




Summer 2015

The Applicability of the Humanitarian Intervention 'Exception' to the Middle Eastern Refugee Crisis: Why the International Community Should Intervene Against ISIS

Milena Sterio

Cleveland-Marshall College of Law, Cleveland State University, m.sterio@csuohio.edu

Follow this and additional works at: https://engagedscholarship.csuohio.edu/fac_articles

 Part of the [Human Rights Law Commons](#), [International Humanitarian Law Commons](#), and the [International Law Commons](#)

How does access to this work benefit you? Let us know!

Repository Citation

Sterio, Milena, "The Applicability of the Humanitarian Intervention 'Exception' to the Middle Eastern Refugee Crisis: Why the International Community Should Intervene Against ISIS" (2015). *Law Faculty Articles and Essays*. 802.

https://engagedscholarship.csuohio.edu/fac_articles/802

This Article is brought to you for free and open access by the Faculty Scholarship at EngagedScholarship@CSU. It has been accepted for inclusion in Law Faculty Articles and Essays by an authorized administrator of EngagedScholarship@CSU. For more information, please contact research.services@law.csuohio.edu.

THE APPLICABILITY OF THE HUMANITARIAN INTERVENTION “EXCEPTION” TO THE MIDDLE EASTERN REFUGEE CRISIS: WHY THE INTERNATIONAL COMMUNITY SHOULD INTERVENE AGAINST ISIS

*Milena Sterio**

I. INTRODUCTION

The refugee crises in Iraq and Syria, which has been evolving over the past decade as a result of both ongoing conflict in these countries and the recent surge of Islamic State-led violence, has morphed into a true humanitarian catastrophe.¹ Tens of thousands of refugees have been subjected to violence and have been dispersed and forced to live under dire conditions; such massive population flows have destabilized the entire region and have threatened the stability of neighboring countries.² The United States and several other countries have been engaged in a military air strike campaign against the Islamic State, but the international community has otherwise not authorized a multilateral military action against the Islamic State in order to alleviate refugee and other humanitarian suffering.³ This Article will argue that in light of such a tremendous humanitarian crisis, reflected in the current refugee crisis, international law authorizes states to intervene through the paradigm of humanitarian intervention. This Article will argue that if international law embraces the concept of humanitarian intervention as an evolving norm of customary law, then this norm encompasses

* The Charles R. Emrick Jr.- Calfee Halter & Griswold Professor of Law and Associate Dean for Academic Enrichment, Cleveland-Marshall College of Law. The author would like to thank the Cleveland-Marshall College of Law for its generous research support, which has been invaluable for the research and writing of this Article, as well as Elisabeth Leonard for her invaluable research assistance.

1. *Iraqi & Syrian Refugee Crisis*, WORLD HELP, <http://worldhelp.net/iraqi-syrian-refugee-relief/> (last visited May 30, 2015).

2. *Id.* “Millions of lives hang in the balance, lacking access to the most basic necessities needed for survival. Food, water, shelter, and medical care are desperately needed.” *Id.*

3. *See infra* Part III.

intervention in situations of a humanitarian refugee crisis, such as the one that has unfolded in Iraq and Syria.

In Part II, this Article will provide background on the Islamic State, and on its recent operations in Iraq and Syria. In Part III, this Article will briefly describe the ongoing refugee crises in Iraq and Syria, caused by Islamic State-led warfare in the region. Part IV of this Article will focus on the use of force under international law, and Part V will discuss the evolving concept of humanitarian intervention. Part VI will propose a legal framework for the evolving norm of humanitarian intervention, including humanitarian intervention to assuage a severe refugee crisis. This Article will conclude that international law can, and should, develop in order to embrace a new normative framework for humanitarian intervention, which can then apply to situations of severe refugee crises causing humanitarian suffering. States which are unable and unwilling to address humanitarian catastrophes, including significant refugee crises, should be subject to external intervention by other states acting to halt such humanitarian suffering.

II. THE RISE OF THE ISLAMIC STATE AND ITS SUCCESSFUL EXPANSION IN IRAQ AND SYRIA

The Islamic State in Iraq and Syria (ISIS), also known as the Islamic State and the Islamic State of Iraq and the Levant (ISIL), started as an Al Qaeda splinter group in Iraq in 2004.⁴ The group, first known as Islamic State in Iraq, attempted to merge with the al-Nusra Front in Syria in 2013, to form the so-called Islamic State in Iraq and the Levant.⁵ Although the al-Nusra leadership rejected the merger with Islamic State in Iraq, by 2014, Islamic State in Iraq had overtaken large swaths of territory in both Iraq and Syria and announced the creation of a caliphate that would efface all state borders, turning Islamic State's leaders into the self-declared authority over the world's estimated 1.5 billion Muslims.⁶ In 2014, the group also an-

4. *ISIS Fast Facts*, CNN LIBRARY, <http://www.cnn.com/2014/08/08/world/isis-fast-facts/> (last updated May 23, 2015).

5. *Id.*

6. *Id.* See also KENNETH KATZMAN ET AL., CONG. RESEARCH SERV., R43612, THE "ISLAMIC STATE" CRISIS AND U.S. POLICY 1 (Feb. 11, 2015), available at https://www.scribd.com/fullscreen/257029095?access_key=key-rqLs1IS7vMJnfAdvVrH8&allow_share=true&escape=false&view_mode=scroll [hereinafter CRS Report] (describing ISIS leaders' vision of creating caliphate in Middle East).

nounced a name change to the Islamic State (IS).⁷ Its fighters are mostly comprised of former Iraqi soldiers, who are unable to serve under the new Iraq government after Saddam Hussein’s military was disbanded. By 2014, the Central Intelligence Agency (C.I.A.) had announced that ISIS fighters totaled somewhere between 20,000 and 31,500 – an estimate far greater than many analysts had originally predicted.⁸ Its aim is to establish an Islamic state or caliphate in the Sunni areas of the Middle East, which encompasses large parts of both Syria and Iraq. ISIS currently controls hundreds of square miles; it has a presence from Syria’s Mediterranean coast to south of Baghdad. ISIS funds itself through oil production and smuggling as well as through ransoms from kidnappings, selling stolen artifacts, extortion and controlling crops. ISIS “is a transnational Sunni Islamist insurgent and terrorist group that has expanded its control over areas of northwestern Iraq and northeastern Syria since 2013, threatening the security of both countries and drawing increased attention from the international community.”⁹

ISIS rules by Sharia law. It is known for killings thousands of people, carrying out public executions and punishing all those perceived as disrespecting Sharia law.¹⁰ In addition, ISIS fighters have destroyed numerous valuable antiquities in the area.¹¹ Moreover, ISIS fighters have driven tens of thousands of Syrians and Iraqis out of their homes, thereby causing a tremendous refugee crisis in the Middle East.¹² By December of 2014, the United Nations reported that an estimated 3 million refugees in the area were in need of humanitarian assistance.¹³

One of the reasons that ISIS has been able to operate with such success in areas of Iraq and Syria, and has been able to cause the displacement of as many individuals, is because of the already volatile situations in both of these countries. Both Iraq and Syria have experienced ongoing internal conflict over the

7. *ISIS Fast Facts*, *supra* note 4.

8. CRS Report, *supra* note 6, at 1.

9. *Id.*

10. *ISIS Fast Facts*, *supra* note 4.

11. *Id.*

12. *See infra* Part III.

13. *WORLD HELP*, *supra* note 1.

past decade – Iraq since 2003 and Syria since the Arab Spring.¹⁴ Both of these countries have a history of instability and internal unrest and were fertile ground for the rise of the ISIS terrorist organization. The section below will briefly describe the current refugee situations in Iraq and Syria as massive flows of refugees have overwhelmed the Middle East and provoked a true humanitarian catastrophe. This Article will analyze whether third states have the right to militarily intervene in places, such as Iraq and Syria, in order to appease humanitarian suffering inherent in a refugee crisis.

III. ISIS IN IRAQ AND SYRIA AND THE ONGOING REFUGEE CRISIS

“The humanitarian situations in Iraq and Syria have been described as a ‘mega crisis’ in part because displacements and movement of populations are intertwined between the two countries.”¹⁵ Estimates indicate that “17.4 million people living in either Iraq or Syria are affected by conflict and in need of humanitarian assistance.¹⁶ In addition, more than 3.3 million Syrians and nearly 0.2 million Iraqis are displaced as refugees.”¹⁷

Iraq has experienced an urgent humanitarian crisis, with an estimated 5.2 million people in need of humanitarian and protection assistance since January 2014. In addition, reports indicate that over 2.1 million people in Iraq are Internally Displaced Persons (IDPs), that 1.5 million are in areas under the control of armed groups, such as ISIS, or impacted by the conflict, and that 0.2 million are Syrian refugees.¹⁸ Close to half of the newly displaced persons are believed to be children.¹⁹ “As of late October 2014, of the 2.1 million IDPs, an estimated 850,000 were seeking shelter in Iraq’s Kurdistan region, mainly in Dohuk governorate, while increased movements to central and south-

14. See Joseph O’Rourke, *Education for Syrian Refugees: The Failure of Second-Generation Human Rights During Extraordinary Crises*, 78 ALB. L. REV. 711, 713-717 (2014-15) (detailing Syrian civil war).

15. CRS Report, *supra* note 6, at 22 (citing United Nations High Commissioner for Refugees, Antonio Guterres). “Faced with ‘mega-crisis,’ U.N. warns of refugee suffering and security threats.” *Id.* at 23 n.79.

16. *Id.* at 23.

17. *Id.*

18. U.N. Office for the Coordination of Humanitarian Affairs, Iraq Crisis, Situation Report No. 22 (November 22-28, 2014) [hereinafter Situation Report].

19. *Id.*

ern Iraq were straining the response capacities of host communities in these areas.”²⁰ In addition to IDPs in Kurdistan, it is estimated that over 700,000 persons are displaced in the central region and 200,000 in the south.²¹

The conflict situation in Iraq, coupled with the rise in sectarian violence, has exacerbated the refugee crisis. “An estimated 3.6 million Iraqis reside in areas under the control of the IS and other armed groups. Of these, 2.2 million are thought to be trapped in conflict-affected areas.”²² These IDPs, living in conflict areas, lack access to basic health services as well as food, water, and other supplies, and are considered to be in urgent need of humanitarian assistance.²³

The ongoing conflict in Syria has equally created a serious humanitarian crisis.²⁴ As of November 2014, more than half of the population in Syria was in need of humanitarian assistance (12.2 million people).²⁵ According to the same reports, 7.6 million Syrians have been displaced inside the country. “In addition, more than 3.3 million Syrians are displaced as refugees, with 97% fleeing to countries in the immediate surrounding region, including Turkey, Lebanon, Jordan, Iraq, Egypt, and other parts of North Africa.”²⁶ According to a troubling United Nations statistic, in 2014, an average of more than 90,000 Syrians per month have been registering as refugees in countries in the region.²⁷ This number continues to increase as the political and military situation worsens; humanitarian needs of all such refugees are tremendous and increase daily. In addition to registered and registering refugees, many Syrians are estimated to be living in remote areas that have been besieged by either the

20. CRS Report, *supra* note 6, at 23.

21. *Id.*

22. *Id.*

23. See Situation Report, *supra* note 18.

24. See Paul R. Williams et al., *Presidential Powers and Foreign Affairs: Executive Power and International Crises: Preventing Mass Atrocity Crimes: The Responsibility to Protect and the Syria Crisis*, 45 CASE W. RES. J. INT’L L. 473, 489 (2012) (concluding Syria crisis rivals “worst humanitarian tragedies of the past two decades”).

25. U.N. Under-Secretary General for Humanitarian Affairs and Emergency Relief Coordinator, *Security Council Briefing on Syria* (November 25, 2014), available at <https://docs.unocha.org/sites/dms/Documents/USG%20Valerie%20Amos%20SecCo%20statement%20on%20Syria%2025%20November%202014%20as%20delivered.pdf>.

26. KATZMAN ET AL., *supra* note 6, at 24.

27. *Id.*

Government of Syria or various opposition forces at different points in the conflict.²⁸ In areas under siege by the Syrian government, reports have surfaced about intentional policies of starvation, attacks against civilians and indiscriminant use of heavy weapons, as well as “a weak health infrastructure that is often under deliberate attack” by government forces.²⁹ It thus appears that many Syrian civilians are living under dire conditions and are in obvious need of humanitarian assistance. Last but not least, some Syrians appear to be living as de facto refugees.

Experts recognize that some Syrians have not registered as refugees, presumably from fear or other reasons, and have chosen instead to blend in with the local population, living in rented accommodations and makeshift shelters, particularly in towns and cities. The U.N. Office for the Coordination of Humanitarian Affairs (UNOCHA) estimates that more than 80% of Syrian refugees are living outside camps in mostly urban settings.³⁰

The Syrian refugee crisis has negatively impacted neighboring countries, including Lebanon, Jordan and Turkey, whose governments have expressed concerns about the potential political implications of allowing thousands of IDPs to remain for a protracted period of time.³¹ In addition, the presence of such large refugee populations in these host countries has drained such countries’ economies, energy, and natural resources and has the potential to destabilize the entire region.³² Under such dire circumstances, when the refugee crisis of one or more states, caused by ongoing conflict, has heavily impacted neighboring states and has the potential to destabilize the entire region, can third states intervene militarily to appease the refugee crisis under the guise of humanitarian intervention? In other words, can a refugee crisis ever justify a military humanitarian intervention staged outside of the parameters of United Nations-sanctioned measures and operations? The section below will analyze the most important international law principles on

28. *Id.*

29. *Id.*

30. *Id.*

31. See Mike Sanderson, *The Syrian Crisis and the Principle of Non-Refoulement*, 89 INT’L L. STUD. 776, 778 (2013) (noting majority of Syrian refugee remain in five countries surrounding Syria: Egypt, Iraq, Jordan, Lebanon, and Turkey; concluding that because refugee presence has had high impact on these countries, “it would be naïve to expect such generosity to persist indefinitely”).

32. See KATZMAN ET AL., *supra* note 6, at 24.

the use force, as well as the evolving humanitarian intervention exception, in order to attempt to answer this difficult question.

IV. USE OF FORCE UNDER INTERNATIONAL LAW

International law generally prohibits all states from using force against each other, except in situations of self-defense or pursuant to the United Nations Security Council authorization. This Article will discuss in this Part the general ban on the use of force (A), the two exceptions to this ban (B), and recent examples of states' use of force (C).

A. *The Prohibition on the Use of Force*

According to Article 2(4) of the United Nations Charter, "[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."³³ This general ban on the use of force is a fundamental norm of international treaty law, as evidenced by the United Nations Charter, as well as part of customary law with the character of *jus cogens* norms, as confirmed by the International Court of Justice.³⁴ Under the Charter rules, nations agreed to not use force against each other, in exchange for a vision of the world wherein states would enjoy their territory and their freedom to be let alone by external actors.

State sovereignty in its traditional form implied that each state was autonomous – that a state had to voluntarily consent to any outside authority.³⁵ The general ban on the use force, described above, flows from this traditional notion of state sovereignty. In other words, sovereignty has historically implied that states were free to engage in any type of behavior that they saw fit within their own borders, and that no other states were allowed to intervene in order to stop that behavior, no matter how repugnant it may have been. Sovereignty thus served a specific purpose: that of a shield, protecting states from outside intrusion and use of force by other states or groups of states.³⁶

33. U.N. Charter art. 2, para. 4.

34. *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S)*, 1986 I.C.J. 14, 190 (June 27).

35. LOUIS HENKIN, *INTERNATIONAL LAW: POLITICS AND VALUES* 8-11 (1995).

36. See GARETH EVANS, ET. AL., *INT'L COMM'N ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT: REPORT OF THE INT'L COMM. ON INTERVENTION AND STATE SOVEREIGNTY* (2001), available at <http://responsibilityto>

In addition, the traditional notion of sovereignty also implied that only states were relevant actors in international law; only states could be subject to international norms and treaties and any prohibition on different types of behavior could only extend to states.³⁷ Thus, if a state chose to abuse its own population, or if a non-state actor, such as ISIS today, engaged in particularly reprehensible behavior, this was not a problem of international law, as private individuals and non-state actors did not constitute subjects of international law. In other words, the concept of state sovereignty dictated that international law should not intervene in matters occurring solely within state borders, when such matters did not concern other states. This idea is rooted in another fundamental concept of international law, the principle of non-intervention. “[I]nternational law . . . plac[es] a duty on all sovereign states not, broadly speaking, to intervene in the internal affairs of others . . . [A] state has the international legal right, the sovereign right, to conduct itself throughout its territory as, by and large, it sees fit.”³⁸ The principle of non-intervention flows directly from the concept of state sovereignty and dictates that states have the right to be free of outside interference.

Finally, the idea of state sovereignty is reflected in another doctrine of international law- the principle of *uti possidetis*. According to *uti possidetis*, “states emerging from decolonization shall presumptively inherit the colonial administrative borders that they held at the time of independence.”³⁹ *Uti possidetis* thus protects existing colonial borders from change, by elevating them to the status of international borders. The principle of *uti possidetis* has a direct link to the notion of state sovereignty: a state, once in existence and delineated by its borders, may not be interfered with by any actors in the international arena. *Uti possidetis* is a general principle of international law, as con-

protect.org/ICISS%20Report.pdf [hereinafter ICISS Report]. The Report of the International Commission on Intervention and State Sovereignty correctly points out that sovereignty traditionally functioned as control.

37. Milena Sterio, *The Evolution of International Law*, 31 B.C. INT’L & COMP. L. REV. 213, 216 (2008).

38. Alan James, *The Concept of Sovereignty Revisited* 336, in *KOSOVO AND THE CHALLENGE OF HUMANITARIAN INTERVENTION* §21 (Albrecht Schnabel & Ramesh Thakur eds., 2000).

39. Steven Ratner, *Drawing a Better Line: Uti Possidetis and the Borders of New States*, 90 AM. J. INT’L. L. 590, 592-93 (1996).

firmed by the International Court of Justice, which has held that this principle's "obvious purpose is to prevent the independence and stability of new States."⁴⁰ In addition, the principle of *uti possidetis* has been applied in other non-colonial contexts, to protect intra-state borders from subsequent change within civil conflicts, such as the one in the former Yugoslavia.⁴¹ While the idea of preserving the status quo and thereby preventing further territorial squabbles is generally appealing to many, the development and application of *uti possidetis* has led, somewhat unfortunately, to the international community's reluctance to intervene in the internal affairs of a sovereign state, even when such intervention may save thousands of civilian lives.

"[T]he extension of *uti possidetis* to modern breakups leads to genuine injustices and instability by leaving significant populations both unsatisfied with their status in new states and uncertain of political participation there. . ."⁴² Thus, the principle of *uti possidetis* may lead to unfortunate stalemates within the international community in instances of civil/internal warfare. The application of *uti possidetis* may indefinitely protect state borders by prohibiting forceful border changes; the application of the non-intervention principle may further protect states, as delineated by their international borders, from any future encroachment by external actors. Article 2(4) of the United Nations Charter and its general ban on the use of force reflects this type of logic and encompasses the three principles of sovereignty, *uti possidetis*, and non-intervention.

40. Frontier Dispute (Burk. Faso v. Mali), 1986 I.C.J. 554, ¶ 20 (Dec. 22). The International Court of Justice has also discussed and affirmed the principle of *uti possidetis*. Land, Island and Maritime Frontier Dispute (El Sal./Hond.; Nicar. Intervening), 1992 I.C.J. 351, 345 (Sept. 11) (stating "this is a principle the application of which is automatic: on independence, the boundaries of the relevant colonial administrative divisions are transformed into international frontiers").

41. Documents Regarding the Situation in the Former Yugoslavia Conference on Yugoslavia Arbitration Commission: Opinions on Questions Arising from the Dissolution of Yugoslavia, Jan. 11 & July 3, 1992, 31 I.L.M. 1488, 1499 (1992). *But see*, Hurst Hannum, *Rethinking Self-Determination*, 34 VA. J. INT'L L. 1, 38 (1993) (criticizing approach and arguing Commission's "neo-decolonization territorial approach can have troubling consequences if used to legitimize secession for groups possessing a distinct political status while denying the right of secession to territorially based ethnic communities not formally organize into political units").

42. Ratner, *supra* note 39, at 590-91.

B. Exceptions to the Prohibition

The Charter contemplates two exceptions to the above-mentioned prohibition on the use of force. First, the United Nations Charter contemplates the right of self-defense for each member state. Under Article 51, every state has the right to exercise self-defense if it has been the target of an armed attack by another state or group of states.⁴³ The Charter's notion of self-defense is consistent with the above-described notion of state sovereignty. State sovereignty implies that states should be free of external interference; if a state attacks another state, however, the so-called sovereignty shield has been broken by the aggressor state, and the victim state should be entitled to act against the aggressor state. It may also be argued that a state which uses military force against another state in self-defense does not act in contravention of Article 2(4), because such defensive actions are not committed against the territorial integrity or political independence of the attacker state, but are instead exercised because of self-protection and self-defense. Self-defense exists on both the individual level, where the attacked or threatened state acts against the attacker, and the collective level, where a group of attacked or threatened states acts against the attacker.⁴⁴

The Second exception to the Charter's general ban on the use of force allows for the possibility of collective military action against a rogue state, pursuant to the explicit authorization of the Security Council.⁴⁵ The United Nations Charter's structure reflects the post-World War II international balance of power: in the wake of the Great War, victor countries created this world organization, in an effort to preserve international peace and security. While each state is considered equal and sovereign as a member of the United Nations organization and can vote in its General Assembly, World War II victor countries maintained their superior status and political, military and economic advan-

43. "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence 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." U.N. Charter art. 51.

44. See Ratner, *supra* note 39 (discussing various types of self-defense).

45. U.N. Charter art. 42 ("[s]hould the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security").

tage through the creation of the Security Council, where five permanent members (United States, United Kingdom, France, the Soviet Union/Russia, and China) hold veto power and can authorize the use of military force against any other state.⁴⁶ These five powerful states, through the creation of the Security Council and its veto structure preserved the right to unilaterally decide whether member state sovereignty could be breached in the future, by holding onto to the power to authorize the use of force against others.

Throughout the Cold War, the Security Council remained paralyzed, because of politically conflicting positions of the United States and the Soviet Union. The Council authorized the use of force only two times: in Korea in 1950, and in Iraq in 1990 (the First Gulf War).⁴⁷ The Security Council has been more active since the end of the Cold War, and it has authorized the use of military force for various purposes, such as peacekeeping operations in the former Yugoslavia, Somalia, the Democratic Republic of the Congo, Kosovo and East Timor, and by regional arrangements, such as the ECOWAS Mission in Côte d'Ivoire (ECOMICI), the European Union force in the Democratic Republic of the Congo (EUFOR R.D. Congo) and the African Union Mission in Somalia (AMISOM).⁴⁸ Moreover, the Council has authorized the use of force more broadly, by "all necessary means" or "all necessary measures," in Somalia, Haiti,

46. See, e.g., HENKIN, *supra* note 35, at 137-38 (noting states involved in negotiation of the UN Charter sought to outlaw war and that this was their main objective); see generally OFFICE OF THE HISTORIAN, THE FORMATION OF THE UNITED NATIONS, 1945, <https://history.state.gov/milestones/1937-1945/un> (last visited June 1, 2015). As of today, it is unlikely that the five permanent members of the Security Council would accept to change the existing veto structure. As a recent meeting in March 2013, representatives of the five permanent members declared the following:

Many of reform proposals include a demand on elimination of veto power of the permanent members or include a proposal to provide veto powers to new permanent members. We would like to declare that our delegations will not compromise to any of proposals which would change the current veto structure.

Luka Kavèiè, *The Security Council Big Five: 'Current Veto Structure Will Not change'*, THE UN HERALD (Mar. 21, 2013), <http://unherald.blogspot.com/2013/04/the-security-council-big-five-are-clear.html>.

47. See U.N. SECURITY COUNCIL, 14. WHAT KIND OF MEASURES INVOLVING THE USE OF ARMED FORCE HAS THE SECURITY COUNCIL IMPOSED IN THE PAST?, FREQUENTLY ASKED QUESTIONS, <http://www.un.org/en/sc/about/faq.shtml#measures> (last visited June 1, 2015).

48. *Id.*

Rwanda, Eastern Zaire, Albania, Bosnia and Herzegovina, East Timor, the Democratic Republic of the Congo, Liberia and Iraq.⁴⁹ Most recently, the Council has authorized Member States, acting nationally or regionally, to use force in Libya, in order to protect civilians who were under threat of attack because of this country's unfolding civil unrest.⁵⁰ Despite the increased number of more recent authorizations for the use of force by the Security Council, it can be observed that most such instances of approval for the use of force have entailed either limited mandates for the use of force (to protect civilians in Libya or for specific peacekeeping operations in the former Yugoslavia, Somalia, East Timor, etc.), or missions organized by regional organizations, such as in the case of ECOWAS, the European Union or the African Union. General approvals by the Security Council for the use of force by "all necessary means" against a United Nations Member State have remained limited throughout this organization's history. When the United Nations Charter was negotiated, in the wake of World War II, states agreed not to use force in the future, because they hoped that international peace and security would be preserved if all states respected this system. Under the Charter, the use of force, even if authorized by the Security Council, remains a limited and rare occurrence, as this organization's drafters had hoped and predicted.

C. States' Use of Force Throughout Charter History

United Nations' Member States have occasionally used force against each other, despite the Charter's general prohibition, and outside of its two exceptions described above. Two such instances of use of force by states include intervention by states to protect their own nationals, as well as intervention to support democracy and socialist regimes.

The British government asserted the protection of nationals rationale for the use of force, when it intervened in Egypt during the 1956 Suez Canal crisis; moreover, the same reasoning was advanced by the United States when it invaded Grenada in 1983 and Panama in 1989.⁵¹ In addition, states have used a simi-

49. *Id.*

50. *See generally* S.C. Res. 1973, U.N. Doc. S/RES/1973/2011 (Mar. 17, 2011).

51. LORI F. DAMROSCH, ET AL., *INTERNATIONAL LAW: CASES AND MATERIALS* 973-74 (4th ed. 2001).

lar rationale to support the use force against other states, by arguing that armed intervention to protect one's nationals and rescue them from being held hostage is lawful.⁵² Israel used this rationale to justify its intervention in Uganda, to rescue Israeli hostages from a hijacked plane at Entebbe, and the United States relied upon this logic when it intervened in Iran to rescue American hostages from the U.S. Embassy in Teheran.⁵³ It should be noted that some have argued that state intervention to protect its nationals is an instance of self-defense, which was lawful under customary law before the promulgation of the Charter, and which has remained lawful under the Charter.⁵⁴ Under this view, intervention to protect nationals would be an authorized use of force by states but would instead fall squarely within the confines of the Charter system. It is beyond the scope of this Article to assess the validity of this argument; instead, this Article will simply note that the protection and/or rescue of nationals has constituted one of the grounds on which states have sought to justify intervention within the borders of another state.

Additionally, during the Cold War states have argued that intervention to support democracy or intervention to support other socialist regimes is a lawful exception to the general ban on the use force under the Charter system. The United States, under President Reagan, famously articulated the so-called Reagan Doctrine: the notion that the United States has the right to use military force on the territory of other states in order to defend democracy and support democratic regimes.⁵⁵ In a parallel move, Soviet Union leader, Leonid Brezhnev, asserted a similar right of socialist states to intervene in the territory of other states to support the maintenance of socialist regimes⁵⁶

52. Louis Henkin, *Use of Force: Law and U.S. Policy*, in *RIGHT V. MIGHT: INTERNATIONAL LAW AND THE USE OF FORCE* 37, 41-42 (2d ed. 1991).

53. DAMROSCH ET AL., *supra* note 51, at 975.

54. D.W. BOWETT, *SELF-DEFENCE IN INTERNATIONAL LAW* 87-90 (1958); *see also* DAMROSCH ET AL., *supra* note 51, at 973. *But see* IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 301 (1963) (arguing against legality of use of force through intervention to protect nationals).

55. W. Michael Reisman, *Allocating Competences to Use Coercion in the Post-Cold War World: Practices, Conditions, and Prospects*, in *LAW AND FORCE IN THE NEW INTERNATIONAL ORDER* 26, 34 n.13 (Damrosch & Scheffer eds., 1991).

56. *See* DAMROSCH ET AL., *supra* note 51, at 977 (Brezhnev Doctrine manifested itself in 1968, through Soviet invasion of Czechoslovakia).

Both of the above-mentioned exceptions to the prohibition of the use of force have failed to garner significant support. While military intervention to protect nationals may justify a limited use of force, this type of rationale would not suffice as legal ground for a large-scale humanitarian intervention. Moreover, both the Regan and the Brezhnev doctrines were specifically rejected by the International Court of Justice in the Nicaragua case, which held that “[t]he Court cannot contemplate the creation of a new rule opening up a right of intervention by one State against another on the ground that the latter has opted for some particular ideology or political system.”⁵⁷ In sum, while some states have periodically referred to these legal rationales to justify their use of force against other states, these sporadic types of arguments have done little to change the existing treaty and customary law and their overall ban on the use of force.

Throughout the United Nations’ history, most states have attempted to justify their respective uses of force against other states by advancing legal arguments consistent with the organization’s Charter. In most cases states have relied on the self-defense exception to support their use of force. For example, the former Soviet Union claimed that its military intervention in Afghanistan in 1979 was justified because of self-defense.⁵⁸ Russia, its successor state, similarly used the self-defense argument to justify its use of force in the Georgian break-away provinces, South Ossetia and Abkhazia, in 2008. The United States asserted the self-defense rationale numerous times in the 1980’s, in order to support military incursions in Panama, Grenada, Haiti, and Nicaragua.⁵⁹ It should be noted that the United States has claimed a right of both anticipatory or preventive self-de-

57. *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 133 (June 27).

58. See *Russian Invasion of Afghanistan*, HISTORY LEARNING SITE, http://www.historylearningsite.co.uk/russia_invasion_afghanistan.htm (last visited June 3, 2015). The Soviet Union claimed that it had been invited by the then Afghan Prime Minister Amin to help him stabilize his government in its fight against Islamic insurgency throughout the country, the Soviet claim was essentially one of collective self-defense. *Id.*

59. DAMROSCH ET AL., *supra* note 51, at 937 (noting U.S. representatives in 1980’s, during military incursions into Grenada, Nicaragua, and Panama, continued to rely on validity of U.N. Charter and sought to justify American actions under law).

fense,⁶⁰ as well as preemptive self-defense.⁶¹ Both types of self-defense reflect instances where the state using force (United States) attempted to justify its use of force by stretching the parameters of the self-defense argument to more nuanced situations which would not easily fall in the traditional self-defense paradigm. This type of legal reasoning is consistent with the argument asserted above - that states using force under the United Nations' Charter system most often attempt to advance legal arguments consistent with the Charter itself, as opposed to attempting to circumvent the system altogether.

In addition to the Great Powers, like the United States and the former Soviet Union/Russia, other smaller states have relied on the self-defense rationale to justify their use of military force against other states. For example, Azerbaijan and Armenia have claimed that they were exercising the right to self-defense against each other throughout their military actions over the disputed Nagorno-Karabakh region;⁶² Serbia has claimed self-de-

60. *Id.* at 966-67 (describing circumstances giving rise to 1989 military action against Panama, which were, according to then President George H.W. Bush, exercised in self-defense). See Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1633-35 (1984) (providing general discussion of anticipatory self-defense).

61. The Bush Doctrine was developed in the National Security Strategy of the United States, published on September 17, 2002. This strategy document stated the following:

The security environment confronting the United States today is radically different from what we have faced before. Yet the first duty of the United States Government remains what it always has been: to protect the American people and American interests. It is an enduring American principle that this duty obligates the government to anticipate and counter threats, using all elements of national power, before the threats can do grave damage. The greater the threat, the greater is the risk of inaction – and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack. There are few greater threats than a terrorist attack with WMD. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively in exercising our inherent right of self-defense. The United States will not resort to force in all cases to preempt emerging threats. Our preference is that nonmilitary actions succeed. And no country should ever use preemption as a pretext for aggression.

The White House President George W. Bush, The White House, National Security Strategy, Sep. 17, 2002, available at <http://georgewbush-whitehouse.archives.gov/nsc/nss/2006/print/sectionV.html> (2006).

62. See International Crisis Group, Armenia and Azerbaijan: A Season of Risks, Europe Briefing No. 71, 26 Sep. 2013, available at <http://www.crisisgroup.org/~media/>

fense in its actions against Kosovo;⁶³ Israel has claimed self-defense in its wars with Egypt, Lebanon, and Syria.⁶⁴ This Article will not attempt to discuss the specific validity of each of the above-mentioned asserted self-defense claims, nor will this Article evaluate the legal soundness of preventive or preemptive self-defense. Instead, this Article will argue that while many states may at times assert that the current norms on the use of force, as they exist within the United Nations structure and in customary law, are outdated or inflexible, most states consistently advance legal arguments consistent with such norms, any time they use force against other states.

It is also interesting to note that at times states have chosen not to legally justify their military actions within the existing United Nations legal structure, but that in such instances, states have offered non-legal rationales to support their behavior, or have claimed that their actions were necessary because of an extraordinary situation. First, in some instances, states have advanced non-legal arguments to support their use of force. For example, North Atlantic Treaty Organization (NATO) member states asserted a moral, humanitarian rationale to justify air strikes against the Federal Republic of Yugoslavia in 1999.⁶⁵ Most NATO countries having participated in the airstrikes chose not to use legal arguments to justify their use of force against the Federal Republic of Yugoslavia, and instead adopted a non-legal rhetoric.⁶⁶ This type of rationale was also reflected in the

Files/europe/caucasus/b071-armenia-and-azerbaijan-a-season-of-risks.pdf for a detailed briefing of the Azerbaijan-Armenia conflict.

63. See generally Milena Sterio, *The Kosovar Declaration of Independence: "Botching The Balkans" or Respecting International Law*, 37 GA. J. INT'L & COMP L. 267 (2009) (providing detailed discussion of Kosovo).

64. See STANIMIR A. ALEXANDROV, *SELF-DEFENSE AGAINST THE USE OF FORCE IN INTERNATIONAL LAW* 173-79 (1996) (detailing Israeli wars with Egypt, Lebanon, and Syria involving claims of self-defense).

65. INDEPENDENT INT'L COMM'N ON KOSOVO, *KOSOVO REPORT: CONFLICT, INTERNATIONAL RESPONSE, LESSONS LEARNED* 167-68 (2000) [hereinafter *KOSOVO COMMISSION*].

66. For example, a few days before the start of the NATO-led aerial strikes against the former Yugoslavia in 1999, the U. S. State Department spokesman stated that, "[w]e and our NATO allies have looked to numerous factors in concluding that such action, if necessary, would be justified. . . ." and that "we and our NATO allies believe there are legitimate grounds to threaten and, if necessary, use military force." Sean Murphy, *Contemporary Practice of the United States Relating to International Law*, 93 AM. J. INT'L. L. 628, 631 (1999). But see the position of the United Kingdom government: "We are in doubt that NATO is acting within international law and our

opinion of the independent international commission on Kosovo, chaired by Richard Goldstone and Carl Tham, which published a post-intervention analysis on the legality of the NATO air strikes in Kosovo. The Goldstone and Tham analysis noted that this type of humanitarian intervention "is a situation in a gray zone of ambiguity between an extension of international law and a proposal for an international moral consensus."⁶⁷ Moreover, according to Goldstone and Tham the use of force against the Federal Republic of Yugoslavia was illegal but legitimate, because "a 'right' of humanitarian intervention is not consistent with the UN Charter if conceived as a legal text, but False it may, depending on context, nevertheless, reflect the spirit of the Charter as it relates to the overall protection of people against gross abuse."⁶⁸ Second, some states have at times advanced a *sui generis* type of rhetoric to justify the use of force against specific rogue regimes. For example, the United States used an "exceptionalism" rhetoric during the NATO air strikes against the Federal Republic of Yugoslavia: then Secretary of State, Condoleeza Rice, consistently referred to Kosovo as *sui generis* – a case of use of force which does not create a precedent, because of Kosovo's unique circumstances.⁶⁹ According to Rice, these unique circumstances, warranting the use of force against the Yugoslav leadership, included the break-up of the former Yugoslavia, of which Kosovo had been a province, and the extraordinary force used by the Milosevic regime against Kosovar Albanians.⁷⁰ Similarly, United Nations Secretary-General, Ban Ki-Moon, has labeled Kosovo as a "highly distinctive

legal justification rests upon the accepted principle that force may be used in extreme circumstances to avert a humanitarian catastrophe." Simon Duke et al., *The Major European Allies: France, Germany, and the United Kingdom, in KOSOVO AND THE CHALLENGE OF HUMANITARIAN INTERVENTION* § 9 (Schnabel & Thakur eds., 2000) [hereinafter *KOSOVO AND THE CHALLENGE*].

67. *Id.* at 164, 331-32.

68. KOSOVO COMMISSION, *supra* note 65, at 186.

69. *Id.* at 174 ("NATO and its supporters have wisely avoided staking out any doctrinal claims for its action either prior to or after the war. Rather than defining the Kosovo intervention as a precedent, most NATO supporters among international jurists presented the intervention as an unfortunate but necessary and reasonable exception").

70. *U.S. Rules out Recognising S. Ossetia*, CIVIL.GE DAILY NEWS ONLINE (Mar. 6, 2008), <http://www.civil.ge/eng/article.php?id=17273>.

situation” because of the international community’s prolonged involvement in this volatile region.⁷¹

This Article will not attempt to assess the validity of this type of *sui generis* claim. Instead, this Article will argue that states, including the most powerful ones, consistently attempt to justify specific instances of use of force by referring to the existing United Nations’ Charter-based framework on the use of force. If such an argument cannot be worked out, states most often resort to claiming that a particular instance of use for force was exceptional or *sui generis*. Most states presumably engage in this type of legal reasoning because they are uncomfortable with the idea that any other state could attempt to use force outside the confines of the United Nations system. Most states presumably also believe that any use of force should remain exceptional and rare, which is why the more novel legal rationales justifying the use of force to prevent humanitarian catastrophes have met resistance. While most states likely agree that humanitarian suffering should be stopped, they are often unwilling to agree about the legality of the use of force outside of the confines of the existing United Nations system. The following section will discuss the evolving theory of humanitarian intervention, as well as more novel developments such as the Responsibility to Protect doctrine and the theory of involuntary sovereignty waiver.

V. HUMANITARIAN INTERVENTION “EXCEPTION:” ITS PROPOSED VALIDITY UNDER INTERNATIONAL LAW

Humanitarian intervention has emerged as an external limitation on state behavior during the second half of the 20th century (A). It is linked to two other theories, Responsibility to Protect (B) and involuntary sovereignty waiver (C), both of which contemplate instances where external actors may be justified in intervening against a rogue regime which has been abusing its own population, including in instances where the abuse has sparked a severe refugee crisis.

71. *UN Secretary-General Ban Ki-moon: I wish to note that Kosovo is a highly distinctive situation*, INTERFAX, <http://web.archive.org/web/20080314204124/http://www.interfax.com/17/373003/Interview.aspx> (last visited June 3, 2015).

A. *Origins of Humanitarian Intervention*

The concept of humanitarian intervention has been described as a vertical constraint on states, because external norms are imposed on otherwise sovereign states "by diplomatic and public persuasion, coercion, shaming, economic sanctions, isolation, and in more egregious cases, by humanitarian intervention."⁷² This phenomenon is revolutionary because "it contradicts the notion of national sovereignty - that is, that a state can do as it pleases in its own jurisdiction."⁷³

The concept of humanitarian intervention developed over the last century, international law evolved from a set of rules governing inter-state behavior, to a complex labyrinth of rules, regulations, codes, and directives applicable to both state and non-state actors.⁷⁴ The fields of human rights law and humanitarian law evolved, imposing novel prohibitions on state actors and limiting their otherwise un-checked sovereignty.⁷⁵ The use of force for humanitarian purposes, which emerged over the past few decades, represents situations where external states have determined that intervening in the affairs of another sovereign state is crucial in order to protect individual rights and prevent individual suffering. This type of use of force rationale implies that the protection of the individual is important enough in order to justify a breach of state sovereignty. In other words, the intervening state will encroach upon the sovereignty of the state which has been abusing human rights by launching a humanitarian intervention against the latter.

This type of use of force toward humanitarian purposes does not coincide with the above-described exceptions to the overall ban on the use of force- self-defense and Security Council authorization. In most instances of humanitarian intervention, the intervening state does not act in self-defense, nor does the Security Council become involved, typically because of a permanent member veto.⁷⁶ In these situations, where the inter-

72. John Alan Cohan, *Sovereignty in a Postsovereign World*, 18 FLA. J. INT'L L. 907, 941 (2006).

73. DAVID P. FORSYTHE, *HUMAN RIGHTS AND WORLD POLITICS* 6-7 (1983).

74. See Sterio, *supra* note 37, at 214.

75. *Id.* at 226-32 (discussing changes in international human rights law through the creation of new norms and the development of limitations on state sovereignty).

76. See, e.g., BRIAN D. LEPARD, *RETHINKING HUMANITARIAN INTERVENTION: A FRESH LEGAL APPROACH BASED ON FUNDAMENTAL ETHICAL PRINCIPLES IN INTER-*

vening nation cannot assert a self-defense rationale and the Security Council experiences political paralysis disabling it from authorizing the use of force, the intervening nation or group of nations may argue that its actions are justified under the emerging norm of humanitarian intervention.⁷⁷ Recent examples of humanitarian intervention include the 1991 United Nations-authorized intervention in north Iraq in order to protect the Kurds and the 1999 NATO-led air strikes against the Federal Republic of Yugoslavia, described above. Other more remote instances of humanitarian intervention include military action by India in East Pakistan to “liberate” Bangladesh, and intervention by Tanzania in Uganda, in order to oust dictator, Idi Amin.⁷⁸

Much discussion about the legality of the emerging humanitarian intervention exception to the general ban on the use of force was recently sparked in the context of the 1999 air strikes against the Federal Republic of Yugoslavia, briefly discussed above. In 1999, NATO countries launched a series of air strikes against Yugoslav leadership in order to halt government violence perpetrated against ethnic Albanians in Kosovo.⁷⁹ The NATO campaign took place outside of the confines of the Charter-sanctioned use of force structure, because the Security Council was paralyzed in light of Russian and Chinese opposition to any authorization to use force against Yugoslavia.⁸⁰ The NATO-led campaign, which has been described as an instance of humanitarian intervention,⁸¹ provoked significant legal controversy. NATO member states advanced a humanitarian rationale to justify their military intervention in Yugoslavia, by arguing that the conflict was fought “to avert a humanitarian catastro-

NATIONAL LAW AND WORLD RELIGIONS 362 (2002) (noting Security Council vetoes have blocked humanitarian interventions in the past).

77. See Nathan J. Miller, *International Civil Disobedience: Unauthorized Intervention and the Conscience of the International Community*, 74 MD. L. REV. 315, 344 (2015) (describing that many scholars have argued in favor of the existence of a new rule of customary international law superseding the prohibition on the use of force found in the United Nations Charter).

78. See Harold Hongju Koh, *Syria and the Law of Humanitarian Intervention (Part II: International Law and the Way Forward)*, JUST SECURITY (Oct. 2, 2013), <http://justsecurity.org/2013/10/02/koh-syria-part2/> [hereinafter Koh Part II].

79. Williams et al., *supra* note 24, at 478.

80. *Id.* at 477-78.

81. Miller, *supra* note 77, at 345 (noting that the NATO intervention in Kosovo is cited by proponents of the argument that international law permits this type of intervention on humanitarian grounds).

phe by disrupting the violent attacks currently being carried out by the Yugoslav security forces against the Kosovo Albanians and to limit their ability to conduct such repression in the future."⁸² Some scholars supported the intervention and argued that humanitarian action can be justified "where a government or effective authority actively exterminates its populace, or where it denies to it that which is necessary for its survival, or where it forcibly displaces it."⁸³ Others were more critical and argued that the NATO intervention was illegal under the existing Charter system, because of the inherent danger of adopting a humanitarian rationale to authorize future uses of force. "[I]f it is accepted that a state or group of states can unilaterally decide to intervene . . . [t]he door will have been opened to all sorts of subjective claims as to when interventions are justified and when they are not."⁸⁴ The position of the United States also appeared to reject the legality of humanitarian intervention, although the United States had been one of the main proponents of the NATO-led intervention.⁸⁵ Other criticisms of the NATO intervention and its humanitarian justification included questions about why NATO countries were so keen on intervening in the former Yugoslavia while they appeared unwilling to act in other equally troubled regions,⁸⁶ as well as proposals to reform the Security Council by eliminating the veto structure and by replacing it with a voting majority.⁸⁷

While many in the international community would agree that the status of humanitarian intervention within international law remains vague, most would admit that states have continu-

82. See Paul Rogers, *Lessons to Learn*, 55 *WORLD TODAY* 4, 4-6 (Sept. 1999). This was a statement issued by the British Secretary of Defense.

83. Marc Weller, *Armed Samaritans*, *COUNSEL* 20-22 (Aug. 1999).

84. Michael Byers, *Kosovo: An Illegal Operation*, *COUNSEL* 16-18 (Aug. 1999).

85. Michael J. Matheson, *Justification for the NATO Air Campaign in Kosovo*, 94 *AM. SOC'Y INT'L L.* 301, 301 (2000). Acting Senior Legal Adviser to the United States State Department, Michael Matheson, stated that "many NATO states – including the United States – had not accepted the doctrine of humanitarian intervention as an independent legal basis for military action that was not justified by self-defense or the authorization of the Security Council." *Id.*

86. See James Mayall, *The Concept of Humanitarian Intervention Revisited*, in *KOSOVO AND THE CHALLENGE OF HUMANITARIAN INTERVENTION*, *supra* note 38, § 20; Simon Duke et al., *The Major European Allies: France, Germany, and the United Kingdom*, in *KOSOVO AND THE CHALLENGE OF HUMANITARIAN INTERVENTION*, *supra* note 38, § 9.

87. Catherine Guicherd, *International Law and the War in Kosovo*, 41 *SURVIVAL* 19, 25 (Summer 1999).

ously debated the concept of humanitarian intervention and have, at times, accepted its legitimacy. The two sections below will discuss two concepts related to humanitarian intervention: responsibility to protect and involuntary sovereignty waiver. Both of these theories provide evidence that the international community has become increasingly comfortable with breaking the sovereignty shield and has continued to discuss the possibility of intervention against rogue regimes. As it will be explored in Part VI below, such sovereignty breaking can, under this type of rationale, be justified in instances where the rogue regime is provoking a refugee crisis of a severe magnitude.

B. *Responsibility to Protect*

The phrase “responsibility to protect” was initially used in the 2001 report of the International Commission on Intervention and State Sovereignty (ICISS); this commission had been formed in response to then-United Nations’ Secretary General Kofi Annan’s question of when the international community must intervene in order to stop humanitarian suffering.⁸⁸ ICISS was specifically tasked with determining when the principle of state sovereignty should yield to the principle of humanitarian intervention – action aimed at preventing a humanitarian crisis within the borders of a sovereign state. The ICISS Report noted that the traditional notion of state sovereignty has evolved toward “sovereignty as responsibility in both international functions and external duties.”⁸⁹

Two devastating events slowed the progress of the concept of responsibility to protect: the September 11, 2001 terrorist attacks on the World Trade Center and the March 2003 United States’ invasion of Iraq.⁹⁰ In light of these two events, many states focused on preventing further terrorist attacks, and many states feared that any interventionist doctrine, like responsibility to protect, would be mis-used in the future to justify another

88. INT’L COMM’N ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT 12–13 (Dec. 2001), available at <http://responsibilitytoprotect.org/ICISS%20Report.pdf> [hereinafter ICISS Report]; see also Max W. Mathews, Note, *Tracking the Emergence of a New International Norm: the Responsibility to Protect and the Crisis in Darfur*, 31 B.C. INT’L & COMP. L. REV. 137, 138 (2008).

89. ICISS Report, *supra* note 88, § 2.14.

90. See *An Introduction to the Responsibility to Protect* § 1, INT’L COALITION FOR THE RESPONSIBILITY TO PROTECT, <http://www.responsibilitytoprotect.org/index.php/about-rtop/learn-about-rtop> [hereinafter INTERNATIONAL COALITION].

Iraq-like invasion. Despite such setbacks, Kofi Annan continued to promote the development of responsibility to protect.⁹¹ In addition, African Union member states embraced this concept by including it in the Constitutive Act of this organization's Charter.⁹² Article 4(h) of the Constitutive Act of the African Union states that it is the "right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity."⁹³ Article 4(h) thus reflects the African Union member states' acceptance of responsibility to protect, as it authorizes member states to intervene in each other's affairs in order to prevent humanitarian catastrophes from occurring.

The development of responsibility to protect resulted in the creation of the World Summit Outcome Document in 2005; this document was accepted by most heads of state present at that year's World Summit.⁹⁴ Paragraphs 135-138 of the World Summit Outcome Document stipulate that each individual state has the primary responsibility to protect its populations from genocide, war crimes, crimes against humanity and ethnic cleansing and that the international community should assist and encourage states to exercise this responsibility. Moreover, these paragraphs provide that the international community has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means to help protect populations threatened by these crimes.⁹⁵ Finally, according to these paragraphs, when a state manifestly fails in its protection responsibilities, and peaceful means are inadequate, the international community should

91. *Id.* § 2 (noting that as part of his effort to promote responsibility to protect, in 2003 Kofi Annan formed the High-level Panel on Threats, Challenges and Change to report on how the UN should confront the greatest security threats of the 21st century). Moreover, the Secretary-General published his own report entitled *In Larger Freedom: Towards Development, Security and Human Rights for All*. This report was similar to the High-level Panel, in which he emphasized the need of governments to take action against threats of massive human rights violations and other large scale acts of violence against civilians).

92. CONSTITUTIVE ACT OF THE AFRICAN UNION [CONSTITUTION] Jul. 11, 2000, available at http://www.au2002.gov.za/docs/key_oau/au_act.htm.

93. *Id.* at art. 4(h).

94. INTERNATIONAL COALITION, *supra* note 90, § 4.

95. *Id.*

take stronger measures, including collective use of force authorized by the Security Council through its Chapter VII powers.⁹⁶

The concept of responsibility to protect has developed since the 2005 World Summit in several significant ways. First, Security Council officially referred to responsibility to protect for the first time in unanimously adopted Resolution 1674 on the Protection of Civilians in Armed Conflict.⁹⁷ Second, another Security Council Resolution (1706, which authorized the deployment of United Nations peacekeeping troops in Darfur, specifically referred to above-mentioned Resolution 1674 and to paragraphs 138 and 139 of the 2005 World Summit Outcome Document (also on responsibility to protect).⁹⁸ Third, other recent Security Council resolutions have more indirectly referenced responsibility to protect by focusing on the protection of civilians in conflict areas. For example, Resolution 1970 passed in 2011 called upon Libya's "responsibility to protect" by referring the situation to the ICC and imposing financial sanctions as well as an arms embargo.⁹⁹ Resolution 1973 authorized the enforcement of a no-fly zone and the use of force for "all necessary measures . . . to protect civilians and civilian populated areas under threat or attack . . . while excluding a foreign occupation force of any form[.]"¹⁰⁰ This Resolution also condemned the Libyan government for allowing gross violations of human rights and attacks against civilians that may amount to crimes against humanity.¹⁰¹ Moreover, Security Council adopted Resolution 1975 on Cote d'Ivoire in 2011, condemning human rights violations occurring against the civilian population in this country and labeling them a crime against humanity.¹⁰² Resolution 1975 specifically stated that it was the primary responsibility of each state to protect civilians; because of Cote d'Ivoire's failure to do so, Resolution 1975 reaffirmed the United Nations' mandate in this country, as well as the use of force for all necessary means to protect civilians.¹⁰³ These two sets of resolutions represent evidence of the international community's growing consensus that each state

96. *Id.*

97. G.A. Res. 1674, ¶ 4, U.N. Doc. S/RES/1674 (Apr. 28, 2006).

98. G.A. Res. 1706, at 1, U.N. Doc. S/RES/1706 (Aug. 31, 2006).

99. G.A. Res. 1970, ¶ 4-14, U.N. Doc. S/RES/1970 (Feb. 26, 2011).

100. G.A. Res. 1973, ¶ 4, 6, U.N. Doc. S/RES/1973 (Mar. 17, 2011).

101. *Id.* at 1.

102. *See generally* G.A. Res. 1975, U.N. Doc. S/RES/1975 (Mar. 30, 2011).

103. *Id.*

has a responsibility to protect civilians within its own borders, but that in instances where a state fails to do so it is appropriate and important for the Security Council to use force in order to prevent humanitarian suffering

Despite recent developments in the evolution of the responsibility to protect theory, it would be premature to assert that this theory has reached the status of binding law. States' recent opposition to the concept of responsibility to protect demonstrates the lack of consistent and uniform state practice needed for the creation of a customary norm. For example, in 2007, Russia and China vetoed a Security Council resolution on the situation in Burma, arguing that the internal affairs of a sovereign state such as Burma should not be debated within the Security Council, and proposing to refer the situation to the Human Rights Council.¹⁰⁴ Additionally, Security Council member states did not refer to responsibility to protect in the Darfur Resolution, which had authorized the deployment of a hybrid United Nations-African Union military force in this troubled region. "As compared to the earlier Resolution 1674, this limited endorsement was disappointing to the community of civil society and policymakers working to advance the norm."¹⁰⁵ Moreover, states have expressed opposition to responsibility to protect outside of the Security Council, by declining to provide funding for the office of the new Special Adviser on responsibility to protect.¹⁰⁶ While this decision was partially caused by other procedural matters, it nonetheless reflected some United Nations' member states' viewpoint that responsibility to protect did not represent a truly binding norm of international law.

Most importantly, it should be noted that responsibility to protect, even if it were to become binding law, does not modify the existing rules on the use of force under the United Nations' Charter system. As described above, responsibility to protect contemplates any type of military intervention against a rogue regime within the existing Security Council structure. According to responsibility to protect, states are not authorized to unilaterally use force against other states to force them into compliance with international law. Instead, it is up to the Security Council to intervene to halt humanitarian suffering. Respon-

104. INTERNATIONAL COALITION, *supra* note 90.

105. *Id.*

106. *Id.*

sibility to protect does not offer a legal rationale for humanitarian intervention, outside of the confines of the existing international law use of force regime.

Finally, it should also be noted that implementation of responsibility to protect has been slow. On January 12, 2009, United Nations Secretary-General issued a report entitled “Implementing the Responsibility to Protect.”¹⁰⁷ The report called for a three-pillar approach. First, Pillar One emphasizes that states have the primary responsibility to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.¹⁰⁸ Second, Pillar Two “addresses the commitment of the international community to provide assistance to States in building capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.”¹⁰⁹ Finally, Pillar Three recognizes that the international community has the responsibility to take action to prevent genocide, ethnic cleansing, war crimes and crimes against humanity, in situations where a state is manifestly failing to protect its population.¹¹⁰ The Secretary-General’s report further urged the General Assembly to develop a strategy for implementing responsibility to protect, according to the three pillars described in the report.¹¹¹ The United Nations’ General Assembly passed a resolution in 2009, whereby it accepted to continue considering the development and implementation of responsibility to protect.¹¹² Since 2009, the General Assembly member states have debated responsibility to protect but have failed to progress further than agreeing to continue “considering” this concept.¹¹³ Thus, despite Secretary-General’s report and his calls for the implementation of responsibility to

107. U.N. Secretary-General, *Implementing the Responsibility to Protect*, U.N. Doc. A/63/677 (Jan. 12, 2009), available at <http://responsibilitytoprotect.org/implementing%20the%20rtop.pdf> [hereinafter *Implementing RtoP*].

108. *Id.*

109. INTERNATIONAL COALITION, *supra* note 90 (citing *Implementing RtoP*).

110. *Implementing RtoP*, *supra* note 107.

111. *Id.*

112. *The Responsibility to Protect*, G.A. Res. 63/308, ¶ 2, U.N. Doc. A/RES/63/308 (Oct. 7, 2009), available at [http://responsibilitytoprotect.org/Resolution%20RtoP\(3\).pdf](http://responsibilitytoprotect.org/Resolution%20RtoP(3).pdf).

113. See INTERNATIONAL COALITION, *supra* note 90.

protect, states have resisted any real implementation efforts and have limited themselves to debating this idea.

To conclude, despite slow progress in the development and implementation of responsibility to protect, it appears that states seem at least willing to debate the concept, demonstrating their readiness to discuss a sovereignty-breaking theory. In this sense, responsibility to protect is revolutionary and may provide legal justification for instances of humanitarian intervention undertaken to alleviate refugee suffering of a significant magnitude.

C. *Involuntary Sovereignty Waiver*

Like responsibility to protect, the theory of involuntary sovereignty waiver is another sovereignty-encroaching concept, which purports to legitimize intervention in the internal affairs of a rogue regime, if the latter abuses its own population. The term "involuntary sovereignty waiver" was first coined by Richard Haass, Director of Policy Planning for the State Department in the George W. Bush Administration and the current President of the Council on Foreign Relations.¹¹⁴ Haass argued that states "waive" their sovereignty if they commit one of the following sets of acts: if they harbor weapons of mass destruction; if they sponsor or protect terrorists; and if they commit humanitarian abuses.¹¹⁵ Haass' theory, like responsibility to protect, embraces the notion that a state committing humanitarian violations against its own population may not be able to resist external actors' involvement within its borders.

According to Haass, external actors may intervene in the internal affairs of such rogue states in order to eradicate rogue behavior. In other words, rogue states cannot claim the protection of their sovereignty shield, and can be intruded upon by outside actors because "sovereignty is not a blank check," and

114. Haass initially developed his theory in 2002, arguing that states waive their sovereignty if they commit atrocities against their own people or if they harbor terrorists. Nicholas Lemann, *The Next World Order*, NEW YORKER (Apr. 1, 2002), available at <http://www.newyorker.com/magazine/2002/04/01/the-next-world-order>. Haass amended his theory in 2003, when he added states that pursue weapons of mass destruction. Richard N. Haass, *Remarks to the School of Foreign Service and the Mortara Center for International Studies, Georgetown University: Sovereignty: Existing Rights, Evolving Responsibilities*, WASHINGTON FILE (Jan. 14, 2003), available at <http://www.iwar.org.uk/news-archive/2003/01-15.htm> [hereinafter *Georgetown Speech*].

115. *Georgetown Speech*, *supra* note 114.

“outlaw regime” jeopardize their sovereignty “by pursuing reckless policies fraught with danger for their citizens and the international community.”¹¹⁶ Haass’ theory is different from responsibility to protect, because Haass argued that such outside intervention could be undertaken by one of the powerful states themselves, such as the United States, without any United Nations’ involvement or specific approval by the Security Council.¹¹⁷ According to Haass’ argument, humanitarian intervention would become another exceptions to the general ban on the use of force, pursuant to which powerful states could engage in unilateral military action against rogue regimes, in order to prevent a humanitarian catastrophe.¹¹⁸

The involuntary sovereignty waiver theory has not been universally embraced, because it is unclear whether this theory was ever meant to apply to states other than the United States and its closest allies, and because some scholars have questioned whether the development of this type of rationale would signal a return to a rule by the Great Powers – our planet’s most powerful (few) states.¹¹⁹ Nonetheless, the involuntary sovereignty waiver theory evidences at least one state’s willingness to debate the existence of a humanitarian intervention-type justification for the use of unilateral military force. This type of argument, like the concept of responsibility to protect, represents a novel use of force theory, and a novel understanding of the traditional notion of state sovereignty. The development of this theory could lead toward authorizing the use of force outside of the confines of the United Nations Charter system.

116. MILENA STERIO, *THE RIGHT TO SELF-DETERMINATION UNDER INTERNATIONAL LAW: “SELFISTANS,” SECESSION, AND THE RULE OF THE GREAT POWERS* 51 (2012) (citing RICHARD N. HAASS, *INTERVENTION: THE USE OF AMERICAN MILITARY FORCE IN THE POST COLD WAR WORLD* (rev’d ed. 1999)).

117. *Georgetown Speech*, *supra* note 114.

118. See Michal J. Kelly, *Pulling at the Threads of Westphalia: “Involuntary Sovereignty Waiver”? Revolutionary International Legal Theory or Return to Rule by the Great Powers?*, 10 *UCLA J. INT’L L. & FOREIGN AFF.* 361, 403-404 (2005) (detailing Haass’ view).

119. Scholars have discussed Haass’ theory in the context of an evolving “rule” by the Great Powers – the most powerful states on the international stage, such as the Security Council permanent members (United States, Russia, China, France, and Great Britain), as well as other economically, politically, and militarily powerful states such as Germany, Japan, and Italy. Because Haass argued that interventions could be unilaterally staged by powerful countries, like the Great Powers, against “rogue” regimes, scholars have wondered whether this constitutes a return to a Great Powers’ Rule. See, e.g., Kelly, *supra* note 118; STERIO, *supra* 116.

In light of the above, it can be argued that humanitarian intervention is an emerging norm of international law. Moreover, humanitarian intervention, coupled with theories of responsibility to protect and involuntary sovereignty waiver, demonstrate the international community's willingness to re-evaluate the traditional norms of state sovereignty, as well as to create novel authorizations for external military involvement in bloody civil wars. The catastrophic refugee situation in Iraq and Syria, caused by ongoing violence as well as the ISIS conflict, illustrates the necessity for the development of new humanitarian rationales toward the use of force outside of the Charter system. The section below will discuss the applicability of the humanitarian intervention exception to the refugee crisis in Iraq and Syria.

VI. HUMANITARIAN INTERVENTION AGAINST ISIS TO HALT REFUGEE CRISIS

Does international law, and in particular, the emerging norm of humanitarian intervention, allow states to intervene in an ongoing internal conflict, which has caused a refugee crisis of humanitarian proportions, and which the internal authorities have been unwilling or unable to contain? This Article argues that if one accepts the existence of the humanitarian intervention exception to the overall ban on the use of force, then this exception does and should encompass severe refugee crisis. In other words, if states are allowed to intervene in the territory of another state under the guise of humanitarian intervention, then such intervention can occur in instances where the refugee situation in the offending state has become intolerable and has reached the threshold of a humanitarian catastrophe. In addition, the theory of involuntary sovereignty waiver, discussed above, lends support for the same view – that governments which abuse their own populations, by failing to contain and adequately address a severe refugee crisis forfeit or waive the right to be free of external interventions.¹²⁰

The right of any state to intervene in the internal affairs and within boundaries of another state should never be unlimited and should always comport to stringent norms and carefully prescribed circumstances. Harold Koh and several other scholars

120. See *supra* Part V.

have recently argued, in the context of the unfolding Syrian crisis, that states have the right, under international law, to engage in a humanitarian-type intervention within the territory of a state which is unable or unwilling to contain the humanitarian crisis.¹²¹ The same argument is applicable to a situation where the humanitarian crisis consists of a severe refugee crisis, if and when such a refugee crisis rises to the magnitude of a veritable tragedy. As Part III above has described, the refugee crisis in Syria and Iraq, caused by the ongoing ISIS conflict, has risen to such levels.¹²² In both of these countries, significant refugee crises had existed for several years prior to the current ISIS conflict, because of other ongoing conflicts in these areas. Iraq had been in a state of conflict since the United States invasion in 2003, and Syria has been in the throes of a serious internal conflict since the Arab Spring in 2011.¹²³ The existing and unfolding refugee situations were only exacerbated by the ISIS offensive, and as Part III above describes, thousands of displaced persons in both Iraq and Syria are in dire necessity of humanitarian assistance.¹²⁴ Because the governments of Iraq and Syria are unwilling or unable to adequately address the refugee crises within their borders, external states have the right, under international law, to intervene in a military fashion in order to alleviate the humanitarian suffering of thousands of refugees in this troubled geographic area.

What would such a military intervention aimed at halting a refugee crisis entail? What limitations should international law encompass to authorize such an intervention while curtailing it to its true humanitarian goal? This Article argues that Harold Koh's proposed framework for humanitarian intervention in general should apply to a refugee crisis as well, if such a crisis rises to the same level of a humanitarian catastrophe. According to Koh, humanitarian intervention could be legal under international law if the following criteria are met:

[1] If a humanitarian crisis creates *consequences significantly disruptive of international order*— including proliferation of chemical weapons, massive refugee outflows, and events destabilizing to regional peace and security of the region— that would likely soon create an

121. Koh Part II, *supra* note 78.

122. *See supra* Part III.

123. *See supra* Part III (discussing unfolding conflict and refugee crisis in Iraq and Syria).

124. *See supra* Part III.

imminent threat to the acting nations (which would give rise to an urgent need to act in individual and collective self-defense under Article 51);

[2] a Security Council resolution were not available because of persistent veto; and the group of nations that had persistently sought Security Council action had *exhausted* all other remedies reasonably available under the circumstances, they would not violate U.N. Charter Article 2(4) if they used;

[3] *limited force for genuinely humanitarian purposes* that was necessary and proportionate to address the imminent threat, would demonstrably improve the humanitarian situation, and would terminate as soon as the threat is abated.¹²⁵

The first criterion of the Koh framework already encompasses “massive refugee outflows” as one of the possible ways in which international order could be disrupted sufficiently to warrant an external military intervention.¹²⁶ In the context of the ongoing ISIS conflict in Iraq and Syria, it is undisputed that the refugee situation has destabilized regional peace and security. As I have argued elsewhere, I do not agree with Professor Koh that the humanitarian situation needs to create an imminent threat to intervening nations and to give rise to the necessity of collective self-defense under Article 51 of the United Nations Charter.¹²⁷ Instead, I believe that humanitarian intervention is necessary precisely in those instances where other uses of force, such as self-defense and Security Council authorization, are not available. Thus, I believe that humanitarian intervention in general should be authorized where a humanitarian crisis has created a situation disruptive of international order and regional peace and stability; if an extra-ordinary refugee situation is an integral element of such a humanitarian crisis, such as in Iraq and Syria during the ISIS conflict, then I believe that external states have the right to intervene in order to halt the humanitarian suffering, even if the intervening nations’ interests are not threatened by the crisis. Moreover, in the context of the ISIS conflict and the refugee situation in Iraq and Syria, it is evident that the Security Council is not likely to act, because of persistent veto and threat of veto by Russia and/or China, and that potentially- intervening nations would have exhausted all other

125. Koh Part II, *supra* note 78.

126. *Id.*

127. Milena Sterio, *Humanitarian Intervention Post-Syria: Legitimate and Legal?*, 40 BROOK. J. INT’L L. 109, 157 (2014).

reasonably available remedies.¹²⁸ Finally, intervening nations themselves would have the burden of tailoring their humanitarian intervention to a military action necessary and proportionate to the ongoing stability threat, caused by the refugee crisis, as well as to an operation which would improve the humanitarian suffering, by addressing the refugee situation and attempting to halt the ongoing flow of refugees. Thus, a military intervention launched under this framework in Iraq and Syria would attempt to combat ISIS forces in order to liberate areas from which refugees have fled and to allow such refugees to return to their homes, or to re-settle them in other available and suitable geographic areas. Any such intervention would be terminated as soon as the refugee situation is abated, but presumably a form of peacekeeping military presence in Iraq and Syria could continue for a longer time, to ensure that ISIS forces do not return and recapture the same land areas.

The United States already has engaged in military action against ISIS. Starting in September 2014, the United States has carried out numerous air strikes against ISIS in northern Syria and in Iraq.¹²⁹ Other nations have similarly conducted military operations of their own.¹³⁰ In early 2015, Jordanian fighter jets joined the fight against ISIS by carrying out strikes in Syria against ISIS targets.¹³¹ The international community has, short of condoning such unilateral military interventions, indicated that it considers ISIS to be a criminal organization whose lead-

128. Louis Charbonneau & Michelle Nichols, *U.N. Security Council Powers Meet Again on Syria; No Outcome*, REUTERS (Aug. 29, 2013), <http://www.reuters.com/article/2013/08/29/us-syria-crisis-un-idUSBRE97S17R20130829> (noting Russia and China had vetoed three proposed resolutions which would have condemned Assad regime and threatened United Nations sanctions).

129. Jim Sciutto, *U.S. airstrikes hit ISIS inside Syria for first time*, CNN (Sept. 23, 2014), <http://www.cnn.com/2014/09/22/world/meast/u-s-airstrikes-isis-syria/>; Avaneesh Pandey, *Pentagon Acknowledges Airstrikes Against ISIS May Have Caused Civilian Deaths, Initiates Investigation*, INT'L BUS. TIMES (May 26, 2015), <http://www.ibtimes.com/pentagon-acknowledges-airstrikes-against-isis-may-have-caused-civilian-deaths-1775602> (reporting, inter alia, "U.S.-led coalition has carried out nearly 1,400 airstrikes on ISIS strongholds in Iraq and Syria since the aerial offensive began last August. . .").

130. Helene Cooper & Anne Barnard, *Jordan and Emirates Carry Out Airstrikes in Syria Against ISIS*, N.Y. TIMES (Feb. 20, 2015), available at http://www.nytimes.com/2015/02/11/world/middleeast/united-arab-emirates-resume-airstrikes-against-isis.html?_r=0 (reporting both Jordan and the United Arab Emirates have carried out air strikes against ISIS in Syria).

131. *Id.*

ers should face international criminal responsibility.¹³² In November 2014, the United Nations' Independent International Commission of Inquiry on Syria concluded that ISIS has committed war crimes and crimes against humanity, and that leaders of the militant group should be held accountable by organizations such as the International Criminal Court.¹³³ In light of all of the above, it seems logical to argue that international law allows states like the United States and Jordan to intervene in Syria and Iraq, because the latter are unable or unwilling to control the refugee catastrophe brought about by the ISIS conflict. Harold Koh's proposed framework, delineating the legal parameters of humanitarian intervention, is perfectly applicable to the current refugee crisis in Iraq and Syria, caused by ISIS.

VII. CONCLUSION

"Because humanitarian intervention is a necessity in today's world of civil strife and violent internal conflicts, its legal framework needs to be developed and constructed~~False~~"¹³⁴ If humanitarian intervention has become a necessity in today's world, then international law needs to evolve and adapt to embrace this concept. Severe refugee crises, such as those taking place in Iraq and Syria, represent instances of tremendous humanitarian suffering, and there is no reason to exclude these types of situations from the content of the developing norm of humanitarian intervention. The above-described legal framework for humanitarian intervention, proposed by Harold Koh, represents a welcome development in the field of international law; moreover, Koh's proposed framework covers situations of refugee crises.¹³⁵ The international community should rely on this type of novel legal argument to intervene in Iraq and Syria, in order to halt the ongoing refugee catastrophe, under the paradigm of humanitarian intervention.

132. John B. Bellinger III, *Make ISIS' Leaders Face Justice*, N.Y. TIMES (Apr. 2, 2015), http://www.nytimes.com/2015/04/03/opinion/make-isis-leaders-face-justice.html?_r=0 (arguing ISIS leaders should stand prosecution before International Criminal Court).

133. *Independent International Commission of Inquiry on the Syrian Arab Republic*, U.N. OFFICE OF THE HIGH COMM'R FOR HUMAN RIGHTS, <http://www.ohchr.org/EN/HRBodies/HRC/IICISyria/Pages/IndependentInternationalCommission.aspx>.

134. Sterio, *supra* note 127, at 169.

135. See Koh Part II, *supra* note 78.

