponents argue that action is not justified because Pyongyang does not constitute an 'imminent threat.' They are wrong."[67] While Bolton correctly states the test is one of necessity, he seems to equate future imminence with a present necessity to act. While this could be true in some circumstances, this case in hindsight proves a lack of necessity.

At issue is the difference between the terminology of theories of self-defense in advance of an actual attack. Terminology such as "anticipatory," "preemptive," "precautionary," and "interceptive self-defense" have all found their way into academic debates and even national doctrine.[68] Shue and Rodin offer a helpful distinction that "[t]he normative conceptions of preemptive attack and preventative war can be made mutually exclusive by requiring, by definition, that a military action is preemptive only if it responds to an imminent attack and that a military action is preemptive only if it does not respond to an imminent attack…"[69]

Dinstein's proposal of *interceptive self-defense* offers an interesting addition to the discussion. Dinstein uses the term "interceptive" to refer to the use of force to counter an armed attack that "the other side has committed itself to . . . in an ostensibly irrevocable way."[70] His use of the term interceptive avoids the policy-laden discussion that typically surrounds anticipatory self-defense. To Dinstein, the issue "is not who fired the first shot but who embarked upon an apparently irreversible course of action, thereby crossing the legal Rubicon."[71] I argue that the corollary to this point of no return is a necessity to act.

The presence of imminence (or lack thereof) is important, but must be considered as part of a larger test that includes, by the very language of *Caroline*, whether there is a choice of means or a moment for deliberation. In other words, the totality of the circumstances matter to determine whether there is a necessity to act in the present. Returning to Bolton and the North Korean example, while it is beyond the scope of this article to speculate on the imminence of the North Korean threat at the time of occurrence or even today, there certainly appears to have been a choice of means. Diplomatic measures have produced high-level talks and perhaps a

67. *Id.*

68. *See* DINSTEIN, *supra* note 12, at 194 (stating that the United States' claim to a preemptive right is often termed "anticipatory" self-defense).

69. Shue & Rodin, *supra* note 10, at 2 (citation omitted).

70. DINSTEIN, *supra* note 12, at 204-05 (citation omitted).

71. *Id.* at 204.

commitment to end a state of war on the Korean Peninsula.[72] At the very least, diplomatic measures have delayed the necessity of military action.

2. If force is used in self-defense, that force should be neither unreasonable, nor excessive, and must be limited by the necessity that compels the use of force

As a preliminary note, it is important to distinguish between the *jus ad bellum* and *jus in bello* concepts of proportionality. To describe the latter, a disproportionate attack is one "which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."[73]

Proportionality in the *jus ad bellum* sense means something entirely different. Dinstein describes it as a reasonableness standard "in the response to force by counter-force."[74] But the question remains -- what is reasonable? Some suggest that "[t]here is a profound lack of clarity and consensus as to the test to be applied with regard to the proportionality requirement…"[75]

One approach, specifically the equivalent retaliation approach, would countenance force commensurate in strength with the attack but last only so long as necessary to neutralize the threat.[76] Another approach might attempt to align force in self-defense with the pursued objective.[77] If, for example, the objective was deterrence, this theory would allow a minimum level of force necessary to persuade the aggressor not to attack.[78]

The *Caroline* standard provides a level of guidance that at least establishes the floor for proportionality analysis. It requires that the force used be neither unreasonable nor excessive and limited by the necessity that compelled the force in the first place.[79] Hence, we return to the issue of necessity.

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72. *See* James Griffiths, *North and South Korea Vow to End the Korean War in Historic Accord,* CNN (Apr. 28, 2018, 6:03 PM), https://www.cnn.com/2018/04/27/asia/korean-summit-intl/index.html.

73. Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts, art. 51, June 8, 1977, 1125 U.N.T.S. 17512.

74. DINSTEIN, *supra* note 12, at 233.

75. Dapo Akande & Thomas Lieflander, *Clarifying Necessity, Imminence, and Proportionality in the Law of Self-Defense,* 107 AMER. J. INT'L L. 563, 566 (2013).

76. WARREN & BODE, *supra* note 24, at 38.

77. Akande & Lieflander, *supra* note 75, at 566.

78. WARREN & BODE, *supra* note 24, at 41.

79. Webster Letter, Apr. 24, 1841, *supra* note 8.

3. Viewed through the prism of necessity, *Caroline* requires three conditions precedent to the use of force in self-defense

In consideration of the scope of the necessity standard under *Caroline*, a state must satisfy the following three conditions precedent to the use of force in self-defense: 1) a state or actor must threaten or commit an armed attack or measures tantamount to an armed attack;[80] 2) alternatives to force must fail or must be deemed impracticable, and 3) competent intelligence must suggest that an armed response is presently required to protect national security interests.

This restatement tracks Webster's formula, but attempts to phrase it in a manner more applicable to circumstances in the modern operational environment. The requirement of a threat or commitment to an armed attack aligns with the U.N. Charter's prohibition against threats to the political independence or territorial integrity of other states.[81] The addition of the language, "or measures tantamount to an armed attack,"[82] raises the possibility of attacks that are not "armed" in the normal sense, such as those that originate in cyberspace, but have effects that are roughly equivalent to an armed attack.

The requirement to attempt practicable alternatives highlights that the use of force in self-defense is a last resort. As Webster noted, the force must be "nothing less than a clear and absolute necessity."[83] Finally, even if alternatives have failed, the situation must still require the resort to an armed response that is aimed at protecting national security interests.

The protection of national security interests originates from the phrase, "[i]t is admitted that a just right of self-defence attaches always to nations, as well as to individuals, and is equally necessary for the preservation of both."[84] It should be noted that the word "preservation" had a special meaning at the time Webster penned it – it was a concept without limitation, and as Jennings notes, one that "[w]ould serve to cloak with an appearance of legality almost any unwarranted act of violence on the part of a state."[85] While there is language in Webster's formulation to guard against unrestrained action, there is certainly room for concern that a

80. The addition of "measures tantamount to an armed attack" might account for actions such as cyber attacks that have an equivalent effect or potential effect of an armed attack.

81. U.N. Charter art. 2, ¶ 4.

82. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, para. 184, at 87 (June 27).

83. Webster Letter, Apr. 24, 1841, *supra* note 8.

84. *Id.*

85. Jennings, *supra* note 52, at 91.

necessity-based analysis, unrestrained by imminence, might increase the resort to force.

C. *Necessity – The Mother of In(ter)vention?*

If the analytical framework of self-defense shifts away from a requirement of an imminent threat, one concern ought to be whether there are sufficient constraints to prevent frequent resort to force under the guise of necessity. It should not strain the imagination to think of examples where a state might falsely claim a necessity to act where none exists. The risk of the slippery slope argument is a real concern – one would only need to look to Crimea for an example of the legal undulations a state might attempt in citing an increasingly nebulous "necessity" of action.[86]

However, I believe this concern is overstated for two reasons. First, if the concern is that states might concoct a necessity to justify action, it is not at all clear that they would not also create an imminent (and imagined) threat. Second, although the idea that a necessity-centric analysis could lead to the conclusion that force is permissible, it is not at all clear that force would not *also* be justified under an imminence analysis.

Perhaps a deeper criticism is that a necessity-based self-defense argument risks bypassing the safeguards inherent in collective action. Louis Henkin offers that the collective character of NATO's decision-making in Kosovo, although not initially approved by the Security Council, at least offered the protection against abuse by individual states pursuing purely national interests.[87] For this reason, Henkin argues for ratification of illegal but legitimate collective action when the Security Council is deemed "unavailable" to authorize intervention due to a threat or likelihood of veto.[88]

In response, I would ask how individual state action in the face of potential Security Council veto is any different. Is not the requirement to notify the Security Council of actions taken in self-defense sufficient to reign in rogue unilateral action?[89] One might anticipate a stern rebuke by the Security Council or the General Assembly in response to individual state action deemed outside the bounds of self-defense.

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86. *See* Steven Pifer, *Five Years After Crimea's Illegal Annexation, the Issue is No Closer to Resolution,* BROOKINGS (Mar. 18, 2019), https://www.brookings.edu/blog/order-from-chaos/2019/03/18/five-years-after-crimeas-illegal-annexation-the-issue-is-no-closer-to-resolution/.

87. *Id.* at 826-27.

88. *Id.* at 826.

89. U.N. Charter art. 51 (requiring Member States to immediately report actions taken in self-defense to the Security Council).

Indeed, the Security Council is charged with maintaining international peace and security, as suggested by the temporal limit on state action in self-defense. Article 51 allows states to engage in self-defense, but only "until the Security Council has taken measures necessary to maintain international peace and security."[90] But if the beginning limit does not start with an imminent threat, when does the right to pre-attack self-defense begin?

Returning to the concept of self-defense as an inherent right, it seems natural that defining the threat is a political calculation. In a detailed account of pre-war attacks throughout history, Hew Strachan notes that the notion of preemption "grew from the operational level of war . . . whereas preventive war was a political one."[91]

IV. HARMONIZING THEORIES OF PRE-ATTACK USES OF FORCE IN SELF-DEFENSE

As the foregoing discussion demonstrated, the questions regarding when force can be used prior to an actual attack can be quite challenging. At least two types of pre-attack defensive military action permeate scholarship and discussion: preemption and prevention.[92] One scholar defines preemptive acts as "those initiated on the basis of an expectation that an enemy attack is imminent" and preventative acts "as those initiated in the belief that armed conflict, while not imminent, is inevitable, and that delay would involve great risk."[93]

In the days leading up to the 1967 Six-Day War, Israel observed armies from Egypt, Syria, and Jordan massing on its border.[94] Israel executed an attack on these forces in anticipation of an imminent attack across its border; this preemptive attack enabled Israel to prevail. This is an excellent example of a lawful use of preemptive force. Israel saw clear indications of a potential attack growing along its border. But no matter how good the intelligence, Israel based its action on its *prediction* of an attack.

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90. U.N. Charter art. 51; *see also* MICHAEL NEWTON & LARRY MAY, PROPORTIONALITY IN INTERNATIONAL LAW 64 (2014).

91. Hew Strachan, *Preemption and Prevention in Historical Perspective*, *in* PREEMPTION: MILITARY ACTION AND MORAL JUSTIFICATION 23, 27 (Henry Shue & David Rodin eds., 2007) (citation omitted).

92. WARREN & BODE, *supra* note 24, at 24; *see also* DINSTEIN, *supra* note 12, at 194 (stating that the United States terms what is here called "preemptive" self-defense as "anticipatory" self-defense).

93. PHILIP BOBBITT, TERROR AND CONSENT: THE WARS OF THE TWENTY-FIRST CENTURY 136 (2009).

94. WARREN & BODE, *supra* note 24, at 26.

As Professor Dinstein notes, the theories' "common denominator is that they are all conjectural."[95] Henry Shue explored the limits of conjecture to see what might justify a preventative attack absent an imminent threat."[96] Consider the example of potential WMD in Iraq in 2003.[97] Assume intelligence credibly suggests that Iraq has stockpiles of WMD that are currently stored in several locations. Further, consider that intelligence suggests an intent by Iraq to distribute the WMD to a wide network of terrorists in the near future. Under these conditions, one can see that use of force might be justified to destroy the stockpiles *before* they are disseminated. Shue terms this the "last chance" or "last resort" theory.[98] The idea is that although an attack is not imminent, immediate action is required to reduce the threat. Otherwise, the opportunity will be permanently lost.

What brings the preemption and prevention theories together is not the immediacy of the threat, but rather the necessity of immediate action. The emergent principle is that "[n]o military action is ever justified unless it is necessary."[99] But it *cannot* be said that *necessity justifies all military action.* Indeed, if necessity is to be the guiding principle, it must be constrained. As discussed in Part III, those constraints involve a state or actor that has threatened or committed to an armed attack or measures tantamount to an armed attack, alternatives to force that have failed or are not practicable, and competent intelligence that has suggested that an armed response is presently required to protect national security interests.

Interestingly, Shue suggests a fourth possible requirement: multilateral authorization.[100] Certainly, this requirement would align with the U.N. Charter's preference for Security Council authorization of force. Yet, is it reasonable to assume states will yield to the decisions of multinational bodies? In the case of an imminent attack, there may be no time for such an appeal, much less deliberation. While procedural multilateralism is likely beyond the pale of what might be expected, perhaps *substantive* multilateralism is not. As Shue notes, "[f]or 'substantive multilateralism' to work, major states would need to feel a responsibility to protect their security only in ways that accorded with widely shared norms."[101]

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95. DINSTEIN, *supra* note 12, at 195.

96. Henry Shue, *What Would a Justified Preventative Military Attack Look Like?*, *in* PREEMPTION: MILITARY ACTION AND MORAL JUSTIFICATION 222, 228 (Henry Shue & David Rodin eds., 2007).

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* at 232.

101. *Id.* at 244.

It is here that a necessity-based analysis proves useful. While states may bolster their assessments of threats, a focus on the necessity of action acknowledges that decisions to resort to force are inherently political. Where states have already abjured the requirement of imminence in their calculations, at the very least, a carefully crafted necessity test provides stability in the sense that it makes state action more predictable.

Returning to where we started, a necessity-based analysis might help explain the 2020 Soleimani attack. While the classified details are beyond the reach of this article, it is possible to discern a necessity-based justification by taking facts as stated by the Trump Administration. To satisfy the first prong, Ambassador Craft, in her letter to the Security Council President, cited an "escalating series of armed attacks."[102] Moreover, President Trump's expression of a future threat of attack supports the third prong.[103] And while it is less clear that alternatives failed or were not practicable, given the number of cited attacks in the series, it appears at least plausible that a determination of impracticability would not be irrational.

V. CONCLUSION

A faithful interpretation of the principles in *Caroline* allow for harmony between customary self-defense and the U.N. Charter's rules controlling the use of force. By returning the focus to necessity instead of imminence, we avoid the need to deem certain uses of force as legitimate but illegal. With the necessity analysis as the guide, intervening states will not be able "to plead self-defense as a mere shibboleth."[104]

This reinterpretation will make the words of *Caroline* and the U.N. Charter "go the right way again," provide a coherent rule that enables states to defend their actions in the open, and allow the international community to defend humanity in the open. Refusal to sanction illegal acts will restore legitimacy to acts of self-defense and to the international legal regimes supporting them.

102. Ambassador Craft Letter, Jan. 8, 2020, *supra* note 4.
103. President Trump Remarks, Jan. 3, 2020, *supra* note 3.
104. Jennings, *supra* note 52, at 92.

INTRODUCTION TO FIGHTING IN THE LAW'S GAPS

Kenneth Watkin*

I want to start out by expressing my sincere appreciation to Professor Rachel VanLandingham and Southwestern Law School's Journal of International Law for the invitation to participate in this conference amongst so many friends and colleagues. Many of the participants are leaders in their field who have a wealth of operational or academic experience, and sometimes both. I anticipate rich discussions about the real-world challenges we face.

I am particularly honored to be opening up the conference with some introductory remarks on "legal seams." My interest in this subject reflects my immersion in the law's gaps following the horrific attacks of 9/11. It was an incredibly hectic period that highlighted the strengths, the weaknesses, and unfortunately, the significant "missing bits" of treaty law and common understandings about customary international law. Perhaps what was most evident were the limitations that the prevailing traditional orthodoxy of 20th Century interpretations of international law brought to the "fight." My experiences and ruminations on this issue culminated in my writing a book titled, *Fighting at the Legal Boundaries: Controlling the Use of Force in Contemporary Conflict*.[1]

Note, I identified the issue as one of fighting at the legal boundaries, although "legal seams" and the "law's gaps" are an integral part of any discussion about "boundaries." Figure 1.1 identifies what I view as the main bodies of law relevant to contemporary operations and their boundaries:[2]

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1. KENNETH WATKIN, FIGHTING AT THE LEGAL BOUNDARIES: CONTROLLING THE USE OF FORCE IN CONTEMPORARY CONFLICT (2016).

2. *Id*. at 14.

Figure 1.1

Applicable Legal Regimes

I have three preliminary points to frame this discussion. First, as you can note, I do not use the terms *jus ad bellum* or *jus in bello* to describe the law governing State self-defense, or international humanitarian law, respectively. Beyond its use by what sometimes appears to be an exclusive "guild" of international lawyers, Latin has had its day as a language of communication. Of course, a guild is defined as a "medieval association of craftsmen or merchants, often having considerable power." [3] Latin is not the language of military commanders, politicians or the general public. The people we have to convince.

Secondly, the boundaries identified in this diagram are two-fold. There are the outer limits of what each body of law entails, and then the question of how the different bodies of law interface and interact, or in other words, how they work at the seams. Finally, the bodies of law that impact on everyday operations are more numerous than just State self-defense, humanitarian law, or human rights law. Consideration must be given to

3. Oxford Dictionary, https://www.lexico.com/definition/guild (last visited Feb. 8, 2020).

domestic law, including national human rights law and international criminal law. The United States military has called this amalgam of laws "operational law," a term that I wholeheartedly embrace.

I say "amalgam" or mixture because practitioners do not have the luxury of applying each of these bodies of law in isolation. However, that is the approach traditionally adopted by international lawyers. This is largely driven by the desire to separate the law governing hostilities from State self-defense so that the former is equally applied to both parties independent of the "justness" or the lack of justness in their reasons for going to war. The problem is, as the renowned British academic Adam Roberts has noted, "[i]n practice that separation has never been absolute…"[4]

At a minimum these two bodies of law have a sequential relationship. This is something practitioners have known for some time. This means these bodies of law meet at the "seams." Yet it was interesting in the aftermath of the January 3, 2020 strike against Iranian Major-General Soleimani and Abu Mahdi al-Muhandis the degree to which legal commentators were discussing, seemingly for the first time in some cases, whether there was an armed conflict in existence and what law might actually apply to control the strike.[5] In this regard, I commend to you the commentary by Geoffrey S. Corn and Chris Jenks entitled, *Soleimani and the Tactical Execution of Strategic Self-defense*, published on January 24, 2020 on the Lawfare national security website for an accurate assessment of this issue that identifies international humanitarian law as being applicable.[6]

What is noteworthy is that the Soleimani and al-Muhandis situation actually represents the easy example. There are far more challenging threshold questions involving the response to attacks by non-State actors. In this respect, the *Tadic* criteria,[7] developed in the 1990s appears to be

4. Adam Roberts, *The Equal Application of the Laws of War: A Principle Under Pressure*, 90 INT'L REV. RED CROSS 931, 932 (2008).

5. *See* Agnes Callamard, *The Targeted Killing of General Soleimani: Its Lawfulness and Why It Matters*, JUST SECURITY (Jan. 8, 2020), https://www.justsecurity.org/67949/the-targeted-killing-of-general-soleimani-its-lawfulness-and-why-it-matters/; Eliav Lieblich, *Targeted Killing of General Soleimani: Why the Laws of War Should Apply, and Why It Matters*, JUST SECURITY (Jan. 13, 2020), https://www.justsecurity.org/68030/targeted-killing-of-general-soleimani-why-the-laws-of-war-should-apply-and-why-it-matters/; Mary Ellen O'Connell, *The Killing of Soleimani and International Law*, EJIL: Talk! (Jan. 6, 2020), https://www.ejiltalk.org/the-killing-of-soleimani-and-international-law/; Michael J. Glennon, *The Irrelevance of Imminence*, LAWFARE (Jan. 15, 2020, 9:08 AM), https://www.lawfareblog.com/irrelevance-imminence.

6. Geoffrey S. Corn & Chris Jenks, *Soleimani and the Tactical Execution of Strategic Self-Defense*, LAWFARE (Jan. 24, 2020, 2:54 PM), https://www.lawfareblog.com/soleimani-and-tactical-execution-strategic-self-defense.

7. Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) (holding that an "armed conflict exists whenever there is a resort to armed forces between States or

woefully inadequate when States are faced with a "one off" attack by a well-armed non-State actor threatening State-like violence. The reality of transnational terrorist threats has resulted in a greater acceptance over the past twenty years of a "totality of the circumstances" approach, which looks at factors such as the organization of the non-State group, the weapons and tactics it employs, the nature of the target, and what force is required to be used by the State to respond to the threat in deciding if there is an armed conflict.[8]

Importantly, what is not addressed by applying a strict separation between the law governing the recourse to war and that controlling the conduct of hostilities, is that in situations of ongoing conflict, both bodies of law will have to be applied. One theory that I call the "overarching" theory sees the self-defense principles, such as proportionality, applying throughout an armed conflict.[9] A more "limited" version would apply it to conflicts "short of war" and cross border action taken against non-State actors. That leaves open how and where these two bodies of law interface, which I would suggest occurs at the strategic level.[10]

The world, and hostilities in particular, are far more complex than the law often appears to recognize. Unfortunately, legal discussions rarely get beyond a binary analysis with suggestions that one body of law or another applies to a particular situation, while another does not. For example, the past twenty years has witnessed significant disagreement regarding the application of international human rights and humanitarian law. This often highly technical, frequently ideological, and sometimes strikingly arcane debate occurs within the "guild" of international lawyers. Not surprisingly, this debate takes place under the rubric of another Latin term, *lex specialis*, which is an odd choice of terminology when what we need is clarity.

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protracted arms violence between governmental authorities and organized armed groups or between such groups within a State," and "[i]nternational humanitarian law applies from the initiation of such armed conflict and cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved." "Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.").

8. *See* Prosecutor v. Boškoski, Case No. IT-04-82-T, Judgment, ¶ 257 (Int'l Crim. Trib. for the Former Yugoslavia July 10, 2008) (referring to the "totality of circumstances"); Laurie R. Blank & Geoffrey S. Corn, *Losing the Forest for the Trees: Syria, Law, and the Pragmatics of Conflict Recognition*, 46 VAND. J. TRANS'L. L. 693, 731-45 (2013); WATKIN, *supra* note 1, at 375-378; Geoffrey S. Corn, *"Legal Classification of Military Operations"*, *in* U.S. MILITARY OPERATIONS: LAW POLICY, AND PRACTICE 67, 77-78 (Geoffrey S. Corn, Rachel E. VanLandingham & Shane R. Reeves eds., 2016).

9. WATKIN, *supra* note 1, at 58-63.

10. *Id*. at 63-72.

The reality is much different. Of course, human rights are relevant. The American academic and International Court of Justice Judge, Richard Baxter, went so far as to note that "international humanitarian law is human rights law."[11] Frequently, human rights law itself applies concurrently or on its own. If your State is an occupying power, or it is fighting an insurgency, as was the position the United States found itself in after the 2003 Iraq invasion, you could be dealing not only with organized resistance groups continuing to wage hostilities, but also simultaneously having to maintain law and order. In other words, the situation could be described as "law enforcement," or "policing."

However, gaps can remain. These gaps are often the result of the uncertainty regarding interpretations of international law, such as identifying the threshold for non-international armed conflict. That uncertainty can lead States to apply a policy solution to fill the "gap," as can be seen in the United States' approach of its forces complying "with the law of war during all armed conflicts, however such conflicts are characterized, and in all other military operations."[12] Thus, the law of armed conflict is applied even though there is no armed conflict. This approach works well if it results in detained persons being treated to prisoner of war standards. It is far more problematic regarding the use of force. Absent an armed conflict, it is human rights law that must be applied as a matter of law. That law trumps policy.

In my view, international law is at a crossroads. Since the turn of this century, the well-established law primarily designed to control inter-State conflict has been confronted with violence of a significantly different nature. Many of the long held legal "orthodoxies," largely developed during the Cold War, simply do not provide the necessary answers for today's complex post-9/11 world.

When I first became involved in operational law matters thirty years ago, it was not uncommon to hear international lawyers propose the following: (1) "war" has been outlawed, (2) there is no authority to intervene in another country to rescue your nationals, (3) a customary international law right of

11. R.R. Baxter, *Humanitarian Law or Humanitarian Politics? The 1974 Diplomatic Conference on Humanitarian Law*, 16 HARV. INT'L. L. J. 1, 25 (1975).

12. U.S. Dept. of Def., Directive 2311.01E, DoD Law of War Program ¶ 4.1 at 2 (2006) (certified current as of Feb. 22, 2011), https://ogc.osd.mil/LoW/practice/DoDDirectives/dod_law_of_war_program_dodd_2311_01e.pdf; *see also* U.S. Dept. of Def., Office of General Counsel of Dept. of Def., Dept. of Def. Law of War Manual ¶ 3.1.1.2 at 71 (2015) (updated Dec. 2016), https://dod.defense.gov/Portals/1/Documents/pubs/DoD%20Law%20of%20War%20Manual%20-%20June%202015%20Updated%20Dec%202016.pdf?ver=2016-12-13-172036-190 (noting that "DoD practice also has been to adhere to certain standards in the law of war, even in situations that do not constitute "war" or "armed conflict," because these law of war rules reflect standards that must be adhered to in all circumstances").

State self-defense did not survive the creation of the U.N. Charter, (4) a non-State actor cannot carry out an "armed attack" resulting in the exercise of State self-defense since the Charter only applies to States, and (5) non-international armed conflict is limited by a State's territorial boundaries.

Many of these traditional interpretations of the law have not stood the test of time, or importantly, the crucible of practical application. For example, some eighteen years after the attacks of 9/11, few would argue that an attack by a non-State actor must be attributable to a State in order for the victim State to be able respond with extra-territorial military action.[13] Further during the past twenty years, States have regularly intervened in failed and failing States to rescue their nationals, with many of those kidnappings being linked to terrorist groups seeking to fund their operations. Law does not stand still, and in order to remain relevant, interpretations of the law must also reflect the realities of the security threats. This is not new. A number of States such as the United States and Israel found themselves to be "outliers" in their approaches to counterterrorism in the 1980s and 1990s, but after 9/11, their views were suddenly more mainstream.

Overly restrictive interpretations of international law can also create "legal gaps" in the contemporary security dialogue. Legal theory does not always match practical reality. One example is the debate about the gravity of an attack necessary to be considered an "armed attack" under the U.N. Charter. Similarly, returning to the Soleimani and al-Muhandis strike, much of the public debate, both by lawyers and non-lawyers alike, has centered on a traditional, very narrow interpretation of the self-defense "imminence" test based on the 1837 *Caroline* incident. Under that 19th Century test, a State must "show a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation."[14] In this regard, I commend Charlie Dunlap's piece on the Lawfire website titled, *The Killing of General Soleimani was Lawful Self-Defense, Not "Assassination,"* for a discussion of broader criteria to be applied to imminence.[15]

The reality is that the *Caroline* test is not the only accepted test for self-defense action. As Thomas Ruys notes in his excellent book on armed attack

13. WATKIN, *supra* note 1, at 51; *see also* David Kretzmer, *The Inherent Right to Self-Defence and Proportionality in Jus Ad Bellum*, 24 EUR. J. INT'L L. 235, 273 (2013).

14. *The Avalon Project - Documents in Law, History and Diplomacy: British-American Diplomacy: The Caroline Case, in* 4 TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA 80-121 (Hunter Miller ed., Annotation, Government Printing Office 1934) (1836-1846), https://avalon.law.yale.edu/19th_century/br-1842d.asp (last visited Feb. 10, 2020).

15. Charlie Dunlap, *The Killing of General Soleimani was Lawful Self-Defense, Not "Assassination,"* LAWFIRE (Jan. 3, 2020), https://sites.duke.edu/lawfire/2020/01/03/the-killing-of-general-soleimani-was-lawful-self-defense-not-assassination/.

and self-defense, there are two divergent interpretations of Article 51 of the U.N. Charter: one that he calls the traditional "restrictionist" approach, and one that is "counter-restrictionist."[16] The latter approach supports a broader concept of imminence based on pre-emptive action where an attack is imminent but has not been launched.[17] Like many changes in the application of international law, the acceptance of a broader anticipatory self-defense has been increasing post-9/11, including from States such as the United States, the United Kingdom, and Australia.[18] Proponents of anticipatory self-defense frequently rely on "the increasing speed and destructive potential of modern weaponry" in order to justify action "that is not strictly reactive in nature."[19] One merely needs to consider cyber warfare and autonomous weapons to ask whether or how the *Caroline* rationale applies to emerging security 21st Century threats.

Further, the recent legal dialogue does not appear to have addressed the "accumulation of events," or the "needle prick" theory, which looks at consecutive attacks that take place "linked in time, source and cause."[20] As Professor Ruys has identified, this theory raises three considerations. One, "the proportionality analysis of a defensive action should not focus on the immediate cause, but also entails a retrospective element" permitting a larger scale response.[21] Two, less grave uses of force can "when forming part of a chain of events, qualitatively transform into an 'armed attack.'"[22] Finally, it increases the "likelihood that more attacks will imminently follow," thereby justifying defensive action even if the armed attack is factually over.[23] My reading of the January 8, 2020 United States letter to the U.N. Security Council,[24] and the following Notice on the legal framework for that strike,[25] with their references to a prior series of escalating armed attacks from Iran

16. TOM RUYS, 'ARMED ATTACK' AND ARTICLE 51 OF THE UN CHARTER: EVOLUTIONS IN CUSTOMARY LAW AND PRACTICE 250-54 (2010).

17. *Id.*

18. *Id*. at 323.

19. *Id*. at 257.

20. *Id.* at 168.

21. *Id*.

22. *Id.*

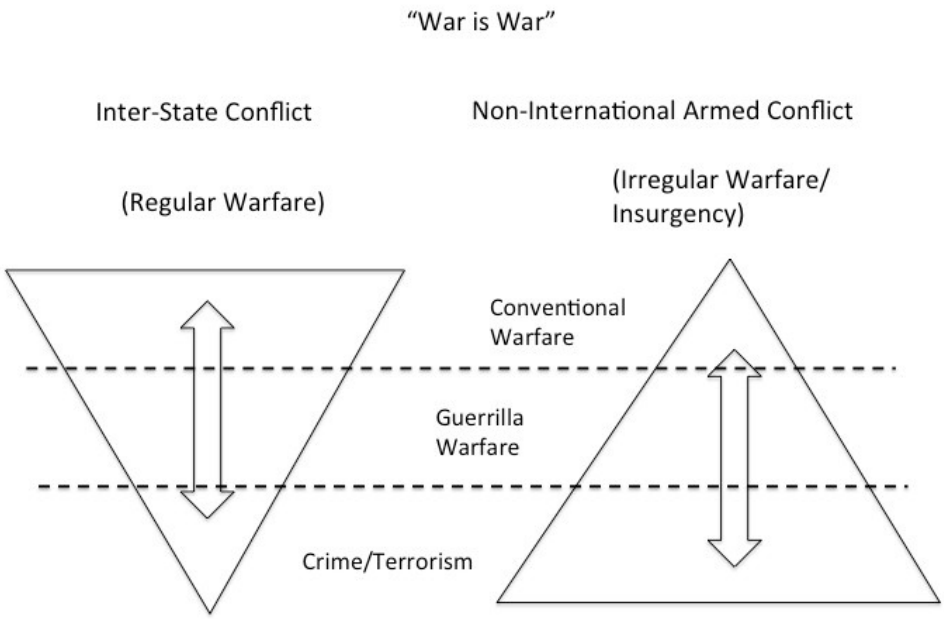
23. *Id*. at 168-69.

24. Permanent Rep. of the United States of America to the U.N., Letter dated 8 January 2020 from the Permanent Rep. of the United States of America to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2020/20 (Jan. 8, 2020), https://undocs.org/S/2020/20.

25. Notice on the Legal and Policy Framework Guiding the United States' Use of Military Force and Related National Security Operations, JUST SEC'Y, https://www.justsecurity.org/wp-content/uploads/2020/02/notice-on-the-legal-and-policy-frameworks-guiding-the-united-states-use-of-military-force-and-related-national-security-operations.pdf (last visited Feb. 15, 2020).

and Iranian supported militias, and a desire to deter further attacks, appears to rely on such an "accumulation of events" doctrine.

Finally, a fundamental challenge for international lawyers is to ensure both the law and State approaches towards conflict accurately reflect contemporary armed conflict. There is a bias amongst States and many international lawyers towards viewing armed conflict through an "international armed conflict" or State-versus-State lens. However, looking at the following diagram, there is a robust treaty regime for only the "conventional warfare" portion of inter-State conflict:



Most conflict occurs in the other realms. Notwithstanding attempts over the past decade to refocus State armed forces towards inter-State armed conflict the reality is that the prevailing form of conflict remains against non-State actors either directly or through proxies. In this reality lies significant discussions about "gaps" in the law for the most prevalent security challenges.

As Hew Strachan has noted, "war is war."[26] All wars, inter-State or non-international armed conflict, have elements of conventional and guerrilla warfare, as well as the requirement to maintain public order. That said, the pull of "conventional warfare" is remarkably strong, frequently prompting the creation of doctrinal terms to deal with other than the "ideal" of State-on-State warfare. One such term that will be dealt with in this conference is "hybrid warfare." Such warfare involves an adversary that "simultaneously and adaptively employs a fused mix of conventional weapons, irregular tactics, terrorism, and criminal behavior in the battle space to obtain their political objectives."[27] The term attempts to force a broader dialogue about how wars are fought, although in many instances it is used in a binary sense of conventional operations and then something else, such as cyber activity or covert operations (e.g. the "little green men" in the Crimea).[28]

While a helpful construct, it can also be fairly asked whether this is just another in a long line of doctrinal terms that have been developed to try to deal with the messy reality of warfare as it has always existed.[29] There have, of course, been other terms such as three block wars,[30] military operations other than war ("MOOTW"),[31] low intensity conflict,[32] mosaic wars,[33] composite warfare,[34] non-linear war,[35] gray zone conflict,[36] and reaching back in history, small wars.[37] One wonders what the shelf life will be on

26. HEW STRACHAN, THE DIRECTION OF WAR 207-08 (2013).

27. Frank G. Hoffman, *Hybrid vs. Compound War: The Janice Choice: Defining Today's Multifaceted Conflict*, ARMED FORCES J. (2009), http://armedforcesjournal.com/hybrid-vs-compound-war/.

28. SEAN MCFATE, THE NEW RULES OF WAR: VICTORY IN THE AGE OF DURABLE DISORDER 196-97 (2019).

29. *Id*. at 179.

30. Charles C. Krulak, *The Strategic Corporal: Leadership in the Three Block War*, MARINES MAG. (Jan. 1999), https://apps.dtic.mil/dtic/tr/fulltext/u2/a399413.pdf.

31. *Joint Doctrine for Military Operations Other Than War*, Joint Pub 3- 07, ¶ 2, at I-1, (Jun. 16, 1995), https://www.bits.de/NRANEU/others/jp-doctrine/jp3_07.pdf (outlining the concept of MOOTW).

32. *Military Operations in Low Intensity Conflict FM 100-20/AFP 3-20*, GLOBAL SEC'Y, https://www.globalsecurity.org/military/library/policy/army/fm/100-20/index.html (last visited Feb. 16, 2020).

33. DAVID PETRANEUS, THE U.S. ARMY, MARINE CORPS, COUNTERINSURGENCY FIELD MANUAL, ¶ 1- 37, at 14 (2007).

34. EEBEN BARLOW, COMPOSITE WARFARE: THE CONDUCT OF SUCCESSFUL GROUND FORCE OPERATIONS IN AFRICA 424 (2016).

35. MCFATE, *supra* note 28, at 179.

36. Gary Corn, *Punching on the Edges of the Grey Zone: Iranian Cyber Threats and State Cyber Responses*, JUST SEC'Y (Feb. 11, 2020), https://www.justsecurity.org/68622/punching-on-the-edges-of-the-grey-zone-iranian-cyber-threats-and-state-cyber-responses/.

37. CHARLES EDWARD CALLWELL, SMALL WARS: THEIR PRINCIPLES AND PRACTICE 21 (3rd ed. 1996) (1906).

"hybrid warfare" as we continue to struggle with other emerging modes of warfare.

In my view, what is needed from a legal perspective is for international lawyers to address contemporary security and legal challenges by applying a broader "holistic" approach where the potential impact of all the bodies of law must be considered throughout the life of the conflict. Many of these bodies of law have to be applied sequentially, and often simultaneously. Their interaction cannot be ignored. The analysis must also critically and objectively consider the practical effects of adopting overly narrow interpretations of the law, or applying just one body of law to the exclusion of another. Those advocating a broad unitary application of the "laws of war" or "human rights" law must look more deeply at the "on the ground" or tactical effect of adopting what often appear to be rigid positions. Above all, there is the practical impact that must be considered before a particular legal approach is given any credence. To do this, practitioners need to talk to academics and vice versa.

Ultimately as lawyers, we need to ensure that "legal boundaries do not become barriers to operational success or to the protection of civilians regardless of where they live."[38]

38. WATKIN, *supra* note 1, at 30.

HUMANITARIAN INTERVENTION AND THE RESPONSIBILITY TO PROTECT: WHERE IT STANDS IN 2020

Kenneth Watkin*

> "The UK is permitted under international law, on an exceptional basis, to take measures in order to alleviate overwhelming humanitarian suffering. The legal basis for the use of force is humanitarian intervention…"
>
> - The UK's legal position regarding attacks on chemical weapons facilities in Syria[1]

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1. PRIME MINISTER'S OFFICE, *Syria Action – UK Government Legal Position*, GOV.UK (Apr. 14, 2018), https://www.gov.uk/government/publications/syria-action-uk-government-legal-position/syria-action-uk-government-legal-position [hereinafter *Syrian Action*].

1. INTRODUCTION

On April 14, 2018, the United Kingdom, along with its United States and French allies, carried out aerial attacks against three of Syria's chemical weapons sites, including a scientific research center and two chemical weapons facilities.[2] That attack was prompted by an earlier use of chemical weapons by the Syrian regime on April 7, in Douma, the last rebel-held town in the Eastern Ghouta region.[3] The Syrian action had caused an estimated forty to seventy fatalities, including a large number of children, while hundreds of persons were injured.[4] Each of the attacking States gave a slightly different rationale for seeking to respond to the Syrian use of chemical weapons. The United Kingdom stated it was relying on "humanitarian intervention" as the legal basis for its strikes. Its co-belligerents were less forthcoming regarding a rationale under international law. The United States, relying largely on domestic legal authorities,[5] indicated it acted "to promote the stability of the region, to deter the use and proliferation of chemical weapons, and to avert a worsening of the region's current humanitarian catastrophe."[6] The French rationale, which reads primarily as a policy document, focused on the requirement to dissuade the Syrian regime from using chemical weapons. The Syrian regime's use of chemical weapons meant "the very foundations of reason and civilisation are under threat."[7]

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2. Helene Cooper, Thomas Gibbons-Neff & Ben Hubbard, *U.S., Britain and France Strike Syria Over Suspected Chemical Weapons Attack*, N.Y. TIMES (Apr. 13, 2018), https://www.nytimes.com/2018/04/13/world/middleeast/trump-strikes-syria-attack.html.

3. *Syria War: What We Know About Douma 'Chemical Attack'*, BBC NEWS (Jul. 10, 2018), https://www.bbc.com/news/world-middle-east-43697084.

4. Organisation for the Prohibition of Chemical Weapons [OPCW], *Note by the Technical Secretariat: Report of the Fact-Finding Mission Regarding the Incident of Alleged Use of Toxic Chemicals as a Weapon in Douma, Syrian Arab Republic, on 7 April 2018,* at ¶ 3.1, OPCW Doc. S/1731/2019 (Mar. 11, 2019).

5. *See, e.g.*, Memorandum from Steven. A. Engel, Assistant Attorney General, U.S. Dep't of Justice, to Counsel to the President (May 31, 2018), https://www.justice.gov/olc/opinion/file/1067551/download.

6. Letter from the President to the Speaker of the House of Representatives and the President Pro Tempore of the Senate, (Apr. 15, 2018), https://www.whitehouse.gov/briefings-statements/text-letter-president-speaker-house-representatives-president-pro-tempore-senate-3/.

7. *See* Press Release, Edouard Philippe, Prime Minister, Statement to the National Assembly on French Armies' Intervention in Response to the Use of Chemical Weapons in Syria, (Apr. 16, 2018), https://www.gouvernement.fr/sites/default/files/locale/piece-jointe/2018/04/declaration_de_m._edouard_philippe_premier_ministre_sur_lintervention_des_armees_francaises_en_reponse_a_lemploi_darmes_chimiques_en_syrie_-_16.04.2018_en.pdf [hereinafter France's Statement].

While the protection of humanity writ large was clearly part of the American and French rationales for acting, the United Kingdom was particularly direct in stating it was relying on the international principle of humanitarian intervention as the legal basis for bombing Syrian targets. Claiming such an authority to intervene appears, at first glance, to be at odds with the considerable effort expended by the international community over the past twenty years to restrict States taking military action in another State on humanitarian grounds without authorization by the United Nations Security Council. In this respect, a United Kingdom academic, Dapo Akande, provided an opinion regarding the 2018 strike stating that the legal position advocated by "the government is not an accurate reflection of international law as it currently stands. International law does not permit individual States to use force on the territory of other States in order to pursue humanitarian ends determined by those States."[8] This approach is consistent with interpretations of the U.N. Charter's *travaux préparatoires* that "unambiguously confirm that, apart from a use of force in self-defense, the prohibition contained in Article 2(4) was intended to be all-inclusive with respect to unilateral uses of force."[9]

Professor Akande's negative view was reinforced by reference in his opinion to the government having relied on the "so-called doctrine of 'humanitarian intervention.'"[10] Further, it indicated that the United Kingdom "is one of only a handful of States that accepts that international law provides a right of humanitarian intervention."[11] Regarding humanitarian intervention, it was suggested:

> The most significant problem with the government's legal position is that it would require a radical restructuring of the most fundamental rules of the international legal order. The argument that there is a right of humanitarian intervention under customary international law implies that a rule of customary international law can prevail over or modify the prohibition of the use of force in the UN Charter.[12]

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8. Opinion of Dapo Akande, *The Legality of the UK's Air Strikes on the Assad Government in Syria*, ¶ 4 (Apr. 16, 2018), https://d3n8a8pro7vhmx.cloudfront.net/campaigncountdown/pages/2243/attachments/original/1523875290/Akande_Opinion_UK_Government%27s_Legal_Position_on_Syria_Strike_April_2018.pdf?1523875290.

9. Int'l Law Ass'n Conference on Use of Force, *Final Report on Aggression and the Use of Force*, 21, (2018), http://repository.essex.ac.uk/24215/1/ILA%20Use%20of%20Force%202018.pdf [hereinafter *Final Report*].

10. Akande, *supra* note 8, at ¶ 5.

11. *Id.* at ¶ 8.

12. *Id*.

Yet, these arguments did not convince a United Kingdom Parliamentary Committee, which after reviewing differing approaches towards the issue stated, "[w]hilst noting the divisions in legal opinion around the concept of humanitarian intervention, we agree that it seems unlikely the creators of the UN Charter would have expected that the prohibition on the use of force would be applied in a way that prevented States from protecting civilian populations and stopping mass atrocities."[13] This highlights a common aspect of humanitarian intervention. There is a key tension between strict legal opinions seeking to restrain force squarely within the wording of the U.N. Charter, and what is viewed as an imperative moral and political responsibility to act. Notably, attempts at the United Nations Security Council to have the strikes against the Syrian chemical weapons facilities condemned were unsuccessful.[14] While not a direct endorsement of the allied action, it will be seen that the rejection by the Security Council of an attempted condemnation on humanitarian intervention has been used elsewhere to suggest a level of political endorsement of that action.

At the heart of the issue is the question of whether the authority to use force is solely bound by the wording of the U.N. Charter, or whether independent State action can be taken to "alleviate overwhelming humanitarian suffering."[15] This issue frequently arises when the "positivist" mechanism established in the U.N. Charter after World War II for maintaining international order does not, for whatever reason, offer a solution to such humanitarian crises. In this regard, the United Kingdom and France made specific reference to the stymying of efforts to gain Security Council approval for the action to be taken to address Syria's use of chemical weapons.[16] Considering when to embark on humanitarian intervention raises numerous issues, such as the scope of the intervention related to the nature of territorial State sovereignty, the application of moral principles, a growing international emphasis on human rights, questions about the legitimacy versus the legality of State action, and the interaction between law and political reality.

This is not the only context within which questions have been asked regarding the exclusivity of U.N. Charter-based international security framework. That framework was specifically established to restrict the

13. FOREIGN AFFAIRS COMMITTEE, GLOBAL BRITAIN: THE RESPONSIBILITY TO PROTECT AND HUMAN INTERVENTION, 2017-19, HC 1005, ¶ 18 (UK) [hereinafter GLOBAL BRITAIN].

14. *Id.* at ¶ 17 (following the airstrikes Russia sought condemnation of the attacks in the UN Security Council and proposed a draft resolution that "would have demanded the United States and its allies immediately cease such actions and refrain from any further use of force in violation of international law.").

15. *Syrian Action*, *supra* note 1, at ¶ 3.

16. *Id*. at ¶ 4(ii); *see also* France's Statement, *supra* note 7.

recourse to war, and significant portions of the international legal community have interpreted its provisions very strictly with a goal of limiting any use of force, except in the most exceptional and grave instances where action in self-defense is warranted. Yet, disagreements amongst international scholars remain. As will be discussed, humanitarian intervention provides another example of an area of international law governing the security environment that is not settled. Ultimately, the need to act on political and moral grounds must be weighed against restrictive text-based interpretations of the legal framework established in the "black letter" law.

The concept of humanitarian intervention will be addressed by outlining how it has developed, and the controversy its invocation creates. By necessity, this means looking not only at humanitarian intervention, but also the principles that have been established in a modern context to frame its application to humanitarian crises, which has become known as *The Responsibility to Protect*, or R2P. First, the historical basis of humanitarian intervention and the impact of the development of the 1945 U.N. Charter will be explored. This includes assessing changing notions of "sovereignty," and the growing interest in the 20th Century in international "justice." Secondly, the post-Charter introduction of humanitarian intervention will be explored, including the introduction of an element and significance of acquiescence by the international community towards action being taken without prior Security Council authorization. Next, the analysis will turn to the impact of the changing post-Cold War security situation and the subsequent response by the international community that ultimately established the doctrine of *The Responsibility to Protect*.[17]

The fourth part will look at humanitarian intervention in the 21st Century highlighting a continuing level of resistance from a number of States to the concept, and a reluctance by the United Nations to authorize military intervention on that basis. At the same time, as can be seen in the 2018 United Kingdom/Syria chemical weapons example, there remains the likelihood that some States will claim such intervention to be applicable when they conclude there is a compelling need to use force to prevent or mitigate a humanitarian crisis. The analysis then turns to an assessment of the concept of humanitarian intervention in terms of the disagreement that exists as to whether such action is legally justified only when authorized in accordance with the U.N. Charter or can be also justified on a customary law basis. Other areas of international law, where similar differing views exist,

17. *See generally* INT'L COMM'N ON INTERVENTION AND STATE SOVEREIGNTY, INT'L DEV. RESEARCH CTR., THE RESPONSIBILITY TO PROTECT (2001), https://idl-bnc-drc.dspacedirect.org/bitstream/handle/10625/18432/IDL-18432.pdf?sequence=6&isAllowed=y [hereinafter THE RESPONSIBILITY TO PROTECT].

will be discussed in order to illustrate that this is not the exclusive source of use of force debate and to better situate the ongoing controversy. The sixth and final part provides a conclusion indicating where the law presently stands, setting out a way ahead at the dawn of the third decade of this Century.

A. *Humanitarian Intervention and the United Nations Charter*

The issue of whether other governments can intervene when another State abuses its own people is not a new one under international law. As James Turner Johnson suggests, a key aspect of the authority to intervene is centered on the notion of "sovereignty," which "is identified with the European international order that came out of the 1648 Peace of Westphalia…and is currently legally defined by the United Nations Charter."[18] A pre-modern view of sovereignty had been based on an interpretation of Just War theory that focused on a ruler's authority to rectify injustice and punish wrongdoing, effectively a "personal moral responsibility to seek the common good."[19] This idea of sovereignty was to change because of a re-conceptualization of a State's authority to use force in self-defense where "the fundamental measure of injustice was any attack across the territorial boundaries of a political community."[20] As a result, "the idea of sovereignty became defined with a responsibility to protect those borders."[21]

In any event, by the 19th Century, Just War principles had waned in significance, being replaced by a "balance of power" doctrine between States that reflected an unrestricted right of war.[22] Given that Just War theory had lost relevance regarding its influence on State action, it would be difficult to argue that a contemporary right to intervene can be based on international standards developed during that period. However, the U.N. Charter use of force legal framework introduced after World War II represented a reintroduction of Just War principles (*jus ad bellum*) regarding State recourse to war. In doing so, it was the later definition of sovereignty based on

18. James Turner Johnson, *Humanitarian Intervention, the Responsibility to Protect, and Sovereignty: Historical and Moral Reflections,* 23 MICH. ST. INT'L. L. REV. 609, 619 (2015) (citation omitted).

19. *Id*. at 623.

20. *Id*. at 625.

21. *Id*.

22. IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 14-19 (1963); *see also* Robert J. Delahunty & John Yoo, *From Just War to False Peace*, 13 CHI. J. INT'L L. 1 (2012).

"territorial inviolability" that underpinned that framework, rather than "in terms of the responsibility of government to serve the good of its people."[23]

Therefore, the starting point for analyzing the modern concept of humanitarian intervention is the adoption of the U.N. Charter, and in particular, the emphasis placed on the responsibility of the State to protect the population on its own territory. Correspondingly, intervention by other States was presumptively prohibited.[24] As Article 2(4) of the U.N. Charter indicates, "[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations."[25] This idea is reinforced in Article 2(7), which expressly provides that nothing in the U.N. Charter authorizes "the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State," except through the application of enforcement measures authorized under Chapter VII.[26]

While the U.N. Charter clearly privileges the sanctity of State boundaries and jurisdiction, it also laid the seeds for consideration of the protection of human rights. In the preamble, it is noted that a key purpose of the United Nations is "to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion."[27] Universal respect for human rights was further addressed in Articles 55 and 56 of the Charter. Importantly, these rights were identified as being linked to international security in terms of "the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations."[28] It has been noted that human rights, as enshrined in the Charter, is a principle that is equal to the non-use of force.[29] This post-war focus on international human rights law, which previously had been largely viewed through a domestic law lens, was indicative of the tension that was to develop between States protective of their sovereign territorial rights,

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23. Johnson, *supra* note 18, at 632.

24. Corfu Channel Case, (U.K. v. Albania), Judgement, 1949 I.C.J. Rep. 4 (Apr. 9) ("The Court can only regard the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law.").

25. U.N. Charter art. 2, ¶ 4.

26. *Id.* at art. 2, ¶ 7.

27. *Id.* at art. 1, ¶ 3.

28. *Id.* at art. 55, 56.

29. Christopher Greenwood, *Humanitarian Intervention: The Case of Kosovo*, 10 FINNISH Y.B. INT'L. L. 141, 161-62 (1999).

and those seeking to ensure there was no immunity for the humanitarian abuses.

In a similar vein, the immediate aftermath of World War II saw the international prosecution of war criminals, the creation of the prohibition on genocide, and the development of international human rights law treaties. For example, the international reach of post-World War II international law can be seen in the 1949 Geneva Conventions, where States were, in respect of war crimes resulting from what treaties designated as grave breaches, required to search for and bring alleged war criminals before their own courts, or hand them over to another State for prosecution.[30] Similarly, the 1948 Genocide Convention called upon States to prevent and punish acts of genocide,[31] pledge themselves to grant extradition,[32] and permitted them to "call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated" therein.[33]

The U.N. Charter places the authority to intervene in the affairs of a Member State squarely in the hands of the Security Council with its power to act pursuant to Chapter VII regarding any threat to the peace, breach of the peace, or act of aggression. Regional or sub-regional organizations carrying out enforcement action under Chapter VIII of the U.N. Charter also require the authorization of the Security Council.[34] The interpretation that there is a restriction on States acting unilaterally is supported by the *Military and Paramilitary Activities in and Against Nicaragua Merits* case, where the International Court of Justice ruled, "the argument derived from the preservation of human rights in Nicaragua cannot afford a legal justification for the conduct of the United States," and was inconsistent with the claim of acting in self-defense.[35]

30. *See, e.g.*, Geneva Convention Relative to the Treatment of Prisoners of War art. 129, August 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

31. Convention on the Prevention and Punishment of the Crime of Genocide art. I., Jan. 12, 1951, 1021 U.N.T.S. 278.

32. *Id.* at art. VII.

33. *Id.* at art. VIII.

34. U.N. Charter art. 53, ¶ 1.

35. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 268.

However, reliance need not necessarily be placed solely on the United Nations Security Council as the option might also be available to have the matter considered by the General Assembly in Emergency Special Session under the 1950 Uniting for Peace resolution.[36] That said, this approach, while frequently suggested as a possibility,[37] suffers some weaknesses and is not universally embraced.[38] In terms of a positivist textual interpretation of the U.N. Charter, the Security Council is often viewed as the sole proper authority empowered to authorize intervention.[39] The International Court of Justice is another organ of the United Nations that might be called upon to take action in respect of genocide,[40] although it is difficult to see how it could act in a timely fashion to avert the humanitarian crisis.

B. *Post-Charter Interventions to 2000*

Although there clearly has been a concentration of power in the hands of United Nations organs, this has not ended international debate over humanitarian intervention in the post-Charter period. The post-World War II period has witnessed a number of interventions by States that were justified, at least in part, by claiming they were for humanitarian purposes. Those interventions include India-Bangladesh (1971), Tanzania-Uganda (1978), Vietnam-Kampuchea (1978-1979), France-Central African Empire (1979), France, U.K., and the U.S.-Iraq (1991-to protect the Kurds), ECOMOG-Liberia, Sierra Leone (1989-1999), and NATO-Kosovo (1999).[41] These actions were controversial, occurring within the overall context of State skepticism regarding the willingness of the United Nations Security Council to act; a concern, particularly by weaker and non-Western States, that such intervention represented entry onto a slippery slope eroding

36. U.N. Charter art. 10, ¶ 1; U.N. Charter art. 11, ¶¶ 1-3; G.A. Res. 377 (V), § A (Nov. 3, 1950).

37. *See, e.g*., Akande, *supra* note 8, at 5; s*ee also* Michael Ramsden, *"Uniting for Peace" and Humanitarian Intervention: The Authorising Function of the U.N. General Assembly*, 25 WASH. INT'L. L. J. 267, 305 (2016) (arguing the Uniting for Peace resolution "mechanism, when properly used and supported by a consensus of U.N. members, holds the promise of promoting both legality and legitimacy in the attainment of collective security objectives that would otherwise be unreachable due to Council deadlock.").

38. Ramsden, *supra* note 37, at 270-72 (discussing weaknesses of the "Uniting for Peace" approach).

39. GLOBAL BRITAIN, *supra* note 13, at 12 ("[T]here are risks to undermining the authority of the UNSC through invoking the 'Uniting for Peace' resolution.").

40. YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 77 (5th ed. 2017).

41. THOMAS M. FRANCK, RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS 139-70 (2002).

sovereign rights; and the fact that such interventions could occur for broader geo-political reasons than just humanitarian ones.[42]

It is noteworthy that not all of these interventions attracted international criticism, and some received United Nations Security Council recognition after the fact. In this respect, the Economic Community of West Africa ("ECOWAS") interventions under the auspices of its multi-lateral armed force, and the Economic Community of West African States Monitoring Group ("ECOMOG") in Liberia and Sierra Leone, were eventually ratified and adopted by the Security Council through their being commended in subsequent resolutions, and by making the United Nations a partner in follow on operations.[43] The 1999 NATO intervention in Kosovo was more controversial. Humanitarian "necessity," "catastrophe," or "considerations" was invoked by a number of States to justify the bombing.[44] In that case, a limited indication of support might be indirectly based on the fact that a Resolution condemning that action was rejected in a 12-3 vote by the United Nations Security Council.[45] As has been noted, there was a very similar reaction to the 2018 Russian efforts to condemn the American, British and French attack on Syrian chemical weapons facilities.

In addition, in the Kosovo example, once the conflict was over, the Council passed a resolution calling on the Federal Republic of Yugoslavia to "put an immediate and verifiable end to violence and repression in Kosovo, and begin and complete verifiable phased withdrawal from Kosovo of all military, police and paramilitary forces," as well as deploy military and civilian personnel to maintain security and establish a transitional administration.[46] However, there was no United Nations "commendation" for the NATO action, and considerable State condemnation of the bombing. It quickly became evident that there would be opposition by China, Russia and members of the Non-Aligned Movement to intervention occurring in the internal affairs of States without the authority of the Security Council.[47]

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42. Ramsden, *supra* note 37, at 276 (describing that India, Vietnam and Tanzania interventions "each brought an end to serious human rights abuses, but the basis for the interventions was hotly contested and the intervening States prevaricated about their legal justifications.").

43. *Id.* at 162.; s*ee* S.C. Res. 788, ¶ 1 (Nov. 19,1992); S.C. Res. 856, ¶2 (Aug. 10, 1993); S.C. Res. 866, ¶ 2 (Sept. 22, 1993); S.C. Res. 1289, ¶¶ 8-9 (Feb. 7, 2000); S.C. Res. 1299, ¶ 1 (May 19, 2000).

44. Greenwood, *supra* note 29, at 157-58 (e.g., United Kingdom, The Netherlands, Canada).

45. U.N. President of the S.C., Letter dated March 24, 1999 from the Permanent Representative of the Russian Federation addressed to the President of the Security Council, U.N. Doc. S/1999/320 (Mar. 26, 1999).

46. S.C. Res. 1244, ¶¶ 3, 9 (June 10, 1999).

47. CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 47-51 (3rd ed. 2008).

It is difficult to argue that silence or perceived acquiescence by States, or after-the-fact Security Council commendations for State action, establishes a broad unilateral right of humanitarian intervention. At most, what might be said is that, notwithstanding the clear "positivist" rules in the U.N. Charter restricting intervention to that authorized by the Security Council, there remains a certain level of acceptance that such action might be taken by States on an exceptional basis. This leaves the world community to judge after the fact as to what moral and political grounds the State should be condemned or supported. It has perhaps been put best as "it is important not to confuse what the law *in some limited circumstances may condone* or excuse with what is *required* by the law in every circumstance."[48] There have developed suggestions of a unlawful, but legitimate distinction in addressing action by a State without Security Council approval. As was stated by the Independent Commission on Kosovo regarding action NATO action taken to liberate Kosovo:

> The Commission's answer has been that the intervention was legitimate, but not legal, given existing international law. It was legitimate because it was unavoidable: diplomatic options had been exhausted, and two sides were bent on a conflict which threatened to wreak humanitarian catastrophe and generate instability through the Balkan peninsula. The intervention needs to be seen within a clear understanding of what is likely to have happened had intervention not taken place: Kosovo would now still be under Serbian rule, and in the middle of a bloody civil war. Many people would still be dying and flows of refugees would be destabilizing neighboring countries.[49]

Such a conclusion appears fundamentally problematic. It has been noted that "a dichotomy between what is 'lawful' and what is 'legitimate' is undesirable in any society and particularly undesirable in international law."[50] This is an issue that fundamentally highlights the clash between "power-based views of law (domestic or international)" and "norms autonomously validated by God, nature, or a common sense of right or justice."[51] It represents a tension between "strict" interpretations of the law and the morally right thing to do. However, this also makes such intervention a risky proposition for any State, or coalition of States, as there is no guarantee of subsequent acceptance of that action.

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48. FRANCK, *supra* note 41, at 173 (emphasis added).

49. *Kosovo Report*, Independent Commission on Kosovo (2000), https://reliefweb.int/sites/reliefweb.int/files/resources/F62789D9FCC56FB3C1256C1700303E3B-thekosovoreport.htm.

50. Greenwood, *supra* note 29, at 145.

51. FRANCK, *supra* note 41, at 176.

C. *The 21st Century, Humanitarian Intervention, and The Responsibility to Protect*

The 1990s witnessed a number of humanitarian catastrophes resulting, in large part, from the re-alignment of Cold War powers and interests, an attendant implosion of States, and a degradation of the ability of a number of countries to effectively govern their territory. The concept of "failed" or "failing" States began to dominate the international dialogue. Not only were there conflicts in the countries such as the former Yugoslavia, Somalia, and East Timor, but in 1994, there was a horrific genocide in Rwanda. These conflicts threatened international peace and security, and their humanitarian impact was significant. Ending that decade was the 1999 NATO bombing in Kosovo, which provided further impetus to deal with the concept of humanitarian intervention. However, it was to be an area fraught with controversy as those favouring intervention were confronted with forceful resistance by States arguing for the protection of territorial integrity and political independence.

The 1990s was a period that witnessed a renewed emphasis on international human rights and, in particular, a focus on holding perpetrators of war crimes, genocide, and crimes against humanity to account. At times, international criminal law, through the judgements of various criminal tribunals, even appeared to provide the main impetus to reinvigorate and update humanitarian law. Human rights law advocates largely sought an independent path, often acting in competition with humanitarian law advocates in the struggle to determine which regulatory framework would govern State action (e.g., the *lex specialis* debate).[52] The result was that the international dialogue was increasingly about the application of international human rights law, the rights of individuals subjected to violence within territorial boundaries, and an ending of immunity for abusive world leaders. The creation of international criminal tribunals and claims of universal jurisdiction also produced some very uncomfortable moments as they exposed the tensions between different values such as State immunity and individual criminal responsibility, and State sovereignty and internationalism.[53]

52. *See, e.g.*, William Abresch, *A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya*, 16 EUR. J. INT'L L. 741, 747-48 (2005) (suggesting that human rights law should govern the use of force during internal conflict).

53. Greenwood, *supra* note 29, at 142.

The "sanctity" of international borders was increasingly questioned, both in theory and in practice. In this respect, with many conflicts spilling over to adjacent States, the focus increasingly turned to the parties to a conflict, and not to the conflict's geographic location.[54] Overall, the international law governing "internal" armed conflict was seen to include human rights, international criminal law, and humanitarian law.[55] The international legal community has struggled with how to deal with this shift towards seeking greater protection for foreign populations while balancing the desire to maintain the sanctity of State borders.

Kofi Annan, the United Nations Secretary-General, acknowledged in his 1999 report on the work of the organization that "[w]ith relatively few inter-State wars, traditional rationales for intervention have become decreasingly relevant, while humanitarian and human rights principles have increasingly been invoked to justify the use of force in internal wars, not always with the authorization of the Security Council."[56] At the same time, he reinforced the traditional view "that enforcement actions without Security Council authorization threaten the very core of the international security system founded on the Charter of the United Nations. Only the Charter provides a universally accepted legal basis for the use of force."[57] The desire to prevent the types of humanitarian and human rights tragedies that arose in the 1990s resulted in the international community turning its attention increasingly towards studying the authority to intervene on humanitarian grounds.[58] However, only a minority of States were advocates for the right of humanitarian intervention without a Security Council authorization.[59] This could be seen in the 2000 declaration made by States of the Non-Aligned Movement, where all unilateral military action was condemned, "including those made without proper authorization from the United Nations Security Council."[60]

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54. SANDESH SIVAKUMARAN, THE LAW OF NON-INTERNATIONAL ARMED CONFLICT 9-20 (2012).

55. Sandesh Sivakumaran, *Re-envisaging the International Law of Internal Armed Conflict*, 22 EUR. J. INT'L L. 219, 232 (2011).

56. U.N. Secretary-General, *Rep. on the Work of the Organization of Its Fifty-Fourth Session*, ¶ 62, U.N. Doc. A/67/1-S/1 (1999).

57. *Id*. at ¶ 66.

58. *See* SUSAN BREAU, THE RESPONSIBILITY TO PROTECT IN INTERNATIONAL LAW: AN EMERGING PARADIGM SHIFT 17-26 (2016) (presenting an excellent overview of the development of the concept of the responsibility to protect and its relationship to the "right" of humanitarian intervention).

59. OLIVIER CORTEN, THE LAW AGAINST WAR: THE PROHIBITION ON THE USE OF FORCE IN CONTEMPORARY INTERNATIONAL LAW 515 (2012).

60. *Id.* at 516 (quoting from the *Final Document*, Ministerial Conference, Cartagena (Columbia) ¶ 11 (Apr. 8, 2000)).

The effort to address the challenge of humanitarian intervention at the turn of the 21st Century was reflected in two 2001 reports. The first report, *Humanitarian Intervention*, commissioned by the Dutch government, found "not only that there is currently no sufficient legal basis for humanitarian intervention without a Security Council mandate, but also that there is no clear evidence of such a legal basis emerging."[61] However, the report also acknowledged the counterweight of a concern over an abuse of human rights, and attached "great importance to the increasing significance of the international duty to protect and promote fundamental human rights," and in the Advisory Committee on Issues of Public International Law and the Advisory Council on International Affairs's view, "this duty forms the basis for further development of a customary law justification for humanitarian intervention without a Security Council mandate."[62] Reference was made to *The Case Concerning the Barcelona Traction, Light and Power Company Limited*, which indicated that there are certain rights of interest to the international community as a whole "that are the concern of all States," and that "all States can be held to have a legal interest in their protection."[63]

The second report, *The Responsibility to Protect*, commissioned by the Government of Canada, further developed the notion of intervention to protect populations for humanitarian purposes.[64] This 2001 International Commission on Intervention and State Sovereignty report's central theme was "the idea that sovereign States have a responsibility to protect their own citizens from avoidable catastrophe – from mass murder and rape, from starvation – but that when they are unwilling or unable to do so, that responsibility must be borne by the broader community of states."[65] The three main elements of *The Responsibility to Protect* were: (1) the responsibility to prevent; (2) the responsibility to react, (3) and the responsibility to re-build.[66] Regarding principles of military intervention, reliance was placed on the Just War (*jus ad bellum*) principles of just cause, right authority, right intention, last resort, proportional means, and reasonable prospects of success.[67] Of particular note was the conclusion that:

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61. *Humanitarian Intervention*, International Affairs and Advisory Committee on Issues of Pubic International Law 23 (2001).

62. *Id.*

63. Barcelona Traction, Light and Power Co. (Belgium v. Spain), Judgement, 1970 I.C.J. 3, at ¶ 33 (second phase) (Feb. 5).

64. THE RESPONSIBILITY TO PROTECT, *supra* note 17.

65. *Id.* at VIII.

66. *Id.* at XI.

67. *Id.* at XII; *see* JAMES TURNER JOHNSON, MORALITY AND CONTEMPORARY WARFARE 28 (1999) (noting that the Just War principles regarding the resort to the use of force by States (*jus ad*

> There is no better or more appropriate body than the United Nations Security Council to authorize military intervention for human protection purposes. The task is not to find alternatives to the Security Council as a source of authority, but to make the Security Council work better than it has.[68]

The Responsibility to Protect report also identified that where the Security Council failed to deal with a request to intervene in a reasonable time, alternative options included consideration by the General Assembly in Emergency Session, and action by regional and sub-regional organizations acting under Chapter VIII of the U.N. Charter. This latter action could be undertaken "subject to their seeking *subsequent* authorization from the Security Council."[69] In making this recommendation, the report specifically notes "that in some cases that authorization has been after the event, as with the approval of the interventions by ECOWAS's Monitoring Group (ECOMOG) in Liberia in 1992 and Sierra Leone in 1997."[70]

The reference to the General Assembly acting to intervene reflects an overall frustration with the deadlock that gripped the Security Council for much of the Cold War, and can still be a factor impacting on the international response to security crises. In this regard, the *Responsibility to Protect* report found that "[i]t is evident that, even in the absence of Security Council endorsement and with the General Assembly's power only recommendatory, an intervention which took place with the backing of a two-thirds vote in the General Assembly would clearly have powerful moral and political support."[71] Subsequently, a 2011 letter to the Secretary General from the Brazilian representative to the United Nations stated, "[t]he use of force, including in the exercise of the responsibility to protect, must always be authorized by the Security Council, in accordance with Chapter VII of the Charter, or, in exceptional circumstances, by the General Assembly, in line with its resolution 377 (V) ["Uniting for Peace" resolution]."[72]

Whatever the political impact of such General Assembly action, it cannot be said that body has the power to authorize the use of force as part

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bellum) are identified as just cause, right authority, right intention, proportionality of ends, and last resort).

68. THE RESPONSIBILITY TO PROTECT, *supra* note 17, at XII (3) A.

69. *Id.* at XIII (emphasis added).

70. *Id.* at ¶ 6.5; *see also id.* at ¶ 6.35.

71. *Id.* at ¶ 6.7.

72. G.A. Res. 56/211, *Integrated and Coordinated Implementation of and Follow-up to the Outcomes of the Major United Nations Conferences and Summits in the Economic, Social and Related Fields Follow-up to the Outcome of the Millennium Summit*, at 3 (Nov. 11, 2011).

of an enforcement action in the same manner as the Security Council.[73] That said, were an intervention ever to be based upon a General Assembly recommendation, it would be difficult to argue it had no political/diplomatic "legitimacy."[74] However, as can be seen from the United Kingdom Parliamentary Committee rejection of that approach following the 2018 chemical weapons facilities strike in Syria, reliance on a General Assembly resolution has not necessarily gained wide support.[75] However, this approach does have the advantage of keeping the debate about the morality of intervention within the confines of the "black letter" law of the U.N. Charter, rather than assess the independent actions of one or a small number of States.

Once again, the analysis of humanitarian intervention pits a positivist view that action can only be taken under the Charter against the morale or legitimacy pressure that something must be done. In extreme situations where the responsibility to protect is so objectively clear, the result is that the general rule, the sovereignty of the problem State must be respected, is rebutted. The issue is by what authority, and with what degree of political consensus. It has been suggested that while the *Responsibility to Protect* report attempted "to establish a case for the responsibility to protect and humanitarian intervention to support it, important segments of the international community are not convinced."[76]

In 2004, the United Nations Secretary General released a report title, *A More Secure World: Our Shared Responsibility*, which once addressed the responsibility to protect issue.[77] The report recognized:

> [T]here is a growing acceptance that while sovereign Governments have the primary responsibility to protect their own citizens from such catastrophes, when they are unable or unwilling to do so that responsibility should be taken up by the wider international community — with it spanning a continuum involving prevention, response to violence, if necessary, and rebuilding shattered societies.[78]

73. Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter), Advisory Opinion, 1962 I.C.J. 151, 165 (Mar. 30).

74. THE RESPONSIBILITY TO PROTECT, *supra* note 17, at ¶ 6.9 ("Collective intervention blessed by the UN is regarded as legitimate because it is duly authorized by a representative international body; unilateral intervention is seen as illegitimate because self-interested.")

75. GLOBAL BRITAIN, *supra* note 13, at ¶¶ 29-30.

76. Johnson, *supra* note 18, at 630.

77. U.N. Security-General, *A More Secure World: Our Shared Responsibility*, U.N. Doc. A/59/565 (Dec. 2, 2004).

78. *Id.* at ¶ 201.

The focus was on the authority of the Security Council to intervene as it endorsed:

> [T]he emerging norm that there is a collective international responsibility to protect, exercisable by the Security Council authorizing military intervention as a last resort, in the event of genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign Governments have proved powerless or unwilling to prevent.[79]

That report also outlined "five basic criteria of legitimacy" for the Security Council to apply when considering whether to authorize military intervention, including (1) the seriousness of the threat; (2) proper purpose; (3) last resort; (4) proportional means, and (5) the balance of consequences.[80] Further, those "guidelines for authorizing the use of force should be embodied in declaratory resolutions of the Security Council and General Assembly."[81] These criteria mirror those found in *The Responsibility to Protect*, and also confirm that traditional State self-defense principles (*jus ad bellum*) should be applied in assessing whether intervention should occur.

In a 2005 report, In Larger Freedom, Towards Development, Security and Human Rights for All, the Secretary-General confirmed that:

> If national authorities are unable or unwilling to protect their citizens, then the responsibility shifts to the international community to use diplomatic, humanitarian and other methods to help protect the human rights and well-being of civilian populations. When such methods appear insufficient, the Security Council may out of necessity decide to take action under the Charter of the United Nations, including enforcement action, if so required.[82]

Further, reference was made once again to principles regarding the use of force that were firmly grounded in Just War theory.[83]

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79. *Id.* at ¶ 203.

80. *Id.* at ¶ 207.

81. *Id.* at ¶ 208.

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

83. *Id.* at ¶ 126 ("When considering whether to authorize or endorse the use of military force, the Council should come to a common view on how to weigh the seriousness of the threat; the proper purpose of the proposed military action; whether means short of the use of force might plausibly succeed in stopping the threat; whether the military option is proportional to the threat at hand; and whether there is a reasonable chance of success.").

The Responsibility to Protect doctrine was the subject of further comment in the *2005 World Summit Outcome* document adopted by the High Level Plenary Summit of the General Assembly.[84] The responsibility of States to protect their populations was stressed,[85] however, it was also noted that:

> [W]e are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.[86]

It has been suggested that this World Summit Outcome document represents a critical turning point regarding the humanitarian intervention as "[n]owhere is there a discussion of a right to intervene but, rather, the resolution is confirmation of an international responsibility to react to genocide, crimes against humanity, ethnic cleansing and war crimes."[87] The growing interest in a "responsibility to protect" was also reflected in the 2007 Secretary-General appointment of a Special Advisor on the Responsibility to Protect. This appointment was directly linked to "the agreement contained in paragraphs 138 and 139 of the 2005 World Summit Outcome Document."[88]

What is evident from the history of the acceptance of a responsibility to protect approach is that by the turn of the 21st Century, the dialogue concerning intervention for humanitarian grounds, while based on intervention under the U.N. Charter, would be assessed against principles that have their genesis in Just War theory, underpinning the legitimate recourse to force by States. From a United Nations perspective, the focus remained on seeking authority from the Security Council. However, any suggestion that all Member States concurred in that being the exclusive mechanism for authorizing such intervention is not supported by State practice.

84. G.A. Res. 60/1, 2005 World Summit Outcome (Sept. 16, 2005).

85. *Id.* at ¶ 138.

86. *Id.* at ¶ 139.

87. BREAU, *supra* note 58, at 25.

88. Letter dated 31 August 2007 from the Secretary-General addressed to the President of the Security Council, U.N. Doc. S/2007/721 (Dec. 7, 2007).

D. *The Responsibility to Protect to Present Day*

The *Responsibility to Protect* report has attracted interest, study and comment, but it cannot be said to have been embraced in terms of the Security Council taking military action to protect persons being subjected to serious humanitarian abuses. It has been noted that the concept began to be operationalized by the United Nations, which includes the Secretary-General's release of the 2009 report, *Implementing the Responsibility to Protect*.[89] However, particular attention was placed on the first pillar: prevention. It did not fundamentally increase the Security Council's willingness to authorize military action to protect persons victimized by serious humanitarian abuses. The Human Rights Council and the office of the High Commissioner of Human Rights were slow to react, although it has been noted that "[t]he architecture of the United Nations bureaucracy has undergone substantial change with the introduction of the Special Advisors on Genocide and the Responsibility to Protect, who ensure annual reporting on the implementation of the concept."[90]

An example where the world might have invoked humanitarian intervention in responding to a genuine humanitarian catastrophe was in the early 2000s in Sudan. However, States were reluctant to intervene without territorial State consent in a conflict starting in 2003 which had created large scale human suffering. A July 2004 Security Council Resolution expressed grave concern, but also noted "that the Government of Sudan bears the primary responsibility to respect human rights while maintaining law and order and protecting its population within its territory."[91] This was followed by a Resolution calling for support for "the efforts of the African Union aimed at a peaceful conclusion of the crisis and *the protection of the welfare of the people of Darfur*."[92] There was also a 2005 reference by the Security Council to the International Criminal Court encouraging the Court to "to support international cooperation with domestic efforts to promote the rule of law, *protect human rights* and combat impunity in Darfur."[93] Notwithstanding reference to "the provisions of paragraphs 138 and 139 of the 2005 United Nations World Summit Outcome Document," in the

89. U.N. Secretary-General, *Implementing the Responsibility to Protect,* U.N. Doc A/63/677 (Jan. 12, 2009).

90. BREAU, *supra* note 58, at 29.

91. S.C. Res. 1556, Preamble (Jul. 30, 2004).

92. S.C. Res. 1564, ¶ 3 (Sept. 3, 2004) (emphasis added).

93. S.C. Res. 1593, ¶ 4 (Mar. 31, 2005) (emphasis added).

preamble of a 2006 Security Council Resolution, there was to be no true military intervention.[94] The deployment of an African Union military force ("AMIS") in 2004, and subsequently, a hybrid AU/UN force mission, effectively relied on Sudanese consent.[95]

One analysis of *The Responsibility to Protect* doctrine identifies the option of "robust peacekeeping" as being indicative of the post-report evolving practice of the United Nations towards protecting civilian populations in the Sudan, the Democratic Republic of Congo, Burundi, and the Ivory Coast.[96] It is certainly evident that the concept of "robust peacekeeping" was also a product of the complex and difficult United Nations operations that arose during the 1990s. It describes the situation wherein the Security Council has not authorized peace enforcement under Chapter VII, but has "given United Nations peacekeeping operations 'robust' mandates authorizing them to 'use all necessary means' to deter forceful attempts to disrupt the political process, protect civilians under imminent threat of physical attack, and/or assist the national authorities in maintaining law and order."[97]

Robust peacekeeping is distinguished from Chapter VII peace enforcement in that the former still requires the consent of the "main parties," including the territorial State.[98] This modernized form of peacekeeping is a doctrine that clearly has an internal conflict and protection-of-civilian focus. That focus is represented in the *United Nations Peacekeeping Operations: Principles and Guidelines* observation that "[t]he environments into which United Nations peacekeeping operations are deployed are often characterized by the presence of militias, criminal gangs, and other spoilers who may actively seek to undermine the peace process *or pose a threat to the civilian population.*"[99] In some respects, similar to the acknowledgement in the *Responsibility to Protect* report of a General Assembly Uniting for Peace, and subsequent Security Council authorization of Chapter VII regional action, there was pressure within the international community to find non-traditional means of protecting civilians severely threatened by internal strife.

Notwithstanding these indirect efforts to protect threatened populations, the idea of military intervention, even under Security Council authorization, remained controversial. This was particularly evident in the 2011 United

94. S.C. Res. 1706, Preamble (Aug. 31, 2006).

95. GRAY, *supra* note 47, at 380-82.

96. BREAU, *supra* note 58, at 217-18.

97. UNITED NATIONS PEACEKEEPING OPERATIONS: PRINCIPLES AND GUIDELINES, DEP'T OF PEACEKEEPING OPERATIONS 34 (2008).

98. *Id.* (emphasis added).

99. *Id.* (emphasis added).

Nations' intervention in Libya. That year, the "Arab Spring" led to protests and a government crackdown that rapidly caught the attention of the international community. Discussion of responsibility to protect doctrine quickly gained traction as the Libyan government was identified as having committed crimes against its population. The Security Council asserted Libya's responsibility to protect its population in a February 2011 resolution mandating action, including a referral to the International Criminal Court, and an arms embargo, travel ban, and assets-freeze against high-level Libyan officials.[100] Its failure resulted in Resolution 1973, which authorized enforcement action, including the creation of a no-fly zone, enforcement of the arms embargo, and "all necessary measures…to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya, including Benghazi, while excluding a foreign occupation force of any form on any part of Libyan territory."[101]

With the reference in Resolution 1973 to excluding a foreign occupation force, the Libya intervention appeared to be uniquely crafted to limit "intervention" to an aerial response. Some countries that might have normally been considered against such an intervention abstained from the vote.[102] However, the operation ultimately was to be viewed by many States and commentators as having strayed into "regime change," with the NATO-led aerial bombing campaign assisting rebel forces to topple the Ghaddafi regime.[103] This very likely led the abstaining States to question the wisdom of tolerating the authorization. It has also been criticized by human rights groups for having caused civilian casualties.[104]

Therefore, it is no surprise that the Libya operation sparked considerable debate concerning the future of *The Responsibility to Protect* doctrine. This was to have direct impact on decisions about intervening in Syria later that decade. It is evident that concern about how the Security Council mandate for Libya was executed directly impacted on whether intervention would be considered in the subsequent Syrian conflict.[105] At the same time, it has also been noted that intervention in Syria, or later in Iraq, would have had trouble meeting the precautionary principle of "a reasonable chance of success."[106]

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100. S.C. Res. 1970 (Feb. 26, 2011).

101. *Id.* at ¶ 4, at 3 (citation omitted).

102. BREAU, *supra* note 58, at 230.

103. *See* DINSTEIN, *supra* note 40, at 359; *The Crisis in Libya*, INT'L COALITION FOR THE RESP. TO PROTECT, http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-libya#Lessons (last visited 19 May 2019).

104. *The Crisis in Libya*, *supra* note 103.

105. Sarah Brockmeier, Oliver Stuenkel & Marcos Tourinho, *The Impact of the Libya Intervention Debates on Norms of Protection*, 30 GLOBAL SOCIETY 113, 125-26 (2015).

106. BREAU, *supra* note 58, at 254.

This latter point highlights the development a more recent nuanced discussion of *The Responsibility to Protect* doctrine, with analysis focusing on how military force is used and controlled.[107]

In this respect, the 2011 Brazilian letter to the Secretary-General following the Libyan operation focused on military force as: (1) being limited by its legal, operational, and temporal elements; (2) abiding by the letter and spirit of the United Nations authorized mandate; (3) producing as little violence, instability and harm as possible, and (4) using force must be limited, proportionate, and limited to the established objectives.[108] These factors reflect the traditional *jus ad bellum* principles set out in *The Responsibility to Protect*, including right intention, last resort, proportionate means, and reasonable prospects.[109] Notably, the *Responsibility to Protect* report also included an operational principle that should have had particular relevance when assessing the Libyan operation: "[a]cceptance of limitations, incrementalism and gradualism in the application of force, the objective being protection of a population, not defeat of a state."[110]

The controversy and debate regarding the Libyan operation did not end the responsibility to protect debate, nor its potential applicability to the contemporary global security situation. Notably, the United Nations Security Council has continued to include protection of the civilian population as part of its mandates for United Nations controlled operations (e.g., the Sudan,[111] and Mali[112]).[113] Further, the responsibility to protect was the subject of a 2018 Secretary-General report seeking to improve the reaction of the international community towards "the prevention of genocide, war crimes, ethnic cleansing and crimes against humanity and the protection of vulnerable populations."[114] The problem was not seen to be one of a weak or misplaced principle, but rather "because the international community has been insufficiently resolute in its implementation and has allowed disagreements

107. Brockmeier, Stuenkel & Tourinho, *supra* note 105, at 129-30.

108. U.N. Security-General*, Follow-up to the Outcome of the Millennium Summit*, at ¶ 11(d)(e) & (f) U.N. Doc. A/66/551-S/2011/701 (Nov. 11, 2011).

109. THE RESPONSIBILITY TO PROTECT, *supra* note 17, at XII, ¶ (3).

110. *Id.* at XIII, ¶ (4).

111. S.C. Res. 1990, ⁋ 3(d) (Jun. 27, 2011) (calling upon United Nations Interim Security Force for Abyei acting under Chapter VII to "without prejudice to the responsibilities of the relevant authorities, to protect civilians in the Abyei Area under imminent threat of physical violence").

112. S.C. Res. 2085, ⁋ 9(d) (Dec. 20, 2012) (acting under Chapter VII to create the African-led International Support Mission in Mali (AFISMA) tasked with supporting "the Malian authorities in their primary responsibility to protect the population").

113. Brockmeier, Stuenkel & Tourinho, *supra* note 105, at 129-30.

114. U.N. Secretary-General, *Responsibility to Protect: From Early Warning to Early Action*, U.N. Doc. A/72/884 (Jun. 1, 2018).

about the past to foil unity of purpose in the present."[115] This resonates with a sentiment expressed by Thomas Franck that "the problem for the system is not so much how to accommodate such interventions in its framework of legality but how to find States willing to undertake the necessary rescue."[116]

E. *Testing the Limits of "Established" Law*

As the 21st Century enters its third decade, intervention to prevent humanitarian atrocities is now firmly grounded in the idea of a "responsibility to protect" vulnerable civilian populations. However, questions remain regarding if, when, or how such interventions might actually be authorized. Does such authorization have to be provided solely by the United Nations Security Council? Absent such authorization, can such a military intervention ever be considered legally justified by the international community? In this respect, territorial integrity and political independence remain key factors influencing international reluctance to accept that humanitarian intervention should be considered. However, these are factors to be considered. They should not necessarily be seen as bars to such intervention taking place. It is clear that the Security Council is the preferred lawful or "right" entity to authorize such action, either through Chapter VII, or Chapter VIII of the U.N. Charter, but is it the only one?

There has been an acceptance, although somewhat grudgingly, that the General Assembly might also become involved on an exceptional basis recommending such action. That said, there is no mention of that option in a 2018 International Law Association study titled, *Final Report on Aggression and the Use of Force*.[117] Notwithstanding that oversight, support for General Assembly action undoubtedly has been gained precisely because it can be anchored within the provisions of the U.N. Charter. Still, given a desire to act in the face of a humanitarian crisis, as well as the possibility that such action may fail to gain sufficient support in the Security Council, or is vetoed by one of its permanent members, or simply not be dealt with by the General Assembly, it remains possible that a State, coalition, or even a regional grouping of States, will want to act without the prior authority of the Security Council. This is exactly the situation presented by the United Kingdom in its reliance on humanitarian intervention as the basis for striking Syrian chemical facilities in 2018.

Ultimately, the question is one of whether the written words of the U.N. Charter exhausts the permissible action by a State or States confronted with

115. *Id.*
116. FRANCK, *supra* note 41, at 191.
117. *See Final Report*, *supra* note 9.

a population being exposed to criminal acts of clearly inexcusable proportions. Despite views that have been expressed to the contrary, one possible avenue is customary international humanitarian law. Indeed, the issue of a customary law basis for intervention was also raised in the 2018 International Law Association's study, *Final Report on Aggression and the Use of Force*.[118] As was noted in that study, such a position automatically runs up against the requirement to provide evidence of State practice, and that such practice has been widely accepted by other States (e.g., *opinio juris*).[119] By broadly considering the concept of humanitarian intervention, it is challenging to suggest such a customary rule has fully crystalized or attracted wide support given the limited number of times it has been invoked and the resistance it has encountered from some parts of the globe.[120]

However, that is not the end of the discussion. Customary law is established by "a pattern of claim, absence of protest by States particularly interested in the matter at hand and acquiescence by other States."[121] Further, "[t]ogether with related notions such as recognition, admissions and estoppel, such conduct or abstinence from conduct forms part of a complex framework within which legal principles are created and deemed applicable to States."[122] In this regard, the scope and nature of humanitarian intervention as a customary rule appears to be in the formation stage. Indeed, the International Law Association study expends nearly four pages assessing its potential status. The study comes to the conclusion that humanitarian intervention is supported by a minority of writers, and also notes that others emphasize "that a use of force to avert a humanitarian catastrophe will, if stringent conditions are met, fall into a legal grey area."[123] Further, the *Final Report on Aggression and the Use of Force* states "that it is difficult to conclude that a right of humanitarian intervention is unquestionably unlawful."[124]

The viability of humanitarian intervention as a customary rule may be considerably aided when the focus is narrowed to specific instances where States are confronted with horrific acts amounting to war crimes, genocide, and crimes against humanity in circumstances where the Security Council for whatever reasons is deadlocked, and there are no other ulterior motives on the part of the intervening State or States. In assessing this issue, it is difficult

118. *Id.* at 21.

119. *Id*.

120. However, in 1991, it was suggested that in respect of the Kosovo operation that "modern customary international law recognizes a right of military intervention on humanitarian grounds by States, or an organization like NATO." Greenwood, *supra* note 29, at 171.

121. MALCOLM N. SHAW, INTERNATIONAL LAW 89 (6th ed. 2008).

122. *Id*. at 89.

123. *Final Report*, *supra* note 9, at 24.

124. *Id*.

to ignore that State practice does exist, as seen both during the Cold War and after (e.g., action taken by India, Tanzania, Vietnam, France, the United Kingdom, ECOMOG, and NATO). This action was clearly not limited to Western powers, nor were these claimed humanitarian interventions carried out exclusively by developed States. Interventions occurred in circumstances where the United Nations Security Council was seen in some instances to subsequently condone the action, and in others, to at least not condemn it. This reality is significant and cannot be ignored.[125]

The debate concerning humanitarian intervention highlights yet another area where long held interpretations may be giving way to the realities of the changing security environment. This is not the only area of international law where this is occurring. The certainty with which international law is sometimes viewed to be "settled" is being challenged on a number of fronts. It has rightly been noted that "[l]egal rules are not static, but are capable of evolving over time."[126] For example, prior to 9/11, it was not uncommon to hear international lawyers claim that the right to self-defense, set out in the U.N. Charter, had no application to non-State actors acting alone since their actions had to be attributable to a State in order for an armed attack to occur, such that Article 51 was applicable. In 2020, it is safe to say that this "is no longer the majority view."[127]

Similarly, the authority to intervene in another State to defend your own nationals has been area of longstanding controversy. However, there has been increasing acceptance in this area, particularly given the contemporary threats posed to persons located in failed or failing States, that intervention in another State to protect one's own nationals can be justified under international law. That said, due to the lack of consensus, such intervention has been argued to be justified under a variety of different rationales (e.g., law enforcement, forceful countermeasures, self-defense in response to an armed attack, non-combatant evacuation measures, proportionate defensive measures, or simply the defense of nationals).[128] The wide variety of suggested legal bases is not necessarily an indication of their weakness, but rather that an overly strict interpretation of the law will cause alternative rationales to be considered.

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125. GLOBAL BRITAIN, *supra* note 13, at ¶¶ 16-17; *see also* Greenwood, *supra* note 29, at 163.

126. TOM RUYS, ARMED ATTACK AND ARTICLE 51 OF THE UN CHARTER: EVOLUTIONS IN CUSTOMARY LAW AND PRACTICE 6 (2010).

127. David Kretzmer, *The Inherent Right to Self- Defence and Proportionality in Jus Ad Bellum*, 24 EUR. J. INT'L L. 235, 273 (2013).

128. Kenneth Watkin, FIGHTING AT THE LEGAL BOUNDARIES: CONTROLLING THE USE OF FORCE IN CONTEMPORARY CONFLICT 394 (2016); *see also Final Report*, *supra* note 9, at 17-18.

The law does not stand still, and with respect to humanitarian intervention, State practice has likely not come to an end. There may crystalize a broader acceptance of a customary law norm recognizing that in exceptional circumstances, relief needs to be provided militarily to a threatened population even if only by a State acting alone, or in conjunction with a small number of allies. For that to happen, a State or States claiming a customary law authority to intervene will have a more sympathetic argument if they closely adhere to Just War principles (i.e., just cause, right intention, last resort, proportional means, and reasonable prospects of success) to guide their conduct.

In this respect, it is noted that the United Kingdom was careful to indicate its adherence to such principles in its published legal position. It stated that:

> In these circumstances, and as an exceptional measure on grounds of overwhelming humanitarian necessity, military intervention to strike carefully considered, specifically identified targets in order effectively to alleviate humanitarian distress by degrading the Syrian regime's chemical weapons capability and deterring further chemical weapons attacks was necessary and proportionate and therefore legally justifiable. Such an intervention was directed exclusively to averting a humanitarian catastrophe caused by the Syrian regime's use of chemical weapons, and the action was the minimum judged necessary for that purpose.[129]

Given such a measured approach, and what was at stake, it is difficult to imagine such action would attract liability under the crime of aggression.[130] In this respect, it should be noted that the *Final Report on Aggression and the Use of Force* indicated that an inability to state such an intervention is unquestionably unlawful may well be of relevance when considering whether an act of aggression occurred.

2. CONCLUSION

Nearly twenty years after the publication of the *Responsibility to Protect* report, it is likely that the international community will continue to place particular importance on the territorial sovereignty with an initial approach towards humanitarian crises being that the protection of the human rights of persons found in the territory of a State remains the responsibility of that State. However, the requirement that United Nations Members must refrain from the threat or use of force against the territorial integrity or political

129. *Syria Action*, *supra* note 1, at ¶ 4(iii).

130. Rome Statute of the International Criminal Court, art. 8 bis., June 11, 2010, 49 I.L.M. 1325, 1334-35.

independence of any State will not preclude intervention occurring on humanitarian grounds, such as in situations of genocide or other large-scale killings, war crimes, ethnic cleansing, and crimes against humanity. Such intervention can be comfortably authorized by the Security Council acting pursuant to Chapter VII, or as a regional action under Chapter VIII of the Charter.

While there is not universal agreement, there is a role for the United Nations General Assembly in authorizing humanitarian intervention. That option should not be discounted. In that regard, the General Assembly has, at least in theory, the option to exceptionally recommend intervention by acting under the 1950 *Uniting for Peace* Resolution. This would provide a form of legitimacy. That said, the General Assembly has never acted in this manner, and it is not clear under what circumstances it would be prepared to do so.

This leaves open the question of individual States, a coalition of States, or a regional organization, acting on its own without prior Security Council authorization. Given recent history, such action may be more likely to occur than having authorization provided by the Security Council to carry out a humanitarian intervention. Any such action will undoubtedly be better received if a State is not acting alone, and instead acting as part of a coalition or regional effort. This does not mean the Security Council may not eventually be involved, as it is very possible that attempts may be made by the territorial State or an ally to condemn the humanitarian action. That body may also be asked to address the crisis or other issues in the territorial State related to that intervention. This can possibly set the scene for a form of direct or indirect "commendation" by the Security Council, or at least provide a record that no "condemnation" was made of the intervention. This in turn could further aid in crystalizing the argument for a customary law basis for humanitarian intervention.

Given the risk attendant with a State relying on a claim based on customary international law to be able to carry out a humanitarian intervention, any decision to do so should be strictly governed by the principles identified in the *Responsibility to Protect* doctrine. These include a just cause, a right intention, acting as a last resort, using only proportional means, and having a reasonable prospects of success.[131] Further, there should be clear operational objectives, an unambiguous mandate, adequate resources provided to complete the mission, an acceptance that the objective is the protection of the population and not the defeat of the State, appropriate rules

131. THE RESPONSIBILITY TO PROTECT, *supra* note 17, at XII, ¶ (2).

of engagement, and maximum coordination with humanitarian organizations.[132]

132. Id. at XIII, ¶ (4).