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Mary Ellen O'Connell

*University of Notre Dame Law School*

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## The Popular but Unlawful Armed Reprisal

MARY ELLEN O'CONNELL<sup>αβ</sup>

In the early morning hours of April 6, 2017, United States President Donald Trump ordered an unprecedented attack on a Syrian Air Force base.<sup>1</sup> The U.S. Navy fired fifty-nine Tomahawk Cruise missiles from ships in the Mediterranean, reportedly killing nine, including four children, and damaging property.<sup>2</sup> Trump announced that the attack was a response to the Syrian government's alleged use of chemical weapons days earlier, in which seventy-two died.<sup>3</sup> Syria denied carrying out the chemical attack, and the U.S. offered no public legal justification for its actions.<sup>4</sup> Nevertheless, the French and German governments issued a joint press release stating that the U.S. attacks were a "just and proportionate" response to the use of chemical weapons.<sup>5</sup> Indeed, the U.S. attacks were generally met with approval in the

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<sup>β</sup> This Article is based on Professor O'Connell's presentation of the Ohio Northern University Pettit College of Law Dean's Lecture of October 19, 2017.

1. Jason Le Miere, *Trump's Attack on Syria Killed Four Children, State News Agency Claims*, NEWSWEEK (Apr. 7, 2017, 11:10 AM), <http://www.newsweek.com/syria-attack-children-civilian-killed-580555>.

2. *Id.*

3. Jason Collie & Francesca Gillet, *Syria Air Strikes: UK Backs Donald Trump's Cruise Missile Strike in Response to Assad's Chemical Attack Which Killed 72 Civilians*, EVENINGSTANDARD (Apr. 7, 2017, 5:47 PM), <https://www.standard.co.uk/news/world/us-launches-cruise-missile-strike-on-syria-after-chemical-attack-that-killed-72-people-a3509446.html>.

4. See Sabrina Siddiqui & Lauren Gambino, *Are Donald Trump's Missile Strikes in Syria Legal?*, GUARDIAN (Apr. 7, 2017, 5:26 PM), <https://www.theguardian.com/us-news/2017/apr/07/donald-trump-us-missile-strikes-syria-legal>.

5. Chiara Palazzo & Peter Foster, *'Assad Bears Full Responsibility': How the World Reacted to Donald Trump's Missile Strike on Syria*, TELEGRAPH (UK) (Apr. 7, 2017, 6:37 AM), <http://www.telegraph.co.uk/news/2017/04/07/us-air-strike-syria-world-reacted-donald-trumps-decision-intervene/>; see Aldo Zammit Borda, *The Precedent Set by the US Reprisal Against the Use of Chemical Weapons in Syria*, EJIL: TALK! (May 1, 2017), <https://www.ejiltalk.org/the-precedent-set-by-the-us-reprisal-against-the-use-of-chemical-weapons-in-syria/comment-page-1/#comment-251292> (suggesting that Syria's use of chemical weapons created extenuating circumstances mitigating otherwise unlawful action).

West.<sup>6</sup> In the U.S., they were among President Trump's most popular actions in his first year in office.<sup>7</sup>

On June 18, 2017, Iran launched missiles into eastern Syria targeting a town held by ISIS forces following violence on June 7 at Iran's parliament and a shrine in Tehran that left at least eighteen dead and more than fifty wounded.<sup>8</sup> ISIS claimed responsibility for the incident.<sup>9</sup> Iran's government stated its aim in attacking was "to punish the terrorists for the twin attacks on the Iranian parliament and the holy shrine of the late founder of the Islamic Republic, Imam Khomeini . . . ."<sup>10</sup> Iran also threatened to retaliate in the same way in the future if provoked.<sup>11</sup> It was the first time in thirty years that Iran had fired missiles outside its territory, and while it is true that Iran has been assisting the government of Bashar al Assad in the civil war in Syria, the purpose of the June 18 attacks was retaliation.<sup>12</sup> Iran's Supreme Leader Ayatollah Ali Khamenei "vowed Iran would slap its enemies."<sup>13</sup> Concern about Iran's use of missiles was voiced by several states.<sup>14</sup> The criticism did not specify that Iran had violated international law.<sup>15</sup>

On April 14, 2018, France, the United Kingdom, and the United States fired over 100 missiles at three sites in Syria.<sup>16</sup> Syria reported property damage but no casualties as a direct result of the action. The strikes followed one week after reports that the Syrian government had again used

6. E.A. Crunden & Esther Yu Hsi Lee, *International Leaders Weigh in on U.S. Strike in Syria*, THINKPROGRESS (Apr. 7, 2017, 3:33 PM), <https://thinkprogress.org/international-response-to-syria-strike-1bd28add73c3/>.

7. Glenn Greenwald, *Spoils of War: Trump Lavished with Media and Bipartisan Praise for Bombing Syria*, THE INTERCEPT (Apr. 7, 2017, 10:43 AM), <https://theintercept.com/2017/04/07/the-spoils-of-war-trump-lavished-with-media-and-bipartisan-praise-for-bombing-syria/>.

8. Saeed Kamali Dehghan, *Iran Targets 'Terrorists' in Missile Strike on Isis-held Syrian Town*, GUARDIAN (June 18, 2017, 6:25 PM), <https://www.theguardian.com/world/2017/jun/18/iran-targets-terrorists-in-missile-strike-on-isis-held-syrian-town>. 'ISIS' is an acronym for the Islamic State of Iraq and Syria, a group also known by the acronym 'ISIL', the Islamic State in Iraq and the Levant. See ALI SOUFAN, ANATOMY OF TERROR: FROM THE DEATH OF BIN LADEN TO THE RISE OF THE ISLAMIC STATE xvi (2017). Increasingly, the group is known as "Daesh," the Arabic form of the acronym. ISIS is an offshoot of the terrorist organization, Al Qaeda. The two groups separated, and ISIS has been denounced by the main Al Qaeda organization. See *id.*

9. Dehghan, *supra* note 8.

10. *Id.*

11. *Iran Fires Missiles at ISIL Positions in Eastern Syria*, ALJAZEERA (June 18, 2017), <http://www.aljazeera.com/news/2017/06/iran-fires-missiles-isil-positions-eastern-syria-170618193251349.html>.

12. *Id.*; Dehghan, *supra* note 8.

13. *Iran Fires Missiles at ISIL Positions in Eastern Syria*, *supra* note 11.

14. See Mehdi Jedinia, *Iran Escalates Involvement in Syria with Anti-IS Missile Strike*, VOA (June 21, 2017, 4:45 PM), <https://www.voanews.com/a/iran-escalates-involvement-in-syria/3910361.html>.

15. See *id.*

16. Helene Cooper, Thomas Gibbons-Neff, Ben Hubbard, *U.S., Britain, and France Strike Over Suspected Chemical Weapons Attack*, NEW YORK TIMES, April 13, 2018), <https://www.nytimes.com/2018/04/13/world/middleeast/trump-strikes-syria-attack.html>.

chemical weapons in opposition areas. Only the United Kingdom attempted to cite a legal basis for the resort to force. Prime Minister Theresa May's office issued a statement saying the missile attacks were justified as "humanitarian intervention . . ." <sup>17</sup> After the action, at a debate at the UN, U.S. representative Nikki Haley, merely said it was "justified, legitimate, and proportionate" without any attempt to provide the legal basis for finding it justified. The French UN representative said the attacks were a response to the Syrian regime's unlawful use of chemical weapons. He did not answer the Bolivian representative's question, asking why it was lawful to violate the prohibition on force to respond to the unlawful use of chemical weapons. <sup>18</sup>

Despite the express and implied support for the attacks on Syria on all three dates, retaliatory attacks are clearly prohibited by international law. <sup>19</sup> International law generally prohibits the use of force except in self-defense, with the UN Security Council's authorization, or in some cases with the invitation of a government. <sup>20</sup> Retaliation or reprisals are after-the-fact responses that do not fit the exception for self-defense and would thus need Security Council authorization or an invitation to join in a lawful use of force by, in this case, Syria's government. <sup>21</sup> Prior to the Trump administration, the U.S. consistently attempted to justify retaliatory uses of force as by characterizing the facts to fit the self-defense or invitation

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17. 'Syria Action – UK Government Legal Position', 14 April 2018, <https://www.gov.uk/government/publications/syria-action-uk-government-legal-position/syria-action-uk-government-legal-position>.

18. Sewell Chan, *U.N. Security Council Rejects Russian Resolution Condemning Syria Strikes*, N.Y. TIMES, April 14, 2018, <https://www.nytimes.com/2018/04/14/world/middleeast/un-security-council-syria-airstrikes.html>.

19. See U.N. Charter art. 2, ¶ 4. "Few propositions about international law have enjoyed more support than the proposition that, under the Charter of the United Nations, the use of force by way of reprisals is illegal." Derek Bowett, *Reprisals Involving Recourse to Armed Force*, 66 AM. J. INT'L L. 1 (1972). Bowett supports this conclusion by spending most of the article attempting to create a new justification for resort to reprisals. See, e.g., *id.* at 26-28. For an author who shares Bowett's interest in seeing a new exception to permit reprisals, see, William O'Brien, *Reprisals, Deterrence and Self-Defense in Counterterror Operations*, 30 VIRGINIA J. INT'L L. 421 (1990). For a thorough rejection of these arguments in favor of legalizing reprisals, see, Roberto Barsotti, *Armed Reprisals*, in CURRENT LEGAL REGULATION OF THE USE OF FORCE (A. Cassese ed., 1986). By 2018, Gray found the law against reprisals unchanged. CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE, 160, 162, and 205 (2018).

20. Shane Darcy, *Retaliation and Reprisal*, in THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW 879 (Marc Weller et al., eds., 2015).

21. *Id.* at 881. Darcy provides a definition but one that relies on a term with no legal definition, war: "Such reprisals . . . can be considered as acts of forcible self-help, involving an unlawful use of force falling short of war, by one state in response to a prior violation of international law by another. 'Armed reprisals' is the most suitable label for such actions." *Id.* Darcy goes on to note that Antonio Cassese considered reprisals to be "'aimed at either impelling the delinquent state to discontinue the wrongdoing, or at punishing it, or both.'" *Id.* at 882 (quoting ANTONIO CASSESE, INTERNATIONAL LAW 299 (2005)).

paradigms.<sup>22</sup> While those arguments generally fell short,<sup>23</sup> they at least recognized the law, unlike the decision to offer no legal justification following either the April 2018 or April 2017 attacks.<sup>24</sup>

The implications of these latest violations of international law on the use of force for the world are grave.<sup>25</sup> Human lives have been taken through missile attacks amidst indications of declining knowledge and respect for the law.<sup>26</sup> Such disrespect has repercussions.<sup>27</sup> The U.S., France, the UK, and Iran want ISIS to comply with human rights and to denounce terrorism and violence of all kinds, yet, such demands lack credibility when those issuing them do not themselves comply with international law's most important rules.<sup>28</sup> Moreover, disrespect for the law in one area can weaken the system as a whole, a system that extends from the principle of non-intervention to regulation of cyber space.<sup>29</sup>

One thesis of this article is that disrespect for the prohibition on reprisals is owing in part to lack of knowledge respecting what the law actually requires.<sup>30</sup> The first part of the discussion provides a brief overview of the law relevant to the use of force in general and armed reprisals in particular.<sup>31</sup> The second part focuses on past U.S. attempts to fit armed reprisals into the self-defense exception.<sup>32</sup> The article concludes that these past attempts weakened respect for the law, paving the way for the American and Iranian attacks in Syria and the muted world reaction to them.<sup>33</sup> Despite any short-term gratification the attacks brought, long term they undermine the interest in avoiding a lawless world that both the U.S. and Iran seem to desire.<sup>34</sup> Former U.S. Secretary of State Rex Tillerson in

22. See, e.g., Micah Zenko, *How the Obama Administration Justifies Targeted Killings*, COUNCIL ON FOREIGN REL. (July 5, 2012), <https://www.cfr.org/blog/how-obama-administration-justifies-targeted-killings>.

23. Amanda Taub, *Experts: Obama's Legal Justification for the War on ISIS is "a Stretch"*, VOX (Sept., 12, 2014, 8:20 AM), <https://www.vox.com/iraq-crisis/2014/9/12/6134159/is-obamas-new-isis-strategy-legal>.

24. Siddiqui, *supra* note 4.

25. Jan Lemnitzer, *Is Trump's Strike in Syria Changing International Law?*, CONVERSATION (Apr. 11, 2017, 10:46 PM), <http://theconversation.com/is-trumps-strike-in-syria-changing-international-law-76073>.

26. Miere, *supra* note 1.

27. Lemnitzer, *supra* note 25.

28. U.N. Charter art. 2, ¶ 4, <http://www.un.org/en/sections/un-charter/chapter-i/index.html> (last visited May 29, 2018).

29. See *Olmstead v. United States*, 277 U.S. 438, 485, 48 S. Ct. 564, 72 L. Ed. 944 (1928) (Brandeis, J., dissenting) (Brandeis stated, "If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself").

30. See *infra* *The Prohibition on the Use of Force*, notes 37-117 and accompanying text.

31. See *id.*

32. See *infra* *The Prohibition on Armed Reprisals*, notes 118-249 and accompanying text.

33. See *infra* *Conclusion*, notes 250-257 and accompanying text.

34. Lemnitzer, *supra* note 25.

October 2017, demanded that China, for example, adhere to the world's "rules-based order."<sup>35</sup> All rules-based systems begin with the prohibition on the unauthorized use of force.<sup>36</sup>

#### THE PROHIBITION ON THE USE OF FORCE

Following centuries of evolution to which political leaders, scholars, popular movements, religious leaders, and others contributed, most sovereign states in the world agreed to a treaty rule in 1945 that generally prohibits the use of force.<sup>37</sup> The rule is at the heart of the United Nations Charter, a multilateral treaty that established the United Nations organization and set rules and principles for member states.<sup>38</sup> The first line of the Charter provides the UN's purpose: "We the peoples of the United Nations determined to save succeeding generations from the scourge of war . . . ." agree to be bound by the terms of the Charter.<sup>39</sup> Chapter I, Article 1(1) further emphasizes the purpose of the UN and the principles the organization seeks to foster:

To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace[.]<sup>40</sup>

Article 2(4) specifically prohibits resort to force by states: "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."<sup>41</sup> The Charter's drafters intended Chapter I, Article 2(4) to be a general prohibition on the use of force, a fact that becomes evident when it is read in the context of the Charter as a whole and its negotiating history.<sup>42</sup> Chapter VI of the Charter mandates that disputes be settled peacefully.<sup>43</sup> Chapter VII provides the only two express Charter-based exceptions to

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35. Nicole Gaouette, *Tillerson Raps China as 'Predatory' Rule Breaker*, CNN (Oct. 19, 2017, 2:34 AM), <http://www.cnn.com/2017/10/18/politics/tillerson-china-rebuke-speech/index.html>.

36. *Id.*

37. *See* U.N. Charter art. 2, ¶ 4.

38. *See generally*, U.N. Charter.

39. *Id.* pmb1.

40. *Id.* art. 1 ¶ 1.

41. *Id.* art. 2, ¶ 4.

42. Edward Gordon, *Article 2(4) in Historical Context*, 10 YALE J. INT'L L. 271, 278 (1985).

43. U.N. Charter art. 33, ¶ 1.

Article 2(4).<sup>44</sup> Articles 39–42 enumerate the powers of the UN Security Council to authorize force for the purpose of restoring international peace and security.<sup>45</sup> Chapter VII, Article 51 permits the use of force in individual and collective self-defense if an armed attack occurs, until the Security Council acts.<sup>46</sup> The Charter also promotes human rights and economic development to mitigate some of the well-known causes of conflict.<sup>47</sup> Chapter XV, Article 99 authorizes the UN Secretary General to bring any matter that may threaten international peace and security to the attention of the Security Council.<sup>48</sup>

U.S. President Franklin Roosevelt commissioned the drafting of the Charter in 1939.<sup>49</sup> The U.S. also organized the final negotiating session in San Francisco in 1945.<sup>50</sup> The records from San Francisco confirm that the drafters intended Article 2(4) to be a comprehensive ban on the use of force.<sup>51</sup> A member of the U.S. delegation in responding to a question by the Brazilian delegation on the scope of Article 2(4) said, the authors of the original text intended “to state in the broadest terms an absolute all-inclusive prohibition; the phrase ‘or in any other manner’ was designed to insure that there should be no loopholes.”<sup>52</sup> The negotiating history also confirms that Article 2(4) covers the use of armed force in distinction to more general forceful or coercive measures not involving the use of force, such as economic sanctions,<sup>53</sup> cyber-attacks, or minimal uses of force such as those involved in law enforcement.<sup>54</sup>

The broad prohibition on resort to force in Article 2(4) was paired with only one exception in the original draft, force authorized by the Security Council.<sup>55</sup> The Council must first consider measures short of force.<sup>56</sup> If these are found inadequate, measures involving armed force may be used to

44. *Id.* arts. 39–42, 51.

45. *Id.* arts. 39–42.

46. *Id.* art. 51.

47. *Id.* art. 1, ¶ 3.

48. U.N. Charter art. 99.

49. See STEPHEN C. SCHLESINGER, ACT OF CREATION: THE FOUNDING OF THE UNITED NATIONS, A STORY OF SUPERPOWERS, SECRET AGENTS, WARTIME ALLIES AND ENEMIES, AND THEIR QUEST FOR A PEACEFUL WORLD 33–34 (2003).

50. *Id.* at 34, 111.

51. U.N. Conference on International Organization, E/F.752/24 (June 4, 1945).

52. *Id.*

53. See *id.* (discussing the rejection of a proposal by Brazil to extend the prohibition on force to economic coercion).

54. See Mary Ellen O’Connell, *The Prohibition of the use of Force*, in RESEARCH HANDBOOK ON INTERNATIONAL CONFLICT AND SECURITY LAW: JUS AD BELLUM, JUS IN BELLO, AND JUS POST BELLUM 107 (Nigel D. White & Christian Henderson, eds., 2013); but see Thomas Ruys, *The Meaning of Force and the Boundaries of the Jus Ad Bellum: Are Minimal Uses of Force Excluded from UN Charter Article 2(4)?*, 108 AM. J. 159, 163 (2014).

55. U.N. Charter art. 42.

56. *Id.* arts. 40–41.

re-establish international peace.<sup>57</sup> Latin American states at San Francisco became concerned that their proposed treaty for collective self-defense might conflict with the Article 2(4)/Security Council regime in the Charter.<sup>58</sup> Article 2(4) could be construed as requiring a state to get Security Council authorization prior to assisting another state that had been attacked in violation of Article 2(4), so<sup>59</sup> the Latin American States requested an additional exception.<sup>60</sup> In response, the U.S. delegation drafted a new, narrow provision permitting self-defense and collective self-defense in an emergency case where an “armed attack occurs” until the Security Council acts.<sup>61</sup> The new provision became Article 51.<sup>62</sup>

The U.S. delegation discussed the possibility of allowing resort to self-defense in anticipation of an armed attack.<sup>63</sup> This however was rejected.<sup>64</sup> One member of the delegation, Senator Harold Stassen, explained: “We did not want exercised the right of self-defense before an armed attack had occurred.”<sup>65</sup> Indeed, only a narrow right of self-defense would be consistent with other provisions of the Charter.<sup>66</sup> In addition to the general prohibition on force in Article 2(4), the provisions of Chapter VII and Chapter VIII giving the Security Council principal authority over peace and security made sense only in the case of a narrow exception for the use of force by States acting independently of the Council.<sup>67</sup>

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57. *Id.* arts. 39, 42.

58. See RUTH B. RUSSELL, A HISTORY OF THE UNITED NATIONS CHARTER (1958), 695-696; see also, George K. Walker, *Anticipatory Collective Self-Defense in the Charter Era: What the Treaties Have Said*, 31 CORNELL INT'L L. J. 321, 351 (1998).

59. U.N. Charter art. 2, ¶ 4.

60. In 1947 parties to the Rio Treaty provided in Article 3: “The High Contracting Parties agree that an armed attack by any State against an American State shall be considered as an attack against all the American States and, consequently, each one of the said Contracting Parties undertakes to assist in meeting the attack in the exercise of the inherent right of individual or collective self-defense recognized by Article 51 of the Charter of the United Nations.” Rio Treaty, Inter-American Treaty of Reciprocal Assistance, Rio-U.S., art. 3, Sept. 2, 1947, 62 Stat. 1681.

61. Walker, *supra* note 58, at 351-53.

62. *Id.* at 351.

63. *Foreign Relations of the United States: Diplomatic Papers, 1945, General: The United Nations, Volume I*, U.S. DEP'T OF STATE: OFFICE OF THE HISTORIAN, <https://history.state.gov/historicaldocuments/frus1945v01> (last visited Apr. 18, 2018).

64. *Id.*

65. *Id.*

66. Bert V. A. Röling, *The Ban on the Use of Force and the U.N. Charter*, in THE CURRENT LEGAL REGULATION OF THE USE OF FORCE, pp. 4-5 (A. Cassese ed., 1986). (“[M]ost commentators begin the process of exegesis with Art. 2(4), in deference to the paramount concern of the Charter with the maintenance of ‘international peace and security.’ It then becomes desirable to interpret the word ‘force’ in Art. 2(4) at least widely enough to ensure that any significant use of military force is banned; and to give the acknowledged exception created by Art. 51 a correspondingly narrow meaning.”); see also, Dominika Švarc, *Redefining Imminence: The Use of Force Against Threats and Armed Attacks in the Twenty-First Century*, 13 ILSA J. INT'L & COMP. L. 171, 175, 177 (2006).

67. U.N. Charter arts. 39, 52, ¶ 3, 53 ¶ 1.

Requiring an armed attack placed an important control on a use of force that had not been authorized by the Security Council.<sup>68</sup> The defending state is in a position to point to open, public evidence of the need to respond with force.<sup>69</sup> Other, less tangible or immediate threats must be submitted to the collective scrutiny of the Security Council.<sup>70</sup> The design relies on collective deliberation of the Council as a better process for determining threats to the peace than would be case of the unilateral decision of the potential victim.<sup>71</sup>

States claim one additional basis for resort to force relevant to this discussion, invitation or consent.<sup>72</sup> Iran accepted the Syrian government's invitation to assist in suppressing the dozens of armed militias challenging it, including ISIS.<sup>73</sup> Invitation does not appear in the Charter and on its face conflicts with Article 2(4), but the practice is common.<sup>74</sup> States have on dozens of occasions since 1945, cited a right to assist governments in suppressing internal armed rebellion.<sup>75</sup> The International Court of Justice (ICJ) has considered cases on the question of illegal use of force that also featured invitations.<sup>76</sup> The court has not taken up the legality of invitations in any detail. It clearly implies, however, in *Armed Activities on the Territory of the Congo (Armed Activities)* and *Military and Paramilitary Activities in and against Nicaragua (Nicaragua) v. United States* that invitation is a lawful basis for the use of force abroad when the invitation is issued by a government in control of most of the state or at least fighting with a likelihood of success in maintaining control against armed non-state actors seeking to oust it.<sup>77</sup>

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68. Švarc, *supra* note 66, at 171, 177.

69. U.N. Charter art. 51.

70. *Id.* art. 39.

71. Mary Ellen O'Connell, *The Arc toward Justice and Peace*, in *ARCS OF GLOBAL JUSTICE: ESSAYS IN HONOUR OF WILLIAM A. SCHABAS* 469 (Margaret M. deGuzman & Diane Marie Amann, eds., 2018).

72. Max Byrne, *Consent and the Use of Force: An Examination of 'Intervention by Invitation' as a Basis for US Drone Strikes in Pakistan, Somalia & Yemen*, 3 *J. ON USE FORCE & INT'L L.* 97, 98 (2016).

73. *Iran's Presence in Syria on Syrians' Invitation*, MEHR NEWS AGENCY (Feb. 14, 2018, 4:41 PM), <https://en.mehrnews.com/news/132159/Iran-s-presence-in-Syria-on-Syrians-invitation>.

74. U.N. Charter art. 2, ¶ 4.

75. Louise Doswald-Beck, *The Legal Validity of Military Intervention by Invitation of the Government*, 56 *BRIT. Y.B. INT'L L.* 189, 189 (1986).

76. *E.g.*, *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, Judgment, 2005 ICJ Rep. 168, 194 (Dec. 19); Christian Marxsen, *The Crimea Crisis: An International Law Perspective*, 74 *ZaöRV* 367, 372 (2014).

77. *Armed Activities*, 2005 ICJ Rep. at 212; *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, Judgment, Merits, 1986 ICJ Rep. 25, 78 (June 27). The right to issue an invitation to join in collective self-defense to an armed attack from a foreign State is expressly provided for in UN Charter Article 51. See Doswald-Beck, *supra* note 75, at 213, 221; Marxsen, *supra* note 76, at 375-77; see generally BRAD R. ROTH, *GOVERNMENTAL ILLEGITIMACY IN INTERNATIONAL LAW* 284 (1999).

In *Armed Activities*, the ICJ also found that withdrawing consent requires no formal, express evidence; indirect indications suffice.<sup>78</sup> That finding is consistent with the position that a high bar exists to the lawful exercise of armed force by a state on another state's territory under a justification of invitation or consent.<sup>79</sup> Indirect and even ambiguous evidence that consent has been withdrawn is sufficient to end it.<sup>80</sup> Syria plainly wants Iran's assistance, so if Iran had attacked ISIS as part of its effort at ending the organization's hold on Syria, the attacks would arguably have been lawful.<sup>81</sup> The announcement that the purpose of the June 2017 missile strikes was revenge for ISIS terrorism raises questions of their legality.<sup>82</sup> The fact that the missile strikes involved a far greater quantity of force further distinguishes the attacks from the assistance offered with Syria's consent.<sup>83</sup> Even if Syria gave its consent, as will be discussed below, it could not authorize a use of military force for punishment or revenge.<sup>84</sup>

The ICJ has ruled on other aspects of the use of force beyond invitation.<sup>85</sup> In the *Nicaragua* case, it held that an armed attack triggering the right of self-defense must be significant—it must be more than a mere frontier incident.<sup>86</sup> The court found the additional obligations to limit the use of force in the term “inherent right” (“*droit naturel*” in the French version) of UN Charter Article 51 as a reference to additional, restrictive principles found in international law outside the Charter.<sup>87</sup> Among the important rules of general international law are the general principles of necessity, proportionality, and attribution.<sup>88</sup> Necessity requires that any use of force in self-defense be undertaken only as a last resort and where there is a high likelihood that using military force will succeed in accomplishing

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78. *Armed Activities*, 2005 ICJ Rep. at 197.

79. *Id.* at 194-95 (stating that Uganda claimed that in response to a threat by the Democratic Republic of the Congo and the Sudan, it exercised its sovereign right of self-defense to augment its forces in eastern Congo).

80. *Id.* at 198 (stating that no particular formalities were required for the Democratic Republic of the Congo to withdraw its consent to the presence of Ugandan troops on its soil).

81. See David W. Lesch, *Iran Is Taking Over Syria. Can Anyone Stop It?*, N.Y. TIMES (Aug. 29, 2017), <https://www.nytimes.com/2017/08/29/opinion/iran-syria.html>.

82. See *Iran Fires Missiles at ISIL Positions in Eastern Syria*, *supra* note 11.

83. *Syria Crisis: Where Key Countries Stand*, BBC (Oct. 30, 2015), <http://www.bbc.com/news/world-middle-east-23849587> (stating that Iran was believed to have spent billions of dollars to support President Assad, provide military advisors, and to subsidize weapons, lines of credit, and oil transfers).

84. Michael Wood, *International Law and the Use of Force: What Happens in Practice?*, 53 INDIAN J. INT'L L. 345, 352 (2013).

85. *Nicar. v. U.S.*, 1986 I.C.J. Rep. at 103 (discussing the right of self-defense in cases of armed attack which has already occurred).

86. *Id.* at 103-04.

87. *Id.* at 93.

88. *Id.* at 94, 65.

the legitimate objective of defense.<sup>89</sup> Proportionality requires that even when the requirements of necessity are met, military force must not impose a disproportionate cost on the state responsible for the armed attack compared with the injury to the defending state.<sup>90</sup> Attribution requires that force may only be used on the territory of a foreign sovereign state where the government of that state is responsible for the wrongful armed attack. Some scholars have attempted to assert that attacking a single individual or armed group found on the territory of a state is somehow different than attacking the state itself. That is an erroneous characterization under the law of state responsibility and the right of territorial integrity. A state may not be attacked because of the presence of armed terrorist organizations uncontrolled by the state.<sup>91</sup> The territorial state may have failed to exercise due diligence with respect to controlling non-state actors.<sup>92</sup> Failure of due diligence, however, does not give rise to the right to use force in self-defense.<sup>93</sup>

The prohibition on the use of force is today discerned as more than mere treaty law or even customary international law. It is widely categorized as *jus cogens* or a peremptory norm.<sup>94</sup> Peremptory norms are the international community's highest ethical principles. They are consistent with ancient and universal moral principles. No derogation from these norms is permitted through the operation of standard treaty and customary international law processes for creation and modification of rules. No derogation is permitted by, for example, expanding exceptions. Peremptory norms can always reach more conduct, never less. This point is easy to grasp when other *jus cogens* norms are considered. In addition to the prohibition on the use of force, genocide, slavery, torture, and apartheid are prohibited.<sup>95</sup> The logic of *jus cogens* mandates that these prohibitions

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89. *Oil Platforms (Iran v. U.S.)*, Judgment, 2003 ICJ Rep. 161, 198 (Nov. 6). (stating that the conditions for the exercise of the right of self-defense are well-settled and require that self-defense warrants only measures which are proportional to the armed attack and necessary to respond to it).

90. *Id.* at 198-199. For more on proportionality, see Georg Nolte, *Multipurpose Self-Defence, Proportionality Disoriented: A Response to David Kretzmer*, 24 EUR. J. INT'L L. 283 (2013).

91. *Armed Activities*, 2005 I.C.J. Rep. at 222-23, 268 (noting that while Uganda claimed to have acted in self-defense, it never claimed that it had been subjected to an armed attack by Congo. The series of attacks on Uganda were not attributable to Congo on the evidence.); see also James Gathii, *Irregular Forces and Self-defense Under the UN Charter*, in 37 INT'L HUMANITARIAN L.: WHAT IS WAR? AN INVESTIGATION IN THE WAKE OF 9/11 97, 97 (Mary Ellen O'Connell ed., 2012) (arguing that expanding the right of self-defense to include attacks by irregular forces whose conduct is not attributable to a State would be inconsistent with earlier Security Council criticisms of self-defense.)

92. *Armed Activities*, 2005 I.C.J. Rep. at 231 (stating that Uganda would be responsible for any lack of vigilance in preventing violations of human rights and international humanitarian law by other actors present in the occupied territory, including rebel groups acting on their own account).

93. See Gathii, *supra* note 91.

94. *Nicar. v. U.S.*, 1986 I.C.J. Rep. at 100.

95. Jan Wouters; Sten Verhoeven, *The Prohibition of Genocide as a Norm of Jus Cogens and its Implications for the Enforcement of the Law of Genocide*, 5 INT'L CRIM. L. REV. 401, 404 (2005); Erika

can never be narrowed as that would result in derogation. Slavery, for example, was once thought to involve only cases where one person purported to legally own another.<sup>96</sup> The international community now discerns that slavery exists in a broader set of circumstances. There is *de facto* slavery, not just *de jure*.

The prohibition on the use of force plainly belongs in this small set of extraordinary legal norms. Historians of the international law on the use of force commonly trace the prohibition on force to the teaching of St. Augustine, a fifth century North African bishop. Augustine sought to move his congregation away from the strict pacifism being practiced by many early Christians, drawing on Greek and Roman philosophy and law justifying resort to war to achieve peace.<sup>97</sup> Peace was also among the highest Christian values, so Augustine reasoned that peace could be a just cause of war for Christians.<sup>98</sup> He concluded that using limited war when necessary as “a means of preserving or restoring peace” could be acceptable to Christians desiring to conform their conduct to their religious belief.<sup>99</sup> In addition to self-defense, Augustine considered it just to fight to restore what was stolen, to respond to wrongdoing in an attempt to prevent future wrongs, as well as to promote Christianity.<sup>100</sup>

Through the centuries, it became clear that Augustine’s concept of “just war” could be read flexibly.<sup>101</sup> Christians began fighting not just in situations of extremis but to promote the Church or a king.<sup>102</sup> Fighting in the Crusades or fighting to conquer and colonize all became justified under

de Wet, *The Prohibition of Torture as an International Norm of Jus Cogens and its Implications for National and Customary Law*, 15 EUR. J. INT’L L. 97, 97-98 (2004); M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, L. & CONTEMP. PROBS. 63, 68, 72 n.46 (1996).

96. Jean Allain, *The Definition of Slavery in International Law*, 52 HOW. L. J. 239, 240 (2009) (stating that the League of Nations Slavery Convention of 1926 defined slavery as “the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.”).

97. WILHELM G. GREWE, *THE EPOCHS OF INTERNATIONAL LAW* 107 (Michael Byers, trans. & rev., 2000) (Latin re-phrasing omitted) (stating Augustine’s teaching transformed Antiquity’s conceptions of just war, based primarily on Cicero’s work, and that it was concerned with the restoration of peace).

98. Joachim von Elbe, *The Evolution of the Concept of the Just War in International Law*, 33 AM. J. INT’L L. 665, 669-70 (1939) (stating that the teachings of the numerous canonists who elaborated the doctrine of the just war align with the principles laid down by the Fathers of the Church, particularly in their emphasis that one of the principal conditions of the justness of war was the restoration of peace).

99. GREWE, *supra* note 97, at 107.

100. von Elbe, *supra* note 98, at 667 (stating that the Christian concept of the just war furnishes rules for limiting and guarding it in accordance with the precepts of the new religion); GREWE, *supra* note 97, at 106-07 (Latin re-phrasing omitted).

101. Geoffrey Parker, *Early Modern Europe*, in *THE LAWS OF WAR: CONSTRAINTS ON WARFARE IN THE WESTERN WORLD* 40, 43 (Michael Howard et al. eds., 1994) (stating that many European statesmen proclaimed with pride that they fought principally to advance the cause of their church and that King Phillip was accused by the pope of wishing to attack England solely for political reasons).

102. *Id.* at 43.

the argument that once all the world converted to Christianity, peace would prevail and all fighting would end.<sup>103</sup> Christian warriors succeeded in establishing the Holy Roman Empire that lasted from the crowning of Charlemagne in 800 to the end of the Thirty Years' War with the signing of the Peace of Westphalia in 1648.<sup>104</sup>

During this long period, scholars continued to grapple with the linked issues of the morality and legality of war.<sup>105</sup> In the Middle Ages, St. Thomas Aquinas systematized Augustine's work, giving it a law-like form.<sup>106</sup> From his writing, the restrictive approach to war was adopted into international law as this legal system took its modern form in response to the Protestant Reformation.<sup>107</sup> Resort to war required a just cause as the fundamental pre-requisite, such as self-defense. Lawful war was always a last resort that had to have a prospect of succeeding and would not cause disproportionate injury.<sup>108</sup>

The Reformation and the Scientific Revolution both heavily impacted law, suppressing resort to religious teaching.<sup>109</sup> Law was increasingly considered to require positive, material proof of its rules. Legislation, treaties, and rules of common law or customary law fit the requirement but not higher ethical norms, such as the prohibition on resort to force. Nevertheless, the principles of the just war persisted. In many accounts of the nineteenth century, scholars tend to conclude that the rise of positivism meant the end of legal restraint on force. The record shows, however, that government officials and legal scholars in Europe, as well as North and South America continued to recognize the Just War Doctrine. Few European governments ever failed to offer justifications in terms of some just or lawful cause.

With the suppression of religious teaching, new explanations were needed for the understanding that law is binding. Most legal systems,

103. ARTHUR NUSSBAUM, *A CONCISE HISTORY OF THE LAW OF NATIONS* 20 (2d ed. 1954) (stating that part of the Church's crusade legislation was partly intended to expand ecclesiastical jurisdiction over the estates of the crusaders).

104. *Id.* at 115 (stating that the Thirty Years' War was ended by the Peace of Westphalia after negotiations had dragged on for more than three years).

105. Charles J. Reid, Jr., *John T. Noonan, Jr., on the Catholic Conscience and War: Negre v. Larsen*, 76 NOTRE DAME L. REV. 881, 882 (2001) (stating that throughout its long history, Catholic just-war theory has required believers to examine the morality of state decisions in favor of war).

106. von Elbe, *supra* note 98, at 669-70.

107. Michael Walzer, *The Triumph of Just War (and the Dangers of Success)*, 69 SOC. RES. 925, 926-27 (stating that world rulers embraced the theory of just war and writers Grotius and Pufendorf incorporated just war theory into international law).

108. See CATECHISM OF THE CATHOLIC CHURCH, 555-56 (2d ed. 1997).

109. See e.g. Martyn Shuttleworth, *Science and the Enlightenment*, EXPLORABLE, <https://explorable.com/science-and-enlightenment> (last visited Apr. 18, 2018); See John Witte, Jr., *The Legacy of the Protestant Reformation in Modern Law*, POL. THEORY NETWORK (Oct. 2, 2017), <https://politicaltheology.com/the-legacy-of-the-protestant-reformation-in-modern-law/>.

including international law, began on the basis that God requires obedience to law. In international law, this divine command concept was part of a sophisticated theory known as natural law. As the scientific revolution impacted European thinkers, they looked to material evidence to support reasoning of all kinds. By the late nineteenth and early twentieth centuries, international law scholars argued strenuously for material or positive evidence of the law. They wanted to see consent to treaties or rules of customary international law. They had no time for ideas incorporating acceptance, beauty, belief, or any other extra-positive source. Despite crusading efforts by proponents of “legal science”, however, natural law never disappeared.<sup>110</sup> Indeed, in recent years, new interest has emerged in understanding the place of natural law in the international legal system.<sup>111</sup>

Interestingly, the natural law doctrine of restricted war continued to be espoused even by some pure positivists.<sup>112</sup> The Austrian, Hans Kelsen, said to be the greatest legal mind of the twentieth century by Harvard Law School’s mid-century dean, Dean Roscoe Pound, lent his considerable talent to the legal problem of war. He wrote that the contemporary Just War Doctrine was found in the treaties restricting war, including the Treaty of Versailles of 1919, the 1928 Kellogg-Briand Pact, and the 1945 United Nations Charter. Kelsen cited Augustine, Aquinas, and Grotius as the original authors of the prohibition, a moral and legal norm of *jus cogens*.<sup>113</sup>

Following the invasion of Iraq in 2003 by the United States, United Kingdom, and Australia, the UN Secretary General Kofi Annan instituted a thorough review of the UN Charter rules on the use of force.<sup>114</sup> He determined the review was necessary following criticisms of his conclusion that the three states had violated Article 2(4). Two years later, UN members reaffirmed Article 2(4) during the 2005 United Nations World Summit in New York.<sup>115</sup> The World Summit Outcome document contains these provisions:

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110. See generally 1 LASSA OPPENHEIM, INTERNATIONAL LAW 86-87 (1905) (demonstrating that natural law is still in existence).

111. See, e.g., Jurisdictional Immunities of the State (Diss. Op. Cançado Trindade), Judgment, 2012 I.C.J. 86, at 97, 99, 165, 167 (Feb. 3) (especially his dissenting opinion in *Jurisdictional Immunities of the State* (Ger. v. It.: Greece intervening)).

112. Hendrik Simon, *The Myth of Liberum Ius Ad Bellum: Justifying War in 19<sup>th</sup> Century Legal Theory and Political Practice*, 29 EUR. J. INT’L L. 113-136 (2018).

113. HANS KELSEN, GENERAL THEORY OF LAW AND THE STATE 330 (Anders Wedberg trans. 1945, reprinted 1999, 2011). See also, Mary Ellen O’Connell, *Peace and War*, in THE OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW 290 (Bardo Fassbender & Anne Peters eds., 2012).

114. *Lessons of Iraq War Underscore Importance of UN Charter – Annan*, UN NEWS (Sept. 16, 2004) <https://news.un.org/en/story/2004/09/115352-lessons-iraq-war-underscore-importance-un-charter-annan>.

115. G.A. Res. 60/1, at ¶¶ 78-79 (Sept. 16, 2005).

78. We reiterate the importance of promoting and strengthening the multilateral process and of addressing international challenges and problems by strictly abiding by the Charter and the principles of international law, and further stress our commitment to multilateralism.<sup>116</sup>

79. We reaffirm that the relevant provisions of the Charter are sufficient to address the full range of threats to international peace and security. We further reaffirm the authority of the Security Council to mandate coercive action to maintain and restore international peace and security. We stress the importance of acting in accordance with the purposes and principles of the Charter.<sup>117</sup>

#### THE PROHIBITION ON ARMED REPRISALS

A long-standing interpretation of the UN Charter principles on the use of force is that armed reprisals are unlawful.<sup>118</sup> Armed reprisals do not fit the Article 51 exception for the use of force and would, therefore, require Security Council authorization.<sup>119</sup> The Security Council has never authorized a reprisal. Arguments asserting that reprisals were once unlawful—but are no longer due to evolving state practice or new interpretations—must fail. Such arguments overlook that the prohibition on reprisals is part of the *jus cogens* prohibition on the use of force permitting no derogation.

Prior to the adoption of the Charter, limited evidence suggests that measures short of war, such as reprisals, were regulated under different principles than the Just War Doctrine.<sup>120</sup> Regardless, armed reprisals were subject to a restrictive legal regime throughout the history of international law.<sup>121</sup> Armed reprisals were lawful only if in response to a prior wrong.<sup>122</sup> Other restrictions applied as well.<sup>123</sup> This law is well known, thanks in part to a 1928 arbitral award in the *Naulilaa* case between Portugal and

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116. *Id.* at ¶ 78.

117. *Id.* at ¶ 79.

118. *Id.* at ¶ 77.

119. U.N. Charter art. 51, ¶ 1 (“Nothing in the present Charter shall impair the inherent right of individual or collective self-defence [sic] if an armed attack occurs against a Member of the United Nations . . .”).

120. O’Connell, *supra* note 113, at 278. One such principle is the sovereignty doctrine in which the decision of whether to enter into war was left to the decision of the individual leader of the state. States were encouraged to use various means of peaceful settlement instead of resorting to war. *See id.*

121. U.N. Charter art. 51, ¶ 1.

122. *Id.*

123. *See generally* Arbitration Award (Port. v. Ger.), 2 R. Int’l Arb. Awards 1011 (1949) (emphasizing the other restrictions that are applicable).

Germany.<sup>124</sup> The case was heard by a tribunal established under the Treaty of Versailles and involved events on the eve of the First World War.<sup>125</sup> In 1914, German and Portuguese troops met on the border of their neighboring colonies, today Namibia and Angola.<sup>126</sup> Owing to a misunderstanding—perhaps due to poor translation—the Portuguese killed three German officers.<sup>127</sup> Germany responded with retaliatory attacks against several Portuguese outposts.<sup>128</sup> Portugal claimed these attacks violated international law.<sup>129</sup> The tribunal agreed, finding Germany failed to meet the three conditions of lawful reprisals; first, Portugal had committed no prior wrong.<sup>130</sup> Even if it had committed a prior wrong, Germany was required to give notice of the wrong and demand a remedy, attempting to resolve the dispute peacefully.<sup>131</sup> If the attempt failed, Germany's response had to be proportional to the wrong.<sup>132</sup> Again, it was not proportional.<sup>133</sup>

With the adoption of the Charter in 1945, these rules regarding reprisals became applicable only to coercive measures not involving the use of armed force, known today as counter-measures.<sup>134</sup> In the *Air Services Arbitration* of 1978 between the United States and France, the arbitrators used the term “countermeasure” when referring to a wrong committed by the U.S. against France that was justifiable owing to the prior wrong committed by France.<sup>135</sup> The U.S. had fulfilled the other elements of the Naulilaa formula as well.<sup>136</sup> The U.S. notified France of its view a wrong had been committed and of the need for a remedy.<sup>137</sup> The countermeasures instituted subsequent to the notice were found proportional to the wrong.<sup>138</sup>

The UN International Law Commission confirmed the *Air Services* tribunal's analysis in its Articles on State Responsibility, which was concluded in 2001 through the acceptance by the General Assembly.<sup>139</sup> The

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124. *State Responsibility*, 2 U.N.Y.B. INT'L L. COMM'N 125,136 (1964) (holding that “no violation of international law had occurred on the part of Portugal justifying the German reprisal. [Thus,] [t]he reprisal was [a] breach of international law . . .”).

125. Julia Pfeil, *Naulilaa Arbitration (Portugal v. Germany)*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (2007).

126. *State Responsibility*, *supra* note 124, at 137.

127. *Id.*

128. *Port. v. Ger.*, 2 R. Int'l Arb. Awards.

129. *State Responsibility*, *supra* note 124, at 137.

130. Pfeil, *supra* note 125.

131. *Id.*

132. *Id.*

133. *Port. v. Ger.*, 2 R. Int'l Arb. Awards.

134. *Air Services Agreement (U.S. v. Fr.)*, Judgment, 1978 I.C.J. 417, 427 (Dec. 9).

135. *Id.* at 443.

136. *Id.* at 443-44.

137. *Id.* at 446.

138. *Id.* at 444.

139. G.A. Res. 56/83, art. 49 (Dec. 12, 2001) (allows for certain countermeasures to be taken in limited circumstances).

*Draft Articles on Responsibility of States for Internationally Wrongful Acts* include detailed provisions on countermeasures.<sup>140</sup> The *Articles* provide that countermeasures are allowed “against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations.”<sup>141</sup> The *Articles* make clear, however, that the legal regime of countermeasures does not in any way modify “the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations[.]”<sup>142</sup> Lawful measures taken in response to a prior wrong include non-performance of treaty obligations or the imposition of economic sanctions.<sup>143</sup> They do not include armed attacks.<sup>144</sup>

The United Nations Security Council has also made it clear that armed reprisals violate the Charter.<sup>145</sup> In Resolution 188 of 1964 the Council condemned the United Kingdom’s bombing of Fort Harib in Yemen.<sup>146</sup> The resolution states that reprisals are “incompatible with the purposes and principles of the United Nations.”<sup>147</sup> This point was made again in the General Assembly’s 1970 *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States*.<sup>148</sup> Among the fundamental rights and duties of states, is the “duty to refrain from acts of reprisal involving the use of force” against other states.<sup>149</sup> In 2001, the General Assembly accepted the International Law Commission’s (ILC) *Articles on State Responsibility*, which include the restriction on countermeasures involving the use of force discussed above.<sup>150</sup>

The International Court of Justice, the principal judicial organ of the United Nations, has also found armed reprisals unlawful.<sup>151</sup> In its 1996 advisory opinion on the *Legality of Threat or Use of Nuclear Weapons*, the court said that “armed reprisals in time of peace . . . are considered to be unlawful.”<sup>152</sup> In the *Oil Platforms* case, the International Court of Justice further held that U.S. attacks on Iranian sites were not lawful acts of self-

140. *Id.* arts. 49-54.

141. *Id.* art. 51(1)(a).

142. *Id.* art. 53(1)(a).

143. *Id.* art. 51(2); *see also* Agreement on Subsidies and Countervailing Measures art. 7.9, 1995, 1869 UNTS 14, 21 (allowing the World Trade Organization’s Dispute Settlement Body to authorize a member state to impose countermeasures when another state is not complying with its trade obligations).

144. G.A. Res. 56/83, art. 50.

145. S.C. Res. 188, ¶ 1 (Apr. 9, 1964).

146. Burton M. Leiser, *The Morality of Reprisals*, 85 ETHICS 159, 159 n.1 (1975).

147. S.C. Res. 188, ¶ 1 (It is noteworthy, and to the United Kingdom’s credit, that it did not veto the resolution.).

148. G.A. Res. 2625 (XXV), at 122 (Oct. 24, 1970).

149. *Id.*

150. G.A. Res. 56/83, art. 50.

151. *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. Rep. 95, at 246 (July 8).

152. *Id.*

defense because of their retaliatory nature.<sup>153</sup> They were not undertaken to repel an on-going use of force.<sup>154</sup>

Despite the clear positions of the Security Council and General Assembly respecting the illegality of reprisals by 1986, Ronald Reagan ordered an air attack on Libyan military sites in Tripoli and Benghazi that followed ten days after a terrorist bombing of a disco in Berlin.<sup>155</sup> Three people died in the disco attack; two were American service members. As many as forty people died in the U.S. raids.<sup>156</sup> The U.S. said it had evidence that Libya planned more acts of terrorism.<sup>157</sup> On this basis, U.S. government lawyers and scholars presented the argument that the U.S. actions, in contrast to Libya's, were lawful as self-defense under Article 51 of the Charter.<sup>158</sup> In other words, the U.S. attempted to distinguish its attacks from unlawful armed reprisals and terrorism.<sup>159</sup> The case simply did not fit the requirements of self-defense.<sup>160</sup> To begin with, the Berlin incident did not amount to a significant armed attack per the requirement set out in the *Nicaragua* case.<sup>161</sup> Evidence of the necessity for military action in self-defense owing to future attacks was also inadequate.<sup>162</sup> Whatever vague evidence the U.S. had, amounted to criminal plots, not use of armed force.<sup>163</sup> The UN General Assembly condemned the U.S. attacks.<sup>164</sup>

One interesting point for this discussion from the attack on Tripoli is that the Reagan administration made a serious attempt to justify its actions in terms of the UN Charter.<sup>165</sup> During the Cold War, the U.S. was careful to restrict legal arguments to the use of force accepted under international law.<sup>166</sup> Facts were often manipulated, but rarely interpretations of the law.<sup>167</sup> Such care for preserving the integrity of the Charter noticeably

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153. Iran v. U.S., 2003 ICJ Rep. at 199.

154. Mary Ellen O'Connell, *Lawful Self-Defense to Terrorism*, 63 U. PITT. L. REV. 889, 893-894 (2002).

155. *1986: U.S. Launches Air Strikes in Libya*, BBC (Apr. 15, 1986), [http://news.bbc.co.uk/onthisday/hi/dates/stories/april/15/newsid\\_3975000/3975455.stm](http://news.bbc.co.uk/onthisday/hi/dates/stories/april/15/newsid_3975000/3975455.stm).

156. *Id.*

157. Jules Lobel, *The Use of Force to Respond to Terrorist Attacks: The Bombing of Sudan and Afghanistan*, 24 YALE J. INT'L L. 537, 548-49 (1999).

158. *Id.* at 537.

159. See Christopher Greenwood, *International Law and the United States' Air Operation Against Libya*, 89 W. VA. L. REV. 933, 933 (1987).

160. *Id.* at 949.

161. Lobel, *supra* note 157, at 541.

162. Greenwood, *supra* note 159, at 947.

163. *Id.* at 954.

164. G.A. Res. 41/38, at 2 (Nov. 20, 1986).

165. Greenwood, *supra* note 159, at 949.

166. Bruno Simma, *NATO, The UN and the Use of Force: Legal Aspects*, 10 EURO. J. INT'L L. 1, 3, 4, 17 (1999).

167. Byrne, *supra* note 72, at 98. The United States and the Soviet Union consistently invoked invitation to justify using force in Hungary, Vietnam, the Dominican Republic, Czechoslovakia,

diminished with the collapse of the Soviet Union and the end of worries that the Soviets would adopt the same attenuated justifications.<sup>168</sup>

Paying little heed to the actual terms of the Charter or ICJ interpretations, President Bill Clinton ordered unlawful armed reprisals on several occasions.<sup>169</sup> In 1993, he ordered an attack on government buildings in Baghdad in response to an alleged plot to assassinate former President George H.W. Bush.<sup>170</sup> In 1996, when Iraqi troops moved against Kurdish separatists in northern Iraq, Clinton ordered attacks in southern Iraq.<sup>171</sup> International law prohibits assassination, and murder of any kind is, of course, unlawful. In U.S. criminal law, the mere planning to carry out such an act is criminal, even if no injury results.<sup>172</sup> These are crimes however, not violations of Article 2(4) that give rise to the right of self-defense under Article 51.<sup>173</sup> Article 2(4) prohibits military force by states, not every violent crime with an international dimension, even one involving sovereign states.<sup>174</sup> Moreover, the use of force in self-defense to a violation of Article 2(4) is no longer available days or weeks later in the absence of on-going armed attacks.<sup>175</sup>

With respect to Clinton's attacks in support of Kurdish separatists in Iraq, the U.S. and UK actually tried to argue that these actions were lawful under the UN Security Council Resolutions that had been adopted against Iraq following its invasion of Kuwait in 1990.<sup>176</sup> France and Russia disagreed that those resolutions authorized the use of force in response to incidents with little connection to Kuwait's liberation.<sup>177</sup> Even if the U.S. and UK did have some sort of Security Council authorization to bomb Iraq for a dozen years after its withdrawal from Kuwait, bombing southern Iraq

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Afghanistan, Nicaragua, Grenada, and Panama. See CHRISTINE GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* 182-84 (2018).

168. Simma, *supra* note 166, at 14, 17. A prime example of the new attitude was the fact the U.S. issued no official justification for the first time since 1945 for using military force when it waged the 78-day bombing campaign against Serbia in 1999 to force the removal of Serb forces from its province of Kosovo. Mary Ellen O'Connell, *American Exceptionalism and the International Law of Self-Defense*, 776 SCHOLARLY WORKS 1, 56 (2002).

169. John Quigley, *Missiles with a Message: The Legality of the United States Raid on Iraq's Intelligence Headquarters*, 17 HASTINGS INT'L & COMP. L. REV. 241, 242 (1994); Louis Fisher, *Military Action against Iraq*, 28 PRESIDENTIAL STUD. Q. 793, 793 (1998).

170. Quigley, *supra* note 169, at 241-42.

171. *Id.*; see also Fisher, *supra* note 169, at 794.

172. 18 U.S.C. § 1117 (1994).

173. U.N. Charter arts. 2 ¶ 4, 51.

174. *Id.* at ¶ 4.

175. INT'L AND OPERATIONAL LAW DEP'T, *LAW OF ARMED CONFLICT DESKBOOK* (David Lee ed., 5th ed, 2015) 35, 35 n.10, [http://www.loc.gov/tr/frd/Military\\_Law/pdf/LOAC-Deskbook-2015\\_Ch4.pdf](http://www.loc.gov/tr/frd/Military_Law/pdf/LOAC-Deskbook-2015_Ch4.pdf).

176. U.N. SCOR, 49th Sess., 3245 mtg., at 21-22, U.N. Doc. S/PV.3245 (June 27, 1993).

177. Alex J. Bellamy, *International Law and the War with Iraq*, 4 MELB. J. INT'L L. 497, 508 (2003).

to retaliate for action against the Kurds violated the principles of necessity and proportionality.<sup>178</sup>

Clinton also carried out unlawful reprisals following terrorist attacks on the United States embassies in East Africa.<sup>179</sup> On August 7, 1998, Al Qaeda operatives detonated two truck bombs targeting United States embassies in Dar es Salaam, Tanzania and Nairobi, Kenya.<sup>180</sup> Over 200 people lost their lives because of the bombings, and many more were injured.<sup>181</sup> The vast majority were Tanzanians and Kenyans.<sup>182</sup> A U.S. government committee investigating the attacks, found the embassies lacked proper security.<sup>183</sup> This was a noteworthy finding given that just five years earlier Al Qaeda had carried out an attack on the World Trade Center in New York in which six people died, and more than a thousand were injured.<sup>184</sup> From that moment on, the U.S. had plenty of notice of the character and aims of Al Qaeda.<sup>185</sup> A number of the Trade Center attackers had been arrested and convicted.<sup>186</sup> The U.S. also succeeded in arresting and prosecuting three people linked to the embassy attacks.<sup>187</sup>

Rather than enhance security and redouble law enforcement efforts against Al Qaeda, measures known to succeed against terrorism, Clinton made a fateful decision two weeks after the embassy bombings.<sup>188</sup> He ordered missile attacks on Sudan and Afghanistan.<sup>189</sup> This was a significant step beyond Reagan's attack on Libya for state-sponsored terrorism and

178. See *Iran v. U.S.*, 2003 ICJ Rep. 183, 199 (explaining that “necessity and proportionality must be observed” to grant a right of self-defense). Perhaps more problematic is the fact that self-defense can only be invoked when force is used against the nation claiming self-defense or in a collective defense arrangement. *Id.* The United States was not attacked by Iraq, nor was the United States in a collective defense arrangement with the Kurds. *Id.*

179. See Steven Erlanger, *After the Attacks: The Diplomacy; Missile Strikes are Seen as New Strategy for U.S.*, N.Y. TIMES (Aug. 23, 1998), <http://www.nytimes.com/1998/08/23/world/after-the-attacks-the-diplomacy-missile-strikes-are-seen-as-new-strategy-for-us.html>; see also *In re Terrorist Bombings of U.S. Embassies in E. Afr.*, 552 F.3d 177, 180 (2d Cir. 2008).

180. *In re Terrorist Bombings of U.S. Embassies in E. Afr.*, 552 F.3d at 180.

181. *Id.*

182. *Id.*

183. Philip Shenon, *Many Flaws Blamed in Embassy Attacks*, N.Y. TIMES (Jan. 8, 1999), <http://www.nytimes.com/1999/01/08/world/many-flaws-blamed-in-embassy-attacks.html>.

184. Jesse Greenspan, *Remembering the 1993 World Trade Center Bombing*, HISTORY.COM, Feb. 26, 2013, <https://www.history.com/news/remembering-the-1993-world-trade-center-bombing>.

185. *Id.*

186. Richard Bernstein, *Explosion at the Twin Towers; 4 Are Convicted in Bombing at the World Trade Center that Killed 6, Stunned U.S.*, N.Y. TIMES (Mar. 5, 1994), <http://www.nytimes.com/1994/03/05/nyregion/explosion-twin-towers-4-are-convicted-bombing-world-trade-center-that-killed-6.html?pagewanted=all>.

187. *1998 US Embassies in Africa Bombings Fast Facts*, CNN (Aug. 9, 2017, 11:11 AM), <https://www.cnn.com/2013/10/06/world/africa/africa-embassy-bombings-fast-facts/index.html>.

188. Jamie McIntyre, et al., *U.S. Missiles Pound Targets in Afghanistan, Sudan*, CNN (Aug. 21, 1998, 5:10 AM), <http://www.cnn.com/US/9808/20/us.strikes.02/>.

189. *Id.*

clearly conflicted with the UN Charter.<sup>190</sup> In Afghanistan, the attacks took place in Khost, south of the capital Kabul, and in Jalalabad, east of Kabul.<sup>191</sup> The targets included an Al Qaeda base.<sup>192</sup> In Sudan, the U.S. declared the target to be a “chemical weapons related” facility and that it produced chemicals used in the manufacturing of VX nerve gas.<sup>193</sup>

Speaking to the nation, Clinton announced that he “ordered our armed forces to strike at terrorist-related facilities in Afghanistan and Sudan because of the imminent threat they presented to our national security.”<sup>194</sup> He continued:

I want to speak with you about the objective of this action and why it was necessary. Our target was terror. Our mission was clear - to strike at the network of radical groups affiliated with and funded by Osama bin Laden, perhaps the preeminent organizer and financier of international terrorism in the world today.<sup>195</sup>

“Today,” the president declared, “we have struck back.”<sup>196</sup>

Clinton did not directly cite Article 51 nor could he plausibly; the air strikes followed terrorist crimes, isolated events that were not part of ongoing, state sponsored use of force in violation of Article 2(4) and triggering Article 51.<sup>197</sup> Clinton had no firm evidence of any future plans even if the truck bombs could amount to the significant armed attack required to trigger Article 51.<sup>198</sup> Further, the air strikes were on two sovereigns with no legal responsibility for the embassy bombings.<sup>199</sup> As for necessity, missile strikes in retaliation for non-state actor terrorist crimes have no connection to

190. Shenon, *supra* note 183.

191. McIntyre, *supra* note 188.

192. *Id.*

193. *Id.* VX nerve gas, or methylphosphonothioic acid, is similar to sarin gas in that both chemicals disrupt the functions of muscles and nerves in the body, leading to death in a relatively short amount of time. *Types of Chemical Weapons*, FED’N AM. SCIENTISTS, <https://fas.org/programs/bio/chemweapons/cwagents.html>. (last visited Oct. 3, 2017). The use of any chemical weapons violates the *ius ad bello*, or laws of war because of their indiscriminate and fundamentally inhumane effects. *See generally id.*

194. *President Clinton Strikes Against Terrorist Speech*, AP ARCHIVE (Aug. 20, 1998), <http://www.aparchive.com/search?startd=&endd=&allFilters=&query=president+clinton+strikes+against+terrorist+speech&advsearchStartDateFilter=&advsearchEndDateFilter=&searchFilterHdSDFormat=All&searchFilterDigitized=All&searchFiltercolorFormat=All&searchFilteraspectratioFormat=All>; *see* AP Archive, *USA: President Clinton Strikes Against Terrorist Speech*, YOUTUBE (Jul. 23, 2015), <https://www.youtube.com/watch?v=EyDJVUSbgR0>.

195. AP Archive, *supra* note 194.

196. *Id.*; Barton Gellman & Dana Priest, *U.S. Strikes Terrorist-Linked Sites in Afghanistan, Factory in Sudan*, WASH. POST (Aug. 21, 1998), <http://www.washingtonpost.com/wp-srv/inatl/longterm/efricabombing/stories/strikes082198.htm>.

197. U.N. Charter arts. 2 ¶ 4, 51.

198. *Id.*

199. McIntyre, *supra* note 188.

successful suppression of terrorism. The evidence indicates they are counter-productive.<sup>200</sup> Al Qaeda went on to attack the U.S. on 9/11 as well as a dozen other states.<sup>201</sup> Al Qaeda was emboldened by the U.S. response, treating them as a military organization that could challenge the United States at the inter-state level.<sup>202</sup>

Curiously, Clinton was also emboldened.<sup>203</sup> Many states condemned the air strike on Sudan in part because the site bombed was not a chemical weapons plant and due to lack of evidence justifying the United States' actions.<sup>204</sup> Few states criticized the lack of a legal right to resort to force.<sup>205</sup> So Clinton, embroiled in an impeachment trial over having lied to investigators regarding sex with a White House intern, attacked Serbia in 1999 for seventy-eight days to force the Serbs to pull their forces from the province of Kosovo.<sup>206</sup> The intervention was under the auspices of NATO and clearly violated Article 2(4).<sup>207</sup> It was not, however, a reprisal.<sup>208</sup> It was an act of aggression.<sup>209</sup> Serbia actively attempted to defend itself resulting in an armed conflict.<sup>210</sup> Serbia's defensive actions were the part of attempts to create a legal justification for Kosovo after the fact.<sup>211</sup> Sweden had a committee look into the legal and factual questions surrounding the war, and Canada formed a commission that issued something called the "Responsibility to Protect," a variation on the old concept of "humanitarian intervention" to create a new exception to the Article 2(4) prohibition.<sup>212</sup> These *ex post facto* efforts were in vain. The rules on resort to force are *jus cogens*, meaning no derogation is permitted. New exceptions and interpretations narrowing the reach of a *jus cogens* prohibition are forms of derogation with no legal validity.

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200. Lobel, *supra* note 157, at 555.

201. *US Rocked by Terror Attacks*, BBC (Sep. 11, 2001, 9:54 PM), <http://news.bbc.co.uk/2/hi/americas/1537469.stm>.

202. *America at War: Post 9/11 Timeline*, PBS (June 29, 2004), [http://www.pbs.org/flashpointsusa/20040629/infocus/topic\\_01/timeline\\_sep2001.html](http://www.pbs.org/flashpointsusa/20040629/infocus/topic_01/timeline_sep2001.html). (last visited Mar. 18, 2018).

203. Erlanger, *supra* note 179.

204. *Id.*

205. *Id.*

206. William Clinton, Pres. of U.S., Clinton Justifies U.S. Involvement in Kosovo, (May 13, 1999), in *Transcript: Clinton Justifies Involvement in Kosovo*, CNN (May, 13 1999, 1:23 PM), <http://edition.cnn.com/ALLPOLITICS/stories/1999/05/13/clinton.kosovo/transcript.html>.

207. U.N. Charter art. 2, ¶ 4.

208. *Reprisals*, 12 *Dig. Int'l L.* 148, 149 (1971).

209. U.N. Charter art. 39.

210. See Antonio Cassese, *A Follow-Up: Forcible Humanitarian Countermeasures and Opinio Necessitatis*, 10 *EUR. J. INT'L L.* 791, 793 (1999).

211. U.N. GAOR, 53rd Sess., 7th plen. mtg. at 10-11, U.N. Doc. A/53/PV.7 (Sep. 21, 1998).

212. See INTERN'L COMM'N ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT 2 (Dec. 2001); see generally Gareth Evans, *From Humanitarian Intervention to the Responsibility to Protect*, 24 *WIS. INT'L L. J.* 703, 707-08 (2006).

In 2000, Al Qaeda struck again, blasting a hole in the side of the U.S.S. Cole docked in Aden harbor in Yemen.<sup>213</sup> Seventeen U.S. sailors died.<sup>214</sup> This time Clinton did not carry out any major retaliatory strike but authorized the CIA to use a newly weaponized Predator drone to hunt for Bin Laden and assassinate him and everyone near him with Hellfire missiles.<sup>215</sup> Clinton interpreted the anti-assassination executive order that had restricted such killing since the end of the Vietnam War, as not applicable to drone strikes.<sup>216</sup> No public evidence is available as to whether Clinton had any concern about the international law against assassination and the use of military force on the territory of a sovereign state, regardless of launch vehicle.

The CIA did not, of course, succeed in killing bin Laden in 2000.<sup>217</sup> He went on to order his followers to carry out the 9/11 attacks.<sup>218</sup> President Bush, in office just eight months, followed Clinton's lead and authorized both a major military operation against Afghanistan and a secret mission to kill members of Al Qaeda using drones and other techniques, including a car bomb.<sup>219</sup> By 2009, these tactics in clear violation of international law, had failed to kill bin Laden or slow the pace of terrorist attacks.<sup>220</sup> Rather, new groups related to Al Qaeda or inspired by it began violent action across Africa and Asia.<sup>221</sup> Nevertheless, the new administration of Barack Obama carried on the war in Afghanistan, doubled drone strikes, and continued at varying levels to fight in the civil war in Iraq that had erupted following the unlawful invasion by the U.S., UK, and Australia in 2003.<sup>222</sup> The Bush administration attempted to justify the invasion as Clinton had for the air strikes in 1998 in Iraq, by invoking the Security Council's Resolutions of 1990–1991.<sup>223</sup> Few experts have found this argument credible.

In 2013, perhaps finally concluding that drone attacks were proving counter-productive on many levels in the effort to suppress terrorism,

213. NAT'L COMM'N ON TERRORIST ATTACKS, THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 190 (authorized ed. 2004).

214. *Id.*

215. Mark V. Vlasic, *Assassination & Targeted Killing – A Historical and Post-Bin Laden Legal Analysis*, 43 GEO. J. INT'L L. 259, 261 (2012).

216. NAT'L COMM'N ON TERRORIST ATTACKS, *supra* note 213, at 132, 132 n.123.

217. *Death of Osama bin Laden: Fact Facts*, CNN (Nov. 4, 2017, 1:12 PM), <https://www.cnn.com/2013/09/09/world/death-of-osama-bin-laden-fast-facts/index.html>.

218. NAT'L COMM'N ON TERRORIST ATTACKS, *supra* note 213, at 285.

219. Vlasic, *supra* note 215, at 290.

220. *Id.* at 299.

221. *Id.* at 293-94.

222. *Id.* at 292.

223. U.N. SCOR, 58th Sess., 4701 mtg., at 2–17, U.N. Doc. S/PV.4701 (2003); *see also* Chip Gibbons, *When Iraq Was Clinton's War*, JACOBIN, <https://www.jacobinmag.com/2016/05/war-iraq-bill-clinton-sanctions-desert-fox/>.

Obama's lawyers developed their own set of "guidelines," which led to a steep decline in attacks.<sup>224</sup> At the time the Presidential Policy Guidelines (PPG) were developed, commentators pointed out that they did not have the force of law and would not bind future presidents. Acknowledging that the law actually forbids targeted killing might have caused Obama and his advisers and lawyers to fear the repercussions of admitting to serious law violations during his eight years in power.

Within days of his inauguration, unsurprisingly, Donald Trump provided the military with wide latitude to decide where and when to use military force, including drones.<sup>225</sup> The administration did not mention the UN Charter rules on the use of force in issuing its policy.<sup>226</sup> No mention was made of Obama's PPG.<sup>227</sup> On January 25, 2017, President Trump was joined for dinner at the White House by Secretary of Defense James Mattis and Chairman of the Joint Chiefs of Staff Joseph Dunford.<sup>228</sup> No legal advisers were present.<sup>229</sup> President Trump gave his first approval for a specific military operation: a combined air and ground attack on a village in Yemen.<sup>230</sup>

The operation went forward during the moonless early morning hours of January 29 (January 28 in the U.S.); thirty U.S. Navy Seals, together with United Arab Emirates (UAE) troops and some troops loyal to ousted Yemeni President Hadi, employed drones launching Hellfire missiles, helicopter gunships, Harrier jets, grenades, and small arms.<sup>231</sup> The village of Ghaylil, in the remote Bayda province, was the target. Men of the village had been fighting on the same side as the U.S., in favor of the Saudi-backed President Hadi.<sup>232</sup> The village was fortified and the men kept guard from attack by Houthis, who are backing Hadi's predecessor, President Saleh, who was supported by Iran. According to *The Intercept*, the residents had

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224. *Procedures for Approving Direct Action Against Terrorist Targets Located Outside the United States and Areas of Active Hostilities*, 1 (May 22, 2013), [https://www.justice.gov/oip/foia-library/procedures\\_for\\_approving\\_direct\\_action\\_against\\_terrorist\\_targets/download](https://www.justice.gov/oip/foia-library/procedures_for_approving_direct_action_against_terrorist_targets/download).

225. Josh Berry, *Searching for Strategy: America's Military Under Trump*, HARV. POL. REV. (Sept. 22, 2017), <http://harvardpolitics.com/united-states/searching-for-strategy-americas-military-under-trump/>.

226. *Id.*

227. *Id.*

228. Basma Atassi, et al., *Yemen Raid: The Plan, the Operation, and the Aftermath*, CNN (Feb. 9, 2017), <http://www.cnn.com/2017/02/08/middleeast/yemen-raid-explainer/index.html>.

229. *Id.*

230. *Id.*

231. Iona Craig, *Death in Al Ghayil*, INTERCEPT (Mar. 9, 2017, 9:00 AM), <https://theintercept.com/2017/03/09/women-and-children-in-yemeni-village-recall-horror-of-trumps-highly-successful-seal-raid/>.

232. *Id.*

no idea why the Americans and Emiratis attacked them and did so without compunction.<sup>233</sup>

Women, ten children under the age of thirteen, and fourteen Yemeni men died.<sup>234</sup> A U.S. Navy Seal was killed and several more U.S. troops were wounded. The UAE will not say if they lost anyone. A \$78 million Osprey aircraft was intentionally destroyed to prevent it from falling into opponents' hands. Nevertheless, President Trump's spokesperson Sean Spicer declared the operation "highly successful."<sup>235</sup> He shifted to linking the operation to the Obama administration when the details came out of the dozens killed, including among the children, an eight-year old American girl.<sup>236</sup> A video seized in the raid and meant to demonstrate its success was ten years old.

The U.S. followed this tragedy with yet more air strikes in Yemen.<sup>237</sup> President Trump proclaimed areas "zone[s] of active hostilities," where the military will not need any prior White House authorization to strike.<sup>238</sup> The president went on to loosen the Obama administration's zero civilian casualty policy in counter-insurgency operations, like those in Afghanistan, Iraq, and Syria.<sup>239</sup> Soon after the policy change, well over 100 civilians died in a U.S. airstrike on an apartment building in Mosul, Iraq on St. Patrick's Day.<sup>240</sup> Then on April 6, Trump ordered the attack on Syria.<sup>241</sup> "[O]n Tuesday," the president began, "Syrian dictator Bashar al-Assad launched a horrible chemical weapons attack on innocent civilians."<sup>242</sup> "Using a deadly nerve agent," he continued, "Assad choked out the lives of helpless men, women, and children."<sup>243</sup> "It was a slow and brutal death" caused by Sarin gas, that targeted "[e]ven beautiful babies."<sup>244</sup> The moral outrage of the president peaked when he said that "[n]o child of God should ever suffer such horror."<sup>245</sup>

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233. *Id.*

234. *Id.*

235. *Id.*

236. Craig, *supra* note 231.

237. *Id.*

238. Mary Ellen O'Connell & Brian Boyd, *Drone Technology and the Trump Doctrine*, E-INT'L REL. (June 29, 2017), <http://www.e-ir.info/2017/06/29/drone-technology-and-the-trump-doctrine/>.

239. *Id.*

240. *Id.*

241. Associated Press, *Trump Says Syria Attack in 'Vital' US Interest*, YOUTUBE (Apr. 6, 2017), <https://www.youtube.com/watch?v=OquzsoKJog8>.

242. *Trumps Full Remarks Following the U.S. Strike on Syria*, CNNPOLITICS (Apr. 7, 2017, 6:14 AM), <https://www.cnn.com/2017/04/06/politics/donald-trump-syria-strikes-remarks/index.html>.

243. *Id.*

244. *Id.*

245. *Id.*

German Foreign Minister Sigmar Gabriel said President Trump's missile strike was "understandable."<sup>246</sup> Explaining Germany's frustration, Gabriel said that

It was almost unbearable to see that the U.N. Security Council was not able to react clearly and unambiguously to the barbaric use of chemical weapons against innocent people in Syria . . . . It's understandable that the United States have now reacted with an attack against the military structures of the Assad regime which caused this atrocious war crime.<sup>247</sup>

German Chancellor Angela Merkel and French President Francois Holland then issued a joint press release and declared that "President Assad bears sole responsibility for this development. His repeated use of chemical weapons and his crimes against his own people demanded sanctions, as called for by France and Germany as early as summer 2013 following the massacre in Ghouta."<sup>248</sup> The United Kingdom and Australia described the United States reprisal as "appropriate" and "just."<sup>249</sup>

#### CONCLUSION

Lack of international condemnation, however, is not a license for the use of force nor is moral outrage.<sup>250</sup> Moral outrage at the Syrian government *is* justified. The use of chemical weapons is always wrong. It is little wonder that President Trump's missile strikes were popular.<sup>251</sup> The world looks at Syria with horror as the inhuman violations of human rights continue.<sup>252</sup> We want something to be done; we want Assad and the other perpetrators to be brought to justice.<sup>253</sup> It is equally wrong, however, to transform our sense of injustice into vengeance. Frustration over another

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246. *German Foreign Minister Says U.S. Strike on Syria 'Understandable'*, REUTERS (Apr. 7, 2017, 3:37 AM), <https://www.reuters.com/article/us-mideast-crisis-syria-germany/germ-reign-minister-says-u-s-strike-on-syria-understandable-idUSKBN1790X>.

247. *Id.*

248. Press Release, Joint Statement by Fed. Chancellor Merkel and President Hollande of Fr. Following the Air Strikes in Syria, The Press and Info. Office of the Fed. Gov't (Apr. 7, 2017), [https://www.bundestkanzlerin.de/Content/EN/Pressemitteilungen/BPA/2017/2017-04-07-erklarung-merkel-hollande\\_en.html](https://www.bundestkanzlerin.de/Content/EN/Pressemitteilungen/BPA/2017/2017-04-07-erklarung-merkel-hollande_en.html).

249. Palazzo, *supra* note 5.

250. U.N. Charter arts. 2 ¶ 4, 51.

251. Palazzo, *supra* note 5.

252. John Bacon & Jane Onyanga-Omara, 'Reprehensible': World Reacts to Horror of Syrian Gas Attack That Killed Children, USA TODAY (Apr. 5, 2017, 8:43 AM), <https://www.usatoday.com/story/news/world/2017/04/04/syrian-activists-several-dead-idlib-chemical-attack/100013666/>.

253. Nick Robins-Early, *Inside One Group's Mission to Bring Assad's Regime to Justice*, HUFFINGTON POST (Apr. 26, 2016, 2:05 PM), [https://www.huffingtonpost.com/entry/assad-war-crimes-cija\\_us\\_571ed6e64b0f309baec63e0](https://www.huffingtonpost.com/entry/assad-war-crimes-cija_us_571ed6e64b0f309baec63e0).

use of chemical weapons in Syria cannot justify the violation of a *jus cogens* norm. Since the end of the Cold War, concern for the rule of law continues to fade under the pressure of moral arguments and demands for greater security. Yet, as explained above, the prohibition on the use of force is an ancient and universal moral prohibition as well as legal one.<sup>254</sup>

Secretary of State Rex Tillerson was right to rebuke China for subverting the global order and undermining the sovereignty of its neighbors.<sup>255</sup> He pointed to India as a model.<sup>256</sup> Would that he could point to the United States as a model of compliance with the rules that matter most—the restrictions on killing with military force.<sup>257</sup>

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254. U.N. Charter art. 2 ¶ 4.

255. Gaouette, *supra* note 35.

256. *Id.*

257. *Id.*