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Striking a Grotian Moment: How the Syria Airstrikes Changed International Law Relating to Humanitarian Intervention

Michael P. Scharf*

Abstract

In the years since the 1999 North Atlantic Treaty Organization airstrikes on Serbia to prevent ethnic cleansing of the Kosovar Albanians, international law has been moving in fits and starts toward recognition of a limited right of humanitarian intervention in the absence of United Nations Security Council approval. But all the ingredients necessary for the crystallization of customary international law were not present until the April 14, 2018 United States/French/United Kingdom airstrikes on Syrian chemical weapons facilities. This Article examines the distinctive circumstances of the April 2018 airstrikes, including the context of a crisis of historic proportions, the focus on preventing the use of chemical weapons, the collectivity of the action taken, the limited targets and collateral damage, the explicit invocation of humanitarian intervention by the U.K. as the legal justification, and the U.S.'s apparent adoption of that justification. It explores whether these factors have rendered the April 2018 airstrikes a transformative event that may have changed international law concerning humanitarian intervention.

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I. INTRODUCTION

Since 2011, Syria has been engulfed in a protracted civil war that began as part of the wave of Arab Spring protests against Middle East tyrants.¹ The Syrian conflict has seen the rise and fall of the Islamic State of Iraq and Syria (ISIS) terrorist organization,² the largest refugee migration since World War II,³ and the repeated use of chemical weapons against a civilian population. With all that, Syria has become a dynamic laboratory for the creation of new international law.

Elsewhere, this author has explored how the use of force by the U.S. and its allies against ISIS in Syria has fundamentally changed the international law of self-defense against non-state actors.⁴ This Article, in turn, examines whether the airstrikes against Syria on April 14, 2018 may have crystallized an emerging customary norm of humanitarian intervention, thereby representing a historic development in international law.⁵

The U.S., France, and the U.K. have said that they launched the April 2018 airstrikes to prevent the Assad regime from continuing to use chemical weapons against the Syrian population.⁶ Before the Syrian airstrikes, most countries and experts had taken the position that there was no international law right of humanitarian intervention under customary international law or the U.N. Charter, except when authorized by the Security Council.⁷ As detailed in this Article, however, the three countries claimed a right of humanitarian intervention, and the international response to the April 2018 Syria airstrikes has been overwhelmingly supportive. Something is changing.

¹ See *Timeline of Chemical Weapons Attacks in Syria*, AP (Apr. 10, 2018), <http://perma.cc/MA95-UFXT> (providing a detailed timeline of events related to Syria's use of chemical weapons and the U.S./France/U.K. airstrikes).

² See generally Michael P. Scharf, *How the War Against ISIS Changed International Law*, 48 CASE W. RES. J. INT'L L. 15 (2016).

³ Charlotte Alfred, *What History Can Teach Us about the Worst Refugee Crisis Since WWII*, HUFFINGTON POST (Sept. 12, 2015), <http://perma.cc/L65J-WVC4>; U.N. Office for the Coordination of Humanitarian Affairs, *2018 Humanitarian Needs Overview: Syrian Arab Republic* (Nov. 21, 2017), <http://perma.cc/5M9S-DN3V>.

⁴ See generally Scharf, *supra* note 2.

⁵ Michael Wood (Special Rapporteur), Second Report on Identification of Customary International Law, ¶ 20, U.N. Doc. A/CN.4/672 (May 22, 2014) (“‘Customary international law’ means those rules of international law that derive from and reflect a general practice accepted as law.”). Historically, crystallization of new rules of customary international law was viewed as a protracted process that took many decades, if not centuries, to complete. See Manley O. Hudson (Special Rapporteur), Article 24 of the Statute of the International Law Commission, 26, U.N. Doc. A/CN.4/16 (Mar. 3, 1950).

⁶ U.N. SCOR, 73d Sess., 8233d mtg. at 2, U.N. Doc. S/PV.8233 (Apr. 14, 2018).

⁷ Ryan Goodman, *Humanitarian Intervention and Pretexts for War*, 100 AM. J. INT'L L. 107, 108–9 (2006).

What to make of this change? Was this just a case where international politics aligned against a rogue regime, or did the April 2018 airstrikes constitute a transformative event in customary international law and the interpretation of the U.N. Charter? Some scholars have characterized such events as “International Constitutional Moments.”⁸ But others, including this author, prefer to use the label “Grotian Moment,” a term named for Hugo Grotius, the 15th Century Dutch scholar and diplomat whose masterpiece *De Jure Belli ac Pacis* helped marshal in the modern system of international law.⁹ This Article examines whether the airstrikes against Syria in April 2018 in response to the Assad regime’s use of chemical weapons are one of these so-called Grotian Moments, marking a rapid change in customary international law and in the interpretation of the U.N. Charter concerning the right to use force for humanitarian intervention in the absence of Security Council authorization.

The Article begins by setting forth the background of the 2018 airstrikes. Next, it discusses the principles and process of customary international law formation and the phenomenon of accelerated development of customary international law. This is followed by an examination of the evolving view of humanitarian intervention, starting with the 1999 NATO airstrikes. Finally, the Article explores the unique aspects of the Syrian airstrikes, including the context of a crisis of historic proportions, the focus on preventing the use of chemical weapons, the collectivity of the action taken, the limited targets and collateral damage, the explicit invocation of humanitarian intervention by the U.K. as the legal justification, and the U.S.’s apparent adoption of that justification. It concludes that these factors may have rendered the April 14, 2018 airstrikes a transformative event that has changed international law concerning humanitarian intervention.

⁸ Stanford Law Professor Jenny Martinez, for example, has written that the drafting of the U.N. Charter was a “constitutional moment” in the history of international law. See Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429, 463 (2003). Washington University Law Professor Leila Sadat has similarly described Nuremberg as a “constitutional moment for law.” See Leila Nadya Sadat, *Extraordinary Rendition, Torture, and Other Nightmares from the War on Terror*, 75 GEO. WASH. L. REV. 1200, 1206 (2007).

⁹ See generally MICHAEL P. SCHARF, CUSTOMARY INTERNATIONAL LAW IN TIMES OF FUNDAMENTAL CHANGE: RECOGNIZING GROTIAN MOMENTS (2013). The term “Grotian Moment” was first coined by Princeton Professor Richard Falk. See BURNS H. WESTON ET AL., INTERNATIONAL LAW AND WORLD ORDER 1265–86 (2006). Grotius (1583–1645) is widely considered to have laid the intellectual architecture for the Peace of Westphalia, which launched the basic rules of modern international law. HEDLEY BULL ET AL., HUGO GROTIUS AND INTERNATIONAL RELATIONS 1, 9 (1990); See generally HAMILTON VREELAND HUGO GROTIUS: THE FATHER OF THE MODERN SCIENCE OF INTERNATIONAL LAW (1917). While the results of Westphalia may have been simplified by the lens of history, and Grotius’ role may have been exaggerated, Westphalia has unquestionably emerged as a symbolic marker and Grotius as an emblematic figure of changing historical thought. “Grotian Moment” is thus an apt label for transformational events in customary international law.

II. BACKGROUND ON THE SYRIAN AIRSTRIKES

A. President Obama Draws a Red Line

Since the civil war in Syria began in 2011, Syria has presented the international community with monumental challenges to international peace and security.¹⁰ Responding to the crisis has been complicated by the unique geopolitical situation. Dating back to the 1970s, Russia has been a close ally of the Assad regime, which allows Russia to keep its only naval base outside the former Soviet Union at the Syrian Mediterranean port of Tartus.¹¹ As such, Russia has vetoed Security Council resolutions condemning Assad's harsh actions against the civilian population, blocked the Security Council from authorizing investigations into Syria's use of chemical weapons, and prevented the Security Council from referring the situation to the International Criminal Court (ICC).¹²

In reaction to reports that the Assad regime had amassed chemical weapons, on August 20, 2012, U.S. President Barack Obama declared that Syria's use of chemical weapons would be a "red line."¹³ The inference was that if the Assad regime deployed the internationally banned weapons it would trigger an American military response. He reiterated this threat on several occasions in the following months.¹⁴ Then on August 21, 2013, the Assad regime used chemical weapons on a large scale in the opposition-held Ghouta area of Damascus, causing 1,400 civilian casualties.¹⁵

In response, President Obama tried and ultimately failed to gain support from Congress and international allies to launch a narrowly tailored attack on Syria.¹⁶ At the time, polls revealed that only 36 percent of Americans favored the U.S. taking military action to prevent Syria's chemical weapons use, while 51

¹⁰ See generally U.N. SCOR, *supra* note 6.

¹¹ See Sam LaGrone, *Russia, Syria Agree on Mediterranean Naval Base Expansion, Refit of Syrian Ships*, USNI NEWS (Jan. 20, 2017), <http://perma.cc/68QG-4UDQ>.

¹² U.N. SCOR, *supra* note 6, at 8.

¹³ Glen Kessler, *President Obama and the 'Red Line' on Syria's Chemical Weapons*, WASH. POST (Sept. 6, 2013), <http://perma.cc/UYG2-5U4Q>.

¹⁴ *Id.*

¹⁵ U.N. Secretary-General, Remarks to the Security Council on the Report of the United Nations Missions to Investigate Allegations of the Use of Chemical Weapons on the Incident that Occurred on 21 August 2013 in the Ghouta area of Damascus (Sept. 16, 2013); Joby Warrick, *More than 1,400 Killed in Syria Chemical Weapons Attack, U.S. Says*, WASH. POST (Aug. 30, 2013), <http://perma.cc/8PSL-X8YE>.

¹⁶ Peter Baker & Jonathan Weisman, *Obama Seeks Approval by Congress for Strike in Syria*, N.Y. TIMES (Aug. 31, 2013), <http://perma.cc/RX2T-E7J5>.

percent of those surveyed opposed such military action.¹⁷ Lacking congressional and popular support, the Obama administration never took military action. Rather, it accepted a Russian-brokered deal under which the Assad regime agreed to give up its chemical weapons and submit to international inspections.¹⁸

B. The April 6, 2017 Unilateral Airstrikes

It soon became clear that the Russian-brokered deal had failed to prevent Syrian possession and use of chemical weapons. On April 7, 2017, four months after President Donald Trump entered office, the U.S. fired fifty-nine Tomahawk missiles at the Shayrat Airfield in Syria. President Trump said the airstrike was conducted in response to the Assad regime's use of sarin gas, a chemical weapon, on the town of Khan Sheikhoun—an attack that killed seventy-two people, including a number of children, on April 4.¹⁹ Shayrat Airfield was targeted because it had been used to store chemical weapons and aircraft employed in the April 4 attack.²⁰

The United States acted alone, and President Trump did not articulate a legal rationale for the airstrikes, but said that “[i]t is in the vital national security interest of the United States to prevent and deter the spread and use of deadly chemical weapons.”²¹ U.S. Ambassador to the U.N. Nikki R. Haley said that the U.S. was “justified” in striking the airbase as “a very measured step” and warned that the U.S. was “prepared to do more.”²²

Despite the lack of a stated legal justification, many of America's allies defended the missile strikes. The British Secretary of State for Defence, Michael Fallon, said “we fully support this strike, it was limited, it was appropriate, and it was designed to target the aircraft and the equipment that the United States believe were used in the chemical attack and to deter President Assad from carrying out future chemical attacks.”²³ The European Union was similarly supportive, saying

¹⁷ Clare Malone, *America's Fickle Relationship with Humanitarian Intervention*, FIVETHIRTYEIGHT (Apr. 10, 2017), <http://perma.cc/8KGP-QQ9E>.

¹⁸ Michael R. Gordon, *U.S. and Russia Reach Deal to Destroy Syria's Chemical Arms*, N.Y. TIMES (Sept. 14, 2013), <http://perma.cc/8RHP-X6BF>.

¹⁹ Remarks on United States Military Operations in Syria, 2017 DAILY COMP. PRES. DOC. 238 (Apr. 6, 2017).

²⁰ *Id.*

²¹ *Id.*

²² Somini Sengupta et al., *U.S. Airstrikes in Syria: Fallout Around the World*, N.Y. TIMES (Apr. 7, 2017), <http://perma.cc/H8CS-SBBW>.

²³ Anushka Asthana, *Syria Airstrikes: UK Offers Verbal but Not Military Support to US*, THE GUARDIAN (Apr. 7, 2017), <http://perma.cc/CE7X-RWUL>.

that Syria's use of chemical weapons cannot go unanswered.²⁴ In the Middle East, Saudi Arabia, Jordan, and Turkey said they supported the missile strikes as a "necessary and appropriate response."²⁵

Of all the states in the world, only Russia, Iran, Bolivia, and Syria opposed the airstrikes. Russian Foreign Minister Sergei Lavrov called the strikes "an act of aggression under a completely invented pretext."²⁶

C. The April 14, 2018 Multilateral Airstrikes

In 2018, with Russia's assistance, the Assad regime began the final push to end its civil war, using overwhelming force to punish local populations where insurgents remained active.²⁷ On April 7, 2018, an attack using chlorine gas in the eastern Damascus suburb of Douma killed more than eighty civilians. Believing Assad's forces to be responsible, on April 14, 2018, the U.S., France, and the U.K. together launched another round of missile strikes against Syria.

"The nations of Britain, France and the United States of America have marshalled their righteous power against barbarism and brutality," President Trump said in an address from the White House announcing the military action.²⁸ "The purpose of our actions tonight is to establish a strong deterrent against the production, spread, and use of chemical weapons," he said.²⁹ He added, "[w]e are prepared to sustain this response until the Syrian regime stops its use of prohibited chemical agents."³⁰

One hundred three missiles were fired from a variety of naval vessels and jets—about double what was launched in April 2017.³¹ The chairman of the U.S. Joint Chiefs of Staff, Joseph Dunford, said the targets were "specifically associated" with Syria's chemical weapons program.³² They included a scientific research facility in Damascus, a chemical weapons storage facility west of Homs, and a chemical weapons equipment storage site and command post near Homs.³³

²⁴ *Syria War: World Reaction to US Missile Attack*, BBC (Apr. 7, 2017), <http://perma.cc/ZSX3-F8UW>.

²⁵ Madison Park, *Who's with the US on Syria Strike and Who Isn't*, CNN (Apr. 8, 2017), <http://perma.cc/4GSZ-BNEB>.

²⁶ *Id.*; Syria War: World Reaction to US Missile Attack, *supra* note 24.

²⁷ Daniel Brown, *A Compelling Theory Explains the Latest Chemical Attack in Syria – and It Looks Like Assad Got What He Wanted*, BUSINESS INSIDER (Apr. 9, 2018), <http://perma.cc/TP67-Q52A>.

²⁸ *Syria Air Strikes: US and Allies Attack 'Chemical Weapons Sites'*, BBC (Apr. 14, 2018), <http://perma.cc/5H3Q-WW7J>.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Gen. Dunford Says Targets Linked to Chem Weapons*, AP (Apr. 13, 2018), <http://perma.cc/B84U-3DPL>.

³³ *Id.*

“This is going to set the Syrian chemical weapons program back for years,” Lieutenant General Kenneth McKenzie, a director of the U.S. Joint Chiefs of Staff, told reporters.³⁴

Lamenting that the international investigators had just arrived in Douma to begin their examination of the suspected use of chemical weapons there, Russia called the airstrikes “an act of aggression” and a “violation of the U.N. Charter and the norms and principles of international law.”³⁵ But a Russian-sponsored Security Council resolution that would have condemned the attack was soundly defeated by a vote of three in favor, eight against, and four abstentions.³⁶ Both inside and outside the Security Council, the international reaction to the airstrikes reflected broad support.³⁷

III. THE CONCEPT OF ACCELERATED FORMATION OF CUSTOMARY INTERNATIONAL LAW

Under the conventional view of international law, a state can use military force in another state’s territory only in three situations: (1) with the latter’s consent, (2) with Security Council authorization, or (3) when acting in self-defense against an armed attack.³⁸ None of these exceptions was applicable to the April 14, 2018 airstrikes on Syria.

The question this Article addresses is whether the April 2018 airstrikes have crystallized a fourth situation in which force is allowed, namely to respond to and prevent future use of chemical weapons against civilians when the Security Council is blocked from authorizing humanitarian intervention by a Permanent Member’s veto. If this right now exists under customary international law, then such humanitarian intervention would not be in violation of Article 2(4) of the U.N. Charter, which only prohibits the use of force that is “against the territorial integrity or political independence of any state” and “inconsistent with the

³⁴ Laris Karklis et al., *Airstrikes in Syria Hit 3 Chemical Weapons Facilities, Including One in Damascus*, WASH. POST (Apr. 14, 2018), <http://perma.cc/6ET6-NUBE>.

³⁵ Alonso G. Dunkelberg et al., *Mapping States’ Reactions to the Syria Strikes of April 2018*, JUST SECURITY (Apr. 22, 2018), <http://perma.cc/R8BS-DMX9>.

³⁶ See U.N. SCOR, *supra* note 6, at 3 (noting also Russian President Vladimir Putin’s assertion that “Just as it did a year ago, when it attacked Syria’s Al-Shayrat airbase in Syria, the United States took a staged use of toxic substances against civilians as a pretext, this time in Douma, outside Damascus. Having visited the site of the alleged incident, Russian military experts found no traces of chlorine or any other toxic agent.”).

³⁷ See generally Dunkelberg, *supra* note 35.

³⁸ Goodman, *supra* note 7, at 111.

Purposes of the United Nations.”³⁹ Humanitarian intervention in response to use of chemical weapons is not seeking to threaten the integrity of a state nor bring about political change, but only to save lives and enforce the global ban on chemical weapons.⁴⁰

In the 1986 *Nicaragua Case*, the International Court of Justice observed that “[r]eliance by a State on a novel right or an unprecedented exception to the principle [of non-intervention] might, if shared in principle by other States, tend toward a modification of customary international law.”⁴¹ The formation of customary international law has been described as a process of continuous claim and response.⁴² In the case of the 2018 airstrikes, the claim was explicit. The U.S., France, and U.K. articulated a right to humanitarian intervention in the face of Syria’s use of chemical weapons against civilians. And the claim was not merely a threat, but the actual deployment of force. As such, the three states acted as custom pioneers—the first states to initiate a practice hoping that it will be accepted as a new rule of customary international law by the international community. Custom pioneers have no guarantee that their action will in fact lead to the formation of a binding custom. Sometimes, as here, there is widespread support for the claim, which can foster crystallization of the new rule. Other times, there is widespread condemnation, which would set back the formation of the new rule. And often there is a great deal of silence, which can be interpreted as either acquiescence or indifference.⁴³ Just “as pearls are produced by the irritant of a piece of grit entering an oyster’s shell,” so the claims and responses of states (including their silence) “produce the pearl—so to speak—of customary law.”⁴⁴ Usually this claim and response process takes decades or even centuries to come to fruition,⁴⁵ but periodically world events act as accelerating agents that enable customary international law to develop quite rapidly.⁴⁶

³⁹ Richard Ware, *The Legal Basis for Air Strikes Against Syrian Government Targets*, 7 (House of Commons Libr., Briefing Paper No. 8287, 20198), <http://perma.cc/8ZD7-YW48>.

⁴⁰ *Id.*

⁴¹ Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 207 (June 27).

⁴² See generally Myres S. McDougal & Norbert A. Schlei, *The Hydrogen Bomb Tests in Perspective: Lawful Measures for Security*, 64 YALE L. J. 648 (1955).

⁴³ See Wood, *supra* note 5, ¶ 42 (The International Law Commission has recently stated that “[a]bstention from acting, also referred to as a ‘negative practice of States,’ may also count as practice. Inaction by States may be central to the development and ascertainment of rules of customary international law, in particular when it qualifies (or is perceived) as acquiescence.”).

⁴⁴ Maurice H. Mendelson, *Formation of Customary International Law*, in RECUEIL DES COURS: COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 165, 190 (1998).

⁴⁵ See *supra* note 7.

⁴⁶ See *supra* note 8.

The *Max Planck Encyclopedia of Public International Law* describes two scenarios where the world has witnessed the accelerated formation of customary international law in the past.⁴⁷ First, there are situations involving “the urgency of coping with new developments of technology, such as, for instance, drilling technology as regards the rules on the continental shelf, or space technology as regards the rule on the freedom of extra-atmospheric space.”⁴⁸ Second, there are situations involving “the urgency of coping with widespread sentiments of moral outrage regarding crimes committed in conflicts such as those in Rwanda and Yugoslavia that brought about the rapid formation of a set of customary rules concerning crimes committed in internal conflicts.”⁴⁹ This author has previously explored these scenarios in a book-length treatment.⁵⁰

As described below, the 2018 airstrikes fall within both scenarios. They were in response to the use of (1) unusual weapons and novel delivery systems, and (2) crimes against humanity. Yet, one must approach the concept of accelerated formation of customary international law with caution. As one author warns, “[i]t is always easy, at times of great international turmoil, to spot a turning point that is not there.”⁵¹ With this admonition in mind, the next Sections examine whether the customary international law governing use of force for humanitarian reasons has undergone rapid transformation in light of the 2018 allied airstrikes against Syria.

IV. THE CHANGING LAW OF HUMANITARIAN INTERVENTION

A. Historic Status of Humanitarian Intervention

Since the 1648 Peace of Westphalia, state sovereignty has been regarded as the fundamental paradigm of international law. Leading scholars have described the prohibition of the threat or use of force in Article 2(4) of the U.N. Charter as “the corner-stone of the Charter system.”⁵² This prohibition goes hand in hand

⁴⁷ Tullio Treves, *Customary International Law*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 24 (2006); see INT’L LAW ASS’N COMM. ON FORMATION OF CUSTOMARY (GEN.) INT’L LAW, STATEMENT OF PRINCIPLES APPLICABLE TO THE FORMATION OF GENERAL CUSTOMARY INTERNATIONAL LAW 20 (2000).

⁴⁸ Treves, *supra* note 47.

⁴⁹ Treves, *supra* note 47.

⁵⁰ See generally MICHAEL P. SCHARF, CUSTOMARY INTERNATIONAL LAW IN TIMES OF FUNDAMENTAL CHANGE: RECOGNIZING GROTIAN MOMENTS (2013).

⁵¹ Ibrahim J. Gassama, *International Law at a Grotian Moment: The Invasion of Iraq in Context*, 18 EMORY INT’L L. REV. 1, 30 (2004) (quoting Alan Murray, *Warning Is Sounded as Empire-Building Gains New Cachet*, WALL STREET J. (July 15, 2003, at A4)).

⁵² JAMES L. BRIERLY, THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE 414 (1963); IAN BROWNIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 732 (2008).

with the nonintervention principle enshrined in Article 2(7) of the U.N. Charter, which prohibits coercive intervention into the exclusively domestic affairs of a state.⁵³

As discussed above, there are only three exceptions to the prohibition against the use of force enumerated in the U.N. Charter.⁵⁴ The first covers situations that qualify as self-defense in the face of an armed attack under Article 51 of the U.N. Charter. The second encompasses situations where the use of force has been authorized by the Security Council under Article 42 of the U.N. Charter in response to a threat to the peace, a breach of the peace, or an act of aggression. And the third involves situations where the territorial state has consented to the use of force within its borders.

In the last twenty years, the Security Council has significantly broadened what it considers to qualify as a threat to the peace. The Security Council found threats to the peace in situations involving widespread human rights violations and humanitarian atrocities in Southern Rhodesia (1969), South Africa (1977), Somalia (1992), Rwanda (1994), East Timor (1999), Kosovo (1999), and Libya (2011). In 1992, the president of the Security Council acknowledged this conceptual shift, stating “the mere absence of war and military conflict among States does not itself ensure international peace and security; rather, intrastate humanitarian situations can also become threats to peace and security.”⁵⁵ Yet, Security Council action is often thwarted by the threat or use of the veto by its Permanent Members, and consequently, the Security Council has failed to authorize humanitarian intervention in situations such as Rwanda in 1994, where 500,000 to a million deaths would likely have been prevented had the Security Council acted.⁵⁶

B. The 1999 NATO Intervention

The Kosovo crisis in 1998–1999 emerged out of the same historic backdrop of ethnic tensions that had engulfed the former Yugoslavia in a brutal ethnic conflict from 1991 to 1995. Kosovo was a region of Serbia where Serbs constituted a minority and Albanian Muslims constituted the majority of the

⁵³ Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶¶ 203–5 (June 27).

⁵⁴ Goodman, *supra* note 7, at 111.

⁵⁵ Mehrdad Payandeh, *With Great Power Comes Great Responsibility? The Concept of the Responsibility to Protect Within the Process of International Lawmaking*, 35 YALE J. INT’L L. 469, 470, 495 (2010) (quoting, in part, U.N. President of the S.C., Note dated Jan. 31, 1992, U.N. Doc. S/23500 (Jan. 31, 1992)).

⁵⁶ See VIRGINIA MORRIS & MICHAEL SCHARF, THE INTERNATIONAL TRIBUNAL FOR RWANDA 58–60 (1998).

population.⁵⁷ In 1998, Serbian federal military and security forces began to systematically attack the Albanian population, which fled to the mountains for refuge in the face of widespread ethnic cleansing.⁵⁸

In Resolution 1203 of October 24, 1998, the Security Council determined that the Kosovo situation constituted a threat to the peace; insisted upon the cessation of hostilities, withdrawal of certain forces and the commitment of the parties to seek a political resolution; and authorized an OSCE Kosovo Verification Mission and a NATO Air Verification Mission to monitor compliance with the provisional measures required under Resolution 1199.⁵⁹ But the Security Council did not authorize the use of force, and Russia made it clear that it would veto any attempt to do so.

When the peace negotiations stalled and the brutalities continued, in March 1999 NATO decided to intervene with airstrikes against Serbian government targets in Belgrade and throughout the country.⁶⁰ The airstrikes involved 912 aircraft, which flew a total of 37,225 bombing missions in an effort to induce a diplomatic resolution.⁶¹ The NATO countries had humanitarian motives; there were no strategic or material interests of NATO nations in Serbia.⁶² After seventy-eight days, the NATO bombing campaign ultimately convinced Serbia to sign an agreement providing autonomy for Kosovo under the temporary administration of the United Nations and protection of NATO forces. Subsequently, the Security Council adopted Resolution 1244 of June 10, 1999, which could be interpreted as providing a sort of after-the-fact ratification of the NATO intervention.⁶³

While their interests were purely humanitarian, the U.S. and U.K. declined to provide a legal rationale based on humanitarian intervention. Instead, they justified their actions on moral necessity. The reason for this was explained by Michael Matheson, the acting legal adviser of the U.S. Department of State at the time of the intervention, in the following terms:

About six months before the actual conflict, at the time when NATO was considering giving an order to threaten the use of force, the political community of NATO got together and had a discussion about what the basis

⁵⁷ See generally Noel Cox, *Developments in the Laws of War: NATO Attacks on Yugoslavia and the Use of Force to Achieve Humanitarian Objectives*, 2002 N.Z. ARMED F. L. REV. 13 (2002).

⁵⁸ U.S. DEP'T OF STATE, ERASING HISTORY: ETHNIC CLEANSING IN KOSOVO 10 (May 10, 1999), <http://perma.cc/CJ7G-6B6B>.

⁵⁹ S.C. Res. 1203, U.N. Doc. S/Res/1203, at ¶¶ 1–3 (Oct. 24, 1998).

⁶⁰ Steven Haines, *The Influence of Operation Allied Force on the Development of the Jus Ad Bellum*, 85 INT'L AFF. 477, 480 (2009).

⁶¹ Patrick T. Egan, *The Kosovo Intervention and Collective Self-Defence*, 8 INT'L PEACEKEEPING 39, 40 (2001).

⁶² Fernando R. Tesón, *Kosovo: A Powerful Precedent for the Doctrine of Humanitarian Intervention*, 2 AMSTERDAM L. F. 42, 43 (2009).

⁶³ Dino Kritsiotis, *The Kosovo Crisis and NATO's Application of Armed Force Against the Federal Republic of Yugoslavia*, 49 INT'L & COMP. L. Q. 330, 348 (2000).

of such threat of force would be. At the end of the discussion, it was clear that there was no common agreement on what might be the justification. There were some NATO members who were prepared to base it on a new doctrine of humanitarian intervention; but most members of the NATO Council were reluctant to adopt a relatively open-ended new doctrine. So at the end of that week, the NATO political community said, here is a list of all of the important reasons why it is necessary for us to threaten the use of force. And at the bottom, it said that under these unique circumstances, we think such actions would be legitimate. There was deliberate evasion of making a “legal” assertion.

And this same process occurred in the U.S. Government. There were some who wanted to articulate that humanitarian intervention in now the basis for U.S. action. There was another theory from the Department of Defense, which wanted to adopt sort of an expanded idea of self-defense based on the general interest of the United States in the region; but on reflection, nobody was really prepared to throw all the eggs into either of those baskets. So we ended up with a formulation similar to that of NATO, where we listed all of the reasons why we were taking action and, in the end, mumbled something about its being justifiable and legitimate but not a precedent.⁶⁴

When the principal state actors assert that their actions are *sui generis* and not intended to constitute precedent, this does not create a favorable climate for the cultivation of a new rule of customary international law.⁶⁵ As such, the Independent International Commission on Kosovo, chaired by the former chief prosecutor of the International Criminal Tribunal for the Former Yugoslavia, Richard Goldstone, characterized the 1999 NATO intervention as “illegal but legitimate.”⁶⁶

C. Development of the Responsibility to Protect Doctrine

In the aftermath of the 1999 NATO bombing campaign, the issue of humanitarian intervention emerged as an important aspect of Secretary-General Kofi Annan’s reform agenda at the United Nations. When Annan delivered his annual report to the U.N. General Assembly later that year, he presented in stark terms the dilemma facing the international community with respect to the idea of unauthorized humanitarian intervention:

To those for whom the greatest threat to the future of international order is the use of force in the absence of a Security Council mandate, one might ask—not in the context of Kosovo—but in the context of Rwanda: If, in

⁶⁴ MICHAEL P. SCHARF & PAUL R. WILLIAMS, SHAPING FOREIGN POLICY IN TIMES OF CRISIS, THE ROLE OF INTERNATIONAL LAW AND THE STATE DEPARTMENT LEGAL ADVISER 124–25, (2010) (quoting remarks by Michael Matheson).

⁶⁵ Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10 EUR. J. INT’L L. 1, 20 (1999).

⁶⁶ INDEP. INT’L COMM’N ON KOS., THE KOSOVO REPORT: CONFLICT, INTERNATIONAL RESPONSE, LESSONS LEARNED 4 (2000).

those dark days and hours leading up to the genocide, a coalition of States had been prepared to act in defense of the Tutsi population, but did not receive prompt Council authorization, should such a coalition have stood aside and allowed the horror to unfold?⁶⁷

In his *Millennium Report* to the General Assembly in 2000, Annan posed a similar question: “If humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica—to gross and systematic violations of human rights that offend every precept of our common humanity?”⁶⁸

Rising to the challenge posed by the Secretary-General’s appeal, the government of Canada established the International Commission on Intervention and State Sovereignty (ICISS), which in December 2001 submitted its report to Secretary-General Annan. The ICISS report, entitled *The Responsibility to Protect*,⁶⁹ contained two important innovations. The first was its suggestion that the debate be shifted from focusing on the right to intervene to the responsibility to protect victims of serious human rights violations—a concept that comprises prevention, reaction, and post-conflict support.⁷⁰ The second was its assertion that sovereignty implies a responsibility of the state to protect its citizens from human rights violations, and when the state is unable or unwilling to fulfill its sovereign responsibility, “it becomes the responsibility of the international community to act in its place.”⁷¹

Drawing from principles of “just war” theory,⁷² the ICISS Report sets forth criteria for deciding when military humanitarian intervention is warranted. According to the ICISS, such action should only be employed in extreme cases of large-scale loss of life or ethnic cleansing and where (1) the action is motivated by the “right intention”; (2) the action is a “last resort”; (3) the action is proportional to the threat; and (4) the action carries with it a reasonable chance of ending the suffering.⁷³

On the most important question of who can authorize humanitarian intervention, the ICISS Report emphasizes the primary role of the Security Council. However, should the Security Council fail to react (as when it is paralyzed

⁶⁷ Press Release, Secretary-General Presents His Annual Report to General Assembly, U.N. Press Release SG/SM/7136-GA/9596, (Sept. 20, 1999), <http://perma.cc/FQ2Y-R9FL>.

⁶⁸ U.N. Secretary-General, *We the Peoples: The Role of the United Nations in the Twenty-First Century*: Rep. of the Secretary-General, ¶ 217, U.N. Doc. A/54/2000 (Mar. 27, 2000).

⁶⁹ INT’L COMM’N ON INTERVENTION AND STATE SOVEREIGNTY, *THE RESPONSIBILITY TO PROTECT* (2001).

⁷⁰ *Id.* ¶ 2.28–2.29 (2001).

⁷¹ *Id.* ¶ 2.29 (2001).

⁷² Luke Glanville, *The Responsibility to Protect beyond Borders*, 12 HUM. RTS. L. REV. 1,10 (2012).

⁷³ *THE RESPONSIBILITY TO PROTECT*, *supra* note 69, ¶ 4.19, 4.32.

by a Permanent Member's veto), the report states that action by the General Assembly under the Uniting for Peace Resolution⁷⁴ is a possible alternative that would "provide a high degree of legitimacy for an intervention."⁷⁵

The report also mentions the possibility of action by regional organizations, while pointing out that the U.N. Charter requires that they act with authorization of the Security Council.⁷⁶ Following the reference to the Security Council, however, the ICISS Report refers to cases in which regional organizations have carried out an intervention and only subsequently sought the approval of the Security Council, concluding that "there may be certain leeway for future action in this regard."⁷⁷

As to whether individual states or regional organizations can ever legally act without Security Council authorization, the report is intentionally ambiguous. While observing the lack of a global consensus on the issue, the report avoids deeming such interventions illegal.⁷⁸ Further, the report points out that there will be damage to the international order if the Security Council is bypassed, but also emphasizes that there will be "damage to that order if human beings are slaughtered while the Security Council stands by."⁷⁹ The ICISS finds it intolerable that "one veto can override the rest of humanity on matters of grave humanitarian concern."⁸⁰ Thus, the ICISS urges the permanent members of the Security Council to refrain from using the veto in cases of genocide and large-scale human rights abuses, and cautions that coalitions might take action if the Council fails to live up to its responsibility.⁸¹

⁷⁴ Adopted in 1950, the Uniting for Peace Resolution provides:

That if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security.

G.A. Res. 377(V), U.N. Doc. A/RES/5/377, Uniting for Peace, ¶ A1 (Nov. 3, 1950).

⁷⁵ The Responsibility to Protect, *supra* note 69, ¶ 6.29–6.30.

⁷⁶ *Id.* ¶ 6.31–6.35.

⁷⁷ *Id.* ¶ 6.35, 6.5.

⁷⁸ *Id.* ¶ 6.36–6.37.

⁷⁹ *Id.* ¶ 6.37.

⁸⁰ *Id.* ¶ 6.13, 6.20.

⁸¹ *Id.* ¶ 6.39.

D. Was the International Reaction to the NATO Intervention a Grotian Moment?

In the case of the 1999 NATO intervention in Serbia, a major use of armed force had taken place for humanitarian purposes without Security Council authorization but with widespread support by the international community. According to one scholar, the NATO intervention was “a case that expanded, rather than breached, the law, similar to the Truman proclamation about the Continental Shelf.”⁸² Others have described the NATO intervention as “a watershed event” and “an important transition point in the shift from one international order to the next.”⁸³

Moreover, the NATO intervention led to the ICISS’s articulation of the Responsibility to Protect (R2P) doctrine, a concept that has been described as the “most dramatic normative development of our time”⁸⁴ and a “revolution in consciousness in international affairs.”⁸⁵ The 2001 ICISS Report characterized the responsibility to protect as an emerging principle of customary international law,⁸⁶ and the 2004 High-level Panel Report described it as an “emerging norm,”⁸⁷ an assessment shared by the Secretary-General.⁸⁸ The R2P Doctrine was then unanimously endorsed at the 2005 World Summit by the heads of state and government of every U.N. member state, and later by the United Nations Security Council. Based on these developments, in 2007 Professor Ved Nanda of Denver University School of Law concluded that a government can no longer “hide behind the shield of sovereignty, claiming non-intervention by other States in its internal affairs, if it fails to protect the people under its jurisdiction from massive violations of human rights.”⁸⁹

⁸² Fernando R. Teson, *Kosovo: A Powerful Precedent for the Doctrine of Humanitarian Intervention*, 1 AMSTERDAM L. F. 42, 43 (2009).

⁸³ Heiko Borchert & Mary N. Hampton, *The Lessons of Kosovo: Boon or Bust for Transatlantic Security?*, 46 ORBIS 369, 369 (2002).

⁸⁴ Ramesh Thakur & Thomas G. Weis, *R2P: From Idea to Norm – and Action?*, 1 GLOBAL RESP. TO PROTECT 22, 22 (2009).

⁸⁵ Jeremy Sarkin, *Is the Responsibility to Protect an Accepted Norm of International Law in the post-Libya Era? How its Third Pillar Ought to Be Applied*, 1 GRONINGEN J. INT’L L. 11, 16 (2012).

⁸⁶ The Responsibility to Protect, *supra* note 69, ¶ 2.24, 6.17.

⁸⁷ U.N. Secretary-General, *A More Secure World: Our Shared Responsibility: Secretary General’s High-level Panel Report on Threats, Challenges and Change*, ¶ 203, U.N. Doc. A/59/565 (Dec. 2, 2004).

⁸⁸ U.N. Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All: Rep. of the Secretary-General*, ¶ 135, U.N. Doc. A/59/2005 (Mar. 21, 2005).

⁸⁹ Ved P. Nanda, *The Protection of Human Rights under International Law: Will the U.N. Human Rights Council and the Emerging New Norm “Responsibility to Protect” Make a Difference?*, 35 DENV. J. INT’L L. & POL’Y 353, 373 (2007).

Yet, two roadblocks prevented humanitarian intervention outside the framework of the U.N. from actually ripening into a norm of customary international law following the 1999 NATO intervention and promulgation of the R2P Doctrine. The first impediment was the ambiguity of the initial manifestation of *opinio juris* that accompanied the acts of the NATO states. The participating NATO states were not comfortable with the idea that the bombing campaign would create a new rule of customary international law justifying a broad notion of unilateral humanitarian intervention. Thus, in July 1999, U.S. Secretary of State Madeleine Albright stressed that the air strikes were a “unique situation *sui generis* in the region of the Balkans,” concluding that it was important “not to overdraw the various lessons that come out of it.”⁹⁰ U.K. Prime Minister Tony Blair likewise emphasized the exceptional nature of the Kosovo operation.⁹¹

The second obstruction had to do with the unfortunate timing of the ICISS Report. Shortly after the Report was issued, in March 2003, the United States and a “coalition of the willing” invaded Iraq without Security Council authorization in part to prevent Iraq from deploying weapons of mass destruction and in part in response to Saddam Hussein’s historic record of atrocities against Iraq’s Kurdish and Shi’ite populations.⁹² The action was controversial and widely unpopular across the globe, and prompted the U.N. Secretary-General to create the High-Level Panel on Threats, Challenges and Change.⁹³

The 2004 High-Level Panel Report (which was endorsed by the U.N. Secretary-General) and the 2005 World Summit Outcome Document (which was endorsed by the General Assembly and Security Council) were written to reflect a much narrower conception in which humanitarian intervention is only lawful when authorized by the Security Council.⁹⁴ These developments signified that the R2P doctrine had morphed into a conceptual framework for discourse, which may be quite politically useful but was without legal force. The prohibition of the use of force in the absence of Security Council authorization had been left intact, leading the Rapporteur of the UN Working Group on Enforced or Involuntary Disappearances to comment that “the last few years has shown that the political context within which the doctrine has to operate has severely limited its

⁹⁰ Madeleine Albright, U.S. Sec’y of State, Press Conference with Igor Ivanov, Russian Foreign Minister at Mandarin Hotel, Singapore (July 26, 1999), <http://perma.cc/3FXQ-Q78T>.

⁹¹ 26 Apr. 1999, Parl Deb HC (1999) col. 21 (UK).

⁹² Nanda, *supra* note 89, at 371–72.

⁹³ A MORE SECURE WORLD, *supra* note 8769.

⁹⁴ *Id.* ¶ 203, 256. Mehrdad Payandeh, Note, *With Great Power Comes Great Responsibility? The Concept of the Responsibility to Protect Within the Process of International Lawmaking*, 35 YALE J. INT’L L. 469, 476 (2010).

operation.”⁹⁵ These developments prompted former U.S. Secretary of State Madeline Albright to decry in 2008 that “[t]he notion of national sovereignty as sacred is [once again] gaining ground.”⁹⁶

The issue of whether Responsibility to Protect had been coupled to Security Council authorization was tested in 2008, when Russia cited the R2P Doctrine to justify its use of force to protect threatened Russian populations in the neighboring country of Georgia that year.⁹⁷ Perceiving the military action as a land grab, the United States, European Union, and many other countries protested the Russian invasion of the South Ossetia and Abkhazia provinces of Georgia.⁹⁸ As Nancy Soderberg, former U.S. ambassador to the U.N. has explained, “[t]he Georgia case was really an abuse of power by Russia under an abuse of the Responsibility to Protect Doctrine, and it was not authorized by the U.N. and was resoundingly condemned by the international community.”⁹⁹ In a *Los Angeles Times* opinion piece, Gareth Evans, one of the principal authors of the ICISS Report, argued that the Russian action was clearly invalid because Russia failed to obtain authorization from the Security Council.¹⁰⁰ As Evans explained, “[t]he 2005 General Assembly position was very clear that, when any country seeks to apply forceful means to address an R2P situation, it must do so through the Security Council. The Russia-Georgia case highlights the risks of states, whether individually or in a coalition, interpreting global norms unilaterally.”¹⁰¹

While the Russian pretextual invocation of the R2P Doctrine for its invasion of Georgia constituted a further setback for the idea that humanitarian intervention can be lawful outside the U.N. framework, developments in Iraq and Syria in 2014–2018 may have supplied the tipping point to finally bring aspects of the law of humanitarian intervention to fruition.

E. Use of Force Against ISIS on Mount Sinjar

In 2014, a terrorist group known as ISIS took over two-thirds of the territory of Syria and Iraq. The U.N. Security Council adopted Resolution 2170,

⁹⁵ Sarkin, *supra* note 85, at 13.

⁹⁶ Madeleine K. Albright, *The End of Intervention*, N.Y. TIMES (June 11, 2008), <http://perma.cc/L78B-5PZJ>.

⁹⁷ Brian Barbour & Brian Gorlick, *Embracing the Responsibility to Protect: A Repertoire of Measures including Asylum for Potential Victims*, 20 INT’L J. REFUGEE L. 533, 559 (2008).

⁹⁸ RONALD D. ASMUS, A LITTLE WAR THAT SHOOK THE WORLD: GEORGIA, RUSSIA, AND THE FUTURE OF THE WEST 179–88 (2010).

⁹⁹ *The Responsibility to Protect in Syria and Beyond*, NPR (Feb. 6, 2012), <http://perma.cc/R9ZD-5R9Y>.

¹⁰⁰ Gareth Evans, *Russia and the Responsibility to Protect*, L.A. TIMES (Aug. 11, 2008), <http://perma.cc/Y6PH-EQMF>.

¹⁰¹ *Id.*

condemning the “continued gross, systematic and widespread abuses of human rights” that ISIS was committing against populations that fell under its control.¹⁰² Then, in August 2014, ISIS captured the town of Sinjar in northern Iraq and targeted the ethnic group that lived in the town known as the Yazidis for extermination.¹⁰³ Forty thousand Yazidis fled to nearby Mount Sinjar, where they were trapped by ISIS forces that had cut off their egress.¹⁰⁴

Without authorization by the Iraqi government or U.N. Security Council, President Obama ordered U.S. aircraft to conduct airstrikes on the ISIS forces at the base of the mountain to save the starving Yazidis. Explaining his decision to authorize limited force under the circumstances, President Obama said: “The Yazidis faced a terrible choice: starve on the mountain or be slaughtered on the ground. That’s when America came to help.”¹⁰⁵

President Obama had signaled his advocacy for recognition of a right of humanitarian intervention a year earlier in a September 2013 speech to the United Nations General Assembly:

Different nations will not agree on the need for action in every instance, and the principle of sovereignty is at the center of our international order. But sovereignty cannot be a shield for tyrants to commit wanton murder, or an excuse for the international community to turn a blind eye. While we need to be modest in our belief that we can remedy every evil, while we need to be mindful that the world is full of unintended consequences, should we really accept the notion that the world is powerless in the face of a Rwanda or Srebrenica? If that’s the world that people want to live in, they should say so, and reckon with the cold logic of mass graves. I believe we can embrace a different future.¹⁰⁶

While the United States would later justify its attacks on ISIS in Syria using a novel theory of self-defense against non-state actors,¹⁰⁷ consistent with President Obama’s remarks to the U.N., its initial justification was purely humanitarian.¹⁰⁸ Under these dire circumstances, there was no international protest by any state against this limited military action. The stage was set for the 2017 and 2018 Syria airstrikes.

¹⁰² S.C. Res. 2170, ¶ 1 (Aug. 15, 2014).

¹⁰³ Helene Cooper & Michael D. Schear, *Militants’ Siege on Mountain in Iraq is Over, Pentagon Says*, N.Y. TIMES (Aug. 14, 2014), <http://perma.cc/B9DU-NXLG>; Helene Cooper et al., *Obama Allows Limited Airstrikes on ISIS*, N.Y. TIMES (Aug. 14, 2014), <http://perma.cc/A3DY-UCBA>.

¹⁰⁴ Helene Cooper & Michael D. Schear, *supra* note 103.

¹⁰⁵ Erin Dooley, *Obama: We Broke the ISIL Siege of Mt. Sinjar*, ABC NEWS (Aug. 14, 2014), <http://perma.cc/593M-BL52>.

¹⁰⁶ President Barack Obama, Address to the United Nations General Assembly (Sept. 24, 2013), *in* N.Y. TIMES, Sept. 24, 2013, <http://perma.cc/EC7E-UAHC>.

¹⁰⁷ See Scharf, *supra* note 2.

¹⁰⁸ Cooper et al., *supra* note 103.

V. DID THE 2018 SYRIAN AIRSTRIKES CONSTITUTE A GROTIAN MOMENT?

A. Articulation of a Clear Legal Rationale

States broadly condoned the April 6, 2017 U.S. airstrikes against Syria, but in the absence of a clear legal rationale, the case was viewed as *sui generis*—lacking in clear precedential value. In contrast, there were three particularly noteworthy aspects of the April 14, 2018 airstrikes that may have rendered the airstrikes a Grotian Moment.

First, unlike its unilateral airstrikes on April 6, 2017, on April 14, 2018 the U.S. did not act alone. It is harder for critics to argue pretext when a country acts in concert with others for a humanitarian goal.

Second, whereas the U.S. avoided conveying a legal case for the 2017 airstrikes, in 2018 the three countries unequivocally stated that they believed they had a right under international law in these circumstances to undertake the airstrikes. Importantly, they did not suggest that the action was unlawful but legitimate, as some have characterized the 1999 NATO action discussed above.¹⁰⁹

In its statement to the Security Council, France asserted that the airstrikes were in compliance with “principles and values of the United Nations Charter,” adding that “they serve the law and our political strategy to put an end to the Syrian tragedy.”¹¹⁰

The U.S. told the Security Council, “[w]e acted to deter the future use of chemical weapons by holding the Syrian regime responsible for its atrocities against humanity.... The responses were justified, legitimate, and proportionate.”¹¹¹ And in a press briefing, the U.S. Secretary of Defense added, “We did what we believe was right under international law, under our nation’s laws.”¹¹² Notably, the Department of Justice Office of Legal Counsel issued an official opinion on the legality of the airstrikes on May 31, 2018, which observed a convergence in the domestic and international law justifications focusing on “the U.S. interest in mitigating humanitarian disasters” and in “the deterrence of the use and proliferation of chemical weapons.”¹¹³

¹⁰⁹ *Supra* note 66, at 4.

¹¹⁰ Dunkelberg et al., *supra* note 35.

¹¹¹ U.N. SCOR, 73d Sess., 8233d mtg., Provisional Verbatim Record of the Security Council, Threats to International Peace and Security: The Situation in the Middle East, U.N. Doc. S/PV.8233 (Apr. 14, 2018).

¹¹² Dunkelberg et al., *supra* note 35.

¹¹³ April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities, 42 Op. O.L.C. 1, 11 (May 31, 2018).

In contrast to its statements following the April 2017 airstrikes, it is significant that the United States did not employ the language of armed reprisal, as this is considered unlawful under international law.¹¹⁴ Thus, at the U.N. on April 14, 2018, the U.S. Ambassador stated, “[t]he United Kingdom, France and the United States acted not in revenge, not in punishment and not in a symbolic show of force. We acted to deter the future use of chemical weapons by holding the Syrian regime responsible for its crimes against humanity.”¹¹⁵

It is also significant that the U.S. recognized that chemical weapons presented a special case. As President Trump explained after the Syria airstrikes, “[c]hemical weapons are uniquely dangerous not only because they inflict gruesome suffering, but because even small amounts can unleash widespread devastation.”¹¹⁶ The use of chemical weapons have been outlawed since 1925,¹¹⁷ and the U.N. Security Council has specifically condemned the use of chemical weapons in Syria in a series of resolutions.¹¹⁸ The U.S. concluded that Syria’s continued use of chemical weapons would “desensitize the world to their use and proliferation, weaken prohibitions against their use, and increase the likelihood that additional states will acquire and use these weapons.”¹¹⁹ The U.S. argument, then, is that “the prohibition of chemical weapons is nearly sacrosanct and can, in certain circumstances, justify a forcible response.”¹²⁰

¹¹⁴ Mary Ellen O’Connell, *The Popular but Unlawful Armed Reprisal*, 44 OHIO N.U. L. REV. 325, 338–345 (2018).

¹¹⁵ Threats to International Peace and Security: The Situation in the Middle East, *supra* note 111.

¹¹⁶ 2018 Airstrikes Against Syrian Chemical-Weapons Facilities, 42 Op. O.L.C. 1, 16 (May 31, 2018).

¹¹⁷ Use of chemical weapons was first outlawed in the 1925 Geneva Protocol and the possession of such weapons was prohibited by the Chemical Weapons Convention which entered into force in 1997. *See* The Chemical Weapons Convention at a Glance, ARMS CONTROL ASS’N (June 2018), <http://perma.cc/L2RE-SHJ6>.

¹¹⁸ *See* S.C. Res. 2319 (Nov. 17, 2016) (“Condemning again in the strongest terms any use of any toxic chemicals as a weapon in the Syrian Arab Republic and expressing alarm that civilians continue to be killed and injured by toxic chemicals as weapons in the Syrian Arab Republic); S.C. Res. 2235 (Aug. 7, 2015) (“Condemning in the strongest terms any use of any toxic chemical as a weapon in the Syrian Arab Republic and noting with outrage that civilians continue to be killed and injured by toxic chemicals as a weapons in the Syrian Arab Republic, Reaffirming that the use of chemical weapons constitutes a serious violation of international law, and stressing again that those individuals responsible for any use of chemical weapons must be held accountable.”); S.C. Res. 2209 (Mar. 6, 2015) (“Reaffirming that the use of chemical weapons constitutes a serious violation of international law and reiterating that those individuals responsible for any use of chemical weapons must be held accountable.”); S.C. Res. 2118 (Sept. 17, 2013) (“Determining that the use of chemical weapons in the Syrian Arab Republic constitutes a threat to international peace and security.”).

¹¹⁹ April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities, *supra* note 113, at 17.

¹²⁰ Monica Hakimi, *The Attack on Syria and the Contemporary Jus ad Bellum*, BLOG OF THE EUR. J. INT’L L. (Apr. 15, 2018), <http://perma.cc/W4QA-7MYA>.

Third, the United Kingdom specifically relied on the theory of “humanitarian intervention” in the context of preventing use of chemical weapons to justify the April 2018 airstrikes.¹²¹ It stated that “[a]ny State is permitted under international law, on an exceptional basis, to take measures in order to alleviate overwhelming humanitarian suffering.”¹²² Echoing the main elements of the Responsibility to Protect doctrine, 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 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.¹²³

The United Kingdom then detailed why it reasonably believed that the airstrikes met these requirements, concluding “there was no practicable alternative to the truly exceptional use of force to degrade the Syrian regime’s chemical weapons capability and deter their further use by the Syrian regime in order to alleviate humanitarian suffering.”¹²⁴

This clearly articulated legal rationale distinguishes the 2018 airstrikes from the NATO action in 1999. While the UK had first made public its views on humanitarian intervention in 2014,¹²⁵ this was the first time the rationale was tied to concrete action taken by armed UK forces. Further, although the United States did not similarly formulate a detailed justification, it did tell the Security Council that “[t]he United States is deeply grateful to the United Kingdom and France for their part in the coalition to defend the prohibition of chemical weapons. We

¹²¹ A policy paper issued by the UK Prime Minister’s Office stated: “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....” See Dunkelberg et al., *supra* note 35.

¹²² Threats to International Peace and Security: The Situation in the Middle East, *supra* note 111, at 6–7.

¹²³ PRIME MINISTER’S OFFICE, SYRIA ACTION – U.K. GOVERNMENT LEGAL POSITION, Apr. 14, 2018, <http://perma.cc/8C9X-HUY4>.

¹²⁴ *Id.*

¹²⁵ DEFENCE COMMITTEE, WRITTEN EVIDENCE FROM THE RT HON. HUGH ROBERTSON MP, MINISTER OF STATE, FOREIGN AND COMMONWEALTH OFFICE TO THE FOREIGN AFFAIRS COMMITTEE ON HUMANITARIAN INTERVENTION AND THE RESPONSIBILITY TO PROTECT, 2013–14, HC 5th Special Report (UK).

worked in lock step: we were in complete agreement.”¹²⁶ It is conceivable that the U.S. might subsequently assert that this wording was in regard to something other than the U.K.’s legal theory, for example the timing of the strikes, amount of force employed, or the target selection. But spoken by the U.S. Ambassador to the U.N. at the same Security Council session where the U.K. articulated its humanitarian intervention justification, these words can certainly be interpreted as an implicit adoption of the U.K.’s legal position.¹²⁷ This is particularly significant because the U.S. has never before recognized a right of humanitarian intervention under international law.

B. The Response of the International Community

The U.K.’s clear legal rationale may have laid the groundwork for a Grotian Moment, but it takes widespread state action in support to crystallize an emerging rule of customary international law.¹²⁸

Fifty-six separate states and NATO (consisting of 28 member states)—for a total of over seventy countries—publicly expressed opinions about the April 14, 2018 airstrikes.¹²⁹ Of those, only a small handful, including Russia and Syria, explicitly stated that the airstrikes violated international law. And Russia muddled its position by focusing on the lack of proof that Syria was behind the chemical weapons attack rather than an unequivocal statement that unauthorized humanitarian intervention is always unlawful,¹³⁰ probably because such a statement would have been contrary to the legal argument it invoked as justification for its invasion of South Ossetia, Georgia in 2008.¹³¹

For a case in which there was not a debate in a large international forum such as the U.N. General Assembly, seventy states from every region of the world is actually a fairly large sample from which to discern widespread state practice. In fact, scholars who have carefully dissected the judgments of the International Court of Justice have concluded that “most customs are found to exist on the

¹²⁶ Threats to International Peace and Security: The Situation in the Middle East, *supra* note 111.

¹²⁷ U.N. Office of Legal Affairs, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, (2001), <http://perma.cc/U98H-SQF3> (citing international cases where a State’s unequivocal acknowledgment and adoption of another’s position will render the State retroactively responsible for it).

¹²⁸ 2d Rep. on the Identification of Customary International Law, *supra* note 5, ¶ 53, 63, 69.

¹²⁹ Dunkelberg et al., *supra* note 35.

¹³⁰ Threats to International Peace and Security: The Situation in the Middle East, *supra* note 111 (Russia told the Security Council, “Just as it did a year ago, when it attacked Syria’s Al-Shayrat airbase in Syria, the United States took a staged use of toxic substances against civilians as a pretext, this time in Douma, outside Damascus. Having visited the site of the alleged incident, Russian military experts found no traces of chlorine or any other toxic agent.”).

¹³¹ ASMUS, *supra* note 98.

basis of practice by fewer than a dozen States.”¹³² This is because international law considers states that elect not to weigh in on an issue of general concern as providing silent support or acquiescence.¹³³ In the case of the *S.S. Lotus*, for example, the Permanent Court of International Justice (the forerunner of the ICJ) relied on the absence of protest against legislation based on the objective territoriality doctrine of jurisdiction in finding that such an exercise of jurisdiction was permissible under customary international law.¹³⁴

The state reactions to the April 2018 airstrikes can be characterized as falling into four categories. First, there were those states that expressed recognition of the lawful nature of the military action. This was typified of the statements of the U.S., U.K. and France, as described above, which each affirmatively asserted that the airstrikes complied with international law.¹³⁵

Second, nineteen states and NATO (thirty-eight states in all) expressed approval of the airstrikes with implicit statements concerning legality. These states represented Latin America, Africa, the Middle East, Europe, Asia, and the Pacific.¹³⁶ Typical of the language used was the statement of Germany, which stated, “[t]he military strike was *necessary and appropriate* in order to preserve the effectiveness of the international ban on the use of chemical weapons and to warn the Syrian regime against further violations” (emphasis added).¹³⁷ Similarly, Italy said “[t]he US, France and the UK action against this use of chemical weapons was justified.”¹³⁸ And Spain said “[t]he strikes are a legitimate and proportionate response to the brutal attacks committed by the Syrian regime against the civilian population.”¹³⁹ While terms such as “necessary and appropriate,” “justified,” and

¹³² Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT’L L. 757, 767 (2001).

¹³³ David Koplow, *International Legal Standards and the Weaponization of Outer Space*, in U.N. INST. FOR DISARMAMENT RESEARCH, *SECURITY IN SPACE: THE NEXT GENERATION*, CONFERENCE REPORT 31 MAR. – 1 APR. 2008, at 160; 2d Rep. on the Identification of Customary International Law, *supra* note 5, ¶ 42 (“Inaction by States may be central to the development and ascertainment of rules of customary international law, in particular when it qualifies (or is perceived) as acquiescence.”).

¹³⁴ *S.S. Lotus* (Fr. v. Turk.), Judgment, 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7).

¹³⁵ Dunkelberg et al., *supra* note 35.

¹³⁶ The states of this type included Colombia, Saint Lucia, Australia, Belgium, Canada, Germany, Israel, Italy, Spain, the Netherlands, Turkey, Georgia, Poland, Ukraine, Oman, Qatar, UAE, Japan, South Korea. *Id.* NATO is made up of 28 States: Albania, Belgium, Bulgaria, Canada, Croatia, the Czech Republic, Denmark, Estonia, France, Germany, Greece, Hungary, Iceland, Italy, Latvia, Lithuania, Luxemburg, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Turkey, United Kingdom, and the United States. *See NATO Member Countries*, NORTH AMERICAN TREATY ORGANIZATION (Jan. 4, 2018, 2:14 PM), <http://perma.cc/2ZVM-S7M4>.

¹³⁷ Dunkelberg et al., *supra* note 35.

¹³⁸ *Id.*

¹³⁹ *Id.*

“legitimate” are somewhat ambiguous, they can be read as a statement regarding legality under the circumstances.

Third, some states expressed disapproval of the airstrikes without a statement concerning illegality. The Brazilian Ministry of Foreign Affairs, for example, said “Brazil reiterates its understanding that the end of the conflict can only be reached through political means, through negotiations undertaken in the framework of the United Nations and based on Security Council resolutions.”¹⁴⁰ Other states in this category indicated their concern that the Organization of the Prohibition of Chemical Weapons (OPCW) had not yet completed an investigation of whether Syria was behind the use of chemical weapons at the time of the airstrikes. Thus, the Prime Minister of Algeria said “Algeria can only regret the strikes ... It would have been necessary to wait for the findings of an investigation into the alleged chemical attack before taking any steps.”¹⁴¹ Equatorial Guinea likewise said, “[u]ntil we have reliable proof of the alleged chemical attack which took place last weekend in Douma, the Republic of Equatorial Guinea believes that no aggression is justified.”¹⁴² These statements suggest that had the U.S., France, and the U.K. waited until the OPCW completed its investigation and concluded that Syria was responsible for the use of the chemical weapons, states such as Algeria and Guinea would have accepted the legality of the airstrikes.

And finally, eleven states expressed disapproval while including an explicit statement that humanitarian intervention without Security Council authorization is contrary to international law.¹⁴³ The clearest statement of this type was by South Africa, which said “[t]he alleged use of chemical weapons in Syria cannot be a justification for military airstrikes in a territory of a sovereign state without the authorization of the UN [Security Council].”¹⁴⁴ Bolivia was likewise clear, saying “Bolivia condemns the illegal use of force and calls for compliance with international norms that prevent violations of peace and security and keep the most powerful states from attacking the weakest states with impunity.”¹⁴⁵ Eleven states is a small number out of the nearly 200 that make up the modern community of nations.

More significant as evidence of state practice than public statements are a country’s votes in the U.N. Security Council. In this case, only Bolivia, China, and

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ States in this category included South Africa, Bolivia, Costa Rica, Cuba, Venezuela, China, Iran, and Kazakhstan. *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

Russia voted in favor of the Russian draft Resolution to condemn the April 14, 2018 airstrikes.¹⁴⁶ Cote d'Ivoire, France, Kuwait, Netherlands, Poland, Sweden, the U.K., and the U.S. voted against condemnation. And Equatorial Guinea, Ethiopia, Kazakhstan, and Peru abstained.¹⁴⁷

Some commentators have argued that even if the April 14, 2018 airstrikes did represent a newly emergent international law right to humanitarian intervention, customary international law simply cannot prevail over the U.N. Charter.¹⁴⁸ But as former State Department Legal Adviser Harold Koh points out, "it is not nearly so black and white as the absolutists claim, because textual ambiguity in Article 2(4), the broader structural purposes of the U.N. Charter, and some recent significant state practice give far more legal play in the joints than textual absolutists would concede."¹⁴⁹ In this case, the U.N. Charter is being interpreted to allow for a customary international law right of humanitarian intervention in the narrow circumstances of preventing the use of chemical weapons. This is consistent with the Charter's Purposes and Principles, which include "maintaining international peace and security," "promoting and

¹⁴⁶ U.N. S.C., Russian Federation: Draft Resolution, U.N. Doc. S/2018/355 (Apr. 14, 2018). The text of the Russian draft resolution stated:

The Security Council,

Appalled by the aggression against the Syrian Arab Republic by the US and its allies in violation of international law and the UN Charter,

Expressing grave concern that the aggression against the sovereign territory of the Syrian Arab Republic took place at the moment when the Organization for the Prohibition of Chemical Weapons Fact-Finding Mission team has just begun its work to collect evidence of the alleged use of chemical weapons in Douma and urging to provide all necessary conditions for the completion of this investigation,

1. Condemns the aggression against the Syrian Arab Republic by the US and its allies in violation of international law and the UN Charter,

2. Demands that the US and its allies immediately and without delay cease the aggression against the Syrian Arab Republic and demands also to refrain from any further use of force in violation of international law and the UN Charter,

3. Decides to remain further seized on this matter.

¹⁴⁷ Threats to International Peace and Security: The Situation in the Middle East, *supra* note 111, at 22–23. Russia told the Security Council, "Just as it did a year ago, when it attacked Syria's Al-Shayrat airbase in Syria, the United States took a staged use of toxic substances against civilians as a pretext, this time in Douma, outside Damascus. Having visited the site of the alleged incident, Russian military experts found no traces of chlorine or any other toxic agent." *Id.* at 3.

¹⁴⁸ See, for example, Dapo Akande, *The Legality of the UK's Air Strikes on the Assad Government in Syria* (Apr. 6, 2018), <http://www.scribd.com/document/376483861/Akande-Opinion-UK-Government-s-Legal-Position-on-Syria-Strike-April-2018> (memo prepared by Oxford Professor for MP Tom Watson, Deputy Leader of the UK Labour Party).

¹⁴⁹ Harold Hongju Koh, *The War Powers and Humanitarian Intervention*, 53 HOU. L. REV. 972, 1017 (2016).

encouraging respect for human rights,” and “sav[ing] succeeding generations from the scourge of war.”¹⁵⁰

VI. CONCLUSION

In the years since the 1999 NATO airstrikes on Serbia to prevent the slaughter of the Kosovar Albanians, international law has been moving in fits and starts toward recognition of a limited right of humanitarian intervention. But all the ingredients necessary for a so-called “Grotian Moment” to come to fruition were not present until the April 2018 airstrikes on Syria.

As discussed in this Article, there were several circumstances that made the 2018 airstrikes distinctive. First, for the past seven years, Syria has represented the greatest humanitarian crisis on the planet. As with the changes to international law ushered in by World War II and the conflicts in the former Yugoslavia of the 1990s, the urgency created by the Syrian crisis set the stage for rapid development of customary international law. As with the other Grotian Moments identified by the *Max Planck Encyclopedia of Public International Law* discussed in the beginning of this article, this context serves as a kind of accelerating agent, enabling customary international law to form much more rapidly and with less state practice than is normally the case.

Second, the 2018 airstrikes were undertaken collectively, rather than by a single state. Unlike the 2008 Russian invasion of South Ossetia, Georgia,¹⁵¹ the 2014 U.S. airstrikes against ISIS at Mount Sinjar, or the 2017 U.S. airstrikes against the Syrian airbase, collective action like that undertaken in April 2018 helps ensure that the military force will not be perceived as a pretext for a land grab or regime change.

Third, the participating countries asserted the legality of the April 2018 airstrikes and embraced a common justification—humanitarian intervention—rather than cite only factual considerations that render use of force morally defensible. For customary international law to rapidly crystallize, custom pioneers must be consistent in their articulation of the new rule, its contours, and application. Two former State Department legal advisers, Harold Koh and John Bellinger, have criticized the U.S.’s failure to articulate a legal argument for its past humanitarian interventions.¹⁵² That approach not only makes it harder for

¹⁵⁰ U.N. Charter Art 1 ¶ 1, 3, and pmbl.

¹⁵¹ See Law Library of Congress, 2008-01474, Russian Federation: Legal Aspects of War in Georgia (2008).

¹⁵² John Bellinger, *The Trump Administration Should Do More to Explain the Legal Basis for the Syrian Airstrikes*, LAWFARE (Apr. 14, 2018, 4:46 PM), <http://perma.cc/F6PH-ZHTG>. (“As former State Department Legal Adviser John Bellinger has said, “when the United States uses military force, especially under controversial circumstances, it should explain the legal basis for its actions. When

customary international law to form, but at the same time it makes it easier for the precedent to be abused by other countries since its contours are left purposely ambiguous. This time, by announcing that it was acting “lock step” and “in complete agreement” with the U.K., the U.S. associated itself with a clearly enunciated legal principle.

Fourth, the underlying humanitarian need in the case of the April 2018 airstrikes was to stop the use of chemical weapons against a civilian population—a *jus cogens* norm.¹⁵³ Rather than target infrastructure, airfields, or government buildings, as had been the case of past humanitarian interventions, the targets of the April 2018 strikes were chemical weapons production and storage facilities.¹⁵⁴ While a wider principle of humanitarian intervention might be too much for the international community to buy into at this time, the large majority of states were more concerned about the Assad regime’s attempt to normalize the use of chemical weapons and Russia’s willingness to prevent the Security Council from taking action against Syria than they were about the potential for abuse if future humanitarian interventions without Security Council authorization are condoned.¹⁵⁵

Finally, many states from all parts of the globe expressed support, while only a handful opposed the airstrikes. Russia’s opposition was undermined by its argument that Syria’s responsibility for the chemical attack had not been sufficiently proved and the fact that it had itself invoked the right of humanitarian intervention in the South Ossetia case. Its draft Resolution condemning the April 2018 airstrikes was soundly defeated by the Security Council.

While these circumstances render this a strong case for a Grotian Moment, writing only a few months after the April 2018 airstrikes the author is mindful of the risk, identified earlier in the article, of making too quick a judgment without the benefit of historic hindsight.¹⁵⁶ Since the Security Council declined to condemn the airstrikes, the question that this article addresses—whether a limited

the United States does not do so, it appears to act lawlessly and invites other countries to act without a legal basis or justification.”); Harold Hongju Koh, *The Legal Adviser’s Duty to Explain*, 41 YALE J. INT’L L. 189 (2016); Koh, *supra* note 149, at 977 (“I thought it outrageous that the U.S. government would fail to state a legal rationale to justify its use of force.”).

¹⁵³ Charlie Dunlap, *Do the Syria Strikes Herald a New Norm of International Law?*, LAWFARE, (Apr. 14, 2018), <http://perma.cc/5R5T-Y5K6>. The term *jus cogens* designates a peremptory principle or norm from which no derogation is permitted. *Jus cogens* norms are recognized as being fundamental to the maintenance of the international legal order.

¹⁵⁴ The 1999 NATO airstrikes comprised a 78-day bombing campaign of Serbia’s infrastructure, military targets, and government buildings. The April 2017 airstrikes targeted an airbase in general use. See *supra* notes 104 and 26.

¹⁵⁵ Jan Lemnitzer, *Syria Strikes Violated International Law – Are the Rules of Foreign Intervention Changing?*, THE CONVERSATION (Apr.18, 2018), <http://perma.cc/463B-76GG>.

¹⁵⁶ Ibrahim J. Gassama, *International Law at a Grotian Moment: The Invasion of Iraq in Context*, 18 EMORY INT’L L. REV. 1, 30 (2004).

customary international law right of humanitarian intervention has crystalized from the 2018 Syrian airstrikes—may not require a definitive answer at this time as there is no pending International Court of Justice or International Criminal Court case arguing that the strikes were an unlawful act of aggression. But, this Article’s analysis may render it easier for the U.S. and its allies to marshal support for follow-up airstrikes against Syrian chemical weapons-related targets if they should become necessary. Advocates of a right of humanitarian intervention should be careful, however, in reading this development too broadly, for there is unlikely to be broad international approval at this time for its application outside the context of responding to repeated use of chemical weapons against civilians.