

## NOTE

### R2P: AN EFFICIENT MEANS FOR INTERVENTION IN HUMANITARIAN CRISES— A CASE STUDY OF ISIL IN IRAQ AND SYRIA

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#### I. INTRODUCTION

It is the beginning of August 2014 in Iraq. 170,000 members of the Kurdish minority religious group, known as the Yazidis, are fleeing their homes as the jihadists, known as the Islamist State of Iraq and the Levant (ISIL),<sup>1</sup> attack their city.<sup>2</sup> Approximately 130,000 Yazidis flee to the cities of Dohuk and Irbil.<sup>3</sup> Another 40,000 Yazidis fleeing for their lives take refuge on Mount Sinjar.<sup>4</sup> Soon, however, these displaced families realize they may have sealed their fate.<sup>5</sup> Surrounded by Islamic militants, they cannot descend the mountain without facing a most certain death.<sup>6</sup> But with dwindling supplies of food and water, they will likely die if they stay.<sup>7</sup>

Over a week later, and after calls for a humanitarian intervention from Kurdish officials, the United States, Iraqi Air Force, and Kurd-

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1. Throughout this Note I will be using the term “Islamic State of Iraq and the evant” and its corresponding acronym “ISIL” to refer to the jihadist group that has risen to power in Iraq and Syria. This group has changed their name over the years and has recently gone by the “Islamic State of Iraq and Syria / ISIS” and the “Islamic State / IS.” See Ian Black, *The Islamic State: is it ISIS, ISIL – or Possibly Daesh?*, GUARDIAN (Sept. 21, 2014), <http://www.theguardian.com/world/shortcuts/2014/sep/21/islamic-state-isis-isil-daesh>. However, for simplicity’s sake and to use the most geographically correct term, this Note will refer to them as ISIL unless providing a direct quote.

2. Martin Chulov, *40,000 Iraqis Stranded on Mountain as ISIS Jihadists Threaten Death*, GUARDIAN (Aug. 6, 2014), <http://www.theguardian.com/world/2014/aug/07/40000-iraqis-stranded-mountain-isis-death-threat>.

3. *Id.*

4. *Id.*

5. *See id.*

6. *Id.*

7. *See id.*

ish Peshmerga<sup>8</sup> carry out air strikes and food drops to suppress ISIL's advance against Mount Sinjar and provide much needed supplies to the Yazidis stranded there.<sup>9</sup> The Yazidis have suffered significant persecution over the years at the hands of Muslims who disagree with their pre-Islamic faith, which draws from Christianity, Judaism, and Zoroastrianism.<sup>10</sup> Many Muslims, including Sunni jihadists, have targeted the Yazidis as members of a minority religious group and consider them to be devil worshippers.<sup>11</sup>

The situation in Iraq and Syria continues to deteriorate. One must wonder whether much of the turmoil could have been prevented if states intervened sooner. As states intervened in the crisis, some provided legal bases for their actions, such as collective self-defense.<sup>12</sup> However, the doctrine of the Responsibility to Protect (R2P) provides a legal basis for early non-military intervention and a state's military intervention in Iraq and Syria.<sup>13</sup>

R2P includes three specific responsibilities: (1) the responsibility to prevent crises; (2) the responsibility to react when individuals are in need; and (3) the responsibility to rebuild and address the cause of the harm after an intervention.<sup>14</sup> It also espouses the basic principles that with state sovereignty comes responsibility, and it is a state's responsibility to protect its people.<sup>15</sup> When a population is suffering serious harm and the state in question is unwilling or unable to act, the principle of non-intervention yields to the principle of R2P.<sup>16</sup>

8. The Kurdish Peshmerga, meaning "those who face death," are military fighters from the Kurdistan region of northern Iraq. *Profile: Who are the Peshmerga?*, BBC NEWS (Aug. 12, 2014), <http://www.bbc.com/news/world-middle-east-28738975>.

9. Dana Ford & Josh Levs, *'Heroic' Mission Rescues Desperate Yazidis from ISIS*, CNN (Aug. 16, 2014), <http://www.cnn.com/2014/08/11/world/meast/iraq-rescue-mission/>.

10. *Id.* Zoroastrianism is believed to be the first monotheistic religion in the world and was founded by the Prophet Zoroaster in present-day Iran. *Religions: Zoroastrianism*, BBC, <http://www.bbc.co.uk/religion/religions/zoroastrian/> (last updated Oct. 2, 2009). Zoroastrians believe in a single God whose wisdom is represented by fire. *Id.* At one point, it was one of the most influential religions in the world, but today it is one of the smallest with just roughly 200,000 followers. *Id.*

11. Chulov, *supra* note 2; Ford & Levs, *supra* note 9.

12. See Somini Sengupta & Charlie Savage, *U.S. Invokes Iraq's Defense in Legal Justification of Syria Strikes*, N.Y. TIMES (Sept. 23, 2014), [http://www.nytimes.com/2014/09/24/us/politics/us-invokes-defense-of-iraq-in-saying-strikes-on-syria-are-legal.html?\\_r=0](http://www.nytimes.com/2014/09/24/us/politics/us-invokes-defense-of-iraq-in-saying-strikes-on-syria-are-legal.html?_r=0).

13. See *infra* Section III.

14. INT'L COMM'N ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT XI (2001) [hereinafter THE RESPONSIBILITY TO PROTECT].

15. *Id.*

16. *Id.*

Since the mid-1990s, there has been a sea of change regarding state sovereignty and the principle of non-intervention.<sup>17</sup> The international community has debated the use of R2P when a sovereign is no longer able or willing to protect its citizens from crimes against humanity, war crimes, and genocide occurring within its borders.<sup>18</sup> Whether officially stated or not, ISIL's actions in Iraq and Syria constitute genocide, war crimes, crimes against humanity, and ethnic cleansing.<sup>19</sup> Thus, the rise of ISIL provides the clearest possible case for invoking R2P to prevent further death and destruction and to begin to establish R2P's widespread use. The international community has now reached a time where, by invoking R2P in the case of ISIL, it can provide the salience it needs and pave the way for R2P to potentially become customary international law.<sup>20</sup> Thus, the international community should use the doctrine of R2P as the legal basis for military intervention. The use of R2P would save thousands of lives—in this and future crises. By allowing for early intervention and an escalation of response if necessary, it is the most efficient means of humanitarian intervention.

Section II of this Note discusses the doctrine of R2P and the current human rights crisis occurring in Iraq and Syria. Section III analyzes the situation in Iraq and Syria with regard to the just cause threshold for military intervention under the doctrine of R2P. It then argues that R2P provides a legal basis for the international community to intervene militarily to stop the atrocities occurring in Iraq and Syria. Extrapolating from this notion, this Note argues that, with widespread use, R2P should become customary international law. Section IV discusses the broader implications of R2P and the future of humanitarian intervention.

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17. See discussion *infra* Section II(A).

18. See discussion *infra* Section II(A).

19. See discussion *infra* Section III.

20. Customary international law is a law “which is created and sustained by the constant and uniform practice of States. . . in circumstances which give rise to a legitimate expectation of similar conduct in the future.” COMM. ON FORMATION OF CUSTOMARY (GEN.) INT’L LAW, INT’L LAW ASS’N, STATEMENT OF PRINCIPLES APPLICABLE TO THE FORMATION OF GENERAL CUSTOMARY INTERNATIONAL LAW 8 (2000) [hereinafter CUSTOMARY INTERNATIONAL LAW]; “*Opinio juris*” is when a state believes it has a legal obligation to do, or refrain from doing, a particular act. DAVID J. BEDERMAN, INTERNATIONAL LAW FRAMEWORKS 15–16 (3d ed. 2001).

## II. DISCUSSION

### A. *The Evolution of R2P and its Implications in Iraq and Syria*

The international community's perspective on one state using force against another has changed throughout time, evolving alongside the interpretation of the doctrine of state sovereignty.<sup>21</sup> Initially, states believed they had to find a morally acceptable reason for war.<sup>22</sup> Eventually, the belief that state sovereigns had an "unrestricted right to war" emerged and contributed to the expansiveness World War I.<sup>23</sup> In response to the First World War, the international community collectively renounced war and created the League of Nations to oversee disputes between member nations.<sup>24</sup> However, these international efforts were short lived, as World War II broke out just twenty years later.<sup>25</sup> After World War II, the international community created the United Nations (UN), whose Charter ushered in another period of non-intervention by banning any use of force that does not constitute self-defense or is not authorized by the Security Council.<sup>26</sup> The principle of non-intervention, which compliments the right to state sovereignty, holds as follows:

No State has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are condemned.<sup>27</sup>

Nevertheless, in 1994, the international community began to question the rigidity of the principle of non-intervention.

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21. Sovereignty is defined as "supreme power especially over a body politic" and the "freedom from external control." *Sovereignty*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/sovereignty> (last visited Feb. 6, 2015).

22. BARRY E. CARTER & ALLEN S. WEINER, *INTERNATIONAL LAW* 933 (6th ed. 2011).

23. *Id.* at 933–34.

24. States signed the Kellogg-Briand Pact renouncing war. *Id.* at 940–41.

25. *Id.* at 932.

26. This includes uses of force in declared war, undeclared war, or lesser hostilities. *See* U.N. Charter *prmbli.*; *id.* art. 2(4); CARTER & WEINER, *supra* note 22, at 944, 948; CHATHAM HOUSE, *THE PRINCIPLE OF NON-INTERVENTION IN CONTEMPORARY INTERNATIONAL LAW: NON-INTERFERENCE IN A STATE'S INTERNAL AFFAIRS USED TO BE A RULE OF INTERNATIONAL LAW: IS IT STILL?* 4 (Feb. 28, 2007), <https://www.chathamhouse.org/sites/files/chathamhouse/public/Research/International%20Law/il280207.pdf>.

27. G.A. Res. 2131 (XX), Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty ¶ 1 (Dec. 21, 1965).

In the early 1990's the Rwandan Government was run by the Hutu population.<sup>28</sup> Using deceptive political tactics, powerful Hutu extremists convinced the Hutu population that the Tutsi were to blame for their country's troubles.<sup>29</sup> By the Spring of 1994, the ethnic divide grew so strong that Rwandan armed forces killed 800,000 Tutsi and politically moderate Hutu men, women, and children.<sup>30</sup> As the crisis unfolded in Rwanda, the UN failed to both prevent genocide from occurring and stop it once it began.<sup>31</sup> Shortly thereafter, in July of 1995, Serbians attacked an UN-designated safe area in Bosnia, killing 20,000 Muslim Bosnians.<sup>32</sup> Again, the UN responded with insufficient armed forces to the human rights crisis, and the forces present failed to answer the imminent attack.<sup>33</sup> After the failed international responses to the Rwandan and Bosnian<sup>34</sup> genocides, a new international norm began to emerge.<sup>35</sup> Instead of concentrating solely on national and territorial security, the international community shifted its focus to human security as well.<sup>36</sup> The idea of R2P developed from this foundation, but the 1999 genocide in Kosovo was the final tipping point.<sup>37</sup> After the UN Security Council failed to act, the North

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28. *Genocide in Rwanda*, UNITED HUMAN RIGHTS COUNCIL, [http://www.unitedhumanrights.org/genocide/genocide\\_in\\_rwanda.htm](http://www.unitedhumanrights.org/genocide/genocide_in_rwanda.htm) (last visited Feb. 6, 2016).

29. *Id.*

30. U.N. Secretary-General, *Report of the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda* 3, U.N. Doc. S/1999/1257 (Dec. 15, 1999) [hereinafter *Independent Inquiry Rwanda*].

31. In a report on the response to the Rwandan genocide, the United Nations (UN) admits that its intervention failed because it ignored evidence of imminent genocide, declined to act once genocide occurred, and left Rwanda when its citizens needed the UN the most. *Independent Inquiry Rwanda*, *supra* note 30; Nicole Winfield, *UN Failed Rwanda*, GLOBAL POLICY FORUM (Dec. 16, 1999), <https://www.globalpolicy.org/component/content/article/201/39240.html>. Much of the failure to respond was due to a lack of resources and political will, especially after the failed peacekeeping mission to Somalia. *Independent Inquiry Rwanda*, *supra* note 30.

32. G.A. Res. 53/35, *The fall of Srebrenica*, ¶¶ 2–3, (Nov. 15, 1999).

33. *Id.* at ¶¶ 470–74, 480–84, 488–93.

34. “Bosnian genocide” is the more common name for the Srebrenica genocide. See Sandro Krkljes, *Bosnian Genocide*, WORLD WITHOUT GENOCIDE (Mar. 2014), <http://worldwithoutgenocide.org/genocides-and-conflicts/bosnian-genocide>.

35. See U.N. Secretary-General, *We the Peoples: The Role of the United Nations in the Twenty-First Century* ¶¶ 215–19, U.N. Doc. A/54/2000 (Mar. 27, 2000).

36. Human security's “fundamental components” have been described as “the security of *people* against threats to life, health, livelihood, personal safety and human dignity.” THE RESPONSIBILITY TO PROTECT, *supra* note 14, at 15.

37. Kosovo is a part of Serbia that initially had a great deal of autonomy. *NATO's Role in Relation to the Conflict in Kosovo*, NATO OTAN, <http://www.nato.int/kosovo/history.htm> (last updated July 15, 1999). In 1989, Belgrade, the capital of Serbia, brought Kosovo under its control. *Id.* The Kosovar Albanians, who make up the majority of Kosovo's population, were unhappy with this change. *Id.*

Atlantic Treaty Organization (NATO) forces conducted airstrikes to end the ethnic cleansing of the Kosovar Albanians by the Serbian forces in Kosovo.<sup>38</sup> NATO's unsanctioned military intervention divided the international community: some saw NATO's actions as subverting the UN, while others saw it as morally imperative.<sup>39</sup>

## 1. Developing the Doctrine of R2P

Reacting to the events of the 1990s, Secretary-General Kofi Annan called upon the international community to agree on a method to address the precarious situation of a sovereign complicit in human rights violations within its territory.<sup>40</sup> In response to this request, the Government of Canada formed the International Commission on Intervention and State Sovereignty (Commission) to develop a mechanism for reacting to humanitarian crises.<sup>41</sup> Because R2P is not codified in any treaty, the Commission's report on R2P is the leading document on the principle.<sup>42</sup> Led by the United Kingdom, Canada, and Germany, many states welcomed the report's results.<sup>43</sup> A number remained unsure, including the United States, which was concerned about the specific criteria that might trigger a commitment of forces.<sup>44</sup> Others, such as Russia and China, insisted that the Security Council authorize all instances of the use of force.<sup>45</sup> The three other permanent mem-

38. *Id.*

39. Press Release, Security Council, Security Council Rejects Demand for Cessation of Use of Force Against Federal Republic of Yugoslavia, U.N. Press Release SC/6659 (Mar. 26, 1999).

40. THE RESPONSIBILITY TO PROTECT, *supra* note 14, at VII.

41. The Government of Canada formed the International Commission on Intervention and State Sovereignty (Commission) in response to Kofi Annan's Millennium Report to the General Assembly. *International Commission on Intervention and State Sovereignty*, UNITAR, [https://www.unitar.org/ny/sites/unitar.org.ny/files/69974\\_eng\\_175\\_lpi.pdf](https://www.unitar.org/ny/sites/unitar.org.ny/files/69974_eng_175_lpi.pdf) (last visited Feb. 6, 2016). The Commission's mandate was to reconcile the concepts of intervention and sovereignty in order to provide a means by which the global community can intervene when crimes against humanity occur. *Id.* The Commission consisted of twelve Commissioners with diverse backgrounds supported by an international Advisory Board. *Id.* In developing the report, the Commission conducted numerous round tables throughout the world and met with government representatives, inter-governmental organizations, non-governmental organizations and civil society, and individuals from universities, research institutes, and think tanks. THE RESPONSIBILITY TO PROTECT, *supra* note 14, at VII, 77-82.

42. THE RESPONSIBILITY TO PROTECT, *supra* note 14, at 1-2.

43. Alex J. Bellamy, *Whither the Responsibility to Protect? Humanitarian Intervention and the 2005 World Summit*, 20 ETHICS & INT'L AFF. 143, 151-152 (2006).

44. *Id.* at 151.

45. *Id.*

bers of the Security Council quickly dismissed a blanket prohibition on all unsanctioned military intervention.<sup>46</sup>

States' reactions varied because R2P involves the important issue of state sovereignty and a commitment to act. R2P holds that the international community is responsible for "protect[ing] populations from genocide, war crimes, ethnic cleansing and crimes against humanity."<sup>47</sup> R2P was founded on the basic principle that with state sovereignty comes responsibility and that it is a state's responsibility to protect its people.<sup>48</sup> When a population suffers serious harm and the state in question is unwilling or unable to act, the principle of non-intervention yields to the principle of R2P.<sup>49</sup>

R2P includes three specific elements: (1) the responsibility to prevent; (2) the responsibility to react; and (3) the responsibility to rebuild.<sup>50</sup> In order to successfully execute the responsibility to prevent there must be an early warning system, workable policy measures, and the political will to implement these policy measures in a timely manner.<sup>51</sup> Non-military measures can be political, diplomatic, economic, or military in nature and include restrictions on diplomatic representation, financial sanctions, and arms embargos.<sup>52</sup> To advance from non-military to military measures, R2P establishes an extremely high threshold in order to ensure the international community only uses force in the gravest of circumstances.<sup>53</sup> The paramount goal of rebuilding after an intervention is to guarantee the root cause of the crisis does not resurface.<sup>54</sup> Activities such as reintegrating the military and rebuilding the state's infrastructure and judicial structure are key aspects of the responsibility to rebuild.<sup>55</sup> Regrettably, the crisis in Iraq and Syria is beyond the preventative stage of R2P. Because of this, states should focus on the responsibility to react element of R2P.

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46. Specifically, these countries were France, the United Kingdom, and the United States. *See id.* at 152.

47. G.A. Res. 60/12005, World Summit Outcome ¶ 138 (Oct. 25, 2005).

48. THE RESPONSIBILITY TO PROTECT, *supra* note 14, at VII.

49. *Id.*

50. *Id.* at XI.

51. *Id.* at 20.

52. *Id.* at 30.

53. *Id.* at 29.

54. *Id.* at 39.

55. *Id.*

### B. *The Responsibility to React Element of R2P*

The Commission provides six criteria for determining whether a state may react with military intervention.<sup>56</sup> The criteria include: right authority,<sup>57</sup> just cause,<sup>58</sup> right intention,<sup>59</sup> last resort,<sup>60</sup> proportional means,<sup>61</sup> and reasonable prospects.<sup>62</sup> The Commission further states that under the just cause threshold, military intervention may be used in situations of serious and irreparable harm, or where harm is imminently likely to occur, to humans.<sup>63</sup> The Commission clarifies this harm to be of two types, as follows:

(1) Large scale loss of life, actual or apprehended, with genocidal intent or not, which is the product either of deliberate state action, or state neglect or inability to act or a failed state situation, or

(2) Large scale 'ethnic cleansing', actual or apprehended, whether carried out by killing, forced expulsion, acts of terror or rape.<sup>64</sup>

Notably, unlike in its explanation of the role of the state regarding a large-scale loss of life, the Commission did not include a state component to the ethnic cleansing means of meeting the just cause threshold.<sup>65</sup> Whether the harm caused by a state or non-state actor is inconsequential in determining whether the just cause threshold is met.<sup>66</sup>

In assessing harms occurring in a crisis, states can look for guidance to a number of international treaties written in the wake of World War II and an Expert Commission report on Yugoslavia. First, the London Charter establishes the International Military Tri-

56. *Id.* at 32.

57. The UN has the authority to settle issues of international peace and security; the UN Security Council has the authority to determine whether military intervention is necessary. *Id.* at 32, 49.

58. In other words, "what kind of harm is sufficient to trigger a military intervention overriding the non-intervention principle[?]" *Id.* at 32.

59. Right intention is defined as, "The primary purpose of the intervention must be to halt or avert human suffering." *Id.* at 35.

60. Last resort is defined as, "Every diplomatic and non-military avenue for prevention or peaceful resolution of the humanitarian crisis must have been explored." *Id.* at 36.

61. Proportional means is defined as, "The scale, duration and intensity of the planned military intervention should be the minimum necessary to secure the humanitarian objective in question." *Id.* at 37.

62. Reasonable prospects is defined as, "Military action can only be justified if it stands a reasonable chance of success, that is, halting or averting the atrocities or suffering that triggered the intervention in the first place." *Id.*

63. *Id.* at XII.

64. *Id.*

65. *Id.*

66. *Id.* at 33.

bunal in Nuremberg and provides definitions of war crimes<sup>67</sup> and crimes against humanity.<sup>68</sup> Second, the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) defines genocide.<sup>69</sup> The International Court of Justice<sup>70</sup> has also ruled that the prohibition on genocide is customary international law.<sup>71</sup> Ruling that genocide is customary international law makes the Genocide Convention binding on signatories and non-signatories alike.<sup>72</sup> Lastly, in response to violations of the Geneva Convention in the former Yugoslavia, the UN Commission defined ethnic cleansing.<sup>73</sup>

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67. War crimes are defined as, “[V]iolations of the laws or customs of war . . . [which] include, but . . . [are not] limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity[.]” Charter of the International Military Tribunal, *in* Agreement for the Prosecution and Punishment of Major War Criminals of European Axis (“London Agreement”) art. 6(b), Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 280.

68. Crimes against humanity are defined as, “[M]urder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.” *Id.* art. 6(c) (internal footnote omitted).

69. Genocide is defined as, “[A]ny of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; [or] (e) Forcibly transferring children of the group to another group.” Convention on the Prevention and Punishment of the Crime of Genocide art. 2, Dec. 9, 1948, S. Exec. Doc. O, 81-1, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

70. The UN Charter established the International Court of Justice (ICJ) in 1946 as the principle judicial organ of the UN. *The Court*, INT’L CT. OF JUST., <http://www.icj-cij.org/court/index.php?p1=1> (last visited May 16, 2016). The ICJ’s role is to settle legal disputes and provide advisory opinions in accordance with international law. *Id.*

71. *See* Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgement, 2007 I.C.J. Rep. 43, 142–209 (Feb. 26).

72. *See id.*

73. Ethnic cleansing is defined as, “[A] policy designed by one ethnic or religious group to remove by violent and terror-inspiring means the civilian population of another ethnic or religious group from certain geographic areas.” Ethnic cleansing can be perpetuated through acts of “murder, torture, arbitrary arrest and detention, extra-judicial executions, rape and sexual assaults, confinement of civilian population in ghetto areas, forcible removal, displacement and deportation of civilian population, deliberate military attacks or threats of attacks on civilians and civilian areas, and wanton destruction of property.” Final Rep. of the Comm’n of Experts on Yugoslavia Established Pursuant to Resolution 780 (1992), transmitted by Letter Dated May 24, 1994 from the Secretary-General Concerning

In implementing R2P, one can utilize these definitions and standards to determine the necessary degree of intervention. Under R2P, the international community does not need to wait until a crisis meets every criterion of the above crimes before a non-military or military intervention is appropriate.<sup>74</sup> However, R2P only supports the use of military intervention in instances where there is clear evidence or threat of large-scale killing or large-scale ethnic cleansing.<sup>75</sup>

### C. *The Responsibility to Protect when the UN Process Fails*

Chapter VII of the UN Charter places “primary responsibility for the maintenance of international peace and security”<sup>76</sup> with the Security Council and provides that the Security Council may take whatever action necessary to maintain or restore peace and security.<sup>77</sup> However, this has not been the case due to the use, and threat of use,<sup>78</sup> of the veto power of the Permanent Five (P5)<sup>79</sup> members of the Security Council compounded with a general lack of political will to act when it is desperately needed.<sup>80</sup> For example, the Security Council ignored an assessment by the UN human rights investigator highlighting the potential for genocide in Rwanda in August of 1993.<sup>81</sup> Worse was the Security Council’s failure to react once the mass killings began, due to veto threats from France, the United Kingdom, and the United States.<sup>82</sup> The P5

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Yugoslavia Addressed to the President of the Security Council, ¶¶ 129–130, U.N. Doc. S/1994/674 (May 27, 1994).

74. See THE RESPONSIBILITY TO PROTECT, *supra* note 14, at 33.

75. *Id.*

76. U.N. Charter art. 24, ¶ 1.

77. U.N. Charter art. 42.

78. This is also referred to as the hidden veto, in which permanent members threaten to use their veto power in closed-door sessions. This has a direct effect on what issues are formally taken up by the Security Council. Céline Nahory, *The Hidden Veto*, GLOBAL POL’Y F. (May 2004), <https://www.globalpolicy.org/component/content/article/185/42656.html>.

79. The Permanent Five (P5) members of the UN Security Council are the United States, the United Kingdom, the Russian Federation, China, and France. *The UN Security Council*, COUNCIL ON FOREIGN REL., <http://www.cfr.org/international-organizations-and-alliances/un-security-council/p31649> (last updated Sept. 2, 2015). These countries gained this status as victors of World War II and as countries that could bring important leadership and regional perspectives to Security Council decisions. *Id.* The P5 are the only countries that can veto a Security Council resolution. *Id.* Ten elected member nations make up the remainder of the Security Council. *Id.* These elected members can vote against a resolution, but cannot veto a resolution. *Id.*

80. THE RESPONSIBILITY TO PROTECT, *supra* note 14, at 51.

81. See Winfield, *supra* note 31.

82. Nahory, *supra* note 78. Another example of this issue is when Russia and China threatened to veto the use of force to stop the ethnic cleansing occurring in Kosovo in

refused to increase the number of peacekeepers and eventually pulled them out of Rwanda while the genocide continued.<sup>83</sup>

In similar fashion, the Security Council passed Resolution 2170 condemning the terrorist acts and human rights violations committed by ISIL and their recruitment of foreign fighters.<sup>84</sup> It also reminded states of their duty to not finance terrorist organizations and sanctioned six individuals tied to ISIL.<sup>85</sup> Six months later, the Security Council passed Resolution 2199 condemning all direct or indirect trade with ISIL, particularly relating to oil, antiquities, and arms.<sup>86</sup> It further denounced the incidents of kidnapping and urged states to not pay ransoms to ISIL.<sup>87</sup>

When the Security Council fails to authorize military action in a time of need, the General Assembly can call an Emergency Special Session.<sup>88</sup> Even though the General Assembly does not have the authority to authorize military action, a decision by the General Assembly in favor of military action would put more pressure on the Security Council.<sup>89</sup> Years after ISIL began its reign of terror, the General Assembly is beginning to seriously discuss the issue.<sup>90</sup> Though most nations are simply pointing fingers and talking over each other, the General Assembly's focus is a step in the right direction.<sup>91</sup>

## 1. Legal Principles Supporting Intervention in the Face of UN Inaction:

A number of soft law<sup>92</sup> principles support an ad hoc coalition or single state actor intervening militarily under R2P without a Secur-

1998. Cf. Citizens for Global Solutions, *The Responsibility Not to Veto: A Way Forward*, GLOBAL SOLUTIONS 6 (2014), [https://globalsolutions.org/files/public/documents/RN2V\\_White\\_Paper\\_CGS.pdf](https://globalsolutions.org/files/public/documents/RN2V_White_Paper_CGS.pdf). Eventually, North Atlantic Treaty Organization (NATO) forces bypassed the Security Council and took up a military operation on their own. *Id.*

83. Winfield, *supra* note 31.

84. S.C. Res. 2170 ¶¶ 1–10 (Aug. 15, 2014).

85. *Id.* ¶¶ 11–21.

86. S.C. Res. 2199 ¶¶ 1–17, 24–27 (Feb. 15, 2015).

87. *Id.* ¶¶ 18–22.

88. The Uniting for Peace Resolution allows the General Assembly to call an emergency session within twenty-four hours. G.A. Res. 377 (V) A, Uniting for Peace, ¶ 1 (Nov. 3, 1950).

89. THE RESPONSIBILITY TO PROTECT, *supra* note 14, at 53.

90. Gardiner Harris & Somini Sengupta, *Obama and Putin Play Diplomatic Poker Over Syria*, N.Y. TIMES (Sept. 28, 2015), [http://www.nytimes.com/2015/09/29/world/middleeast/un-general-assembly-syria-isis-refugees.html?\\_r=0](http://www.nytimes.com/2015/09/29/world/middleeast/un-general-assembly-syria-isis-refugees.html?_r=0).

91. *Id.*

92. “Soft law refers to rules that are neither strictly binding in nature nor completely lacking in legal significance.” *Soft Law*, USLEGAL.COM, <http://definitions.uslegal.com/soft-law/> (last visited Feb. 6, 2016).

ity Council resolution.<sup>93</sup> These include fundamental natural law principles and the Universal Declaration of Human Rights (the Declaration). Fundamental natural law principles direct individuals to act for the good of human nature by providing “food, drink, clothing, shelter, creative activity, knowledge, friendship, etc.” to the community.<sup>94</sup> Finding validity in these principles, lawmakers have derived positive law from natural law principles for thousands of years.<sup>95</sup> Additional support comes from the Declaration’s list of thirty inherent rights afforded to all human beings.<sup>96</sup> A number of the rights pertinent to the crisis in Iraq and Syria include, Article 3, which states that “Everyone has the right to life, liberty, and security of person”; Article 5: “No one shall be subject to torture or to cruel, inhuman, or degrading treatment or punishment”; and Article 13(1): “Everyone has the right to freedom of movement and residence within the borders of each state.”<sup>97</sup>

There are also a number of positive law principles that support an ad hoc coalition or single state actor intervening militarily under R2P without a Security Council resolution.<sup>98</sup> These include the human rights provisions of the UN Charter, the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), the Geneva Conventions and Additional Protocols, and the Rome Statute. The preamble of the UN Charter states that members will, “reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small. . . .”<sup>99</sup> Additionally, Article I holds that, “[t]he Purposes of the United Nations are . . . to achieve international cooperation in solving

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93. THE RESPONSIBILITY TO PROTECT, *supra* note 14, at 16.

94. Thomas D. D’Andrea, *The Natural Law Theory of Thomas Aquinas*, NATURAL LAW, NATURAL RIGHTS, AND AMERICAN CONSTITUTIONALISM, <http://www.nlrfac.org/classical/aquinas> (last visited Feb. 7, 2106).

95. This is evident in many places—from Plato defining the ideal city as one “established in accordance with nature” in the *Republic*, to Hugo Grotius’ belief that that we live in an international society governed by the laws of nature, and Grotius’ influence on the international laws of war and the sea, to the influence natural laws had on the Founding Fathers while writing the Constitution. See Plato, *REPUBLIC*, 428e9 (C. D. C. Reeve ed., G. M. A. Grube trans., Hackett Publ’g Co., Inc., 2nd ed. 1992); Robert P. George, *Natural Law*, 31 HARV. J.L. & PUB. POL’Y 171, 188 (2008); Jon Miller, *Hugo Grotius*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (July 28, 2011), <http://plato.stanford.edu/archives/spr2014/entries/grotius/>; *Natural Law: The Ultimate Source of Constitutional Law*, NAT’L CTR. FOR CONSTITUTIONAL STUDIES, <http://www.nccs.net/natural-law-the-ultimate-source-of-constitutional-law.php> (last visited Feb. 7, 2016).

96. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, (Dec. 10, 1948).

97. *Id.* arts. 3, 5, 13(1).

98. THE RESPONSIBILITY TO PROTECT, *supra* note 14, at 16.

99. U.N. Charter, pmb1.

international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion . . . .”<sup>100</sup> The Genocide Convention supports these provisions of the UN Charter by allowing signatories to “call upon the competent organs of the United Nations to take such action . . . for the prevention and suppression of acts of genocide . . . .”<sup>101</sup> Building on these principles, the Geneva Conventions and Additional Protocols provide the foundation for modern humanitarian law in armed conflicts.<sup>102</sup> Furthermore, the Rome Statute establishes the International Criminal Court and defines genocide, crimes against humanity, and war crimes as international crimes.<sup>103</sup>

Currently, R2P is purely aspirational because there are no legal repercussions if the international community fails to act. Nonetheless, a failure to act in cases of humanitarian crisis can lead to large-scale human loss. If R2P were to become customary international law, then all nations would be legally bound to act in response to grave humanitarian crises.<sup>104</sup> In order to become customary international law, an extensive and representative number of states

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100. *Id.* art. 1(3).

101. Convention on the Prevention and Punishment of the Crime of Genocide art. 8, Dec. 9, 1948, S. Exec. Doc. O, 81-1, 78 U.N.T.S. 277.

102. Convention I protects wounded and infirm soldiers and medical personnel from attack, torture, and assault while also guaranteeing them medical assistance in times of need. *See* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31. Convention II extends the protections of Convention I to the naval forces. *See* Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85. Convention III defines a prisoner of war and stipulates that they must be treated humanely. *See* Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135. Convention IV requires the humane treatment of civilians and prohibits attacks on civilian hospitals and medical transports, while also providing guidance on how occupiers should treat an occupied population. *See* Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287. Protocol I heightens restrictions with respect to the protected groups discussed in the Conventions and defines new restrictions regarding the deceased, cultural artifacts, and targets such as dams and nuclear power plants. *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3. Protocol II clarifies “humane treatment” and provides additional protections for prisoners and civilian populations. *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, S. Treaty Doc. No. 100-2, 1125 U.N.T.S. 609.

103. *See* Rome Statute of the International Criminal Court, arts. 5–8, July 17, 1998, 2187 U.N.T.S. 90.

104. *See Customary International Law*, *supra* note 20.

would need to invoke R2P when intervening to prevent or stop human rights atrocities occurring in another state.<sup>105</sup> Additionally, the states that invoke R2P would need to do so because they believe they are legally obligated to intervene under the doctrine of R2P.<sup>106</sup> If these criteria are met, R2P will be considered customary international law.

Many key players have already taken action without the Security Council's necessary authorization for military intervention.<sup>107</sup> This Note argues that with or without Security Council approval, the doctrine of R2P provides the legal means for military intervention in Iraq and Syria. With the situation in Iraq and Syria deteriorating, the UN cannot expect the international community to sit idly by. Many key players have taken action without the Security Council's necessary authorization for military intervention.

#### D. *The Rise of the Islamic State of Iraq and the Levant*

ISIL originated as a Jordanian-based militant group that, at Osama bin Laden's request, joined Al Qaeda, creating Al Qaeda in

105. See *id.* See generally *Customary IHL*, INT'L COMM. OF THE RED CROSS, [https://www.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_in\\_asofcuin](https://www.icrc.org/customary-ihl/eng/docs/v1_rul_in_asofcuin) (last visited Feb. 7, 2016) (discussing the creation of customary international law through state practice, *opinio juris*, and treaties).

106. See BEDERMAN, *supra* note 20, at 17.

107. The United States, the United Kingdom, Australia, Canada, France, Germany, Turkey, Jordan, Saudi Arabia, and Russia are conducting air strikes against ISIL. See Ben Brumfield & Carol Jordan, *Britain Launches Airstrikes Hours After Parliament Backs ISIS Bombings*, CNN (Dec. 3, 2015), <http://www.cnn.com/2015/12/02/europe/isis-britain-germany-vote-iraq-syria/index.html>; Ashley Fantz, *Which Nations Are Attacking ISIS?*, CNN (Dec. 2, 2015), <http://www.cnn.com/2015/12/02/world/war-on-isis-whos-doing-what/>; *Who Is Doing What in the Coalition Battle Against ISIS?*, CNN (Sept. 17, 2014), <http://www.cnn.com/2014/09/14/world/meast/isis-coalition-nations/>; *RAF Conducts First Airstrikes of Iraq Mission*, GOV.UK (Sept. 30, 2014), <https://www.gov.uk/government/news/raf-conducts-first-air-strikes-of-iraq-mission-2>. The United States, the United Arab Emirates, Bahrain, Jordan, Qatar, Saudi Arabia, Morocco, and Turkey are conducting air strikes in Syria. See Martin Chulov, Spencer Ackerman, & Paul Lewis, *US Confirms 14 Air Strikes Against ISIS in Syria*, GUARDIAN (Sept. 23, 2014), <http://www.theguardian.com/world/2014/sep/23/us-launches-air-strikes-against-isis-targets-in-syria>. See also Eric Schmitt, *U.S. Adds Planes to Bolster Drive to Wipe Out ISIS*, N.Y. TIMES (Nov. 26, 2014), <http://www.nytimes.com/2014/11/27/us/us-adds-air-power-but-isis-presents-elusive-target.html> (discussing the increase in U.S. attack and surveillance planes in the fight against ISIL); Jim Sciutto, Mariano Castillo & Holly Yan, *U.S. Airstrikes Hits ISIS Inside Syria for First Time*, CNN (Sept. 23, 2014), <http://www.cnn.com/2014/09/22/world/meast/u-s-airstrikes-isis-syria/> (discussing first U.S. airstrike against ISIL in Syria); *Turkey Launches Air Strikes on Al Qaida Convoy in N. Syria*, WORLDTRIBUNE (Jan. 30, 2014), <http://www.worldtribune.com/2014/01/30/turkey-launches-air-strike-on-al-qaida-convoy-in-n-syria/> (discussing Turkish airstrike against ISIL in Syria).

Iraq (AQ-I).<sup>108</sup> For a number of years, AQ-I was not a threat due to the presence of U.S. military forces in Iraq.<sup>109</sup> However, in 2011, AQ-I reemerged in the jihadist world.<sup>110</sup> By April 2013, AQ-I expanded operations to Syria and changed its name to the Islamic State of Iraq and Syria, or ISIS (ISIL).<sup>111</sup> No longer affiliated with Al Qaeda Central, ISIL captured vast areas of Iraq and Syria.<sup>112</sup> In the wake of their success, ISIL's leader renamed the group the Islamic State.<sup>113</sup> He then declared a new Caliphate,<sup>114</sup> named himself Caliph, and asked all Muslims to declare their allegiance to the new Caliphate.<sup>115</sup> Pervasive throughout ISIL's attacks is its targeting of ethnic and religious minorities in order to cleanse the groups from areas it conquers.<sup>116</sup> All evidence demonstrates that the crisis in Iraq and Syria is only going to worsen without a concerted international effort.

### III. ANALYSIS

By invoking R2P, the international community could set a strong example going forward. The world needs to be more pro-active than re-active when so many lives are at stake. The international community should use the responsibility to protect doctrine as the legal basis for military intervention, because R2P is the most efficient means of humanitarian intervention. The following section will assess the situation in Iraq and Syria in relation to the just cause threshold for military intervention under R2P. Lives will be

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108. Stanford University, *Islamic State in Iraq and Syria*, MAPPING MILITANT ORGS. (Aug. 4, 2014), <http://web.stanford.edu/group/mappingmilitants/cgi-bin/groups/view/1>.

109. *See id.*

110. *See id.*

111. The name ISIS originated from Al Qaeda in Iraq, as the group was also known as the Islamic State in Iraq, or ISI. *Id.* With operations crossing the border into Syria, ISI added Syria to the group's name. *Id.* The difference between ISIS and ISIL comes from variations in the translation of "al-Sham" (translated to "the Levant"), which refers to an area including, but more expansive than Syria. *Id.* Thus, use of the term ISIS is not incorrect, but ISIL is geographically more accurate. *Id.*

112. *Id.*

113. *Id.*

114. Following the death of the Prophet Mohammad, a caliphate is a "political-religious state comprising of the Muslim community and the lands and peoples under its dominion." *Caliphate*, THE ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/89739/Caliphate> (last visited Feb. 7, 2016). A caliphate is "ruled by a caliph," or "successor" in Arabic, "who [holds] temporal and sometimes a degree of spiritual authority." *Id.*

115. Stanford University, *supra* note 108.

116. U.N. Assistance Mission for Iraq (UNAMI) Human Rights Office, Rep. on the Protection of Civilians in Armed Conflict in Iraq: 6 July–10 September 2014, i, 11 (Sept. 2014) [hereinafter U.N. Iraq Report].

saved and costs will be mitigated if R2P is invoked as the legal basis for preventative, non-military, and military intervention in a state's internal crisis, as R2P allows for early intervention and an escalation of response if necessary.

A. *The Humanitarian Crisis in Iraq and Syria meets the Just Cause Threshold of R2P*

The current situation in Iraq and Syria demonstrates the clearest possible case of a state unable or unwilling to protect its own citizens.<sup>117</sup> Moreover, there is substantial evidence of large-scale loss of life and ethnic cleansing.<sup>118</sup> With this evidence, the crisis meets R2P's just cause threshold, and the international community can intervene militarily under the doctrine.<sup>119</sup>

1. ISIL's Actions Amount to Large-scale Loss of Life

In Iraq, non-governmental organizations (NGOs) estimate that ISIL killed 20,000 to 32,000 civilians, police, soldiers, Sahwa,<sup>120</sup> and Kurdish Security Forces<sup>121</sup> from 2012 to 2014.<sup>122</sup> ISIL's control over numerous key cities throughout the country has hindered Iraq's ability to prevent large-scale loss of life.<sup>123</sup> Consequently, Iraq formally requested for the United States to support the Iraqi military through the use of air strikes.<sup>124</sup>

117. See *infra* Section III.A.1.

118. See *infra* Section III.A.1-2.

119. See *supra* Section II.B.

120. See Agence France-Presse, *Database: Iraqi Casualties from Violence: A Comparison (2014)*, IRAQ UNREST, n. 1 <https://docs.google.com/spreadsheet/ccc?key=0Aia6y6NymliRdEZESktBSWVqNWM1dkZOSGNIVmtFZEE#gid=9> (last visited Feb. 7, 2016). "The Sahwa (or "Awakening") are a collection of Sunni tribal militias that sided with U.S. forces from late-2006 onwards, helping turn the tide of Iraq's insurgency." *Id.*

121. See *id.* "These include members of the Iraqi Kurdish security forces, known as the peshmerga and the asayesh." *Id.* n. 2.

122. *Id.*; *Documented Civilian Deaths from Violence*, IRAQ BODY COUNT, <https://www.iraqbodycount.org/database/> (last visited Feb. 7, 2016); see also *Iraq 2014: Civilian Deaths Almost Doubling Year on Year*, IRAQ BODY COUNT, Jan. 1, 2015, <https://www.iraqbodycount.org/analysis/numbers/2014/> (explaining how civilian casualties are increasing along with ISIL offenses and counter-attacks). For background on ISIL, their attacks, and policies for engaging with civilians and enemies, see Stanford University, *supra* note 108.

123. See *Iraq Formally Asks US to Launch Air Strikes Against Rebels*, BBC News (June 18, 2014), <http://www.bbc.com/news/world-middle-east-27905849>.

124. *Id.*

In Syria, NGOs estimate that ISIL killed 4,000 to 5,000 people<sup>125</sup> since April of 2013.<sup>126</sup> The state of affairs in Syria is much different than in Iraq. By continuing to commit human rights violations, the Syrian government demonstrates its neglect in preventing the large-scale loss of life caused by ISIL.<sup>127</sup> Additionally, there is a failed state<sup>128</sup> situation in Syria.<sup>129</sup> The government has lost control of portions of its country, and its authority has weakened.<sup>130</sup> As the governance system deteriorated, militants were provided the opportunity to expand their influence<sup>131</sup>; this put the Assad Regime in the perilous situation of fighting a civil war while fighting multiple jihadist groups in an attempt to maintain control.

Continued violence in both regions hinders UN and NGO access, making many deaths unverifiable.<sup>132</sup> Additionally, the number of individuals dying from the secondary effects of violence,

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125. See Syrian Network for Human Rights, *The Total Number of Victims and the Death Toll for July 2014*, 1 (Aug. 1, 2014), [http://sn4hr.org/public\\_html/wp-content/pdf/english/The\\_Death\\_Toll\\_for\\_July.pdf](http://sn4hr.org/public_html/wp-content/pdf/english/The_Death_Toll_for_July.pdf); Syrian Network for Human Rights, *2591 People Were Killed in August*, 1 (Sept. 1, 2014), [http://sn4hr.org/public\\_html/wp-content/pdf/english/august-death-tollen.pdf](http://sn4hr.org/public_html/wp-content/pdf/english/august-death-tollen.pdf); Syrian Network for Human Rights, *2375 People Were Killed in September, Including 20 Civilians by Coalition Forces*, 1 (Oct. 1, 2014), [http://sn4hr.org/public\\_html/wp-content/pdf/english/sept\\_toll.pdf](http://sn4hr.org/public_html/wp-content/pdf/english/sept_toll.pdf); Syrian Network for Human Rights, *1987 People Were Killed in October, Including Nine Civilians by Coalition Forces*, 1 (Nov. 1, 2014), [http://sn4hr.org/public\\_html/wp-content/pdf/english/oct\\_1987\\_en.pdf](http://sn4hr.org/public_html/wp-content/pdf/english/oct_1987_en.pdf); Syrian Network for Human Rights, *1685 People Were Killed in November*, 2 (Dec. 1, 2014), [http://sn4hr.org/public\\_html/wp-content/pdf/english/Death\\_toll\\_December\\_2014.pdf](http://sn4hr.org/public_html/wp-content/pdf/english/Death_toll_December_2014.pdf); Syrian Network for Human Rights, *1851 People Were Killed in December Death Toll for December 2014*, 3 (Jan. 2, 2015), [http://sn4hr.org/wp-content/pdf/english/1851\\_people\\_were\\_killed\\_in\\_December\\_en.pdf](http://sn4hr.org/wp-content/pdf/english/1851_people_were_killed_in_December_en.pdf); *About 2000 People Killed by Islamic State Since the Establishment of "Caliphate"*, SYRIAN OBSERVATORY FOR HUMAN RIGHTS (Dec. 28, 2014), <http://syriahr.com/en/2014/12/about-2000-people-killed-by-islamic-state-since-the-establishment-of-caliphate/>.

126. The Syrian Revolution began in the spring of 2011. *Syria Profile - Timeline*, BBC NEWS (Dec. 9, 2015), <http://www.bbc.com/news/world-middle-east-14703995>. The Syria Network for Human Rights reports begin with the start of the Revolution, because they cover deaths caused by all parties. See Syrian Network for Human Rights, *Victim's Death Toll*, [sn4hr.org/blog/category/report/monthly-reports/victims-death-toll/](http://sn4hr.org/blog/category/report/monthly-reports/victims-death-toll/). Note, however, that ISIL did not begin operations in Syria until April of 2013. See Stanford University, *supra* note 108.

127. Human Rights Council, Rep. of the Indep. Int'l Comm'n of Inquiry on the Syrian Arab Republic, U.N. Doc. A/HRC/27/60 (Aug. 13, 2014) [hereinafter U.N. Syria Report].

128. "Failed states can no longer perform basic functions such as education, security, or governance, usually due to fractious violence or extreme poverty. Within this power vacuum, people fall victim to competing factions and crime . . ." *Failed States*, GLOBAL POL'Y F., <https://www.globalpolicy.org/nations-a-states/failed-states.html> (last visited Feb. 7, 2016).

129. Jack Goldstone, *Syria, Yemen, Libya—One Factor Unites These Failed States, and It Isn't Religion*, REUTERS (Nov. 30, 2015), <http://blogs.reuters.com/great-debate/2015/11/30/syria-yemen-libya-one-factor-unites-these-failed-states-and-it-isnt-religion/>.

130. *Id.*

131. *Id.*

132. See U.N. Iraq Report, *supra* note 116, at 2.

such as the lack of access to food, water, and medicine, fleeing their homes, or being trapped in areas of ISIL control, is entirely unknown.<sup>133</sup> As a result, it is likely that statistics presented by the UN and NGOs are significantly lower than actual numbers. However, based on available information, ISIL's actions in Iraq and Syria amount to large-scale loss of life, thereby meeting the just cause threshold necessary for military intervention under the doctrine of R2P.

## 2. ISIL's Actions Amount to Large-Scale Ethnic Cleansing

As ISIL conquered new areas, it chose those with predominately minority populations.<sup>134</sup> To instill terror in residents of occupied areas, ISIL publicly tortures and executes individuals who do not comport with their teachings as a warning to follow the ISIL rule of law.<sup>135</sup> No one is spared, as multiple children and women have been executed.<sup>136</sup> According to ISIL's teachings, religious law justifies the torture and executions.<sup>137</sup> ISIL's primary targets are members of minority religions.<sup>138</sup> ISIL considers Yazidis to be non-believers.<sup>139</sup> If they are not immediately killed, Yazidis are given the stark choice to either convert or die.<sup>140</sup> ISIL also distributes pamphlets ordering Christians to convert or pay jizyah<sup>141</sup> and threatens both Christians and Kurds to leave their homes or face death.<sup>142</sup> As of April 30, 2015, nearly three million Iraqis were displaced within the country.<sup>143</sup> In addition, the Human Rights Council estimates that the civil war and militant fighting in Syria

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133. *Id.* art. 4.

134. *Id.* at 11.

135. See U.N. Syria Report, *supra* note 127, at 7, 11; U.N. Iraq Report, *supra* note 116, at 6–7.

136. See, e.g., U.N. Syria Report, *supra* note 127, at 7.

137. See *id.*

138. See Testimony of Assistant Secretary Tom Malinowski Before the House Committee on Foreign Affairs Subcommittees on Africa, Global Health, Global Human Rights and International Organizations and the Middle East and North Africa, Sept. 10, 2014, <http://docs.house.gov/meetings/FA/FA16/20140910/102642/HHRG-113-FA16-Wstate-MalinowskiT-20140910.pdf>.

139. See U.N. Iraq Report, *supra* note 116, at 12.

140. See *id.* at 12–13.

141. Jizyah is a toleration or protection tax, required of non-Muslim subjects in order to continue residing in the area. See *id.* at 11.

142. See *id.*

143. U.N. Assistance Mission for Iraq (UNAMI) Human Rights Office, Rep. on the Protection of Civilians in Armed Conflict in Iraq: 11 December–30 April 2015, i (Apr. 30, 2015); U.N. Iraq Report, *supra* note 116, at i.

has created 7.6 million internally displaced persons and 4 million refugees.<sup>144</sup>

Many Iraqis and Syrians fleeing ISIL report of widespread sexual abuse, much of which has been directed toward Yazidi and Christian women and girls.<sup>145</sup> ISIL has abducted hundreds of Yazidi women and children, forcing them to convert to Islam and marrying them to ISIL fighters.<sup>146</sup> ISIL sells those who do not convert as “malak yamiin,” or sex slaves, and then sends them to rest houses.<sup>147</sup> The women held captive in rest houses suffer multiple rapes by multiple fighters.<sup>148</sup> The abduction and sale of women and girls is so pervasive in Iraq that ISIL established the Office for the Sale of Abducted Women in Mosul.<sup>149</sup> By raping minority women, ISIL aims to populate the Caliphate and prevent future generations of religious minorities from being born.<sup>150</sup> Based on available information, ISIL’s actions in Iraq and Syria amount to large-scale ethnic cleansing.

The reports provided by the UN and NGOs undeniably prove that ISIL has caused large-scale loss of life and large-scale ethnic cleansing throughout both countries.<sup>151</sup> Having met the just cause threshold through both means provided, the international community should cite R2P as the legal basis for their military intervention in Iraq and Syria. This would give the international community a legal basis for their intervention and will give the doctrine the support it needs to become customary international law.

144. This is as of August 13, 2015 and includes the effects of all parties to the conflict. Human Rights Council, Rep. of the Indep. Int’l Comm’n of Inquiry on the Syrian Arab Republic, ¶ 81, U.N. Doc. A/HRC/30/48 (Aug. 13, 2015).

145. See U.N. Iraq Report, *supra* note 116, at 13, 15; U.N. Syria Report, *supra* note 127, at 12–13. The fear of sexual abuse pervades the female population and ISIL believes a woman to be any female over the age of puberty. Indep. Int’l Comm’n of Inquiry on the Syrian Arab Republic, Rule of Terror: Living under ISIS in Syria, ¶ 51, (Nov. 14, 2014) [hereinafter Rule of Terror]. There are accounts of girls as young as 13 years old being taken away from their parents. *Id.*

146. U.N. Iraq Report, *supra* note 116, at 13, 15.

147. Rest houses are where ISIL fighters stay after returning from battle. Rule of Terror, *supra* note 145, ¶ 54; U.N. Iraq Report, *supra* note 116, at 13; Gordon Brown, *The International Criminal Court Must Take on ISIS Crimes Against Children*, WORLD POST (Oct. 5, 2014), [http://www.huffingtonpost.com/gordon-brown/the-international-criminal-court-must-take-on-isis-crimes-against-children\\_b\\_5936560.html](http://www.huffingtonpost.com/gordon-brown/the-international-criminal-court-must-take-on-isis-crimes-against-children_b_5936560.html).

148. Rule of Terror, *supra* note 145, ¶ 54.

149. U.N. Iraq Report, *supra* note 116, at 15.

150. Jamie Schram, *ISIS Thugs Raping Thousands to Populate Caliphate*, N.Y. POST (Sept. 22, 2014), <http://nypost.com/2014/09/22/isis-terrorists-are-raping-women-to-increase-following/>; Rule of Terror, *supra* note 145, ¶ 55.

151. See *supra* Sections III.A.1–2.

B. *R2P Provides a Preventative and Effective Response to Humanitarian Crises*

R2P is the best solution for addressing humanitarian crises because it ensures the avoidance of large-scale loss of life and ethnic cleansing.<sup>152</sup> It encompasses three overarching responsibilities—the responsibility to prevent, the responsibility to react, and the responsibility to rebuild.<sup>153</sup> Thus, R2P aims to be a pro-active, rather than re-active, solution.<sup>154</sup> R2P provides a flexible and legal means for intervention prior to a full-blown crisis.<sup>155</sup> This is achieved through development assistance, good governance systems, human rights initiatives, and support of the rule of law within the state in question.<sup>156</sup> By providing a legal mechanism to intervene before genocide or ethnic cleansing, R2P offers a more economical method of intervention.<sup>157</sup> The cost of intervention, in both lives lost and dollars spent, will be substantially less if the international community can prevent or stop a crisis early on, rather than waiting until a crisis spirals out of control.<sup>158</sup> R2P further provides a structured process for how and when to transition to military intervention.<sup>159</sup>

Though R2P's purpose is often seen as morally correct, it is not without controversy. The debate stems from the ability of states to invoke R2P with or without a resolution passed by the UN Security Council.<sup>160</sup> Under the right authority principle laid out by the Commission, the ideal situation would be for states to follow Article 2.7 and Chapter VII of the UN Charter, which involves the Security Council responding to humanitarian and human rights crises in an effective and timely manner.<sup>161</sup> This is very important, as the UN Security Council has not had great success with military interventions of humanitarian crises.<sup>162</sup>

When either the Security Council and General Assembly mechanisms fail or the logistical hurdles of existing mechanisms take too long, there is precedent of ad hoc coalitions obtaining authoriza-

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152. See *supra* Section III.A.1, II.D.

153. THE RESPONSIBILITY TO PROTECT, *supra* note 14, at 19–44.

154. See *id.*

155. *Id.* at 19.

156. *Id.*

157. See James F. Miskel, *The Complexity of Military Intervention in Humanitarian Crises*, 7 GLOBAL DIALOGUE, Winter/Spring 2005, at 1, 3.

158. See *id.*

159. See *supra* Section II.B.

160. See THE RESPONSIBILITY TO PROTECT, *supra* note 14, at 54–55.

161. See *id.* at 49.

162. See *supra* Section II.C.

tion for military action *ex post facto*.<sup>163</sup> For example, the Security Council did not respond to the crisis caused by the Liberian Civil War for years.<sup>164</sup> To put an end to the killing of innocent civilians, the Economic Community of West African States established a Military Observer Group (ECOMOG) to intervene.<sup>165</sup> Eventually, the Security Council began to take action and support ECOMOG by passing resolutions calling for a cease-fire, sanctions, and an end to the attacks on peacekeepers.<sup>166</sup> Significantly, none of the resolutions condemned ECOMOG's initial unilateral intervention, and the Security Council praised ECOMOG's response to the conflict.<sup>167</sup> Had the UN been supportive, the costs of inaction could have been avoided. Using R2P can provide a quicker call to action, and subsequently, a quicker resolution.

Regional organizations may also be a solution to Security Council inaction.<sup>168</sup> Due to their proximity to a crisis, regional organizations may have a greater interest in taking military action to protect victimized populations.<sup>169</sup> A strict reading of Chapter VIII of the UN Charter requires regional organizations to obtain Security Council approval prior to taking any military action.<sup>170</sup> However, instances arise when the international community faces a choice between two evils—damaging the international order by bypassing the Security Council, or by allowing the slaughter of fellow human beings when the Security Council idly stands by.<sup>171</sup> Most importantly, R2P is the best solution for addressing humanitarian crises because it could save tens of thousands of lives and prevent hundreds of thousands more from becoming internally displaced persons or refugees.<sup>172</sup>

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163. THE RESPONSIBILITY TO PROTECT, *supra* note 14, at 54.

164. *Liberia: Waging War to Keep the Peace: The ECOMOG Intervention and Human Rights*, HUMAN RIGHTS WATCH 5 (June 1993), <http://www.hrw.org/reports/1993/liberia/> [hereinafter *Waging War to Keep the Peace*].

165. Comfort Ero, *ECOWAS and the Subregional Peacekeeping in Liberia*, J. HUMANITARIAN ASSISTANCE: FIELD EXPERIENCE & CURRENT RES. ON HUMANITARIAN ACTION & POL'Y (Sept. 25, 1995), <http://sites.tufts.edu/jha/archives/66> [hereinafter *Subregional Peacekeeping in Liberia*].

166. *See Waging War to Keep the Peace, supra* note 164.

167. *Subregional Peacekeeping in Liberia, supra* note 165.

168. THE RESPONSIBILITY TO PROTECT, *supra* note 14, at 53–54.

169. *Id.*

170. *Id.* at 54.

171. *Id.* at 54–55.

172. *See supra* Sections II.A.1-2, II.B.

### C. *Challenges to the Doctrine of R2P*

One of the biggest challenges to R2P is the argument that military intervention under R2P is illegal in the absence of Security Council approval.<sup>173</sup> For example, the Independent International Commission on Kosovo (Commission on Kosovo) determined that NATO's unsanctioned bombing campaign to stop the genocide occurring in Kosovo was illegal.<sup>174</sup> However, along with this ruling the Commission on Kosovo introduced the phrase "illegal but legitimate."<sup>175</sup> This somewhat oxymoronic phrase expressed the Commission on Kosovo's belief that even though the actions were illegal, they were legitimate because the intervention was justified, all diplomatic avenues were exhausted, and the intervention liberated Kosovo from oppressive Serbian rule.<sup>176</sup> In response to the illegality arguments, proponents of R2P simply point to the ineffective UN and Security Council process.<sup>177</sup> The debate over whether the use of military intervention under R2P without Security Council approval is legal will likely go on for years. However, until it is settled or the UN processes begin to function properly, the international community should make every effort to strengthen the "legitimacy" portion of the "illegal but legitimate" principle when executing military interventions under R2P. This can be achieved through support from regional organizations encompassing the state in question, coalitions that include states neighboring the state in question, Generally Assembly support, and support from NGOs and civil society.<sup>178</sup> These various forms of support would demonstrate that a large or pertinent swath of the international community supports the military intervention—even though the fifteen members of the Security Council have failed to reach a consensus.

Additionally, states that generally oppose the doctrine of R2P are concerned that others will use R2P as a façade—with regime change as the true underlying objective.<sup>179</sup> For these reasons, skept-

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173. See G.A. Res. 60/1, *supra* note 47, ¶ 139.

174. THE INDEP. INT'L COMM'N ON KOS., THE KOSOVO REPORT 4 (2000) [hereinafter THE KOSOVO REPORT].

175. *Id.*

176. See *id.*

177. See *supra* Sections I.A, I.C.

178. See *supra* Sections II.C, III.B.

179. See *The Responsibility to Protect in 2012: R2P Fails in Syria, Brazil's 'RWP' Emerges*, GLOBAL POLICY (Dec. 28, 2012), <http://www.globalpolicyjournal.com/blog/28/12/2012/responsibility-protect-2012-r2p-fails-syria-brazil%E2%80%99s-%E2%80%98rwp%E2%80%99-emerges>.

tical states criticized Western countries that intervened in the Libyan crisis.<sup>180</sup> The Western countries claimed they were acting in accordance with R2P, but others believed this was simply a means to oust the Gaddafi Regime, while giving the appearance of following a legitimate process.<sup>181</sup> These concerns arose again with the escalation of the Syrian civil war and Western desires to remove the Assad Regime.<sup>182</sup> Abuse of R2P is a significant concern, as even the proper implementation of the doctrine involves a restrained definition of sovereignty.<sup>183</sup> On the other hand, Western countries are concerned that states, Russia in particular, will invade other nations under the guise of R2P when they really have ill intentions.<sup>184</sup> For example, in 2008 Russia claimed that the threat and perpetration of egregious crimes against the South Ossetians of Georgia called for military action under R2P.<sup>185</sup> However, the true purpose of the military intervention was to obtain control over parts of Georgia, dismantle Georgia's military, prevent Georgia from joining NATO, and intimidate other former Soviet Union states.<sup>186</sup>

## 1. Implementation of a Military Intervention Under R2P

Each humanitarian crisis is unique unto itself. However, when there are signs of genocide and ethnic cleansing, early military intervention is always best. To succeed in early intervention, the international community must be properly prepared to intervene. The international community, in conjunction with civil society, regional, and subregional organizations and the UN, can monitor crises occurring around the world that have the potential to escalate. As a situation worsens, the international community can develop a plan for military intervention tailored to the specific

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180. *See id.*

181. *See id.*

182. *See id.*

183. *See supra* Section II.A.1.

184. *See* Gareth Evans, *Russia, Georgia and the Responsibility to Protect*, 1 AMSTERDAM L. F. 25, 26–27 (2009); *Interview by Minister of Foreign Affairs of the Russian Federation Sergey Lavrov to BBC, Moscow, August 9, 2008*, THE MINISTRY OF FOREIGN AFFAIRS OF THE RUSS. FED'N (Aug. 9, 2008), [http://www.mid.ru/brp\\_4.nsf/0/F87A3FB7A7F669EBC32574A100262597](http://www.mid.ru/brp_4.nsf/0/F87A3FB7A7F669EBC32574A100262597) [hereinafter *Lavrov Interview*].

185. *See Lavrov Interview, supra* note 184.

186. *See* Evans, *supra* note 184.

needs of the victims.<sup>187</sup> It is important to take advantage of R2P's flexibility, as particular plans may not work in all instances.<sup>188</sup>

Ideally, when a military intervention is necessary, there will be a collective response from all UN member states.<sup>189</sup> However, it is likely that the United States will have to lead—and in more ways than one. First, the United States will need to advocate for other states to ensure they have the capacity to address these horrific situations should they occur, and second, the United States will need to advocate for both non-military and military intervention, once it is apparent a crisis is taking place. Lastly, the United States will need to muster the political will and commit military forces of its own, through either the U.S. military, treaty-based organizations such as NATO, or forces sent to assist the UN. Failure to do any of the above will likely curtail hopes for collective action or a timely response.<sup>190</sup>

The timeline and implementation for each crisis will be different; regardless, now is the time to prepare. The international community should immediately begin working with civil society, regional organizations, and NGOs to increase observation and data collection capabilities, along with dissemination and communication capacities. The sooner the international community is aware of an at-risk area, and the better the information they receive, the more tailored and decisive the intervention can be. Capacity building can also begin in advance of a crisis and be an ongoing aspect of R2P domestically for member states. Training domestic militaries on how to respond to atrocities of genocide and ethnic cleansing is crucial in ensuring an R2P intervention is successful.

With these improvements in place, one can hope that the existing mechanisms of the UN will function properly. If political will and veto powers do not inhibit a timely and efficient response, intervention will take place with Security Council authorization. However, if the UN mechanisms are failing, and the crisis meets either the large-scale loss of life or large-scale ethnic cleansing criteria for R2P's just cause threshold, the international community should implement its plan for military intervention on its own accord. Per Article 51 of the UN Charter, the unsanctioned mili-

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187. U.N. Secretary-General, *Implementing the Responsibility to Protect: Rep. of the Secretary-General*, ¶ 11(c), U.N. Doc. A/63/677 (Jan. 12, 2009) [hereinafter *Implementing the Responsibility to Protect*].

188. *Id.*

189. *Id.* ¶ 49.

190. *See id.*

tary intervention shall continue until the crisis is over or the Security Council takes the necessary measures to reinstate peace and security in the area.<sup>191</sup>

The efficiency and effectiveness of R2P will increase as more states adopt the R2P doctrine, and further still if it attains status as customary international law. Customary international law holds states accountable in the absence of a treaty or ruling from an international court. The countries providing military force in Iraq and Syria should collectively cite R2P as the legal basis for the military intervention to give the emerging doctrine a strong foundation from which to move forward. Coalition backing would begin the practice of widespread use, providing R2P with the opportunity to achieve customary international law status in the future. If the entire international community has a legal responsibility to protect others from extreme harm, states could detect crises and intervene by non-military means sooner, and only if absolutely necessary, intervene militarily, both of which will prevent the unnecessary loss of life.

#### IV. CONCLUSION

Six months after declaring itself a Caliphate, ISIL's reign of terror expanded on multiple fronts.<sup>192</sup> At the end of 2014, ISIL took control over the city of Darna, Libya and its occupants, as well as eleven Libyan oil fields.<sup>193</sup> Then, over the course of 2015, ISIL began to strike outside the confines of Iraq and Syria.<sup>194</sup> In early January 2015, during a three-day siege on Paris, Islamic extremists acting in the name of ISIL killed twelve individuals and terrorized a nation in the Charlie Hebdo attacks.<sup>195</sup> In August, two members of the U.S. armed forces thwarted an attack by an Islamist militant on a train traveling to Paris from Amsterdam.<sup>196</sup> Then, within a

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191. See U.N. Charter art. 51.

192. See Stanford University, *supra* note 108.

193. David D. Kirkpatrick, *Attacks Cripple 11 Oil Fields, Libya Says*, N.Y. TIMES (March 5, 2015), [http://www.nytimes.com/2015/03/06/world/middleeast/libya-says-armed-groups-have-halted-production-at-11-oil-fields.html?\\_r=0](http://www.nytimes.com/2015/03/06/world/middleeast/libya-says-armed-groups-have-halted-production-at-11-oil-fields.html?_r=0).

194. *Charlie Hebdo Attack: Three Days of Terror*, BBC (Jan. 14, 2015), <http://www.bbc.com/news/world-europe-30708237> [hereinafter *Charlie Hebdo Attack*]; Paul D. Shinkman, *New Details on Charlie Hebdo Attackers Yield ISIS, al-Qaida Connections*, U.S. NEWS (Jan. 12, 2015), <http://www.usnews.com/news/articles/2015/01/12/new-details-on-charlie-hebdo-attackers-yield-isis-al-qaida-connections>.

195. *Charlie Hebdo Attack*, *supra* note 194; Shinkman, *supra* note 194.

196. Ralph Ellis, Jessica King, Peter Dailey, & Archith Seshadri, *2 Members of U.S. Military Stop Islamist Attacker on Train in Belgium*, CNN (Aug. 22, 2015), <http://www.cnn.com/2015/08/21/europe/france-train-shooting/index.html>.

twenty-four hour period in November, both Beirut and Paris were attacked by extremists pledging their allegiance to ISIL as hundreds of innocent people were killed.<sup>197</sup> And most recently, ISIL sympathizers opened fire on a holiday party in San Bernardino, California, bringing their reign of terror to U.S. soil.<sup>198</sup>

Each day the threat from ISIL grows, and with it grows the loss of innocent lives and the cost of removing ISIL from power. The international community is now at a pivotal moment. It should use the responsibility to protect doctrine as the legal basis for military intervention in order to save thousands of lives, because R2P is the most efficient means of humanitarian intervention.<sup>199</sup> The international community can come together to provide the doctrine of R2P the salience it needs. It is evident that the just cause threshold of R2P is met, as the acts of ISIL in Iraq and Syria amount to genocide, war crimes, crimes against humanity, and ethnic cleansing.<sup>200</sup> The humanitarian crisis caused by ISIL provides the clearest possible case for utilizing R2P to prevent further death and destruction and to begin to establish R2P's widespread use.<sup>201</sup> By invoking R2P as the legal basis for military intervention in Iraq and Syria, the international community would pave the way for R2P to become customary international law.<sup>202</sup>

With the increased use of R2P, the future of the international community's response to humanitarian crises can only become more efficient and effective. It could spur the UN mechanisms to improve their function; it could lead to a multilateral treaty on R2P; or it could lead to R2P becoming customary international law. These outcomes would provide structure and guidance to the international community on how to respond to a humanitarian crisis, preventing the unnecessary loss of human lives. It is undeniable that this would be an improvement upon the status quo.

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197. Bethan McKernan, *Beirut, Baghdad and Paris: How 24 Hours of Isis Terror Unfolded Around the World*, INDEPENDENT (Nov. 22, 2015), <http://i100.independent.co.uk/article/beirut-baghdad-and-paris-how-24-hours-of-isis-terror-unfolded-around-the-world—ZkWjxFkREFe>.

198. Faith Karimi, Jason Hanna & Yousuf Basil, *San Bernardino Shooters 'Supporters' of ISIS, Terror Group Says*, CNN (Dec. 5, 2015), <http://www.cnn.com/2015/12/05/us/san-bernardino-shooting/>.

199. *See supra* Section III.B.

200. *See supra* Section III.A.

201. *See id.*

202. *See supra* Section III.C.