The ISIS Crisis and The Development of International Humanitarian Law

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THE ISIS CRISIS AND THE DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW

Johan D. van der Vyver*

The international community was shocked in the extreme in recent years by acts of profound barbarism committed by a militant Muslim group, initially called Islamic State of Iraq and the Levant (ISIL) but changing its name in June 2014 to Islamic State in Iraq and Syria (ISIS). The organization is committed to the dictates of a certain brand of the Sunni faction and strives toward bringing most traditionally Muslim inhabited states—besides Iraq and Syria—under its political control, including Jordan, Israel, Palestine, Lebanon, Cyprus and Southern Turkey. It acquired considerable financial resources by gaining control of oil fields in the eastern province of Deir-al-Zour in Iraq, taking control of bank institutions and allocating to itself large sums of money, and receiving generous funding from wealthy donors in predominantly Sunni countries of the Persian Gulf. It lured into its ranks thousands of foreign volunteers, including some from the United States and the United Kingdom. In order to achieve its political objectives, it embarked on horrific acts of terror violence.

A key question for purposes of this survey is what military action can be taken by the international community of states, or by individual sovereignties, to combat the threat emanating from the crime of aggression and the acts of terror violence committed by proponents of ISIL/ISIS. We shall see that existing norms of jus ad bellum do not authorize without further ado military

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intervention across national borders against ISIS strongholds. However, international humanitarian law is currently in the making in what has come to be denoted as the “unwilling and unable paradigm” and which is aimed at authorizing military action by State A against terrorist groups located in State B if the government of State B is either unwilling or unable to prevent its territory from being used as a launching pad for acts of terror violence. Although proponents of the unwilling or unable paradigm sought to bring the military response against the perpetrators of terror violence under the rubric of the right to self-defense, it will appear that its implementation is not confined to situations that will warrant defensive military action.

A particular focus of this essay is airstrikes by military forces of the United States against selected targets in Iraq and Syria which has come to be justified on basis of the unwilling or unable paradigm. There are very special reasons (a) why the American airstrikes are not confined to ISIS strongholds in Iraq but also include al-Qaeda targets in Syria, and (b) why spokespersons of the Obama administration continue to refer to ISIL, as the terror group called itself before it changed its name to ISIS in June 2014. It will be argued that both (a) and (b) stemmed from the fact that the Obama administration did not obtain congressional approval for the airstrikes in the Middle East as required by the American Constitution and maintained that the airstrikes are covered by, amongst others, the congressional approval of a military response to the terror attacks of September 11th orchestrated by al-Qaeda. It will emerge that al-Qaeda was a component of ISIL but not of ISIS, and therefore the Obama administration had to include armed attacks against al-Qaeda, and kept on referring to ISIL, to afford credence to its reliance on the congressional approval of an armed response to the War on Terror sparked by the acts of terror violence of 9/11.

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

In Section C, special attention is paid to the ISIS crisis and the shortcomings of international humanitarian law to counteract terrorism of the kind and on the scale orchestrated by ISIS. A very special focus of this Section is the airstrikes by American armed forces against al-Qaeda and ISIS targets in Iraq and Syria, problems in affording legality to those airstrikes within the confines of American constitutional law and of *jus ad bellum*, and the evolution of a rule of international humanitarian law to accommodate an offensive against the perpetrators of terror violence if the government of the country from which they operate is either unwilling or unable to take action to combat the acts of terror violence.

**A Historical Background**

The Sunni insurgent group originated in 1999 under the name of *Jama’at al-Tawhid wal-Jihad* as the forerunner of *Tanzim Qaidat al-Jahid fi Bilad al-Rafidayn* commonly known as al-Qaeda in Iraq. In 2006, it joined other Sunni insurgent groups to form the Mujahideen Shura Council which consolidated into the Islamic State of Iraq and with a significant presence in Al Anbar, Nineveh and Kirkut. In 2013, the group changed its name to Islamic State of Iraq and the Levant (ISIL). It grew significantly under the leadership of Abu Bakr al-Baghdad due to what was perceived as discrimination against the Sunni faction of Islam. Until February 2014, ISIL had close ties with al-Qaeda, but following a power struggle al-Qaeda cut all ties with the group. On June 29, 2014, the group was renamed to become Islamic State of Iraq and Syria (ISIS).

ISIL/ISIS strictly imposes Islamic punishments such as amputations, beheadings and crucifixions, and has become notorious on account of innumerable acts of extreme terror violence. The beheadings of American journalist James Foley, American/Israeli journalist Steven Sotloff, British humanitarian aid workers David Haines, American humanitarian aid worker Peter Kassig, British taxi driver and humanitarian aid worker Alan Henning, and Japanese journalist Kenji Goto, and the burning to death of a Jordanian pilot Moath al-Kasasbeh, were videotaped and displayed
on the Internet for the world to see. On February 15, 2015, ISIS publicly displayed the beheading in Libya of 21 Egyptian Coptic Christian fishermen. On March 29, 2015 a video was released showing the beheading of eight men said to be Shiite Muslims. ISIS was also responsible for the destruction of valuable religious shrines and works of art that were of special significance to rival Islamic factions.

The Security Council of the United Nations, acting under Chapter VII of the UN Charter, in August 2014 deplored and condemned “in the strongest terms the terrorist acts of ISIL and its violent extremist ideology, and its continuous gross, systematic and widespread abuses of human rights and violations of international humanitarian law.”3 In September 2014, the European Parliament in similar vein condemned “the atrocities threatened or committed by ISIS against various groups not sharing their convictions, above all religious and ethnic minorities such as Christians, Yezidi, Shabak and Turkmen, but also Shiites and Sunnis,” and denounced “the odious assassination by ISIS of two American journalists and a British aid worker.”4

ISIS/ISIS was proclaimed a terrorists organization by the United States (on December 17, 2004), Australia (on March 2, 2006), Canada (on August 20, 2012), Turkey (on October 30, 2013), Saudi Arabia (on March 7, 2014), the United Kingdom (on June 20, 2014), Indonesia (on August 1, 2014), the United Arab Emirates (on August 20, 2014), Israel (on September 3, 2014), Malaysia (on September 24, 2014), Egypt (on November 30, 2014), India (on December 16, 2014), the Russian Federation (on December 29, 2014), Kyrgyzstan (on March 25, 2015), and Pakistan (on August 29, 2015).5 ISIS is furthermore banned in Germany (since September 2014) and Switzerland (since October 2014).6 The banning includes the prohibition of propaganda in favor of, and financial support for, ISIS. The terrorist acts of ISIS in Iraq were also condemned by Syria,7 while Jordan in

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5 Wikipedia “Islamic State of Iraq and the Levant”, supra note 1, at 19/94.
6 Id., at 20/94.
7 Syrian Arab News Agency “Syria Condemns Terrorist Acts in Iraq, Expresses Solidarity with
February 2015 made its condemnation of the organization known by launched airstrikes against ISIS targets.8

It is perhaps important to note at the outset that although the militant group, absent al-Qaeda support, changes its name from ISIL to ISIS in June 2014, President Barak Obama and other spokespersons of the Department of State persist in referring to the group as ISIL. This is probably not due to lack of information on the part of spokespersons of the American government but can most likely be attributed to a special problem of the Obama administration, namely that it has not receive congressional approval for the airstrikes in the Middle East but relied on the congressional approval of the War on Terror that was sparked by the terrorist attacks of 9/11 which was orchestrated by al-Qaeda. This will be alluded to later on in this essay.

B. JUS AD BELLUM

“The history of humankind has been the history of wars.” This assessment of human history by Benjamin Ferencz,9 Chief Prosecutor in the Einsatzgruppen Case at Nuremberg in which 22 high-ranking Nazi officials were prosecuted and convicted for the slaughtering of more than a million innocent men, women, and children,10 can unfortunately not be faulted. As noted by Theodor Meron in his analysis of the (futile) attempts to apply human rights principles in situations of armed conflict:

To genuinely humanize humanitarian law, it would be necessary to put an end to all kinds of armed conflicts. But wars have been a part of the human condition since the struggle between Cain and Abel, and regrettably they are likely to

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remain so.\textsuperscript{11} However, in more recent times, international humanitarian law was set on a course to limit as far as possible the use of armed force as a means of settling international disputes.

1. Limitation of the Use of Armed Force

Following World War I, the French Minister of Foreign Affairs, Aristide Briand, took the initiative in proposing a bilateral agreement between the United States and France to outlaw war between those two countries. U.S. President Calvin Coolidge and Secretary of State Frank B. Kellogg proposed instead that France and the United States take the lead in inviting all nations to join them in outlawing war between States. It was understood that the pact will only apply to acts of aggression and not to military actions taken in self-defense. On August 27, 1928, altogether fifteen nations signed the \textit{Kellogg-Briand Pact}, also known as the \textit{Pact of Paris}. Besides France and the United States, the signatory States included Australia, Belgium, Canada, Czechoslovakia, Germany, India, Ireland, Italy, Japan, New Zealand, Poland, South Africa, and the United Kingdom. The signatories condemned recourse to war for the solution of international controversies and undertook to settle all disputes, without exception, by pacific means.\textsuperscript{12}

Frank Kellogg received the Nobel Peace Prize in 1929 for his contribution to the signing of the \textit{Pact of Paris}. However, most regrettably the Peace Pact did not achieve its noble objective. The Japanese invasion in 1931 of Manchuria in mainland China denoted the first crack in the wall of peace, and aggressive expansionism of Germany and Italy within that same time frame eventually culminated in World War II (1939-1945). Following the War, renewed efforts emerged to maintain peace and security in the world.

The United Nations Organization was founded in 1945 “to save succeeding generations from the scourge of war” and to that end, to unite the strength of its Members “to maintain international peace and security” and to ensure “that armed force shall not be used, save in the

\textsuperscript{11} Theodor Meron, \textit{The Humanization of Humanitarian Law}, 94 AJIL 239, at 240 (2000).

common interest.”13 It called on Member States to settle their international disputes by peaceful means “in such a manner that international peace and security, and justice, are not endangered.”14 It recorded in Article 2(4) of the U.N. Charter a commitment of all Member States to refrain from the threat or use of force against the territorial integrity or political independence of any State, “or in any other manner inconsistent with the Purposes of the United Nations.”15 Those purposes include a resolve:

To maintain international peace and security, and to that end: to take effective collective measures . . . for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means . . . adjustment or settlement of international disputes or situations which might lead to a breach of the peace.16

In terms of the U.N. Charter, “parties to a dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.”17

The General Assembly and the Security Council has repeatedly reiterated the commitment of Member States to international peace and security. The United Nations Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations of 1970 recalled “the duty of States to refrain in their international relations from military, political, economic and any other form of coercion aimed against the political independence or territorial integrity of States.”18 The General Assembly in 1999

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14 Id., art. 2(3).
15 Id., art. 2(4).
16 Id., art. 1(1).
17 Id., art. 33.
adopted a *Declaration on a Culture of Peace*, which was to be achieved through education, sustainable economic and social development, the promotion of human right and securing equality between women and men, fostering democratic principles and practices, advancing understanding, tolerance and solidarity in society, supporting the free flow of information and knowledge, and general and complete disarmament.\(^{19}\) In 2004, the General Assembly published a report on challenges that confront the international community in securing a more secure world, and listed certain strategies for meeting those challenges, including better international regulatory frameworks and norms (mentioning by name the International Criminal Court as a strategy that might deter parties from committing crimes against humanity and war crimes), better information and analysis to facilitate early-warning indications of threatening conditions, preventive diplomacy and mediation, and early (preventive) deployment of peacekeeping forces.\(^{20}\) Earlier, it proclaimed the year 2000 to be the “International Year for the Culture of Peace”.\(^{21}\) The Security Council added its voice to the pursuit of peace by calling on Member States of the United Nations to support and develop a conflict prevention strategy, instructing the Secretary-General to convey to the Council his assessment of threats to international peace and security, and to keep potential conflict situations under close review so as to take early and effective action to prevent armed conflict.\(^{22}\) The Security Council reminded Member States of the United Nations of their obligation to settle their disputes by peaceful means.\(^{23}\)

It is fair to conclude that “in the present development stage of international law, the prohibition to use force has established itself as a generally recognized customary and binding principle.”\(^{24}\) Armed intervention is authorized by the U.N. Charter in two instances only:

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\(^{23}\) *Id.*, at para. 9.

\(^{24}\) Umberto Leanza, *The Historical Background*, in Mauro Politi & Giuseppe Nesi (eds.), THE
(i) Collective armed intervention under auspices of the Security Council as a means of putting an end to a situation that constitutes a threat to the peace, a breach of the peace or an act of aggression;\(^{25}\) and

(ii) Individual or collective self-defense in cases where an armed attack occurred against a Member State of the United Nations.\(^{26}\)

This raises the question whether or not armed interventions other than those mentioned in the U.N. Charter are still, or have become, lawful within the confines of contemporary international humanitarian law.

2. Authorization of Armed Interventions Not Mentioned in the U.N. Charter

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

(a) The Uniting for Peace Resolution

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

[I]f the Security Council, because of lack of unanimity of the Permanent Members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace or act of


\(^{26}\) *Id.*, art. 51. In cases of collective self-defense, the State for whose benefit this right is used must declare itself to be the victim of an armed attack. *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America): Merits*, 1986 I.C.J. 13, para. 196 (at 103) (June 27, 1986). The victim State must furthermore request the assistance of the other State or States participating in the collective defense of the victim State. *Id.*, para. 199 (at 105).
aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or an act of aggression the use of armed force when necessary, to maintain or restore international peace and security.27

The Resolution was adopted in consequence of Russian responses to the Resolution of the Security Council that authorized an armed intervention to resolve the Korean crisis and which culminated in the Korean War (1950-1953). The Resolution was adopted in the absence of a representative of the Union of Soviet Socialist Republics (USSR) who boycotted the meeting of the Security Council in protest against allowing Taiwan to represent China in the United Nations structures. In August 1950, after the return of the Soviet representative to the Security Council, the USSR exercised its veto power to impede all further resolutions. Western countries, under the leadership of the United States of America, thereupon initiated the *Uniting for Peace Resolution*, against the resistance of the Eastern Block, to permit the General Assembly to resolve situations constituting a threat to the peace, a breach of the peace, or an act of aggression. Thus far the Resolution was invoked on ten occasions, mostly by the Security Council, to authorize “Emergency Special Sessions” of the General Assembly to deal with a variety of crisis situations.28 The use of armed force, which under


28 The first Emergency Special Session of the General Session was convened at the request of the Security Council on 1-10 November 1956 to deal with a crisis in the Middle East following the annexation of the Suez Canal by Egypt; the second Emergency Special Session of the General Session was convened at the request of the Security Council on 4-10 November 1956 to deal with a crisis in Hungary following its invasion by the Soviet Union; the third Emergency Special Session of the General Session was convened at the request of the Security Council on 8-21 August 1958 to deal with a crisis in the Middle East in consequence of the deployment of foreign troops in Lebanon and Jordan; the fourth Emergency Special Session of the General Session was convened at the request of the Security Council on 17-19 September 1960 to deal with the situation in the Democratic Republic of the Congo; the fifth Emergency Special Session of the General Session was convened at the request of the Security Council on 17-18 June 1967 to deal with measures taken by Israel to change the status of east Jerusalem; the sixth Emergency Special Session of the General Session was convened at the request of the Security Council on 10-14 January 1980 to deal with a crisis in Afghanistan; the seventh Emergency Special Sessions of the General Session was convened at the request of Senegal on 22-29 July 1980, 20-28 April 1982, 25-26 June 1982, 16-19 August 1982 and 24 September 1982 to deal with the situation in Palestine; the eighth Emergency Special Session of the General Session was convened at the request of the Zimbabwe on 13-14 September 1981 to deal with the situation in Namibia; the ninth Emergency Special Session of the General Session was convened at the request of the Security Council on 29 January-5 February 1982 to deal with the
the *Uniting for Peace Resolution* can be legalized by the General Assembly in cases of a breach of the peace or an act of aggression (not if the situation merely constitutes a threat to the peace) was never authorized by the General Assembly.

**(b) Wars of Liberation**

Wars of liberation are confined to an armed struggle against colonial rule, foreign domination, and racist regimes, and the legitimacy of these (and only these) instances of militant action have also been endorsed by the General Assembly of the United Nations. The General Assembly was quite explicit in saying that the “legitimate struggle” includes the armed struggle of liberation movements. When Resolution 3314 (XXIX) of 14 December 1974 was adopted to define acts of aggression to serve as a guide for the Security Council when called upon to exercise its Chapter VII powers, the General Assembly took special precautions not to adversely implicate wars of liberation. Article 7 of Resolution 3314 (XXIX) thus provides:

> Nothing in this definition . . . could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter [of the United Nations], of peoples forcibly deprived of that right and referred to in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, particularly peoples under colonial and racist regimes or other

situation in occupied Arab territories; the tenth Emergency Special Session of the General Session was convened at the request of Qatar for its first session in April 1997 to deal with illegal Israeli action in occupied East Jerusalem and the rest of the occupied territories.


forms of alien domination: nor the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter and in conformity with the above-mentioned Declaration.  

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

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

The question whether or not the U.N. Charter provisions deal comprehensively with legally permissible armed interventions has mostly been debated in the context of (i) pre-emptive self-defense action, and (b) humanitarian intervention.  

(a)  Pre-emptive self-defense action

Article 51 of the U.N. Charter provides in part:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations.  

Since Article 51 confines the right of Member States of the United Nation to take individual or collective self-defense action “if an armed attack occurs,” the question whether or not this

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33 UN Charter, supra note 13, art. 51. In cases of collective self-defense, the State for whose benefit this right is used must declare itself to be the victim of an armed attack. Nicaragua v. United States of America, supra note 26, para. 196 (at 103). The victim State must furthermore request the assistance of the other State or States participating in the collective defense of the victim State. Id., para. 199 (at 105).

34 Id.
provision precludes pre-emptive self-defense action is in itself problematic.\textsuperscript{35} It stands to reason, though, that a State need not wait for the other side to strike the first blow if it is abundantly clear and absolutely certain that an armed attack is imminent.\textsuperscript{36} As noted by Sir Humphrey Waldock:

Where there is convincing evidence not merely of threats and potential danger but of an attack being actually mounted, then an armed attack may be said to have begun to occur, though it has not passed the frontier.\textsuperscript{37}

Some analysts maintain that reference in Article 51 to “the inherent right of individual or collective self-defense” [emphasis added] could arguably include pre-emptive action.\textsuperscript{38} The inherent right to self-defense includes more than merely taking defensive action after an attack has occurred; reference to individual or collective self-defense “if an attack occurs” was intended “to list [merely] one situation in which a state could clearly exercise that right.”\textsuperscript{39}

The General Assembly of the United Nations endorsed a right to pre-emptive self-defense action, proclaiming “. . . a threatened State, according to established international law, can take military action as long as the threatened attack is \textit{imminent}, no other means would deflect it and the action is proportionate.”\textsuperscript{40} In its \textit{National Security Strategy} of 2002, the United States also endorsed the right to pre-emptive self-defense action:

\begin{quote}
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\end{quote}

\textsuperscript{35} \textit{See Stanimir A. Alexandrov, Self-Defence Against the Use of Force in International Law}, 165. The Hague: Kluwer Law International; Mary Ellen O’Connell, \textit{The Myth of Preemptive Self-Defense}, at 5 (August 2002), available at \url{http://www.asil.org/taskforce/oconnell.pdf} (interpreting Article 51 to mean that “[a]n attack must be underway or must have already occurred in order to trigger the right to unilateral self-defense”).

\textsuperscript{36} \textit{See W. Michael Reisman, International Legal Responses to Terrorism}, 22 \textit{Houston J. Int’l L.} 3, at 17 (1999); and \textit{see also Anthony Clark Arend & Robert J. Beck, International Law and the Use of Force: Beyond the UN Charter Paradigm}, 186. London: Routledge (1993) (stating that “[w]ith the demise of Article 2(4), it is reasonable to assume that this preexisting right [to pre-emptive self-defense] would be rehabilitated”).


\textsuperscript{38} \textit{Arend & Beck, supra} note 36, at 72-73; and \textit{see O’Connell, supra} note 35, at 12; Mark Ellen O’Connell, \textit{Review Essay: Re-leashing the Dogs of War}, 97 AJIL 446, at 453 (2003).

\textsuperscript{39} \textit{Arend & Beck, supra} note 36, at 73.

\textsuperscript{40} \textit{Report of the High-Level Panel on Threats, Challenges and Change, supra} note 20, at para. 188.
The United States has long maintained the option of preemptive actions to counter a sufficient threat to our national security. The greater the threat, the greater the risk of inaction—and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy’s attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively.\textsuperscript{41}

It should be noted, though, that whereas the United States used the concepts of “pre-emptive” and “anticipatory” action interchangeably,\textsuperscript{42} the General Assembly made a distinction between “pre-emptive” and “anticipatory” self-defense action, defining the former concept as action “against an imminent or proximate threat” and the latter as action “against a non-imminent and non-proximate one.”\textsuperscript{43} Even though it could be argued “that the potential harm from some threats (e.g. terrorist armed with a nuclear weapon) is so great that one simply cannot risk waiting until they become imminent, and that less harm may be done (e.g., avoiding a nuclear exchange or radioactive fallout from a reactor destruction) by acting earlier,”\textsuperscript{44} international law requires “that if there are good arguments for preventive military action, with good evidence to support them, they should be put to the Security Council, which can authorize such action if it chooses to.”\textsuperscript{45} And what if the Security Council for whatever reason should not authorize anticipatory defensive action? Then, said the General Assembly, “there will be, by definition, time to pursue other strategies, including persuasion, negotiation, deterrence and containment—and to visit again the military option.”\textsuperscript{46}

It is commonly accepted that pre-emptive self-defense must be confined to the circumstances specified by American Secretary of State Webster in a diplomatic communique to his British counterpart, Lord Ashburton, following the seizure and destruction of a steamboat SS


\textsuperscript{42} Id; and note that this writer has also in the past used the two terms interchangeably. See Johan D. van der Vyver, Ius Contra Bellum and American Foreign Policy, 20 SOU. Afr. Y.B. INT’L L 1, at 4-5 (2003).

\textsuperscript{43} Report of the High-Level Panel on Threats, Challenges and Change, supra note 20, at para. 189.

\textsuperscript{44} Id.

\textsuperscript{45} Id., at para. 190.

\textsuperscript{46} Id.
Caroline, owned by a U.S. citizen, by British and Canadian loyalists, while the ship was moored in American waters. The Caroline affair resulted from the following fact scenario: During the 19th century, a group of rebels from Upper Canada (currently Ontario) revolted against British colonial rule. The rebels were forced to leave the country and took refuge on Navy Island on the American side of the Niagara Falls. Sympathizers with their cause from within the United States supplied the rebels with money, provisions, and arms that were conveyed to Navy Island by SS Caroline. On December 29, 1937, a group of British and Canadian loyalists crossed the international border between Canada and the United States, seized the SS Caroline in American waters, chased away its crew, set the ship alight, and left it adrift over the Niagara Falls. In the exchange of diplomatic notes, Lord Ashburton, while apologizing for the invasion of United States territory, maintained that the destruction of SS Caroline was justified by the necessity of self-defense. U.S. Secretary of State Webster responded that it would be up to Her Majesty’s Government “to show, upon what state of facts, and what rules of international law, the destruction of the ‘Caroline’ is to be defended,” and in particular “to show a necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation.”

47 Letter from Daniel Webster, U.S. Secretary of State, to Lord Ashburton, Special British Minister (Aug. 6, 1842, reprinted in 2 J. MOORE, DIGEST OF INT’L L, sec. 217 at 409 (1906).


emptive military action.\textsuperscript{50} It was, for example, quoted by the Nuremberg Military Tribunal in the context of preventive armed intervention.\textsuperscript{51} Pre-emptive self-defense must therefore remain confined to “situations in which the imminence of an attack is so clear and the danger so great that defensive action is essential for self-preservation.”\textsuperscript{52} It must also comply with the test of proportionality.\textsuperscript{53}

(b) \textit{Humanitarian intervention}

Humanitarian intervention denotes instances of armed conflict where State A takes military action against State B to protect the citizens of State B against severe atrocities committed by the powers that be of State B.\textsuperscript{54} It owes its origin to the writings of Grotius.\textsuperscript{55} Military intervention against ISIS has brought \textit{jus ad bellum} relating to humanitarian intervention in contention and therefore requires special attention in the context of the present survey.

There are those who bluntly deny the legality of humanitarian intervention without Security

\textsuperscript{50} See Waldock, \textit{supra} note 37, at 498; Reisman, \textit{supra} note 37, at 47, 48-49.


\textsuperscript{53} AREND & BECK, \textit{supra} note 36, at 249, note 44.

\textsuperscript{54} For example, the invasion of Uganda in 1979 by Tanzanian forces to rescue the peoples of Uganda from the brutal reign of terror of President Idi Amin. See U.D. Umozurike, \textit{Tanzania’s Intervention in Uganda}, 20 ARCHIV DES VÖLKERRECHTS 301, at 312-13 (1982). Justification of the military action of NATO forces of 1999 in Kosovo to put an end to the repression of the peoples of that region by the Serbian governmental authorities of Serbia can also find no other possible justification than humanitarian intervention. See Richard B. Bilder, \textit{Kosovo and the “New Interventionism”: Promise or Peril?}, 9 J. TRANSNAT’L L. & POL’Y 153 (1999).

\textsuperscript{55} In his seminal work on the law of war and peace, Grotius posed the question “whether there may be a just cause for undertaking war on behalf of the subjects of another ruler, in order to protect them from wrong at his hands.” GROTUIS, \textit{DE JURE BELLII AC PACIS LIBRI TRES}, para. 2.25.8(1). He answered the question in the positive, provided the wrong inflicted by the rules on his own subjects is obvious, explaining: “In conformity with this principle Constantine took up arms against Maxentius and Lucinius, and other Roman emperors either took up arms against the Persians, or threatened to do so, unless these should check their persecutions of the Christians on religious grounds.” \textit{Id.}, at 1.25.8(2).
Arguments in support of the continued legality, or the moral legitimacy, of humanitarian intervention have been wide-ranging. Justifications of humanitarian intervention can be reduced to three distinct approaches:

(i) The **literalist approach**, represented by Julius Stone (1907-1985), the Challis Professor of Jurisprudence and International Law at the University of Sydney (1942-1974) and thereafter Distinguished Professor of Jurisprudence and International Law at the Hastings College of Law of the University of California, maintained that Article 2(4) of the U.N. Charter does not forbid the threat or use of force *simpliciter*, but only the threat or use of force for specific unlawful purposes, namely “against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations”; and since humanitarian intervention does not seek to change territorial borders of the State under attack or to challenge the political independence of that State, it falls outside the scope of the Charter proscription. Furthermore, one cannot, according to Stone, reconcile a blanket prohibition of the threat or use of force with the provisions of Article 2(3) of the U.N. Charter, which calls upon Member States of the United Nations to settle international disputes by peaceful means and in such a manner that international peace, “and justice,” are...
not endangered.\textsuperscript{59}

(ii) The \textbf{flexible and teleological approach},\textsuperscript{60} represented by Michael Reisman, the Myres S. McDougal Professor of International Law at Yale Law School, argued that the prohibition of the threat or use of force must be read in conjunction with the overarching human rights concerns of the United Nations as recorded in several provisions of the U.N. Charter\textsuperscript{61} and of which humanitarian intervention is a logical extension.\textsuperscript{62}

(iii) The \textbf{emergency mechanism argument}, represented by Richard Baxter (1921-1980),\textsuperscript{63} Professor of Law at Harvard University (1954-1979) and Judge in the International Court of Justice (1979-1980), and Richard Lillich (1933-1996),\textsuperscript{64} Professor of International Law at the University of Virginia, based the justification for humanitarian intervention on a necessity deriving from the imperfections of the Security Council, due to the veto powers of the Permanent Members and the (then) prevailing Cold War, to execute its primary function of maintaining international peace and security: There is a need for humanitarian intervention exactly because the Security Council has been immobilized by the veto power of the Permanent Members. This presupposes that humanitarian intervention is to be “deactivated” should the Security Council ever begin to function smoothly.

\textsuperscript{59}STONE, supra note 58, at 95; and see also id., at 98-101.


\textsuperscript{61}U.N. Charter, supra note 13, Preamble and arts. 1, 55 and 56.


\textsuperscript{63}Richard Baxter (discussant in conference proceedings), in HUMANITARIAN INTERVENTION AND THE UNITED NATIONS, supra note 62, 53, at 54 (“... it is almost as if we were thrown back on customary international law by a breakdown of the Charter system”).

Although humanitarian intervention remains “a murky area of law and morality,” there does seem to be the need for “a form of collective intervention’ beyond the veto-bound Security Council,” but then under strict conditions relating, first, to the circumstances that would justify military action in a given situation, and secondly, the manner in which it is to be executed. Humanitarian intervention will only be warranted in exceptional circumstances of extreme, and at the time ongoing, violations of human rights; and as to the execution of an armed intervention, collective rather than unilateral action must be the norm. Humanitarian intervention has thus been defined as “the use of military force—consensual or otherwise—by regional and international bodies to prevent or stop massive and systematic human rights violations.” Human Rights Watch emphasized that nonconsensual military intervention would be justified “only when it is the last feasible option to avoid genocide or comparable mass slaughter,” and added that “given the risk to life inherent in any military action, only the most severe threats to life should warrant consideration of an international armed response.”

There are a number of prominent international lawyers, on the other hand, who maintain that humanitarian intervention is decidedly illegal but might in special circumstances derive a certain morally-defined justification, basing their reluctance to subscribe to the legality of humanitarian intervention on its potential abuse. Richard Falk, for example, argues that the

65 Thomas W. Smith, Moral Hazard and Humanitarian Law: The International Criminal Court and the Limits of Legalism, 39 INT’L POLITICS 175, at 189 (June 2002).


68 Mahmood Monshipouri & Claude E. Welch, The Search for International Human Rights and Justice: Coming to Terms with New Global Realities, 23 HUM. RTS. Q. 370, at 378 (2001); and see also Smith, supra note 65, at 178.


legitimacy, if not the legality, of retaliation—and the same, it is submitted, would apply to humanitarian intervention—derives from the “acceptability” of the use of force in the special circumstances that prompted its use:71

The assumption underlying such an approach is that the primary role of international law is to help governments plan how to act, rather than to permit some third-party judge to determine whether contested action is legal or not. In fact the function of the third-party judge can be performed properly only by attempting to assess in what respects and to what extent the governmental actor “violated” community norms of a presumptive nature.72

Jonathan Charney, commenting on the Kosovo bombings, likewise maintained that “keeping such intervention illegal and requiring states to break the law in extreme circumstances may be the best and most likely way to limit its abuse, despite not being a perfect solution.”73 The moral appeal of the use of force “would tend to mitigate or even overcome any perceived ‘illegality’” of such action.74

Ian Brownlie also proceeded on the assumption that humanitarian intervention is illegal,75 though it might be morally defensible in certain circumstances. To proclaim humanitarian intervention lawful if confined to those circumstances would still leave its application open to abuse.76 Referring to euthanasia as presenting an analogous dilemma, Brownlie argued that one’s responses to instances where humanitarian intervention would be justified by “higher


72 Id., at 442.

73 Jonathan I. Charney, Anticipatory Humanitarian Intervention in Kosovo, 93 AJIL 834, at 838 (1999); and see also Wolfgang G. Friedman, Comment, in LAW AND CIVIL WAR IN THE MODERN WORLD, supra note 29, 574, at 578-79 (maintaining that concepts such as humanitarian intervention have “at best attained the level of accepted international morality rather than law”).

74 Falk, supra, note 69, at 439 (also proclaiming that “[a] rule of conduct isolated from context is often too abstract to guide choice of action”).

75 Brownlie, supra note 60, at 226.

76 Id., at 223 and 225; and see also Ian Brownlie, Thoughts on Kind-Hearted Gunmen, in HUMANITARIAN INTERVENTION AND THE UNITED NATIONS, supra note 62, 139, at 147-48; Schachter, supra note 52, at 1629.
considerations of public policy and moral choice”\textsuperscript{77} should be conditioned by “moderation” while leaving the principle of its illegality intact: “Moderation in application does not necessarily display a legislative intent to cancel the principle so applied.”\textsuperscript{78}

1. The ISIS Crisis

The judgment of the International Court of Justice in the case of \textit{Nicaragua v. The United States of America} is clear authority for the proposition that a Government may seek military assistance from other Governments to repress a militant uprising within its borders, but military support by a foreign Government of the insurgent forces constitutes an infringement of state sovereignty and a violation of international law.\textsuperscript{79} Iraq has therefore, within the framework of contemporary international humanitarian law, requested military support from the United Kingdom, the United States, and a number of other western allies, in its armed struggle against ISIS.

On September 26, 2014, the British House of Commons adopted by 524 votes in favor, and 43 votes against, the following motion:

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

\textsuperscript{77} Brownlie, \textit{supra} note 76, at 146.

\textsuperscript{78} \textit{Id.}, at 147-48.

\textsuperscript{79} \textit{Nicaragua v. United States of America}, \textit{supra} note 26, at para. 195-98.
armed forces.\textsuperscript{80}

It is important to note that authorization by the House of Commons was confined to an armed intervention in the requesting State only.

On March 30, 2015, the Canadian House of Commons approved by majority vote a government proposal to extend the military campaign in Iraq for up to one year, and to authorize airstrikes in Syria.\textsuperscript{81} Confining British military support to operations in Iraq was based on the fact that Syria has not requested the United Kingdom (or Canada and the United States) to attack ISIS strongholds in that country. The United States, however, did, launch air attack against al-Qaeda targets in Syria.

Even though the American Constitution requires Congressional approval before going to war,\textsuperscript{82} President Obama initially did not request the consent of Congress for the military interventions in Iraq and Syria. He essentially based the legality of the airstrikes on the 2001 Authorization of Military Force against Terrorists, which authorized the President to use “all necessary and appropriate force” against those whom he determined “planned, authorized, committed or aided” the September 11\textsuperscript{th} attacks,\textsuperscript{83} and the 2002 Authorization for Use of Military Force against Iraq, which authorized the President—

- to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to—
  - (1) defend the national security of the United States against the continuing threat posed by Iraq; and
  - (2) enforce all relevant United Nations Security Council resolutions regarding

\textsuperscript{80} Cited in \textit{The Guardian} of Sept. 26, 2014.


\textsuperscript{82} Constitution of the United States of America, Art. 8(10).

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

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

It might be noted in passing that referring to ISIL instead of ISIS by American spokespersons is probably insisted upon in order to justify reliance for the current bombing campaign in Iraq on the 2001 Authorization of Military Force against Terrorists. Al-Qaeda was part of ISIL but is not part of ISIS. That, too, is probably the reason why the United States has not confined its armed attacks to ISIS targets in Iraq but has also engaged in airstrikes against al-Qaeda targets in Syria.

So, why not simply obtain Congressional authorization for the current airstrikes targeting ISIS? The answer to this question is in all likelihood the fear that Congress might decline to authorize those airstrikes, (i) because many members of Congress might consider airstrikes without the backing of American soldiers on the ground as futile, and/or (ii) clear indications that a vast number of Republicans will oppose any state action emanating from an Obama initiative merely in opposition to President Obama and irrespective of the merits of those initiatives. It might be noted

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in passing that the Obama administration did on February 12, 2015 submit a proposal to Congress for the authorization of “ground operations in limited circumstances,” including rescue operations and special forces operations to “take action against ISIL leadership.” However, the legality of the current military intervention in Iraq and Syria under the municipal law of the United States is beyond the reach of this survey. We are here concerned with the legality of the airstrikes under the prevailing norms of customary international law.

Within the confines of international humanitarian law, the airstrikes in Iraq by American and other national armed forces are clearly lawful because they were approved, and indeed requested, by the Government of Iraq. The airstrikes in Syria are most likely not lawful under the existing laws and practices of international humanitarian law, because they were not invited by the Government of Syria. The judgment of the ICJ in *Nicaragua v. the United States of America* can be cited in support of these assessments.85 The United States allegedly informed Syria of its intended airstrikes and requested the Syrian Government not to intervene86—and Syria as a matter of fact did not intervene. Could this be interpreted as implied consent? Probably not!

The airstrikes were not authorized by the Security Council of the United Nations. The Security Council in a Resolution of August 15, 2014 called on all States “to take all measures as may be necessary and appropriate and in accordance with their obligations under international law to counter incitement of terrorist acts motivated by extremism and intolerance perpetrated by individuals or entities associated with ISIL, ANF [Al Nusrah Front] and Al-Qaeda and to prevent the subversion of education, cultural and religious institutions by terrorists and their supporters.”87 Although “measures as may be necessary and appropriate” could be taken to include armed force, it was generally understood that the resolution was not intended to authorize an armed intervention. The representative of the Russian Federation, who supported the Resolution, stated quite

85 *See supra*, the text accompanying note 79.
emphatically that “it should not be taken as approval of military action.” The Syrian representative, who also supported the Resolution (the Resolution was adopted unanimously), called upon the Security Council “in the future, to consult with his country and others in the region in order to make its action against terrorism effective.” Legality of airstrikes beyond the borders of Iraq can therefore not be based on Security Council authorization under its Chapter VII powers.

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

It would seem therefore that the legality of the airstrikes in Syria do not come within the confines of existing rules of *jus ad bellum*. It would seem, though, that a new rule of international humanitarian law is currently in the making, which can be called the unwilling or unable paradigm.

2. The Unwilling or Unable Rationale

In a letter to the Secretary-General of the United Nations, dated September 23, 2014, Ambassador Samantha Power, representative of the United States of America to the United Nations, justified the airstrikes in Syria along the following lines:

> ISIL, and other terrorist groups in Syria are a threat not only to Iraq, but also to many other countries, including the United States and our partners in the region and beyond. States must be able to defend themselves, in accordance with the inherent right to self-defense, as reflected in Article 51 of the UN Charter, when, as is the case here, the government of the State where the threat is located is unwilling or unable to prevent the use of its territory for such attacks. The Syrian regime has shown that it cannot and will not confront these safe-havens effectively itself.  

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89 *Id.*, Statement by Bashar Ja’afari (Syria).

This brought onto the agenda a newly devised justification for militant self-defense and humanitarian action, which can conveniently be called “the unwilling or unable rationale”. Although Ms Power sought to justify military action resorted to within the confines of the unwilling or unable rationale as a matter of self-defense, the United States, for one, was not attacked, or under threat of an imminent attack, by ISIS.

Earlier, the unwilling or unable rationale was also endorsed by John Brennan, Assistant to the President for Homeland Security and Counterterrorism, in remarks addressed to the Program on Law and Security of Harvard Law School in 2011. He emphasized that while the United States will uphold legal principles of state sovereignty and the laws of war, it “reserve[s] the right to take unilateral action if or when other governments are unwilling or unable to take the necessary actions themselves.\(^91\) Attorney-General Eric Holder, speaking at Northwestern University School of Law in 2012, had this to say:

[T]here are instances where our government has a clear authority—and, I would argue, the responsibility—to defend the United States through the appropriate and lawful use of lethal force. . . .

This does not mean that we can use military force whenever and wherever we want. International legal principles, including respect for another nation’s sovereignty, constrain our ability to act unilaterally. But the use of force in foreign territory would be consistent with these international legal principles if conducted, for example, with the consent of the nation involved—or after a determination that the nation is unable or unwilling to deal effectively with a threat to the United States.\(^92\)

The unwilling or unable rationale can perhaps be traced back to a Report of the International Commission on Intervention and State Sovereignty of December 2001 on The


Responsibility to Protect, which proclaimed in summary:

Where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect.\(^{93}\)

Based on “the responsibility to protect” rather than “the right to intervene”, it has come to be acknowledged, according to the Commission, “that it is only if the state is unable or unwilling to fulfill this responsibility [to protect], or is itself the perpetrator, that it becomes the responsibility of the international community to act in its place.”\(^{94}\) A “culture of reaction” must accordingly be converted in the mindset of the international community into a “culture of prevention”.\(^{95}\) The Commission asserted the right to take military action in the event of unwillingness and inability on two fronts: self-defense and humanitarian intervention. The right to self-defense within the confines of article 51 of the U.N. Charter has thus been extended “to include the right to launch punitive raids into neighbouring countries that had shown themselves unwilling or unable to stop their territory being used as a launching pad for cross-border armed attacks or terrorist attacks.”\(^{96}\) As far as humanitarian intervention is concerned, the Commission noted an “emerging principle” of international humanitarian law proclaiming “that intervention for human protection purposes, including military intervention in extreme cases, is supportable when major harm to civilians is occurring or imminently apprehended, and the state in question is unable or unwilling to end the harm, or is itself the perpetrator.”\(^{97}\) The Commission emphasized, though, that “[m]ilitary intervention for human protection purposes must be regarded as an exceptional and extraordinary measure, and for it to be warranted, there must be serious and irreparable harm occurring to human

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\(^{94}\) Id., at para. 2.29.

\(^{95}\) Id., at para. 3.42.

\(^{96}\) Id., at para. 2.10.

\(^{97}\) Id., at para. 2.25.
beings, or immediately likely to occur.”\textsuperscript{98} Military intervention for human protection purposes is in the opinion of the Commission justified in two “broad sets of circumstances” only, namely:

- large scale loss of life, actual or apprehended, with genocidal intent or not, which is the product either of deliberate state action, or state neglect or inability to act, or a failed state situation; or
- large scale ‘ethnic cleansing,’ actual or apprehended, whether carried out by killing, forced expulsion, acts of terror or rape.\textsuperscript{99}

These conditions, according to the Commission, satisfies the “just cause” component of a decision to intervene.\textsuperscript{100} The barbaric acts executed by ISIS clearly come within the confines of these indisputable ignitions of a just cause.

It should be noted that humanitarian intervention in the traditional sense is aimed at toppling a repressive government responsible for severe violations of the human rights and fundamental freedoms of its own people. The unwilling or unable rationale authorizes military intervention by State A against terrorist groups in State B in cases where State B is unwilling or unable to repress the acts of terrorism committed or orchestrated within its borders. It does not aim at toppling the unwilling or unable government.

Some of the above citations seem to base the legality of military action against terrorists operating from within a territory under the rule of a government that is unwilling or unable to repress their acts of terror violence on the right to self-defense proclaimed in Article 51 of the U.N. Charter. This, too, is not really the case—at least not in all circumstances. The United States, the United Kingdom, and Canada, for example, have not been attacked by ISIS, and such attacks are also not imminent as required by contemporary international humanitarian law to afford legality to pre-emptive self-defense action within the confines stipulated in the Caroline Case. It is fair to conclude, therefore, that the unwilling or unable paradigm represents a new rule of \textit{jus ad bellum}

\textsuperscript{98} \textit{Id.}, at para. 4.18.
\textsuperscript{99} \textit{Id.}, at para. 4.19.
\textsuperscript{100} \textit{Id.}
D. CONCLUDING OBSERVATIONS

In June 2001, the Secretary General of the United Nations submitted a Report to the General Assembly, at the request of the Security Council, on Prevention of Armed Conflict, in which he advocated the obvious: Prevention is better than cure.101 The Report aspired towards moving “the international community from a culture of reaction to a culture of prevention.”102 Having asserted that “the primary responsibility for conflict prevention rests with national Governments and other local actors,”103 the Report identified as “root causes” of armed conflicts, “socio-economic inequities and inequalities, systematic ethnic discrimination, denial of human rights, disputes over political participation or long-standing grievances over land and other resource allocation.”104 The pursuit of “long-term effective preventive strategies” can include “political, developmental, humanitarian and human rights programmes,”105 as well as “investment in sustainable development.”106 Past experiences have shown “that the earlier the root causes of a potential conflict are identified and effectively addressed, the more likely it is that the parties to a conflict will be ready to engage in a constructive dialogue, address the actual grievances that lie at the root of the potential conflict and refrain from the use of force to achieve their aims.”107 Among the many sustainable strategies that should be pursued in order to achieve long-term prevention of armed conflict, is “a focus on strengthening respect for human rights and addressing core issues of human rights violations, wherever they occur.”108 Special mention is made of the “vital role” which the

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102 Id., at para. II.B.24.
104 Id., at para. I.7.
107 Id., at para. VII.A.167.
108 Id., at para. IV.F.94.
International Criminal Court will have “in determining the most flagrant violation of human rights through the enforcement of international criminal responsibility.”

Looking at world events that followed the compilation of this noble Report, one cannot but cry in despair.

This essay is not focused on the causes as such of armed conflicts, but rather on the military responses to acts of orchestrated violence. In this regard it would seem that international humanitarian law always lags behind the times. Conventions regulating the conduct of armed conflicts are drafted with past experiences in mind, and are as far as means and methods of conducting armed interventions are concerned, almost invariably outdated at the time of their adoption. The Geneva Conventions of 12 August 1949 were designed with a view to the perceptions of armed conflict that was evidenced by World War II at a time when armed conflicts of that kind were no longer common. Protocols were added to the 1949 conventions in 1977 with a view to including guerilla warfare in the concept of armed conflict, but again at a time when belligerents embarked on other means and methods of conducting hostilities. And the international community of states is yet to come to grips with modern technology as a means of combat, as exemplified by newly devised strategies of cyber warfare.

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

It seems evident that the unwilling and unable paradigm complies with these criteria.

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109 Id., at para. IV.F.97.