

2018-01-01

Just War: New Customary International Law To Combat Violent Non-State Actor Groups?

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JUST WAR: NEW CUSTOMARY INTERNATIONAL LAW
TO COMBAT VIOLENT NON-STATE ACTOR
GROUPS?

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Lisa Marie Holz

2018

Dedication

To my family and friends for all your love and support.

For the innocent victims of war everywhere-may their memory be a blessing.

JUST WAR: NEW CUSTOMARY INTERNATIONAL LAW
TO COMBAT VIOLENT NON-STATE
ACTOR GROUPS?

by

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THESIS

Presented to the Faculty of the Graduate School of
The University of Texas at El Paso
in Partial Fulfillment
of the Requirements
for the Degree of

MASTER OF SCIENCE

Intelligence and National Security Studies Program

THE UNIVERSITY OF TEXAS AT EL PASO

May 2018

Acknowledgements

I would like to thank all faculty and staff, both past and present, of the National Security Studies Institute. I am very grateful for all your efforts over the last two and half years. Special thanks must go to Dr. Stephen Coulthart, Dr. Bridget Nolan, and Professor Richard Rosen for their advice and encouragement during the writing of this thesis. Finally, I would also thank Dr. Larry Valero for providing me with some wonderful opportunities. I shall carry the fond memories of my time at UTEP with me where ever I may go.

Abstract

The issue that this study focused upon was the legitimacy of military interventions by a state against a violent non-state actor group located within another state's territory. The research sought to answer how interventions by the United States and its allies have evolved during the post 9/11 era. It additionally explored if the justification for military interventions had changed. This study used data from the Uppsala Conflict Data Program and the United Nations Security Council to create a hybrid data-set and analyzed the data for the location and number of states participating in operations against violent non-state actors ("VNSAs"). This study also investigated consent and authorization issues. The results demonstrate that interventions without consent are not significantly widespread as to constitute a new international norm. The results also highlight that there more "train-and-assist" operations than the traditional "boots-on-the-ground" responses. The findings demonstrate that the international community of states is the final arbiter of morality, and that strategies grounded in deontological ethics are becoming more prevalent. Not only is this compatible with Just War, it consolidates the notion of a rules based international system. Finally, train-and-assist operations may prove far more financially sustainable than traditional interventions.

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Part One

Introduction

Just War Theory (JWT) and state normative practice has predominantly been a Western creation.¹ Its purpose was not intended to abolish war but to reduce the number of conflicts and the suffering associated with war. Just War centered on the circumstances one state could legitimately go to war with another. It also informed as to how states should conduct themselves while engaged in military conflict. However, the global security environment has dramatically evolved from traditional interstate conflicts to include threats posed by violent non-state actor (VNSA) groups located both locally and within other sovereign states.²

Although each violent non-state actor is different, they share some similar traits in that their emergence may serve as an alternative form of governance to the state.³ The relationship between the state and the VNSA is usually one of hostility and it challenge the monopoly on violence that is normally the domain of the state.⁴ Some examples of VNSAs include warlords, domestic and transnational criminal groups, gangs, and terrorist

¹ T. Assad, "Thinking about Terrorism & Just War", *Cambridge Review of International Affairs*, 2010, Vol.23 No.1, p.4.

² M. Walzer, *Arguing About War*, Yale University Press, 2004; N. Fotion, *War and Ethics: a new just war theory*, Continuum International Publishing, 2007

³ P. Williams, *Violent Non-State Actors and National and International Security*, International Security Network- Swiss Federal Institute of Technology, Zurich, 2008, pp. 6-8

⁴ Ibid

organizations.⁵ The terrorist attacks of September 11th ignited debate if Just War Theory can be applied to address the new types of threats.⁶

Addressing the Rise of Violent Non-State Actors

The overarching research problem is: *How have the characteristics of the United States and Allied responses to violent non-state actors (VNSAs) evolved since 9/11 and how have the justifications for interventions changed?* Accordingly, this project explores how and when the U.S. and its allies have intervened against violent non-state actors in the post 9/11 era. It also examines if these types of interventions are compatible with the principles of Just War theory. While it may not be possible to answer the second issue in its entirety, nonetheless it is important to explore due to the continued rise of violent non-state actor organizations.

The issues are significant because there is some disagreement among scholars and jurists as to when states are justified in using military intervention to manage the national security challenges posed by VNSAs. There is not a complete picture as to where and how these interventions are being conducted. *Jus ad bellum* -- the law governing the right to wage war -- was originally premised on the notion that military interventions would

⁵ Ibid

⁶ N.C Crawford, "Just War Theory and the U.S Counterterror War" *Perspectives in Politics*, 2003, Vol.1 No.1, pp.5-25; D. Fisher, "Can a medieval just war theory address 21st century concerns" *The Expository Times*, 2012, Vol.123 No.4, pp.157-165; N. Fotion, "Two Theories of Just War" *Philosophia*, 2006, Vol.34, pp.53-64; H. Hill, "Can Just War Theory Survive the War on Terror" *Journal of Justice and International Studies*, 2020, pp.77-87; E. Patterson, "Just War in the 21st Century: Reconceptualizing Just War Theory after September 11th" *International Politics*, 2005, Vol.42, pp.116-134; M. Walzer, "Terrorism and Just War", *Philosophia*, 2006, Vol.34, pp.3-12

fulfil a rightful intention to advance “good, or [an] avoidance of evil.”⁷ The philosophical issue over who gets to arbitrate what is “good or evil” has been long debated since the times of Socrates and Plato.⁸ It also raises the “do unto others” maxim—what you do to another with impunity on one occasion, may well be revisited upon you by some other in the future.

In *Nicaragua v. United States* (1986), the International Court of Justice held that interventions against VNSAs in other states without consent were illegal. The exception to this was if a state had declared itself to have suffered an armed attack, and that VNSA was acting under the direction or being supported by the host state.⁹ Illegal interventions potentially place states who have ratified the *Rome Statute of the International Criminal Court*¹⁰ in jeopardy of international legal proceedings for war crimes and “crimes of aggression.”¹¹ Foreign policy may also be dramatically impacted upon negatively if partners and allies are uncertain as to the legality of actions taken in concert with the United States—which has not ratified the Statute.

The results of this study will lend support to strengthen the notion of a rules-based international order particularly considering China’s recent statement that it intends to “regain its might and re-ascend to the top of the world.”¹² Furthermore, if it is accepted

⁷ T. Aquinas, *Summa Theologica*, circa 1265-1274, Art.1

⁸ *The Republic of Plato (2nd Ed) Book 1*, Basic Books, 1991, translated with notes and an interpretive essay by A. Bloom, pp.27-34

⁹ *Nicaragua v. United States of America* (1986) I.C.J 14, para.199

¹⁰ *The Rome Statute of the International Criminal Court* July 17, 1998, 2187 U.N.T.S. 90.

¹¹ *Ibid* Arts. 5 and 8

¹² Xinhua News Agency in *Xi’s Key Milestone Positions Him to Rule China for Decades*, Bloomberg Politics, October 24, 2017, <https://www.bloomberg.com/news/articles/2017-10-24/xi-s-new-milestone-positions-him-to-rule-china-for-decades-more>

that these types of interventions are an appropriate response by one state, then it follows that similar interventions should be accepted as legitimate by any other state that chooses to employ this strategy in future. It also raises the issue that if it is a legitimate response to one type of violent non-state actor group, should it not be considered mandatory for all types of VNSA including trans-national organized crime syndicates, pirates, and cartels?

Literature Review: Just War Theory and Violent Non-State Actors

Just War Theory has predominantly been a Western-Eurocentric creation.¹³ Its purpose was not to abolish war but rather to establish rules to reduce the outbreak of conflicts, and the suffering associated with war. The notion that violence could be “just” or “moral” from a Western position first appeared in the writings of Saint Augustine in 400 A.D. Augustine noted that wars had been an ongoing feature throughout various periods of civilization. Rather than attempting to outlaw war itself, he suggested that there could be limits to when military conflicts between nations were permissible. He asserted that war carried out in accordance with the will of God showed “not ferocity but obedience, and God in giving the command, acted not in cruelty, but in righteous retribution...”¹⁴ He further went on to ask the question of “[w]hat is the evil [motivation] in war?” to which he elucidated that cruelty, violence for its own sake, and seeking to usurp power unlawfully

¹³ Assad stated, “It is common knowledge that the concept of ‘just war’ has its roots in medieval Christian theory...today the term...is about the use of international violence that is in fact necessary & moral” He goes on to further add that “a widely regarded illegal act could be legitimized simply by European states endorsing its intentions” Op Cit, p.4

¹⁴ A.H Augustinus, *Contra Faustum Manichaeum*, 400 A.D, Book 22,

were all unjust reasons for conducting war. Additionally, Augustine explored the issue of who could rightfully authorize military acts and concluded:

A great deal depends on the causes ... and on the authority they have for doing so; for the natural order which seeks the peace of mankind, ordains that the monarch should have the power for undertaking war...and that the soldiers should perform their military duties in behalf of the peace and safety of the community. ¹⁵

The question of whether any war could be considered lawful, philosopher, theologian, jurist, and later Saint Thomas Aquinas put forward that firstly, for an armed conflict to be considered as legitimate, there had to be rightful sovereign authority (e.g., prince, monarch) to authorize acts of war.¹⁶ Secondly, there had to be a “just” cause. Aquinas declared, a “just war is ... one that avenges wrong, when a nation or state has to be punished, for refusing to make amends for wrongs ... or to restore what has been unjustly seized.”¹⁷ Finally, he put forward the concept of rightful intention -- “the advancement of good, or the avoidance of evil.” ¹⁸

In 1625 jurist and political theorist Grotius published *De Jure Belli ac Pacis* which consisted of three separate books devoted to *jus ad bellum*, customary practices, and *jus in bello*. In this comprehensive work Grotius employed the philosophy of Natural Law,

¹⁵ Ibid

¹⁶ T. Aquinas, Op Cit, Art.1

¹⁷ Ibid

¹⁸ Ibid

which *Oxford Dictionary* defines as “a body of unchanging moral principles that is regarded as a basis for all human conduct.”¹⁹ This expanded Just War Theory from a religious doctrine to a broader normative theory that elaborated on the concept of *jus ad bellum*—the right to wage war. Indeed, it may be asserted that Grotius could be considered the “father” of what is recognized today as modern Just War Theory and public international law.

Like his predecessors, Grotius examined the question on the lawfulness of war itself. He concluded “so far from any thing (sic) in the principles of nature being repugnant to war, every part of them indeed rather favours (sic) it.”²⁰ Additionally, he expanded upon the notion of the authority of a sovereign power. Furthermore, Grotius distinguished between the nature of public war and matters considered to be private dispute between individuals.²¹

Grotius also elaborated on several other issues, including treaties and obligations with respect to embassies. He asserted that “almost every page of history offers ... the inviolable rights of ambassadors and the security of their persons, a security sanctioned by every clause of human and revealed law.”²² Grotius restated what he considered to be ‘unjust’ causes for war as put forward in the works of his predecessors. Furthermore, he counselled against a rush to war even when a just cause was found to exist in what is now considered the “last resort” principle of modern Just War Theory.²³

¹⁹ Oxford Dictionary Online

²⁰ H. Grotius, *De Jure Bellis ac Pacis*, 1625

²¹ Ibid

²² Ibid

²³ Ibid

Lastly, Grotius contemplated the way in which a “just” war was to be conducted. He introduced to the literature the proposition of *jus in bello*.²⁴ This included the moderation in laying waste to an enemy country, the humane treatment of prisoners and hostages, and a respect for declared neutrality.²⁵ Grotius’ scholarship laid the foundations for codified international law, such as the Geneva Conventions and other conventions of Just War. However, as with the previous foundational works by Aquinas and Augustine the early literature is purely a discussion of ideas on what a ‘just’ war is.

Modern day scholarship on Just War Theory and the subsequent development of the Law of War has proceeded upon the basis of a Christian-Western interpretation, and accepted to be based on the following principles:

- War can only be waged for a just cause, which may extend beyond the cause of self-defense against an armed attack. Humanitarian intervention and pre-emptive war are also often considered just causes.
- War can only be waged under legitimate authority. Usually the constitution and the laws of a nation state specify the institutions and personnel authorized to make war decisions. The U.N Charter authorizes the Security Council to make the international community's war decisions.
- War can only be waged with the right intention. Correcting a suffered wrong is considered a right intention, but seeking material gain is not.
- War can only be waged if there is a reasonable likelihood of success.

²⁴ Ibid

²⁵ Ibid

- War must be waged with proportionality in mind. The suffering which existed pre-war should not be overshadowed by the suffering the war may cause.
- War can only be waged as a last resort. War is not 'just' until all realistic options which are likely to right the wrong have been pursued.²⁶

These are not the only principles, others include: necessity of military action, humanity, and honor.²⁷ Once war has begun, Just War Theory also directs how combatants are to act (*jus in bello*) during the conflict:

- Just war conduct should be governed by the principle of discrimination or distinction. The acts of war should be directed towards the inflictors of the wrong, and not towards civilians caught in circumstances they did not create. The prohibited acts include bombing civilian residential areas that include no military target and committing acts of terrorism or reprisal against ordinary civilians.²⁸
- Just war conduct should be governed by the principle of proportionality. The force used must be proportional to the wrong endured, and to the possible good that may come. This includes attacks that might cause increased or excessive incidental harm *i.e.* an increased level of collateral damage.²⁹

²⁶ U.S. Department of Defense Law of War Manual, 1.11.1, June 2015, Updated December, 2016: Hill, Op Cit, p.79

²⁷ DoD War Manual, Ibid, Chap.2

²⁸ Protocol I Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 51.2, Jun. 8, 1977, 1125 UNTS 3

²⁹ DoD War Manual, Op Cit, 2.4.2; Hill, Op Cit, p.79

Just War Theory was originally state-centric with a predominant focus on how the state is to act in its response to threats from other states.³⁰ However, with the end of the Cold War and the decline of traditional state-versus-state conflict, new threats emerged as a challenge to international security and the theory. A number of scholars posited that with the rise of non-state actor threats, Just War Theory was outdated and that a more pragmatic approach was required.³¹ Others asserted that it did not need to be radically reinterpreted, rather that there needed to be a reintegration and reinforcement of ‘virtue’ as originally espoused by Aquinas.³² With a distinction made between what has been termed “new and old wars,” the theory has subsequently been reworked by some scholars to include a new “Irregular” Just War Theory component.³³

Irregular Just War Theory specifically considered asymmetric warfare which *Oxford Online* defined as “warfare where a smaller or inferior force uses unexpected or unconventional tactics against a larger or superior adversary.”³⁴ Irregular Just War Theory also considered the rise of non-state actor violence such as insurgency and terrorism.³⁵ Fotion asserted that one of the primary benefits of Irregular Just War Theory is that the state is “given some slack to attack preventively,” which is not permitted under Regular Just War.³⁶ He maintained that if the intelligence indicated that a VNSA “has powerful

³⁰ Walzer, 2004 Op Cit

³¹ Crawford Op Cit; Hill Op Cit; Patterson Op Cit

³² Fisher Op Cit, Walzer M, *Just and Unjust Wars: A Moral Argument with Historical Illustrations 5th Edition*, Basic Books, 2015, New York

³³ Fotion 2007, Op Cit

³⁴ *Oxford Online Dictionary*

³⁵ Fotion, Ibid; M. Kaldor, *New and Old Wars: Organized Violence in a Global Era*, 2012

³⁶ Fotion Ibid, p.117

weapons, is in the process of collecting more weapons, is in the process of gaining new recruits to its cause and has plans for a future violent event, then it can be attacked...even if it has not initiated any attacks yet.”³⁷ Another benefit afforded to the state is that the last resort principle is “defunct,” particularly if the state is not aware of the existence of the group until after an attack.³⁸ However, Fotion issued the caveat that the use of Irregular Just War principles should be assessed on a case-by-case basis.³⁹

These “new wars” that are asymmetrical in nature raise other questions. The issue of who is responsible for civilian deaths in urban based settings and how “should” an army fight where insurgents and other VNSAs choose to fight in that environment has yet to be conclusively settled.⁴⁰ Additionally, it also highlights the problem of the use of civilians as human shields.⁴¹ As Walzer asserted that if the number of civilian casualties is considered excessive, then rightly or wrongly, the military will normally be held to blame in the court of public opinion.⁴² Even more importantly the principle of “reasonable success” faces close scrutiny. Under these built up urban conditions, is it possible that an army can be victorious when it is committed to “just rules of engagement,” particularly where the non-state actor does not feel bound to adhere to the established rules of armed conflict?⁴³

³⁷ Ibid

³⁸ Ibid, p.118

³⁹ Ibid, p.117

⁴⁰ Walzer, 2015 Op Cit, Preface, p. xxi

⁴¹ Walzer Ibid

⁴² Protocol I Additional to the Geneva Conventions of August 12, 1949 and Relating to the Protection of Victims of International Armed Conflicts, arts. 51.5(b), 57.2(b), 57.3, Jun. 8, 1977, 1125 UNTS 3; See also Walzer Ibid

⁴³ Ibid, Preface, p. xx

Another associated emerging practice --the Responsibility to Protect-- is directed at legitimizing military action in a state that has become predatory towards its own population either generally or against specifically targeted groups.⁴⁴ Additionally, Scharf has asserted that the “unwilling-and-unable doctrine” legitimized pre-emptive collective self-defense against VNSA groups located in a third state.⁴⁵ This doctrine posits that “force can be justified where a government is unwilling or unable to suppress the threat posed by the non-state actors operating within its borders.”⁴⁶ While this may be a settled doctrine from the U.S’ position, it is highly contestable because it violates other long-standing international customary law vis-a-vis non-intervention and state sovereignty. Bethlehem has suggested that with “the inventing of new language ... the United States was moving away from ... established tenets of international law.”⁴⁷ Furthermore, it is in stark contrast to the International Court of Justice’s ruling in *Nicaragua v. United States* (1986).⁴⁸ Finally, as was underscored in *Democratic Republic of the Congo v. Uganda* (2005), even when consent is obtained “such operations must be limited and restricted within the parameters of such consent.”⁴⁹

A recent philosophical and moral contribution to the literature by Walzer is the concept of non-violence and the theory of war -- a “war without weapons.”⁵⁰ It is premised

⁴⁴ It could be suggested that the Responsibility to Protect is very much aligned with Aquinas’ notions of “advancement of good, or the avoidance of evil...”

⁴⁵ M. Scharf, “How the War Against ISIS Changed International Law” *Faculty Publications*, 2016, Paper 1638 p. 52-53

⁴⁶ *Ibid*, pp.3-4

⁴⁷ Bethlehem in O. Gross, “Unresolved Legal Questions Concerning Operation Inherent Resolve” *Texas International Law Journal*, 2017, Vol.52 No.2 p.21

⁴⁸ *Nicaragua v. U.S.* (1986) Op Cit

⁴⁹ *Democratic Republic of the Congo v. Uganda* (2005) I.C.J 116 at para 52 in Gross, Op Cit, p.16

⁵⁰ Walzer 2015 Op Cit, p.329

on the notion that allows for the conceding of a country or territory to an invading force without any military resistance.⁵¹ It then falls to the civilian population to “deny the victorious army the fruits of its victory through ... civilian resistance and non-cooperation....”⁵² There has been some debate as to its effectiveness and as yet there are “no cases in which ... civilian defense has caused an invader to withdraw.”⁵³ However, Walzer countered that:

...no non-violent struggle has ever been undertaken by a people trained in advance in its methods and prepared ...to accept its costs. So, it might be true; and if it is, we should regard aggression very differently from the way we do at present.⁵⁴

While the concept of a non-violent resistance coupled with civil disobedience was in part responsible for India gaining its independence from the British Empire, this was after India had been colonized for 90 years. It is hard to envisage that a population would be committed to remaining non-violent in the face of an invasion in this day and age.

Although violent non-state actors are not a new phenomenon within nation states, their ability to disrupt the international system has increased exponentially since the end of the Cold War. Some organizations have the financial and materials to rival their host, and other states.⁵⁵ While some may work in collusion with a host regime, many are

⁵¹ Ibid, pp.329-330

⁵² Ibid, p.330

⁵³ Sharp in Walzer, Ibid

⁵⁴ Walzer Ibid

⁵⁵ Williams, Op Cit, p.4; It has been reported that drug cartels within Colombia allegedly had the third largest ‘submarine’ fleet behind the U.S. and China. While they are non-weaponized and used for drug smuggling activity, nonetheless they “tie up considerable resources” of the U.S and other countries – see

involved in direct confrontation with the state and its security institutions.⁵⁶ Additionally, VNSAs challenge the long-held Weberian concept that it is the state that holds the sole monopoly on violence;⁵⁷ however, Williams contended that the notion of state monopoly over the “use of force is increasingly being reduced to a convenient fiction.”⁵⁸

Furthermore, poor governance structures in already fragile states provides space for some VNSAs to step in to provide services to communities that would otherwise be the domain of the state. This can include local security, welfare, education, and local economic opportunities.⁵⁹ Rather than being an “ungoverned space” the territory becomes an “alternatively governed” space.⁶⁰ This in turn further weakens the legitimacy of the state.⁶¹

Many violent non-state actor organizations may appear to share similar traits. These include: a charismatic leader, “a sense of common purpose” for their members, and an organizational structure ostensibly capable of achieving the group’s objectives.⁶² However, there are also some notable differences. Some VNSAs have a hierarchal top-down structure, while others are more decentralized.⁶³ Additionally, the “strength” of organizations can vary between “local, national or transnational” influence.⁶⁴

J. Arasli, “States Vs. Non-State Actors: Asymmetric Conflict and Challenges to Military Transformation” *Eurasia Review*, March 13, 2011, <http://www.eurasiareview.com/13032011-states-vs-non-state-actors-asymmetric-conflict-and-challenges-to-military-transformation/>

⁵⁶ Williams, *Ibid*, p.4

⁵⁷ *Ibid*

⁵⁸ *Ibid*

⁵⁹ *Ibid*, pp.7-8

⁶⁰ *Ibid*, p.6

⁶¹ *Ibid*

⁶² *Ibid*, p.7

⁶³ *Ibid*, p.8

⁶⁴ *Ibid*

Violent non-state actor organizations can also have different motivations for their use of violence. Terrorists use violence to create fear within a target demographic and to disrupt the status quo. Their motivation is normally ideologically driven. However, the gang, organized crime syndicate, or drug cartel's motivation is financial, and violence is used to achieve that objective or remove a rival or other threat.⁶⁵ While there may be some nexus between criminal organizations and terrorist groups, it is more plausible that terrorists become involved in other criminal activity to further their ideological goals.

Summarizing Knowledge Gaps

Modern scholarship has developed upon the basis of a Christian-Euro worldview.⁶⁶ It does not consider other identities and traditions, nor does it consider what these standards may look like from a non-Western perspective. Some Islamic scholars contend that within Islamic culture the only 'just' war is a holy war (not to be confused with *jihad*) and that:

The most widely accepted reasons of a 'just war' are 1. Defense 2. Revolution against tyranny and 3. Establishment of the Shar'iah. However, defensive war in Islam can include: a) punitive wars against the enemies of Islam, b) sympathetic war in support of the struggle of oppressed Muslims in foreign

⁶⁵ Ibid

⁶⁶ Assad Ibid

lands, c) punitive war against rebels within an Islamic state, and d) an idealistic war fought in order to command the good and prevent the commission of evil.⁶⁷

What may be thought to be “just” conduct in conflict in one society, may well be perceived entirely different in another. For example, in Islamic Just War many of the justifications such as to establish Shar’iah would not be considered a “just cause” by Western interpretation.⁶⁸ Additionally, it also raises the undiscussed issue of whether some violent non-state actor groups could be proceeding completely in accordance with their own culturally historic practices yet be considered by Western-led institutions and conventions as “illegal.” By way of example, it may be argued that the Islamic State group (ISIL) was acting in accordance with traditional Islamic scriptures and culture when they enslaved the Yazidi population of Sinjar in 2014 the Islamic State (ISIL) said:

Their continual existence to this day is a matter that Muslims should question as they will be asked about it on Judgment Day, considering that Allah had revealed Āyat as-Sayf (the verse of the sword) over 1400 years ago. He ta’ālā said, {And when the sacred months have passed, then kill the mushrikīn wherever you find them, and capture them, and besiege them, and sit in wait for them at every place of ambush. But if they should repent, establish prayer, and give zakah, let them [go] on their way. Indeed, Allah is Forgiving and Merciful.} [At-Tawbah: 5]⁶⁹

⁶⁷H. Legenhausen, “Islam and Just War Theory”, *The Imam Khomeini Education and Research Institute*, Iran 2007, pp.14-15

⁶⁸ Fotion 2007, Op Cit, p.113

⁶⁹ “The Revival of Slavery Before the Hour” *Dabiq*, October 2014, Iss.4, pp. 14-15

While some maintain these interpretations to be a distortion, Ali asserted that slavery did in fact have a place in Islamic scriptures as was the case with the histories of many other religions and cultural practices prior to the imposition of Western modernity.⁷⁰ Furthermore, Saudi Arabia maintained legal slavery practices as recently as 1962.⁷¹

The modern literature is predominantly qualitative in nature, with very little in the way of quantitative studies to provide an empirical foundation. It is important to gain a better understanding of where these interventions are occurring and how they are being conducted. The typical project has focused on legal arguments, discussions, and research by the way of cases studies into different theatres of conflict.⁷² This is particularly true of the recent assertion that new customary law has developed vis-à-vis a state's right to intervene in another state that is "unwilling or unable" to address violent non-state actor groups within its territory.⁷³

The introduction of new issues related to asymmetrical conflicts being conducted in urban environments has raised *jus ad bellum* proportionality of response by a legitimate military force. While there have been some attempts to explore qualitatively what proportionality might look like under these conditions, often it has been representations made by the media which has informed the debate. Additionally, little empirical research has been done as to the viability of victory when a military force is restricted in its rules of engagement -- *jus in bello*-- because of the changing landscape from a traditional

⁷⁰ K. Ali, "Slavery and Sexual Ethics in Islam"-*Beyond Slavery: Overcoming its Religious and Sexual Legacies*, 2010, Palgrave Macmillan U.S, p.108

⁷¹ Ibid

⁷² Assad, Op Cit; Crawford, Op Cit; Fotion, 2006, Op Cit; Fotion, 2007, Op Cit; Gross, Op Cit; Hill, Op Cit; Kalder, Op Cit; Scharf, Op Cit; Walzer, 2015, Op Cit

⁷³ Both Scharf; and Gross, Op Cit, focused on unresolved legal points and a case study of *Operation Inherent Resolve*.

battlefield to one of an urban theatre. It raises an important area of potentially redefining what success looks like in a “new war” setting.

Finally, very little attention has been given to the idea of using military interventions to address aggressive non-state actor groups who are not listed as terrorist or insurgency organizations.⁷⁴ Some of these groups not only have extensive military resources, but their continued existence challenges the Weberian notion that it is the state that holds the sole monopoly on violence within its sovereign territory. Not only are these groups inherently violent and threaten the stability of their own state, they also pose serious national and human security risks to others as well.⁷⁵

Current Position of International Law

While the theory itself may be continuing to develop to consider the newer unconventional aggressors, it is contestable if international law has kept pace to enable states to address these contemporary security challenges legitimately. The International Court of Justice in *Nicaragua v. United States of America* (1986) held that collective self-defense against non-state actor groups located in a third state is not a legitimate reason to intervene militarily unless there was “a request by the state which regards itself as the victim of an armed attack.”⁷⁶ It additionally established the requirement that the non-state

⁷⁴ Hillary Clinton when U.S Secretary of State stated that “Drug Cartels are showing more and more indices of insurgencies...the violence in Mexico was beginning to resemble Colombia... where insurgent groups at one time or another controlled some 40% of the country.” see *Clinton says Mexico drug crime like an insurgency*, BBC News, September 9, 2010, <http://www.bbc.com/news/world-us-canada-11234058>

⁷⁵ The period of 2008-2011 saw approximately some 30,000 deaths from cartel related activity in Mexico. Bergal maintains that it fits the criteria for ‘armed conflict’ classification- see C. Bergal, “The Mexican Drug War: The Case for A Non-International Armed Conflict Classification” 34 *Fordham International Law Journal*, 2011, pp.1042-1088

⁷⁶ *Nicaragua v. United States of America* (1986) I.C.J 14 at para.199

group for all intents and purposes, had to be under the control and/or be receiving material assistance from the state.⁷⁷ While recognizing that a non-state group could commit an armed attack, the court limited its interpretation of self-defense as contained within Article 51 of the United Nations Charter, as generally applying only to state versus state conflicts.⁷⁸ Although the International Court's decisions and opinions may provide direction and evidence of international law, its rulings are only binding on those countries which agree to submit themselves to its jurisdiction.

The overarching position of the United Nations is that "all Members shall refrain in their international relations from the threat or use of force against territorial integrity or political independence of any state, or any manner inconsistent with the purposes of the United Nations."⁷⁹ The U.N. Charter has numerous sections devoted to the maintenance of "international peace and security...."⁸⁰ Chapter VI provides the mechanisms for peaceful resolutions of disputes including provisions for referral to the International Court, and/or to the Security Council.⁸¹ Chapter VII outlines measures that the Security Council may authorize with respect to actions that are deemed "threats to peace, breaches of the peace, and acts of aggression."⁸² Chapter VIII covers the right of states to participate in regional arrangements for maintaining peace and security, however no "enforcement action shall be undertaken ... without the authorization of the Security Council."⁸³ While

⁷⁷ Ibid at para.195

⁷⁸ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)*, 2004, International Court of Justice, p.62

⁷⁹ Charter of the United Nations 1945, 2.4

⁸⁰ Ibid, Preamble

⁸¹ Ibid Chapter VI, Articles 33-38

⁸² Ibid Chapter VII, Articles 39-51

⁸³ Ibid Chapter VIII, Articles 52-54

the International Court has shown some reluctance to legitimize interventions against violent-non-state actor organizations, the United Nations Security Council has recognized that the actions of some of these groups “constitutes one of the most serious threats to international peace and security....”⁸⁴

It has also been suggested that since the 1986 ruling, a new norm in customary international law has developed that recognizes that where a state is “unwilling or unable to suppress the threat posed by non-state actors operating within its borders” another state may now legally intervene militarily to address the dangers posed by the VNSA.⁸⁵ For this assertion to be valid, it must satisfactorily fulfill the established criteria of ‘what customary international law is’. The definitions may be found in *How is International Law Made?* and *The North Sea Continental Shelf Case*.⁸⁶ The International Court of Justice also defined customary international law as “evidence of a general practice accepted as law.”⁸⁷ *The Vienna Convention* (1969) set out that for a new customary norm to become international law there must be recognition by “the international community ... as a whole ...”⁸⁸ The Restatement (Third) of Foreign Relations Law states that “[c]ustomary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.”⁸⁹ The latter requirement -- that state practice is dictated

⁸⁴ *United Nations Security Council*, Resolution 2249, 20 November 2015, para.1

⁸⁵ Scharf, Op Cit p.53. As this an interdisciplinary project, “norm” is used in the sense of a required standard to be reached. In law the term “normative” is used to describe the way something ought to be done according to a value position.

⁸⁶ *How is International Law Made?* 9 Netherlands Y.B Intl.L, at 3,5 (1978); The I.C.J held that “State practice...should have been both extensive and virtually uniform in the sense of the provision invoked” in *The North Sea Continental Shelf Case (Judgement)*, 1969 I.C.J. 12 at 43.

⁸⁷ *Statute of the International Court of Justice*, (1945) Article 38 (1) (b)

⁸⁸ *The Vienna Convention on the Law of Treaties* (1969) Art. 53

⁸⁹ Restatement (Third) of Foreign Relations Law of the United States, § 102(2) (1987).

by a belief the practice is required under international law -- is the principle known as *opinio juris*. A practice that states feel free to disregard or not obligated to follow does not constitute customary law.⁹⁰

An example of customary international law is the state practice of ensuring diplomatic immunity. This standard has evolved through consistent and uniform practice based upon a belief that international law required the protection of diplomatic staff serving in another country from prosecution under that country's domestic law. However, while there is a requirement that the practice is "general and consistent," it need not be considered universal.⁹¹ Finally, under the principle of *jus cogens*, "[s]ome rules of international law are recognized by the international community of states as peremptory, permitting no derogation. These rules prevail over and invalidate international agreements and other rules of international law in conflict with them establishes that there is no derogation permitted from some international norms and practices, and it takes precedence over conflicting international agreements and practices."⁹² An example of *jus cogens* can be illustrated in the U.N. Charter and the prohibition of wars of aggression.⁹³

With regards to self-defense against non-state actor organizations, the International Court of Justice held that "there is no rule permitting the exercise of collective self-defense in the absence of a request by the state which regards itself as the victim of an armed attack ... the additional requirement that such a state should declared itself to

⁹⁰ Ibid

⁹¹ Ibid comment c.

⁹² Ibid comment k.

⁹³ Charter of the United Nations, 1945, Art. 1. Additionally, this charter is legally binding upon all contracting states - almost every state is a member of the United Nations and is therefore legally bound to the provisions contained within- Art.102.

have been attacked.”⁹⁴ Additionally, the court stated: “that no such general right of intervention exists, in support of an opposition within another state, exists in contemporary international law.”⁹⁵ This decision was followed in *Democratic Republic of the Congo v. Uganda* where the court additionally held that even when consent is obtained “such operations must be limited and restricted within the parameters of such consent.”⁹⁶ However, the court left open the issue as to “whether and under what conditions contemporary international law provides for a right of self-defense against large scale attacks by irregular forces.”⁹⁷

⁹⁴ *Nicaragua v. United States*, 1986 Op Cit, para.199

⁹⁵ *Ibid*, para 209

⁹⁶ *Democratic Republic of the Congo v. Uganda*, 2005 Op Cit para.52

⁹⁷ *Ibid*, para 147

Part Two: Research Design

Methodology

Walzer, Scharf, and others have previously attempted to answer the research question from the position of legal arguments and research by way of case studies.⁹⁸ This project will take a unique approach in that it will attempt to quantify whether there has been a consistent application by states to intervene without consent against violent non-state actor groups in the post-9/11 period. Accordingly, the research design would follow a semi-quantitative approach and then follow up with an exploratory plausibility probe. The quantitative data will provide a numerical summary and be used to answer the first half of the research question

The plausibility probe will then explore three examples of interventions and examine if they are compatible with Just War Theory. The employment of a plausibility probe “allows the researcher to sharpen a hypothesis or theory, to refine the operationalization or measurement of key variables.”⁹⁹ Additionally it enables the researcher to determine the feasibility of a research project.¹⁰⁰ This approach would include the use of multiple sources of data including from government defense websites. This will assist in providing a deeper understanding of the issues and useful in answering the second half of the research question.

⁹⁸ Assad, Op Cit; Crawford, Op Cit; Fotion, 2006, Op Cit; Fotion, 2007, Op Cit; Gross, Op Cit; Hill, Op Cit; Kalder, Op Cit; Scharf, Op Cit; Walzer, 2015, Op Cit

⁹⁹ J.S Levy, “Case Studies: Types, Designs and the Logics of Inference” *Conflict Management and Peace Science*, 2008, Vol.25, p.6

¹⁰⁰ Ibid

The first stage data would not be overly difficult to obtain as it would be based on military interventions that occurred from 2001 until 2016—the Global War on Terror. This specific period was selected because of the evolution of what could be described as the era of the “uber” terrorist organization; that is, groups that have access to extensive financial and other resources required to control swathes of territory within a state. In the follow up exploratory section, the data will shed light on other unexamined state practices from a normative perspective and if they conform with Just War. The exact details of all operations, such as personnel numbers and resources, may not be readily available due to security classifications; however, the data that is available should give a reliable indication for any future hypothesis formulation and testing.

The collection of data would consist of open source materials, and data sets obtained from the Uppsala Conflict Data Program. The Uppsala project is one of the most comprehensive databases of organized violence available and has been described as the “global standard of how conflicts are systematically defined and studied.”¹⁰¹ This will provide important foundational information including parties involved, geographical location, year, etc.¹⁰² However, not all variables are available from the *Uppsala Dyadic Dataset*, therefore I created a hybrid dataset using additional information from U.N. Security Council resolutions and votes to determine issues of consent or authorization. U.N. General Assembly resolution and votes were also examined for evidence of statements from the international community. Finally, I will obtain information from

¹⁰¹ *Uppsala Conflict Data Program (UCDP)* <http://pcr.uu.se/research/ucdp/about-ucdp/>

¹⁰² *UCDP Dyadic Dataset Version 17.2* <http://ucdp.uu.se/>

websites from various national defense departments such as U.S. Department of Defense, *Operation Inherent Resolve*, and the *Global Coalition Against Daesh*.

Definitions and further criteria will be provided from international conventions and case law, including the U.S. Charter; the Statute of the International Court of Justice 1945; The Vienna Convention 1969; *The North Sea Continental Shelf Case (Judgement)* 1969; *Nicaragua v. United States of America (Judgement)* 1986, and *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda - Judgement)* 2005. For this project, interventions will be included on the basis that one of the parties is a non-state actor group and at least one non-host state actor. “Consent” entails the host state’s permission to another state to intervene militarily. “Authorization” means an intervention as approved by the U.N. Security Council. “No consent” means the host state expressly protests or rejects operations conducted within its sovereign territory.

This project also considers decisions from national jurisdictions, including the U.S. Supreme Court. Although not considered binding on the International Court of Justice, legal decisions from national jurisdictions are binding domestically and may be considered persuasive in future cases heard by the ICJ.

The plausibility probe component of the project explores three examples of the nature of military interventions since the terrorist attacks of September 11, 2001. The first focuses on the 2001 intervention into Afghanistan, conducted under the self-defense clause of Article 51 of the U.N. Charter. The second example centers on the use of armed unmanned aerial vehicles in Yemen. The third explores the 2014 intervention in Syria, based upon pre-emptive self-defense, and the “unwilling-and-unable” doctrine.

While these interventions may appear *prima facie* identical, content analysis on official government documents and statements show some significant differences. Each example will outline the facts and justification employed as to the right of intervention in each example. Additionally, the analysis will provide details of how operations were conducted. Finally, each example will be assessed for its compatibility with Just War Theory.

Results and Discussion

During the period examined 2001 - 2016, there were military interventions in 15 geographical locations by non-host states against violent non-state actor groups.¹⁰³ The criteria for inclusion in this dataset was two-fold. The first criteria for eligibility was two opposing actors engaged in armed conflict where one of the parties was the government of a state, although not necessarily the government of the geographical location of the conflict. The other party to the conflict had characteristics consistent with a VNSA. The second being that the intervention was consistent with a “boots-on-the-ground” engagement by a state -- see Figure 1.¹⁰⁴ Each intervening state was coded according to Gleditsch & Ward’s 2013 version of the List of Independent States.¹⁰⁵

¹⁰³ *Uppsala Conflict Data Program, UCDP Dyadic Dataset version 17.2*, <http://ucdp.uu.se/downloads/>

¹⁰⁴ Ibid

¹⁰⁵ K.S Gleditsch, & M.D. Ward, Interstate System Membership: A Revised List of the Independent States Since 1816, *International Interactions*, 1999, Vol.25, pp. 393- 413-updated in 2013; K.S Gleditsch, & M.D. Ward, System membership case description list, 2007.

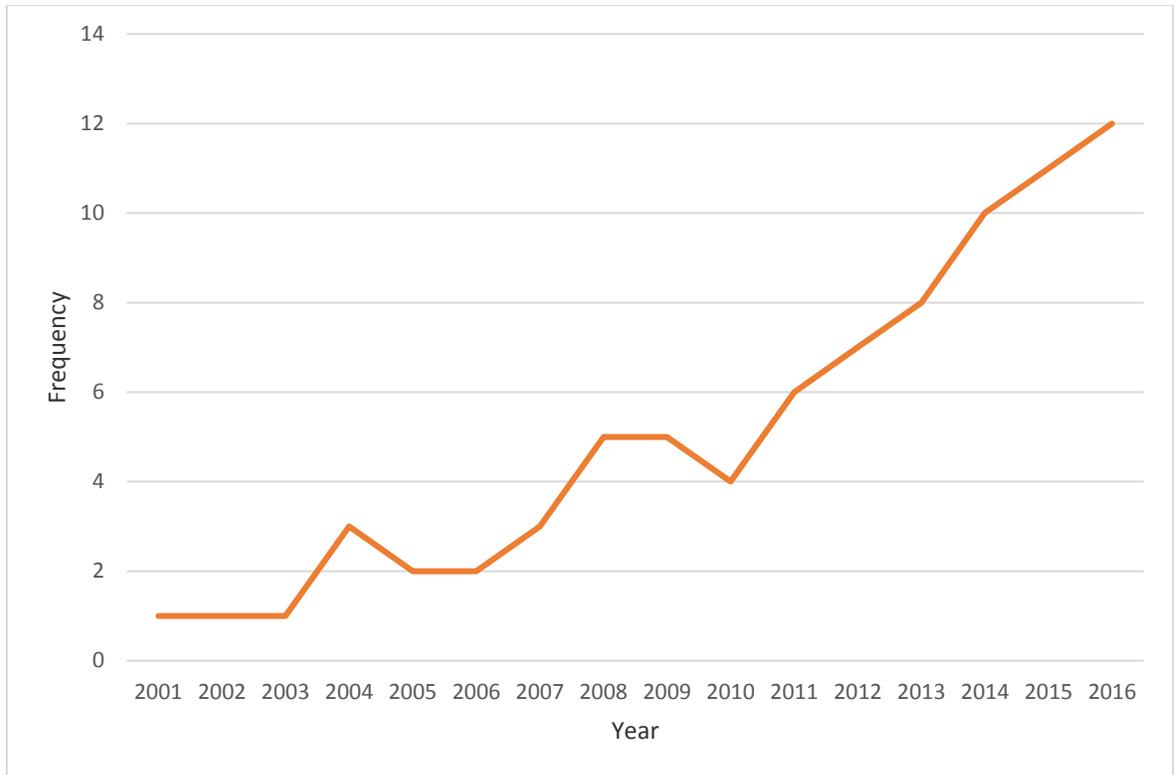


Figure 1-Number of Military Interventions Between 2001-2016

For the purposes of this project a state was defined as either a territory controlled by a recognized sovereign government or a specific territory under the control of an “unrecognized government ... whose sovereignty is not disputed” by the previously recognized sovereign government.¹⁰⁶ These conditions excluded some interventions that would otherwise meet the criteria such as those within the Palestinian Territories, Kurdistan, and Syria, which will be discussed as a separate example in the plausibility probe later in the paper. Finally, data was excluded on the basis that the intervention was

¹⁰⁶ Ibid

not conducted by either the United States or other countries considered to be allies or partners of the U.S.

The *Uppsala Dyadic Dataset* did not include other types of intervention such as air campaigns by fixed wing aircraft or attacks by Unmanned Aerial Vehicles (UAV's) -- more commonly known as "drone strikes." As anticipated, the original dataset did not contain the consent/non-consent variable. Therefore, I created an additional hybrid dataset using data obtained from U.N. Security Council resolutions. Information was also obtained from various websites of governments involved in "boots-on-the-ground" and "train-and-assist" interventions.

The data showed that 15 states were subject to a military intervention -- see Table 1. The most frequent region for operations was Africa with 12 interventions. There were two in the Middle East: Iraq and Yemen. Lastly, there was one in Central Asia in Afghanistan. Afghanistan also had the second highest number of other countries participating in security operations within its territory -- see Figure 2 below.

**Table 1-Location and Number of States
Participating in Intervention**

Geographical Location	Number of Intervening States
Afghanistan	50
Algeria	3
Cameroon	1
Central African Republic	3
Democratic Republic of Congo	2
Iraq	32
Libya	1
Mali	54
Niger	2
Nigeria	3
Rwanda	1
Somalia	10
Sudan	1
Uganda	4
Yemen	10

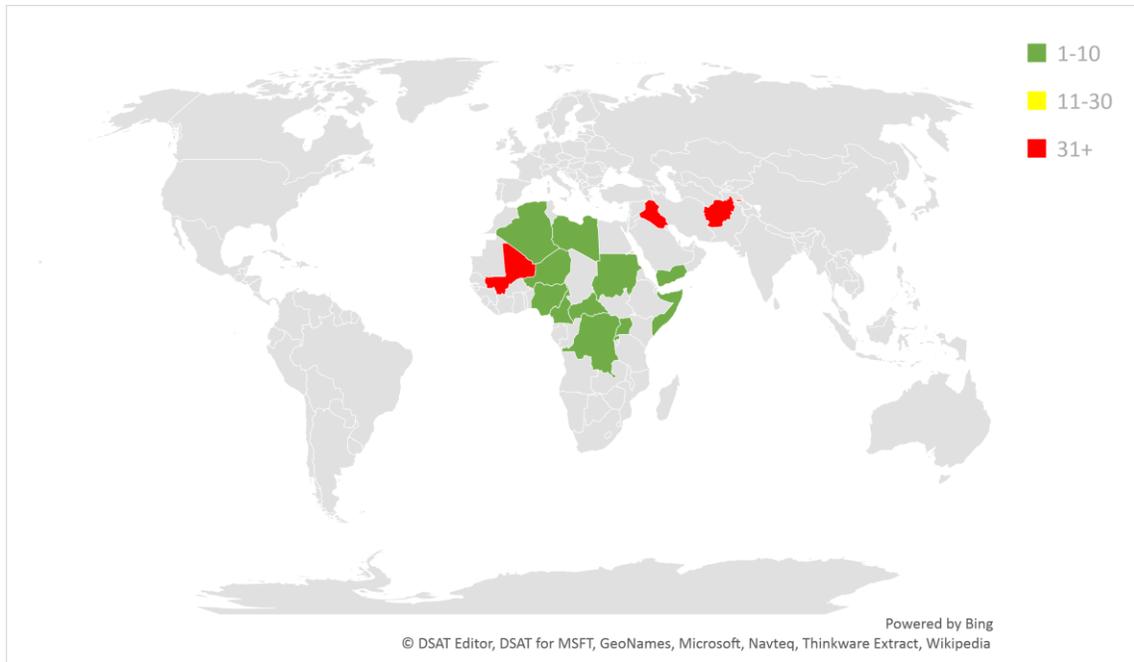


Figure 2–Location of Interventions and Number of Intervening States 2001-2016

At its peak, the intervention into Mali saw 54 states participating in the fight against multiple violent non-state actor organizations including Al Qaida in the Islamic Maghreb (AQIM) and other affiliated groups such as al-Murabitoun and Ansar Dine. The data also showed that the state most actively involved in supporting interventions was Chad, with troops deployed to seven locations: Cameroon, Sudan, Niger, Algeria, Nigeria, Mali, and the Central African Republic. The United States was the second highest intervener with traditional “boots-on-the-ground” operations in five countries: Afghanistan, Iraq, Libya, and Somalia in addition to Mali.¹⁰⁷

¹⁰⁷ *UDCP Dyadic Dataset Version 17.2*

As the consent and non-consent variables were not included in the Uppsala Conflict Data Program, I created a hybrid dataset to specifically to show this information. I defined “consent” as where the intervening state had received express permission from the legitimate governing entity of the host state or by a resolution from the U.N. Security Council authorizing military intervention. Fourteen interventions fulfilled these conditions -- see Figure 3 below. Non-consent was assigned where neither of those two criteria were met. Yemen was coded as unclear and will be discussed separately in the plausibility probe section.

There were no clear cases where consent or authorization had not been obtained. This may in part be explained by a reluctance by the United States and its allies to depart from the well-established norm of sovereignty except to address imminent and exceptional security threats. It may also be explained by a willingness of many states to degrade VNSA activity within their own territory. Additionally, G.W Bush delivered a speech in which he stated that every nation had a choice to either stand with or against the United States.¹⁰⁸ The subsequent invasion of Afghanistan in 2001 sent a clear message for states refusing to cooperate.

¹⁰⁸ G.W Bush, Address to a Joint Session of Congress and the American people, Washington D.C, September 20, 2001, <https://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010920-8.html>

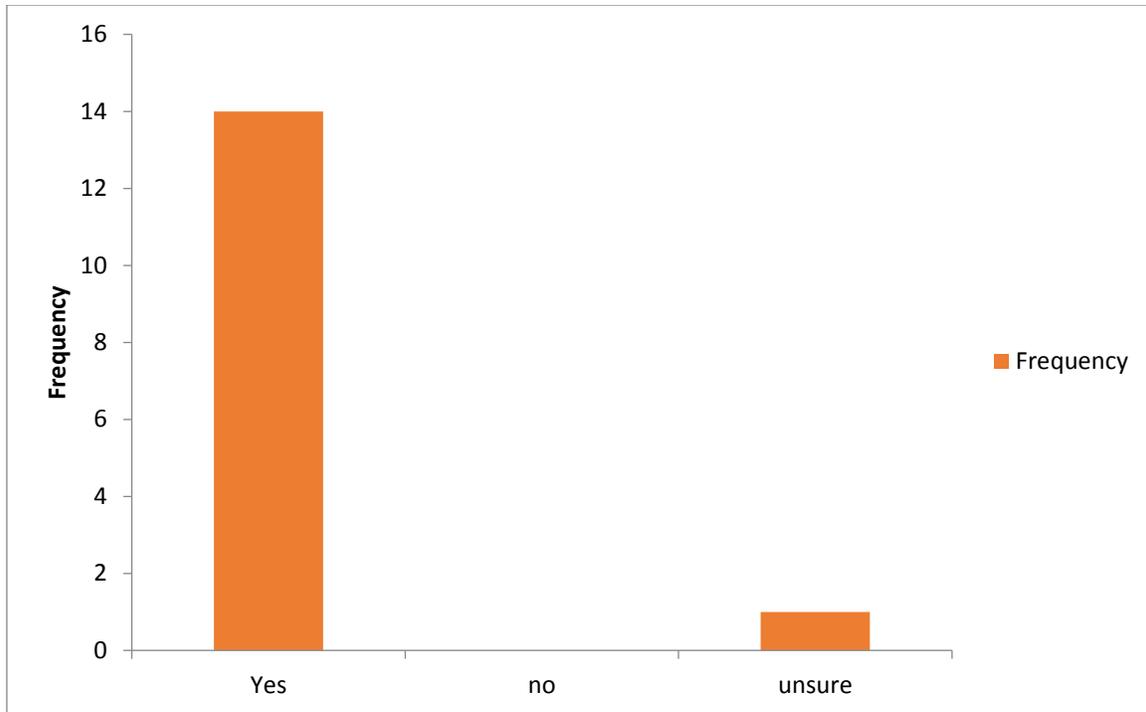


Figure 3-Consent Status of Interventions

Additionally, the types of interventions have evolved from the traditional “boots-on-the-ground” approach such as in Afghanistan and Iraq, to a more nuanced strategy of “temporary deployment” to assist with “peace-keeping forces, building counter-terrorism capabilities, and the mentoring of partner nation militaries.”¹⁰⁹ While it is difficult to keep a comprehensive record of these operations by the United States, Australia, Canada, France, the United Kingdom and other key allies, and the joint forces deployed by NATO and the European Union, these types of missions are becoming increasingly more common.¹¹⁰ Currently missions are being undertaken in but not limited to Mali, Burkina,

¹⁰⁹ A Hunt Friend, *What Does Niger Have to Do with the AUMF?* Center for Strategic and International Studies, October 26, 2017 <https://www.csis.org/analysis/what-does-niger-have-do-aumf>

¹¹⁰ Ibid; *Ministerio Defensa de Espana, Misiones en el exterior*, March 2018 http://www.defensa.gob.es/misiones/en_exterior/; *Ministère des Armées*, March 2018,

and Niger—see Figure 4 below.¹¹¹ This list is by no means complete as many of the U.S. deployments are simply unknown due to classification status.¹¹² Additionally, total numbers of U.S. Special Forces deployed have increased from 43,000 in 2001 to about 70,000 in 2017.¹¹³

The above figures do not consider U.N. “peace-keeping missions.” While not strictly a traditional military intervention *per se*, these U.N.-led operations are comprised of supporting troops, law enforcement, staff officers, and specialist mission officers. The principles of these operations are:

1. Consent of the parties
2. Impartiality
3. Non-use of force except in self-defence and defence (sic) of the mandate.¹¹⁴

It should be noted that while these missions may *prima facie* appear be identical to “peace-enforcement missions” sanctioned by the Security Council, the notable

<https://www.defense.gouv.fr/english/operations/operations/actualites>; NATO, *Operations Past and Present*, December, 2016, https://www.nato.int/cps/en/natohq/topics_52060.html ; Australian Department of Defence : *Global Operations*, March 2018, <http://www.defence.gov.au/Operations/> ; *Global Coalition 75 Partners United in Defeating Daesh*, March 2018, <http://theglobalcoalition.org/en/partners/>

¹¹¹ Missions are also being conducted in: Chad, the Gulf of Guinea, Liberia, Somalia, Senegal, Tunisia, Libya, Morocco, Nigeria, Cameroon, Afghanistan, Rwanda, Kenya, Philippines, Brazil, Argentina, Egypt, Saudi Arabia, Iraq, and Syria, Ibid; *2018 Posture Statement to Congress*, United States Africa Command, March 6, 2018 <http://www.africom.mil/about-the-command/2018-posture-statement-to-congress>;

Programs and Initiatives, US Department of State, March 2018, <https://www.state.gov/j/ct/programs/>

¹¹² *Key senators say they didn't know the US had troops in Niger*, CNN Politics, October 23, 2017 <https://www.cnn.com/2017/10/23/politics/niger-troops-lawmakers/index.html>

¹¹³ *The New American Way of War*, Time, November 30, 2017, <http://time.com/5042700/inside-new-american-way-of-war/>

¹¹⁴ *Principles of Peace Keeping*, United Nations, <https://peacekeeping.un.org/en/principles-of-peacekeeping>

difference is that the latter does not require the consent of the state or parties involved.¹¹⁵

As of January 2018, there were some 15 sanctioned operations of this nature.¹¹⁶



Figure 4-Current U.S. Special Forces Deployments by Region 2017

Over 100-member states -- including both China and Russia -- have contributed 91,544 personnel in support of peace-keeping operations; however, in many cases some countries contributed less than five personnel per mission.¹¹⁷ While some states have low

115 Ibid

116 *United Nations Peace Keeping*, <https://peacekeeping.un.org/en>

117 *Summary of Contributions to Peacekeeping by Mission, Country and Post, Police, UN Military Experts on Mission and Troops*, 28/02/2018, United Nations, https://peacekeeping.un.org/sites/default/files/5_mission_and_country.pdf,

participation numbers, nonetheless, it shows an in-principle commitment to peace-keeping efforts by the majority of the international community. When asked about the role of U.S. forces deployed to missions in Africa, General Thomas D. Waldhauser, Commander of U.S. Africa Command, stated in recent testimony to Congress:

Security operations are executed almost exclusively by the partnered security forces. U.S. Africa Command works with partnered security forces based on their operational needs. The vital objectives of the U.S. and the partnered nation are achieved through a cooperative relationship in which U.S. Africa Command plays a supporting role. African leaders tell us how important it is to develop 'African solutions to African problems.'¹¹⁸

This demonstrates an increased willingness to work in concert with and support the host state forces as opposed to earlier interventions that removed regimes such as the Taliban in Afghanistan.

¹¹⁸ Gen T.D Waldhauser, *Ibid*,

Part Three: Plausibility Probe

The purpose of the plausibility probe was to determine the feasibility of conducting an in-depth study into the research area. It was also employed to assist in answering the second part of the research question—the types of military interventions by the United States and allies against VNSAs such as terrorists and insurgents. The examples chosen for their *prima facie* similarity were Afghanistan, Yemen, and Syria. These examples are not full case studies but rather a synopsis of each military intervention.

The three examples included the type and intensity of response by the United States, and/or by its allies and partners, and the international community's reaction through relevant Security Council resolution and other applicable statements. Each intervention was also analyzed for compatibility with International Court of Justice rulings, as one of the sources of international law. Finally, each was evaluated in accordance with adherence to Just War principles by the intervening state. The implications of the findings are reported in a separate section immediately following the final example.

Afghanistan

On September 11, 2001 VSNA organization Al Qaida attacked the United States murdering some 3,000 people after previous incidents both within the U.S. and on its interests overseas. The U.S. immediately declared that Al Qaida's acts were consistent with the International Court of Justice's definition of "an armed attack" by a non-state actor group that triggered a right to self-defense under Article 51 of the U.N. Charter. While

previously Article 51 had only been thought to be applicable to attacks by other states, there was little disagreement from the international community that in this instance, a non-state actor group could have the same capacity to inflict catastrophic damage as a state. On September 12, the U.N. Security Council unanimously passed Resolution 1368 which stated:

Unequivocally condemns in the strongest terms the horrifying terrorist attacks which took place on 11 September 2001 in New York, Washington, D.C. and Pennsylvania and regards such acts, like any act of international terrorism, as a threat to international peace and security.¹¹⁹

The Security Council also called for the perpetrators, sponsors, and organizers to be held accountable for their acts.¹²⁰ The Council reiterated that it was prepared to take “all necessary steps....” to ensure justice was “seen to be done.”¹²¹

In response to the attacks the U.S. issued the following statement:

The United States of America makes the following demands on the Taliban:
Deliver to United States authorities all the leaders of al Qaeda who hide in your land. Release all foreign nationals, including American citizens, you have unjustly imprisoned. Protect foreign journalists, diplomats and aid workers in

¹¹⁹ United Nations Security Council, Resolution 1368, September 12, 2001, para.1
[https://undocs.org/S/RES/1368\(2001\)](https://undocs.org/S/RES/1368(2001))

¹²⁰ Ibid, para.3

¹²¹ Ibid, para.5

your country. Close immediately and permanently every terrorist training camp in Afghanistan, and hand over every terrorist, and every person in their support structure, to appropriate authorities. Give the United States full access to terrorist training camps, so we can make sure they are no longer operating. These demands are not open to negotiation or discussion. The Taliban must act, and act immediately. They will hand over the terrorists, or they will share in their fate.¹²²

On October 7, 2001, the United States commenced military operations in Afghanistan in response to the attacks known as *Operation Enduring Freedom*. Under both Regular and Irregular Just War Theory, the United States was entitled to pursue Al Qaida with a military response in self-defense and to prevent further attacks. The Taliban Government in Afghanistan provided a safe-haven, permitted Al Qaida to operate training camps within its sovereign territory, and refused to hand over key organizational figures. As Afghanistan is a state, Regular Just War Theory was applicable. Additionally, applying the “but-for test”; *i.e.*, but for Al Qaida’s presence and safe-haven in Afghanistan, it is extremely unlikely there would have been an invasion into Afghanistan. Once the Taliban government had been removed by traditional military methods, the U.S. then set about assisting with traditional “peace after war” re-building the state while still being able to legitimately pursue leaders of Al Qaida.¹²³

¹²² G.W Bush, *Address to the Joint Session of the 107th Congress*, Washington D.C, September 20th, 2001, pp.67-68, https://georgewbushwhitehouse.archives.gov/infocus/bushrecord/documents/Selected_Speeches_George_W_Bush.pdf

¹²³ Fotion, 2006 Op Cit

The covert action and assassination of Osama bin Laden in Pakistan is considered 'just' under Irregular Just War Theory as bin Laden still fulfilled the criteria of an "imminent and ongoing threat" to the United States. Pakistan claimed to have had no prior knowledge of bin Laden's location within its territory. While there may have been some international criticism for the brief infringement of sovereignty, covert action informed by Irregular Just War Theory was no doubt preferable to the alternative, *i.e.*, airstrikes on the compound in Abbottabad, Pakistan. Additionally, the covert operation could be denied had it not been successful in its objectives -- the capture or killing of bin Laden.

Since the death of bin Laden, the United States and allies' role in Afghanistan has evolved. What commenced as a traditional military intervention has subsequently become a mission to stabilize the country. This includes "train, assist, and support" operations to strengthen Afghanistan's capacity to provide security for itself against various VNSA organizations such as the Taliban. It is note-worthy that at the time of writing of this paper, this has been the longest military conflict deployment by the United States since Vietnam—some 17 years.

Republic of Yemen

Although Yemen satisfied the criteria for inclusion in the Uppsala Conflict Data Program, it presents as an interesting example because of its complexity. Historically, the government had been engaged in combatting an ongoing insurgency against the northern Yemeni (mostly) Shi'a Houthi tribes since about 2004. The government claimed that the Houthis wanted to overthrow the elected regime and impose Shar'iah law. The Houthis

counter-claimed they were being targeted by discrimination and overly “aggressive acts by the Yemeni government.”¹²⁴

Additionally, Al Qaida groups in Saudi Arabia and Yemen merged in late 2008/2009 to create Al Qaida in the Arabian Peninsula (AQAP).¹²⁵ After President Salah’s release of 176 suspected Al Qaida fighters in early 2009, the Houthis claimed that the government was using the terrorist group to fight Houthi insurgents.¹²⁶ What initially started as a local uprising between the Houthis, government forces and Sunni extremists has since escalated into civil war; however, other states did not become militarily involved in Yemen until late 2009 when Saudi Arabia deployed military forces and equipment in response to border attacks by Houthi fighters. By December of 2009, *Armed Conflicts Report* claimed that the death toll had reached 236 Houthi fighters, 119 Yemeni government forces, and 82 (later revised to 133) Saudi personnel.¹²⁷ Almost 300 civilians were also killed during this period.¹²⁸

As part of the Global War on Terror, the United States also launched missile strikes in late 2009, allegedly against Al Qaida; however the Houthis claimed that these attacks had not targeted terrorists but instead killed 63 civilians including 28 children.¹²⁹ At the

¹²⁴ *Deadly blast strikes Yemen mosque*, BBC News, May 2, 2008, http://news.bbc.co.uk/2/hi/middle_east/7379929.stm

¹²⁵ *Al Qaida in the Arabian Peninsula*, Mapping Militant Organizations, Stanford University, <https://web.stanford.edu/group/mappingmilitants/cgi-bin/groups/view/19#note6>

¹²⁶ *Yemen’s Forever War: The Houthi Rebellion*, Washington Institute, July 10, 2010, <http://www.washingtoninstitute.org/policy-analysis/view/yemens-forever-war-the-houthi-rebellion>

¹²⁷ *Armed Conflicts Report – Yemen*, Plough Shares, updated 2009, <http://www.ploughshares.ca/libraries/ACRText/ACR-Yemen.htm>; *Saudi Arabia says soldiers killed in Yemen*, Press TV, January 12, 2010

¹²⁸ *Armed Conflicts Report -Yemen Op Cit*

¹²⁹ *Obama Ordered Missile Strikes on Yemeni Terrorists*, ABC News, December 18, 2009. <http://abcnews.go.com/Blotter/cruise-missiles-strike-yemen/story?id=9375236&page=1>; *US air raid kills 63 civilians in Yemen*, Press TV, December 18, 2009

same time Saudi ground forces continued to advance in Sa'dah.¹³⁰ While a cease-fire was brokered between the Yemeni government and the Houthis in early January 2010 by the end of the month the cease fire had collapsed with a resumption of fighting on all sides. The United States proceeded to launch armed drone strikes against suspected Al Qaida targets. Numerous international humanitarian non-governmental organizations condemned these strikes as covert operations being driven by the Central Intelligence Agency (C.I.A.) and, as such, were not subject to accountability or proper congressional oversight.¹³¹

It is estimated that between 2001-2011 there were 12-15 confirmed, another 10-12 possible strikes with between 36-41 alleged civilian deaths.¹³² In 2012, the number of strikes exponentially increased to 29-36 confirmed, 54-70 possible strikes with 7-34 alleged civilian deaths.¹³³ The data for 2013 shows 22 confirmed, 10-11 possible strikes with the alleged civilian death toll between 17-37.¹³⁴ In 2014, there were 13-15 confirmed, another 18 possible strikes with an alleged civilian death toll of between 4-22.¹³⁵

¹³⁰ *Saudi air strike kills Yemen rebels as US drawn into fight*, *Christian Science Monitor*, December 21, 2009, <https://www.csmonitor.com/World/terrorism-security/2009/1221/Saudi-air-strike-kills-Yemen-rebels-as-US-drawn-into-fight>

¹³¹ *CIA Plans Yemen Drone Strikes*, *The Wall Street Journal*, June 14, 2011, <https://www.wsj.com/articles/SB10001424052702303848104576384051572679110>; *U.S Relaxes Drone Rules*, *The Wall Street Journal*, April 26, 2012, <https://www.wsj.com/articles/SB10001424052702304723304577366251852418174>

¹³² *Yemen: Reported US Covert Actions 2001-2011*, *The Bureau of Investigative Journalism* <https://www.thebureauinvestigates.com/drone-war/data/yemen-reported-us-covert-actions-2001-2011>

¹³³ *Yemen: Reported US Covert Action 2012*, *Ibid*, <https://www.thebureauinvestigates.com/drone-war/data/yemen-reported-us-covert-action-2012>

¹³⁴ *Yemen: Reported US Covert Action 2013*, *Ibid*, <https://www.thebureauinvestigates.com/drone-war/data/yemen-reported-us-covert-actions-2013>

¹³⁵ *Yemen: Reported US Covert Action 2014*, *Ibid*, <https://www.thebureauinvestigates.com/drone-war/data/yemen-reported-us-covert-actions-2014>

Numerous scholars and institutions, including the United Nations, have argued that targeted drone strikes as a counter-terrorism strategy violate international law.¹³⁶ Brooks did not see the strikes as a strict violation *per se* but more as a challenge to international law because it “defy[s] straightforward legal categorization.”¹³⁷ Millson and Herman suggested that legality depended on the circumstances of the strike and whether other obligations under Just War had been satisfied.¹³⁸ Drone strikes also raised questions of the violation of the sovereignty norm -- if only even briefly -- of states who had not given their consent or protest U.S. drones operating within their territorial airspace.

An additional issue was raised after the strikes of September and October 2011 respectively, targeted and killed U.S. citizens Anwar al-Awlaki, his teenage son, Abdulrahman al-Awlaki, and Samir Khan.¹³⁹ These specific drone strikes raised questions about the legality of extra-judicial execution of U.S. citizens by the United States without due process. In April 2013, the U.S. Appeals Court ordered the Obama administration to release a Justice Department memorandum outlining the government’s legal rationale for the drone strikes. The document concluded that “wartime legal authority to target enemies extends to Yemen given the circumstances of Al Qaida activities there.”¹⁴⁰

¹³⁶ M. Boyle, “The Costs and Consequences of Drone Warfare” *International Affairs*, 2013, Vol.89 No.1; M. Sterio, “The United States’ Use of Drones in The War on Terror: The (II)Legality of Targeted Killings Under International Law”, *Case Western Reserve Journal of International Law*, 2012 Vol.45

¹³⁷ R. Brooks, “Drones and the International Rule of Law” *Ethics and International Affairs*, 2014, Vol.28 No.1, p.83

¹³⁸ R. Millson and D Herman, *Killing by Drones: Legality Under International Law*, The Foundation for Law, Justice and Society, 2015, Oxford University

¹³⁹ *Memo on Drone Strikes Draws Scrutiny*, *The Wall Street Journal*, February 05, 2013 <http://online.wsj.com/article/SB10001424127887324900204578286432096035960.html>

¹⁴⁰ *New York Times Co. v. U.S. Dep’t of Justice*, 756 bF.3d 100 (2d Cir. 2014); See also *Court Releases Large Parts of Memo Approving Killing of American in Yemen*, *The New York Times*, June 23, 2014, <https://www.nytimes.com/2014/06/24/us/justice-department-found-it-lawful-to-target-anwar-al-awlaki.html>

While the memorandum may have satisfied the requirement of U.S. domestic law, it also raised an important legal issue regarding the role and status of U.S. military involvement in Yemen. As Pejic and Gabor asserted:

In an armed conflict, in the zone of hostilities, combatants may be targeted without warning or detained without trial. Such treatment is unlawful against persons engaging in violence in the absence of armed conflict.¹⁴¹

If the U.S. was engaged in an armed conflict in Yemen, then Just War principles of proportionality and discrimination were applicable for its involvement to be considered rightful conduct *i.e.* that civilians were not to be targeted and that excessive harm was to be avoided while legitimate objectives were targeted. If the U.S. claimed it was not engaged in an armed conflict, then the strikes may be considered as an illegitimate use of force unless consent had been obtained. While the U.S. may have been tempted to cite the “unwilling or unable” doctrine to justify its operations, for reasons that will be discussed later, it may be legally ‘shaky ground’. The United States has continued to maintain a small contingent of special forces as well as a C.I.A. presence in Yemen in response to increased instability and ongoing violent non-state actor organizations such as AQAP and the Islamic State (ISIL) group.¹⁴² Additionally, the “United States forces, in a non-combat

¹⁴¹ Pejic 2005 and Gabor 2005 in M O’Connell, *Combatants and the Combat Zone*, University of Richmond Law Review, Notre Dame Legal Studies Paper, No. 08-39, January 2009 , p.119 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1332096

¹⁴² *The End of Al Qaida*, Time, September 17, 2012, <http://content.time.com/time/magazine/article/0,9171,2123810,00.html>

role, have also continued to provide logistics and other support to regional forces combatting the Houthi insurgency in Yemen.”¹⁴³

After 2011-2012 Arab Spring uprising, the United States has not been the only country to continue to keep a military presence in Yemen. Saudi Arabia and a coalition of nine other Middle Eastern and African states including the United Arab Emirates, Jordan, Senegal, and Morocco have also increased their military capacity with both airstrikes and ground forces. This was in response to the successful Iranian supported Houthi coup in Sana’a, the subsequent take-over of the presidential palace, and the installation of a government led by Mohammad al-Houthi on February 6, 2015.¹⁴⁴ President Hadi, who was forced to flee Yemen, sent a letter to the Gulf Cooperation Council on March 24th, 2017 requesting military intervention -- despite being in exile. As most of the international community considered Hadi as the rightful authority, the request and subsequently consent were legitimate. This is important because consent can only be given by the legitimate authority of a state. Citing Article 51 of the United Nations Charter, the Charter of the League of Arab States, and Treaty on Joint Defence, Hadi asked that international forces be sent “to protect Yemen and its people from Houthi aggression ... Al Qaida and [the] Islamic State...”¹⁴⁵ This has resulted in a continuing sectarian conflict between Shi’a

¹⁴³ Text of a letter from the President to the Speaker of the House of Representatives and the President Pro Tempore of the Senate, December 11, 2017 in *Yemen: Civil War and Regional Intervention*, Congressional Research Service, February 07, 2018, p.8 <https://fas.org/sgp/crs/mideast/R43960.pdf>

¹⁴⁴ *Shia rebels finalize takeover of Yemen, dissolve parliament*, The Globe and Mail, February 6, 2015, <https://www.theglobeandmail.com/news/world/yemens-shia-rebels-finalize-coup-vow-to-dissolve-parliament/article22829401/>; *Senegal to support Yemen campaign*, BBC News, May 5, 2015, <http://www.bbc.com/news/world-middle-east-32586230>

¹⁴⁵ United Nations Security Council, S/ 2015/217, March 27, 2017 in *Yemen: Civil War and Regional Intervention*, Op Cit, p.5

and Sunni forces with external actors from other countries in what has now been referred to as a “chaos state.”¹⁴⁶

United Nations Security Council Resolutions on Yemen

In April 2015, the U.N. Security Council in Resolution 2216 demanded that:

... the Houthis, withdraw from all areas seized during the latest conflict, relinquish arms seized from military and security institutions, cease all actions falling exclusively within the authority of the legitimate Government of Yemen and fully implement previous Council resolutions...,also called upon the Houthis to refrain from any provocations or threats to neighbouring (sic) States, release the Minister for Defence, all political prisoners and individuals under house arrest or arbitrarily detained, and end the recruitment of children.¹⁴⁷

In addition, the Council also called upon member states to implement and take “necessary measures to prevent the direct or indirect supply, sale, transfer” of weapons to the Houthis. It also mandated for financial sanctions against the leaders of the regime.¹⁴⁸

¹⁴⁶ P. Salisbury, “Yemen’s Southern Powder Keg”, *Chatham House*, March 2018, p.5
<https://www.chathamhouse.org/sites/files/chathamhouse/publications/research/2018-03-27-yemen-southern-powder-keg-salisbury-final.pdf>

¹⁴⁷ Security Council Demands End to Yemen Violence, Adopting Resolution 2216 (2015), with Russian Federation Abstaining, United Nations Meetings and Press Releases, April 14, 2015,
<http://www.un.org/press/en/2015/sc11859.doc.htm>

¹⁴⁸ United Nations Security Council Resolution 2216, S/RES/2216 (2015) pp.5-6
http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_res_2216.pdf

While the resolution was strongly worded, it did not give specific authorization for military enforcement or the use of force by Saudi Arabia or any other state against the Houthis; however, this does not preclude a state acting in self-defense in accordance with Article 51 in the event of an armed attack on it by the Houthi regime.¹⁴⁹ The Council also noted that the deteriorating political and security conditions was conducive to a potential resurgence of AQAP, further complicating the environment.¹⁵⁰

From a humanitarian perspective the ongoing civil conflict and the blockade of Yemen continues to adversely affect the civilian population. Food insecurity has caused a famine and “1.3 million Yemeni children were acutely malnourished...17.8 million Yemenis were struggling to find enough food, and 21.2 million Yemenis were in need of humanitarian assistance”¹⁵¹ There is also an acute shortage of medicines and medical supplies, and wide-spread outbreaks of cholera and diphtheria.¹⁵² It is hard to envisage that this is the “good or avoidance of evil” that Aquinas and other Just War scholars advocated and could be seen as being a form of collective punishment.

Syrian Arab Republic

The 2014 military intervention in Syria, presented an interesting example for several reasons. Firstly, the nature of the conflict could be initially classified as a civil war

¹⁴⁹ The United Nations Charter, Chapter VII, Article 51 <http://www.un.org/en/sections/un-charter/chapter-vii/>

¹⁵⁰ United Nations Security Council Resolution 2216, Op Cit p.1

¹⁵¹ *2018 Yemen: High Level Pledging Event*, United Nations Office for Coordination of Humanitarian Affairs, <http://www.unocha.org/2018-yemen-high-level-pledging-event>; *Yemen Famine: The World's Largest Humanitarian Crisis*, 2017 <http://www.yemenfamine.com/>

¹⁵² Ibid

that evolved exponentially to include numerous violent non-state actor organizations such as the Islamic State and Hezbollah. Secondly, the number of various non-state actor groups involved including those in opposition to the regime, and to each other made for an extremely complex situation. Finally, the legal status of the initial intervention by the U.S. and other partner states remains unresolved and has global security implications.

Nobody in late 2010 could have predicted that a self-immolation of a fruit vendor in Tunisia would spark a wave of protests and uprisings in the Middle East and North African (MENA) region that would become known as the “Arab Spring.” The Jasmine Revolution of Tunisia rapidly spread to Egypt, Libya, Yemen, Bahrain, and Syria. Dictators were removed in Tunisia, Egypt and Libya while mounting protests also became increasingly violent in Syria. In March 2011, demonstrators in Damascus were fired upon by security forces of the regime. What had started out as a protest demanding political and economic reforms quickly escalated to calls for the regime to be removed from power. By June 2011, it was estimated that thousands of protestors had been detained. News reports indicated that approximately 1000 civilians, and 150 police and soldiers had also been killed.

The next phase of the conflict was the beginning of an armed insurgency by armed militias, and the creation of the Free Syrian Army in July 2011. It comprised of officers and former armed forces members who had defected from the Syrian Army. The group’s objective was to overthrow the government led by Bashar al Assad. Assad responded in an address to the Syrian parliament that the violence had been instigated by “outside conspirators, and the influence of foreign states” spreading misinformation and

propaganda.¹⁵³ While the United Nations and the Arab League attempted to broker peace, the violence quickly took on the characteristics of a civil war.

Despite numerous attempts to implement ceasefires during the first half of 2012, the violence continued, and in June of that year, the United Nations and the International Committee of the Red Cross proclaimed Syria to be in a “state of civil war.” The violence at this point was predominantly centered in the cities of Aleppo and the capital Damascus. By January 2013 the violence had expanded to other areas and the armed Islamist group Jabhat al Nusra (*a.k.a.* Al Qaida in Syria) had entered the conflict. Kurdish YPG forces were increasingly engaged in fighting against both rebel and government forces. By April, the Shi’a group Hezbollah had also entered the conflict on the side of the Syrian regime. During this period reports emerged that the Syrian regime forces had allegedly used chemical weapons within the conflict, leading to calls for the Syrian government to be disarmed of all chemical weapons.

During late 2013, the Islamic State organization had exploited the conflict with the intention of expanding its Islamic caliphate. ISIL captured the city of Raqqa from the Free Syrian Army, the Army of the Mujahideen, and Islamic Front in January of 2014, and later proclaimed it to be the capital of their caliphate. The group also seized the Shaar oilfield. Additionally, the Turkish air force also became involved and launched airstrikes against convoys of the Islamic State group on the border with Aleppo.

¹⁵³ *Assad blames conspirators for Syrian protests*, The Guardian, 30th March, 2011
<https://www.theguardian.com/world/2011/mar/30/syrian-protests-assad-blames-conspirators>

Meanwhile in June 2014, elections were conducted within government-held territories. For the first time in Syrian elections there were multiple presidential candidates. According to the Supreme Constitutional Court of Syria, 11.63 million Syrians voted (voter participation was 73.42%). Bashar al-Assad retained the presidency with 88.7% of the votes. Assad's challengers, Hassan al-Nouri received 4.3% of the votes, and Maher Hajjar received 3.2%.¹⁵⁴ Representatives from more than 30 countries were invited by Assad and the Syrian government to follow the election process, including representatives from Bolivia, Brazil, Cuba, Ecuador, India, Iran, Iraq, Nicaragua, Russia, South Africa, and Venezuela. In a statement on behalf of the group, Iranian official Alaeddin Boroujerdi said the election was "free, fair and transparent."¹⁵⁵ The United States, the European Union, and the Gulf Cooperation Council dismissed the results of the election and viewed the process as both illegitimate and a farce.

On September 23, 2014 the United States entered the conflict in Syria deploying missiles launched from a destroyer located in the Red Sea, bombers and fighter jets launched from the USS George H.W Bush, and Predator drones against various targets around the Islamic State stronghold of Raqqa. The Syrian representative to the United Nations, had been informed by the United States of the impending strikes. Other countries that participated included Jordan, the United Arab Emirates, Bahrain, the Kingdom of Saudi Arabia, and Qatar. On the same day, Israel shot down a Syrian fighter jet after it entered airspace over the Golan Heights territory. The United States also commenced

¹⁵⁴ *Supreme Constitutional Court: Number of participants in Presidential election reached 11,634,412 with 73.42%*, Sana. English, June 4, 2014

¹⁵⁵ *International observers say Syrian elections were transparent*, LaInfo.es, June 4, 2014

supplying weapons and other resources to various opposition groups including the Free Syrian Army.

Fighting between the various forces and factions continued, and in 2015, U.S. Special Forces led a raid that uncovered evidence that tied Turkish governmental officials to high ranking ISIL members. Australia joined the U.S. led coalition and commenced airstrikes against the Islamic State as an extension of its Iraq mission. The U.S. continued weapon supplies to various opposition groups, Kurdish Peshmerga, and YPG forces fighting for control of Kobani. The U.S. additionally announced that it would “allow air strikes to help defend against any attack on the U.S. trained Syrian rebels, even if the attackers come from forces loyal to Syrian President Bashar al-Assad.”¹⁵⁶

The next major development was at the request of the Syrian government, Russia deployed military forces to intervene in September 2015. This consisted of fighter jets, ground personnel and naval ships in support of the regime and the Syrian Defence Force. By this point Iran had also entered the conflict on the side of Assad with military advisors and the Republican Guard. This is by no means a complete listing of all the various groups and militias involved in the conflict. It highlights the complexities and numerous opposing forces to both the regime, and in many instances on the “opposition” side, to each other. By the end of 2015 some ten states had militarily intervened in some capacity in Syria, but not all did so initially with consent or authorization.¹⁵⁷ At the time of writing this paper,

¹⁵⁶ Anon U.S Official, 2015

¹⁵⁷ These countries included: The United States, Jordan, the Kingdom of Saudi Arabia (KSA), the United Arab Emirates (UAE), Bahrain, and Qatar. Others such as Australia, the United Kingdom and France commenced operations only after the United Nations Security Council Resolution 2249 in November of 2015.

the Islamic State group had lost almost all their previous territory within both Iraq and Syria.¹⁵⁸

While the Syrian conflict did not meet the initial criteria for inclusion in the Uppsala Conflict Data Program because of the definitions mentioned above, the United States and some of its regional partners militarily intervened in Syria. The intervention against the Islamic State and other non-state actor organizations was conducted by both air strikes and missiles launched from various U.S. naval assets. Although the Syrian government was informed of the U.S' intention, it did not give express consent for the operation, nor at that time had authorization been obtained from the U.N. Security Council. Furthermore, Article 51 of the United Nations Charter limits interventions to self-defense.¹⁵⁹

It is difficult to ascertain how the initial intervention was legitimate given that the United States itself had not declared that it had suffered an attack nor in imminent threat of being attacked by the Islamic State group.¹⁶⁰ The intervening countries may well have declared the Syrian regime “unwilling or unable” to combat the violent non-state actor organizations within its territory to provide a justification for the intervention. Assuredly, this claim loses its credibility once the Russian Federation and Iran militarily intervened with the consent of Syria.¹⁶¹ Additionally, not all other states fully agreed with the United States and some of its allies' assessment of both unwilling and unable components of the

¹⁵⁸ *Islamic State and the crisis in Iraq and Syria in maps*, BBC World News, March 28th, 2018, <http://www.bbc.com/news/world-middle-east-27838034>

¹⁵⁹ The United Nations Charter, Chapter VII, Article 51 Op Cit <http://www.un.org/en/sections/un-charter/chapter-vii/>

¹⁶⁰ Gross, Op Cit, pp.20-21

¹⁶¹ Gross Ibid, p.27

doctrine. Instead they relied upon the fact the Syrian government “does not at this time exercise effective control.”¹⁶²

Other states asserted that that there has not been consistent state practice that identified the “unwilling or unable doctrine” as a legitimate international norm.¹⁶³ The United Kingdom stated that the “nebulous parameters of the doctrine make measuring State practice challenging, and consensus of clear State practice (besides the acts of the U.S.) is fleeting.”¹⁶⁴ Additionally, it has been suggested that that the “introduction of ‘unwilling or unable’ terminology . . . when justifying action on a nation’s territory without its permission. . . does not meet a threshold test for rigor or legitimacy in the law of armed conflict.”¹⁶⁵ Finally, Gross asserted that the “unwilling or unable doctrine” is not the current state of law...¹⁶⁶

United Nations Security Council Resolutions on Syria

The chief responsibility of the Security Council under the United Nations Charter is the “maintenance of international peace and security.”¹⁶⁷ It is comprised of five permanent members: the United States, France, the United Kingdom, China, Russia, and 10 non-permanent members who serve a term upon election by the members of the

¹⁶² Letter sent by Germany to the President of the Security Council, December 10, 2015 in Gross, Op Cit, p.29

¹⁶³ Norway, Denmark, and France only acted on a request from the government of Iraq, in Gross Ibid, pp.29-30

¹⁶⁴ Letter from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the Secretary-General and the President of the Security Council, November 25th. 2014 in Gross, Ibid p.30

¹⁶⁵ Aolain in Gross, Ibid

¹⁶⁶ Ohlin in Gross, Ibid

¹⁶⁷ U.N. Charter, Op Cit, art. 24.1

General Assembly.¹⁶⁸ All elected member states of the council have a vote, but only the permanent five have the power of veto, which if wielded, results in the rejection of the proposed resolution.¹⁶⁹ The Council may vote on any number of measures including the authorizing of military interventions against a state under Chapter VII of the United Nations Charter. There has been some debate about the effectiveness of the Security Council given the power of veto of the permanent five, but it is beyond the scope of this project to discuss this issue in detail, other than to say many lives may have been saved had the Council originally been given a mandate to authorize by majority rather than the requirement of a unanimous decision.

The position of the U.N. Security Council regarding the conflict in Syria, has at best been mixed. Fourteen resolutions establishing observer missions, cease fires, and those calling for access for humanitarian workers and aid have passed unanimously since mid-2012; however, several other resolutions that included language such as “referral to the Prosecutor of the International Criminal Court”, “imposition of measures under Article 41,” and other intervention actions were the subject of either a sole veto by Russia, or dual veto’s by both China and Russia.¹⁷⁰ The reasons China and Russia have given have ranged from “non-acceptability of military intervention”, the assigning of blame before independent investigation, and the strong reiteration of “respect for sovereignty, independence and territorial integrity....”¹⁷¹ China has had a consistent policy of not

¹⁶⁸ Ibid art. 23.1

¹⁶⁹ Ibid art. 27

¹⁷⁰ Approved resolutions: S/2012/2014; S/2012/2043; S/2012/2059; S/2013/2118; S/2014/2139; S/2014/2165; S/2015/2209; S/2015/2254; S/2016/2268; S/2016/2314; S/2016/2319; S/2016/2332; S/2016/2336 and S/2018/2401. Not approved draft resolutions: S/2011/612; S/2012/77; S/2012/538; S/2014/348; S/2016/846; S/2016/1026 and S/2017/315

¹⁷¹ United Nations Security Council Draft Resolutions S/2012/77; S/2011/612

supporting resolutions that may lead to military interventions as it is a staunch supporter of the norms of sovereignty and non-interference; however, given Russia's alliance with Syria, the Russian veto may be more politically motivated than based upon principle.

While the Security Council may have been paralyzed with regards to implementing a military intervention strategy regarding the civil war in Syria, it did pass Resolution 2249 on November 20, 2015, regarding the Islamic State group in which it declared:

The Security Council...*Calls upon* Members States that have the capacity to do so to take all necessary measures, *in compliance with international law* (emphasis added), in particular with the United Nations Charter, as well as...humanitarian law, on the territory under the control of ISIL, also known as Da'esh, in Iraq and Syria, to redouble and coordinate their efforts to prevent and suppress terrorist acts committed by ISIL... and other terrorist groups...and to eradicate the safe haven they have established over significant parts of Iraq and Syria;...¹⁷²

The language used in this resolution was specifically directed at the violent non-state actor groups in Syria. It gave no authorization for the use of force against the Syrian regime itself or its security apparatus. Furthermore, the resolution reiterated that all measures undertaken by participating member states were to be conducted "in compliance with international law."¹⁷³ This language may be interpreted that any military

¹⁷² United Nations Security Council Resolution 2249, 2015

¹⁷³ Ibid

operations other than those specifically directed at the Islamic State and associated terrorist organizations including against the Syrian regime were “unlawful,” particularly in light of the International Court of Justice ruling in *Nicaragua v. United States*.¹⁷⁴ .

Implications

From a scholarly perspective, this research demonstrated that Just War Theory is still relevant to modern warfare. It is an enduring moral compass for those engaged in armed conflict. The United States, its allies, and the international community continue to address security threats from a position that is mostly compatible with the theory. Just War principles have evolved from initially addressing interstate violence to application in combatting violent non-state actor groups such as terrorists and insurgents.

While the *jus ad bellum* (just cause) component may sometimes be questionable; the way in which these interventions were conducted, they were almost always compatible with *jus in bello* (rightful conduct within war). Just because a state engages in a conflict that may not be considered a “just” or legitimate intervention, that does not absolve the military force from conducting the campaign with a complete disregard for well-established law and the rules of war. The adherence to the principle of discrimination in that civilians and other protected entities are not to be deliberately targeted is

¹⁷⁴ *Nicaragua v. United States*, 1986, Op Cit. para: 109; 209. As mentioned above, the Court found that there was neither a collective right to self-defense against non-state actor groups unless requested by the attacked state, nor was there a “general right of intervention ... , in support of an opposition within another state, [under] contemporary international law.”

paramount. Additionally, the notion of proportionality of action taken must be in proportion to the wrong suffered or “to the possible good that may come.”¹⁷⁵ As Walzer has stated:

No group of soldiers claiming, to be just warriors, can arrogate to themselves rights they deny to others or claim exemption from everyone else’s obligation -- for if that is allowed and justified, there will soon be no constraints at all.¹⁷⁶

That all member states of the United Nations have signed and ratified a codified version of *jus in bello* in the four *Geneva Conventions*, demonstrates a universal morality among the members of the international community that certain behaviors are unacceptable.¹⁷⁷ In answer to Plato’s question on who gets to decide the morality -- the right or wrong of conduct in conflict -- in this case it is the international community of states. Whether all states comply with their legal obligations is also important. Non-compliance has the potential to undermine established norms and weaken the rule of law, such as the prohibition on the use of chemical weapons. This is another area for potential investigation.

Just War Theory is particularly useful in that it assists us to “understand the wrongfulness of terrorism” in that it deliberately targets civilians as a matter of choice.¹⁷⁸ Successful asymmetric conflicts including insurgencies have been conducted without the targeting of civilians. Indeed, many guerilla style campaigns are successful because of

¹⁷⁵ Hill, 2010 Op Cit, p.79

¹⁷⁶ Walzer 2015 Op Cit, p.346

¹⁷⁷ The *Fourth Geneva Convention (1949)* specifically deals with humanitarian protections for civilians in a war zone, http://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.33_GC-IV-EN.pdf

¹⁷⁸ Walzer, 2006, Op Cit, p.3

the support of the civilian populace. It also casts doubt on the validity of the cliché that “one man’s terrorist is another man’s freedom fighter” - the deliberate targeting of civilians is always morally and ethically repugnant.

Kantian philosophy can additionally be considered an extension of the theory in that all peoples also belong to an international moral community where there is a respect for the fundamental rights of all. It posits that both human and moral progress can only be achieved in a society based on laws. Modern cosmopolitans support some types of military interventions because “the moral obligation to assist arises on the part of all of those able to help ... irrespective of whether they are in any way responsible for the human misery.”¹⁷⁹ It is also premised on the ideas of a common humanity and a shared human dignity.¹⁸⁰ Moreover, it advances the notion that both human and moral progress can only be achieved in a community based on laws. This extends to include current international law regardless of its deficiencies.¹⁸¹

The results of the research lend support to the philosophical concept of deontological ethics as opposed to utilitarianism. While the latter is premised on the ends justifying the means, deontological ethics places a greater emphasis on the way that an objective is achieved.¹⁸² A Kantian approach to VNSAs also implies that states would approve of others adopting similar security strategies. The train and assist missions can

¹⁷⁹ R. Eckersley, “From Cosmopolitan Nationalism to Cosmopolitan Democracy”, *Review of International Studies*, 2007, Vol.33, p.679

¹⁸⁰ Ibid

¹⁸¹ A. Hurrell, “Kant and the Kantian Paradigm in International Relations” *Review of International Studies*, 1990 Vol.16 No.3, p.186

¹⁸² B. Orend, *War and International Justice: A Kantian Perspective*, Wilfrid Laurier University Press, Canada, 2000, p.20

be interpreted as being compatible to Kantian thought as it is ethically means focused. In contrast, interventions without consent could be viewed as more likely to fulfil “the ends justifying the means” of utilitarianism.

Although this project focused on terrorist organizations and insurgencies, some other violent non-state actor groups also have the resources and financial capacity to destabilize the security environment, such as drug cartels. If military interventions are permitted to be conducted without consent or authorization against one type of violent non-state actors, there is a hypothetical case for extending this to include all types of VNSAs irrespective of motivation - be it political or financial. As the current research did not demonstrate evidence of a growing norm for interventions on this basis, interventions without consent have the potential to be a dangerous precedent if adopted to address other VNSA activities. While the threat threshold would need to be considerably higher, it is not beyond the realm of possibility that any state could be declared “unwilling or unable” to act. This is an area for potential investigation, for example, what is the threshold of violence required for an intervention against a major drug cartel?

Increased cooperation between intervening and host states presents as an alternative strategy to combatting VNSAs. It is also compatible with the Just War principle of “the advancement of good, or the avoidance of evil.”¹⁸³ It shifts the intervening state’s role from that of a traditional combat mission to one that predominantly focuses on training local forces. There is a greater emphasis on support and mentoring rather than militarization. The feasibility of this approach could also benefit from further investigation,

¹⁸³ Aquinas Op Cit

particularly with the public's general wariness of ongoing global military engagements and war fatigue.

As the intervening state's forces are trainers and mentors rather than fighters *per se*, there is a greater opportunity to win the 'hearts and minds' of the local population. It reduces the violent non-state actor from using the intervention as a potential recruiting tool based on propaganda messaging. Finally, with the additional responsibilities associated with conducting missions in an urbanized setting, Glenn asserted that a foreign military might find itself "better placed in a supporting rather than leading role particularly if a host government is in place and functioning effectively."¹⁸⁴

As the War on Terror is almost two decades in and showing no signs of ending any time soon it is critical that resources and personnel are not over stretched. Since 9/11 the United States has spent at least \$5.6 trillion in Afghanistan, Pakistan, Syria, and Iraq. This figure does not include other counter-terror related missions being undertaken elsewhere.¹⁸⁵ From a policy perspective, train and assist operations may be more financially sustainable over a longer duration as opposed to the costs associated with long traditional military engagements. This too is an area that could benefit from further investigation.

¹⁸⁴ R. Glenn, *Mega Cities: The Time is Nigh*, Mad Scientist Laboratory-Forecasting the Future of War, March 29, 2018, <http://madsciblog.tradoc.army.mil/>

¹⁸⁵ *Costs of War: The \$5.6 Trillion Price Tag of the post 9 / 11 Wars*, Watson Institute International and Public Affairs, November 2017
<http://watson.brown.edu/costsofwar/files/cow/imce/papers/2017/Summary%2C%20Budgetary%20Costs%20of%20Post%209.11%20Wars.pdf>

Part Four: Conclusion

This research project has examined the United States and its allies' responses to violent non-state actor organizations in other states since the commencement of the Global War on Terror. Data was collected on the period from January 2001 until January 2016. During this time there have been 15 military interventions into other states with all but one being by clear cases of consent by the host state, or authorization under Chapter VII by the United Nations Security Council. The range of states intervening into one state was fifty-four at a maximum, however three quarters of these interventions consisted of less than five states participating.

Types and intensity of responses by intervening states also varied during this time. In 2001 the response to Al Qaida Afghanistan, could be considered a traditional "boots-on-the-ground" campaign supported by missile and air strikes. In Yemen the approach was more nuanced to consist of only air and missile strikes, mostly conducted by drones. It was difficult to get official data on the exact details as many of the drone strikes were covert operations and remain classified. Other allied states including the Kingdom of Saudi Arabia have also intervened in Yemen with traditional ground forces in addition to conducting their own airstrikes.

The data also demonstrated a substantial number of 'train, assist and support' missions, mostly conducted within the MENA region. Again, these operations were conducted with the consent of the host nation or under the authorization of the Security Council. The United States has almost doubled the number of its Special Forces

operations since the early 2000s; however, acquiring exact numbers, locations and specific missions proved difficult to obtain as many remain classified.

The interventions were also examined for their compatibility with Just War principles. While most were found to be *jus ad bellum* -- just cause -- there are some that where the legitimacy of the initial intervention is questionable, specifically Syria. Neither consent from the Syrian government had been obtained, nor had the Security Council authorized the use of military force. Although the Council did eventually issue a resolution of authorization retrospectively some 12 months later, the language contained within was very precise in that only certain terrorist organizations could be targeted. It also highlighted that all action taken was to specifically follow international law.

The International Court of Justice -- as one source of international law -- has expressly stated in *Nicaragua v. United States* under what circumstances a military intervention into another state to target VNSAs can be considered legitimate. The Court's ruling was made in 1986, however, and it can be argued that it did not contemplate that a non-state actor group could present as an equal threat to a state as another state could. As with any court, the International Court of Justice can only issue a ruling or an advisory opinion when a case is before it. Perhaps now is the time for the Court to consider the new types of security challenges presented by well-resourced violent non-state actor groups. It would also be an opportunity for the Court to align its position with that of the Security Council.

Irrespective of whether an intervention is considered legitimate, how an intervening military force conducts its operations -- *jus in bello* -- is equally important from both a

moral and legal stance. The principles of how war is to be conducted places special emphasis on proportionality of response and discrimination in targeting. Under no circumstances is it permissible to deliberately target civilians who may be caught up in the conflict. Violent non-state actors who deliberately target civilians as a strategy of choice are morally and legally reprehensible both from a Just War perspective, and under international law. This prohibition has also been codified by the *Fourth Geneva Convention* and signed by every U.N. member state. The additional *Protocols* set out in detail *jus in bello* requirements although not all countries including the U.S. are signatories.

While this paper focused predominantly on terrorist and other insurgency movements, there are other violent non-state actors who pose an equal security risk both domestically and globally. These include highly militarized drug cartels, gangs, and other transnational organized crime networks. Due to time limitations these groups could not be considered in any detail. This is an area worthy of further research, particularly regarding potential future military interventions in other states.

Finally, this paper has sought to answer whether there had been a development of new international norms relating to military interventions. While there has been an increase in non-traditional ‘train and assist’ missions, there is no legal obligation for states to participate in these types of operations. Nor has any new norm been established regarding intervening without consent under the “unwilling or unable” doctrine. It is not currently international law as there has been no consistent practice by a significant number of states. However, that is not to say that it won’t become a new norm at some

point in the future particularly if violent non-state actor groups continue to proliferate in fragile states.

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