

**THE POWER IS YOURS: THE JUSTIFICATION
FOR MILITARY INTERVENTION TO RESPOND
TO AN ENVIRONMENTAL THREAT**

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I. Introduction

In late December 2019, reports of a new, then-unknown virus began to surface in Wuhan, China.¹ On 20 January 2020, confirmed cases of the coronavirus, known as “COVID-19,” arose in Japan, South Korea, and Thailand.² The following day, the United States saw its first case.³ On 23 January 2020, Chinese authorities isolated the city of Wuhan; one week later, on 30 January 2020, the World Health Organization declared a global health emergency.⁴ Over the next several months, the virus spread worldwide, infecting and killing millions of people.⁵

During the initial stages of the pandemic’s outbreak, the U.S. Department of Homeland Security assessed that “Chinese leaders ‘intentionally concealed the severity’” of COVID-19 while stockpiling

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¹ Derrick Bryson Taylor, *A Timeline of the Coronavirus Pandemic*, N.Y. TIMES (Mar. 17, 2021), <https://www.nytimes.com/article/coronavirus-timeline.html>.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ See WORLD HEALTH ORG., WEEKLY OPERATIONAL UPDATE ON COVID-19: 14 DECEMBER 2020 (2020), <https://www.who.int/docs/default-source/coronaviruse/wou-14december2020.pdf>.

medical supplies.⁶ China pushed back on this assertion, stating that the report attempted to “divert attention” from the United States’ own failures in addressing the virus.⁷ Regardless of the true actions of the Chinese government, COVID-19 illustrates the extent to which an environmental threat can spread and raises the question of whether the United States, or any country, could legally intervene in another country’s affairs to prevent such a threat from spreading.

For the past two decades, the U.S. military has focused on fighting a global war on terror. Soon, though, it may need to shift its focus to another global concern: the environment. Environmental threats that transcend State borders will become more common in the future.⁸ To combat these threats, to preserve its own security, and to maintain international order, the United States needs every option available. While diplomacy and United Nations (U.N.) action should remain the primary methods for combating environmental threats to security, military intervention may be necessary and justified.

International law generally prohibits intervention in another country’s affairs.⁹ The U.N. Charter codified this principle along with the related, but distinct, prohibition against the use of force.¹⁰ Only authorization from the U.N. Security Council or an act in self-defense allows for deviation from these rules.¹¹ A few countries and scholars have argued for a third exception, humanitarian intervention, which would allow for State action, independent

⁶ Will Weissert, *DHS Report: China Hid Virus’ Severity to Hoard Supplies*, ASSOCIATED PRESS (May 4, 2020), <https://apnews.com/article/bf685dcf52125be54e030834ab7062a8>. While the report indicated a 95% probability that China’s shift in procuring medical supplies was not within a normal range, there is no public evidence to suggest it was an “intentional plot.” *Id.* Instead, it may have been due to local officials’ fear of reporting bad news to Beijing or other bureaucratic hurdles in China’s government. *Id.*

⁷ *Id.*

⁸ See OFF. OF THE UNDER SEC’Y OF DEF. FOR ACQUISITION & SUSTAINMENT, REPORT ON EFFECTS OF A CHANGING CLIMATE TO THE DEPARTMENT OF DEFENSE 17 (2019) [hereinafter DOD CLIMATE CHANGE REPORT] (noting the “future” for climate effects meant 20 years); *Worldwide Threat Assessment of the U.S. Intelligence Community: Hearing Before the S. Select Comm. on Intel.*, 116th Cong. 31 (2019) [hereinafter *Worldwide Threat Assessment*] (statement of Daniel R. Coats, Dir., Nat’l Intel.).

⁹ See U.N. Charter art. 2, ¶ 7.

¹⁰ *Id.* ¶¶ 4, 7.

¹¹ See *id.* arts. 42, 51.

from the U.N., to alleviate human suffering in another country.¹² Most arguments for this theory rely on genocide or serious violations of international law;¹³ however, failure to respond adequately to an environmental threat may harm as many people and have a greater chance to spill across borders.¹⁴ A military response may be necessary to contain and extinguish an environmental threat before it spreads and causes death and damage in a region or worldwide.

The United States should be prepared to justify military intervention to minimize, or prevent, damage from environmental threats. This article will explore potential responses to these threats. Part II addresses why environmental threats are a national security concern that may require the ultimate national security response: military intervention. Part III discusses potential justifications for a military response under international law. Part IV discusses military intervention to address environmental threats from the U.S. perspective during great power competition and proposes a test that would allow intervention to combat an environmental threat.

II. Emerging Environmental National Security Threats

In 2019, the Director of National Intelligence of the United States stated to Congress that “[t]he United States will probably have to manage the impact of global human security challenges, such as threats to public health, historic levels of human displacement, assaults on religious freedom, and the negative effects of environmental degradation and climate change.”¹⁵ The national security impacts of environmental threats, particularly as the climate changes, are numerous.

As temperatures rise, the Arctic will continue to melt, opening up new sea routes that Russia and China will contest.¹⁶ Rising ocean levels will

¹² See Kenneth Watkin, *Humanitarian Intervention and the Responsibility to Protect: Where It Stands in 2020*, 26 SW. J. INT’L L. 213, 215–16 (2020).

¹³ E.g., S.C. Res. 1674 (Apr. 28, 2006).

¹⁴ See Watkins, *supra* note 12, at 224; S.C. Res. 1674, *supra* note 13, ¶4 (reaffirming “the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity”).

¹⁵ *Worldwide Threat Assessment*, *supra* note 8.

¹⁶ *Id.*; *The Effects of Climate Change*, NASA, <https://climate.nasa.gov/effects> (Dec. 13, 2021) (stating that the Arctic will eventually become ice-free during summer months). Some environmental threats will have national security implications where humanitarian

cause the sea to consume small island nations.¹⁷ Increasing droughts and lack of access to fresh water will cause additional migration and refugee movement.¹⁸ Hurricanes and severe weather events will become more prevalent and intense, battering communities around the world.¹⁹ Disease will spread quicker and into new regions of the world.²⁰ The U.S. military will need to prepare not only for the domestic effects of these threats (for instance, by preparing bases and personnel for extreme weather and domestic operations), but also the international effects.²¹ These impacts may “increase the frequency, scale, and complexity of future missions” and will “affect the operating environment and roles and missions that U.S. Armed Forces undertake.”²² As the 2014 Department of Defense Quadrennial

intervention is unlikely to be a justification. For example, a loss of Arctic sea ice will increase access, and competition with Russia and China, to sea routes and natural resources that were previously inaccessible. *Worldwide Threat Assessment*, *supra* note 8. While this will create a national security issue that may require military action, such as freedom of navigation operations, military intervention to prevent Arctic ice loss is likely impractical. Regardless, global environmental changes of this type will also “fuel competition for resources, economic distress, and social discontent,” which could involve additional military action. *Id.*

¹⁷ *The Effects of Climate Change*, *supra* note 16.

¹⁸ *Worldwide Threat Assessment*, *supra* note 8. Increasing food and water insecurity will also increase “the risk of social unrest, migration, and interstate tension.” *Id.* Environmental changes could “generate hundreds of millions of human migrants by the middle of the century due principally to sea level rise, increased frequency and intensity of extreme weather events, drought, and desertification.” Katrina Miriam Wyman, *Responses to Climate Migration*, 37 HARV. ENV'T L. REV. 167, 171 (2013). These refugees are “unlikely to qualify for protection under international law,” creating another incentive to intervene to ensure stability. *Id.* at 177. Despite this lack of protection, there is already evidence of climate refugees: as thousands of Guatemalans fled to the United States in 2020 after years of drought and floods and thousands of Syrians fled to Europe due to conditions caused by a civil war and exacerbated by drought. Abraham Lustgarten, *The Great Climate Migration Has Begun*, N.Y. TIMES MAG. (Aug. 23, 2020), <https://www.nytimes.com/interactive/2020/07/23/magazine/climate-migration.html>.

¹⁹ *The Effects of Climate Change*, *supra* note 16.

²⁰ In 2019, prior to the outbreak of COVID-19, the U.S. intelligence community assessed that the United States and the world “remain[ed] vulnerable to the next flu pandemic or large-scale outbreak of a contagious disease that could lead to massive rates of death and disability, severely affect the world economy, strain international resources, and increase calls on the United States for support.” *Worldwide Threat Assessment*, *supra* note 8. Climate change and expansion of international travel and trade could lead to more frequent outbreaks of infectious disease. *Id.* Additionally, in 2017, the United States’ national security strategy highlighted that biological threats, to include natural outbreaks, harm U.S. national security by causing death, “economic losses,” and a lack “of confidence in government institutions.” WHITE HOUSE, NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 9 (2017).

²¹ U.S. DEP’T OF DEF., 2014 QUADRENNIAL DEFENSE REVIEW, at VI (2014); *see* DoD CLIMATE CHANGE REPORT, *supra* note 8.

²² DEP’T OF DEF., *supra* note 21, at VI, 8.

Review noted, “these effects are threat multipliers.”²³ While some of these environmental threats may take years to materialize fully, others are already being felt.

COVID-19 revealed the widespread destruction and death an environmental threat can cause and that other threats are likely to surface. A State could refuse to address pollution, toxins, or radiation flowing from its borders into another country.²⁴ Additionally, conflict could arise from water shortages, causing refugees to flow into another State²⁵ or preventing others from receiving crucial natural resources.²⁶ This is already occurring to an extent in Mexico. According to a 1944 treaty between the United States and Mexico, Mexico sends 114 billion gallons of water to the United States from the Rio Grande and Rio Conchos, while the United States sends 489 billion gallons of water from the Colorado River.²⁷ However, in early 2020, Mexico experienced a severe drought and owed the United States approximately 100 billion gallons of water by 24 October 2020.²⁸ To pay this water debt, Mexico planned to utilize three dams in Chihuahua.²⁹ The farmers in Chihuahua, already in dire straits due to the drought, fought the Mexican National Guard, seized one of the dams, and led a month-long standoff to

²³ *Id.* at 8.

²⁴ For example, in March 2011, a major earthquake caused tsunamis that disabled the power supply and cooling of nuclear reactors in Japan. Claire Wright, *Blueprint for Survival: A New Paradigm for International Environmental Emergencies*, 29 *FORDHAM ENV'T L. REV.* 221, 226 (2017). In the aftermath, radioactive water entered the Pacific Ocean and while the highest concentrations were contained to the region near Fukushima, testing revealed radiation in seawater and tuna off the coast of California, albeit in small doses. *Id.* at 233. If Japan had refused to address this issue, the international community may have intervened.

²⁵ The U.S. intelligence community predicted in 2019 that global displacement will “remain near record highs” and refugees are unlikely to return home, “increasing humanitarian needs and the risk of political upheaval health crises, and recruitment and radicalization by militant groups.” *Worldwide Threat Assessment*, *supra* note 8. Additionally, record numbers of people are being displaced inside their own countries. *Id.* This “is likely to continue to fuel social and interstate tensions globally.” *Id.*

²⁶ See *Transboundary Waters*, U.N. WATER, <https://www.unwater.org/water-facts/transboundary-waters> (last visited Dec. 21, 2021).

²⁷ *Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande*, Mex.-U.S., Feb. 3, 1944, 59 Stat. 1219.

²⁸ Tony Payan, *Mexico’s Water Dispute with the U.S. Is a Symptom of Its Governance Crisis*, *WORLD POL. REV.* (Oct. 7, 2020), <https://www.worldpoliticsreview.com/articles/29112/mexico-s-water-dispute-with-the-u-s-is-a-symptom-of-its-governance-crisis>.

²⁹ *Id.*

prevent their government from routing the water to the United States.³⁰ Eventually, the United States and Mexico settled the dispute, but a future drought could further exacerbate the situation, and the United States may need to protect its interests in resources or to ensure stability in a region with climate refugees.³¹

These scenarios are acute events that may necessitate an immediate response. In addition to these near-term concerns, it would be prudent to combat the long-term effects of climate change. For example, a country's carbon output may accelerate global climate change, causing severe security issues.³² But those acts are too attenuated in time and intent from potential State action or inaction to justify military intervention. The more appropriate mechanisms to address longer-term environmental threats are diplomacy and multilateral institutions.

Ideally, diplomacy and multilateral institutions will address even acute, immediate environmental threats, but some States may hide the issue or decline international assistance. There may be economic, political, or military factors that lead a State to attempt to handle a problem within its own territory, only for the world to see that problem to spread.³³ Additionally, once it becomes clear to the international community that there is a problem, a State may still decline offers of international assistance.³⁴

³⁰ Natalie Kitroeff, 'This Is a War': Cross-Border Fight over Water Erupts in Mexico, N.Y. TIMES, <https://www.nytimes.com/2020/10/14/world/americas/mexico-water-boquilladam.html> (Oct. 16, 2020).

³¹ See *Minute No. 325*, INT'L BOUNDARY & WATER COMM'N: U.S. & MEX. (Oct. 21, 2020), <https://www.ibwc.gov/Files/Minutes/Min325.pdf>.

³² See *Worldwide Threat Assessment*, *supra* note 8.

³³ A. Louis Evans, *Confronting Global Pandemics: Responding to a State's Refusal of International Assistance in a Pandemic*, 34 CONN. J. INT'L L. 1, 6–9 (2018). Fear of economic impacts led Peru initially to conceal an outbreak of cholera in 1991. *Id.* Civil strife occurred in India after reports of a pneumonic plague caused the city of Surat to be "on a war footing" within 48 hours of the report as over 200,000 people attempted to flee. *Id.* A military incentive may also exist for countries to keep information hidden. The United States has a reservation to the current International Health Regulations, which require States to report outbreaks within twenty-four hours, stating, "any notification that would undermine the ability of the U.S. Armed Forces to operate effectively in pursuit of U.S. national security interests would not be considered practicable." *Id.* at 21.

³⁴ *Id.* at 9–13. Both of these situations have occurred in the past as States dealt with environmental or natural disasters. *Id.* at 6–13. The United States declined assistance from

III. The Legality of Military Intervention to Respond to an Environmental Threat

If diplomacy fails and a State refuses international assistance, it may be necessary to take action through other means, to include military intervention. Generally, the principle of non-intervention prohibits States from intervening “directly or indirectly in internal or external affairs of other States.”³⁵ Any intervention violates both this tenant of international law and the prohibition against the use of force and respect for territorial sovereignty.³⁶ There are, however, exceptions that may allow a State to intervene in another State’s affairs.

The Peace of Westphalia in 1648 ended the Thirty Years’ War and is credited with creating the concept of State sovereignty.³⁷ Sovereignty includes “an affirmation of [States’ and peoples’] right to shape and determine their own destiny,” along with ensuring every State has equal rights under international law.³⁸ However, sovereignty does not mean a State can take any action. It is accepted that sovereignty “implies a dual responsibility: externally—to respect the sovereignty of other states, and internally, to respect the dignity and basic rights of all the people within the state.”³⁹ Sovereignty provides the framework for relations among States and is the building block for modern international law.⁴⁰

the U.N. and other States after 2005’s Hurricane Katrina and 2010’s BP oil spill, India refused aid after a tsunami in 2004, and China refused international aid after the 1975 Tangshan earthquake and massive flooding in 2007. *Id.* at 10. States may want to avoid “bad publicity” or fear that allowing foreign States to enter their territory will decrease support for their government or provide evidence for damage claims. Wright, *supra* note 24, at 259.

³⁵ *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. 14, ¶ 205 (June 27).

³⁶ *Id.* ¶ 251.

³⁷ See Watkin, *supra* note 12, at 218. These fundamental principles, though later enshrined in the U.N. Charter, remain customary international law. See *Military and Paramilitary Activities in and Against Nicaragua*, 1986 I.C.J. 14, ¶ 174 (“Principles such as those of the non-use of force, non-intervention, respect for the independence and territorial integrity of States, and the freedom of navigation, continue to be binding as part of customary international law, despite the operation of provisions of conventional law in which they have been incorporated.”).

³⁸ INT’L COMM’N ON INTERVENTION & STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT para. 1.34 (2001) [hereinafter ICISS REPORT].

³⁹ *Id.* para. 1.35.

⁴⁰ *Id.* paras. 2.14–.15.

Following the end of World War II, the U.N. codified these principles in the U.N. Charter.⁴¹ In Article 2, the U.N. Charter states all States have the same powers and responsibilities and that the U.N. “is based on the principle of the sovereign equality of all its Members.”⁴² Additionally, Article 2 prohibits any “threat or use of force against the territorial integrity or political independence of any state”⁴³ and provides that nothing “shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state.”⁴⁴

However, violations of sovereignty may be justified in certain circumstances. First, under Chapter VII of the U.N. Charter, the U.N. Security Council may authorize actions in response to “any threat to the peace, breach of the peace, or act of aggression.”⁴⁵ Second, Article 51 makes clear that nothing in the Charter will “impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations.”⁴⁶ A third justification, humanitarian intervention, has emerged but is not yet widely accepted as international law.⁴⁷ In addition, while not authorizing intervention, there may also be potential remedies through the doctrine of State responsibility, which allows one State to respond to another State’s intentional breach of an international obligation.⁴⁸ Finally, a State may consent to an intervention, but consent-based interventions do not violate the consenting State’s sovereignty. All these principles may allow for a response to environmental threats.

A. Responding to an Environmental Threat Under the United Nations Charter

Any military intervention is presumed prohibited under the U.N. Charter. This includes not only armed attacks but also other less severe forms of intervention, including “organizing, instigating, assisting, or

⁴¹ See U.N. Charter, art. 2.

⁴² *Id.* ¶ 1.

⁴³ *Id.* ¶ 4.

⁴⁴ *Id.* ¶ 7.

⁴⁵ *Id.* art. 39.

⁴⁶ *Id.* art. 51.

⁴⁷ See, e.g., Watkin, *supra* note 12, at 215.

⁴⁸ See *Draft Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries*, [2001] 2 Y.B. Int’l L. Comm’n 31, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2) [hereinafter *Draft Articles*].

participating in acts of civil strife” in another State, or “acquiescing” to those activities in its territory.⁴⁹ However, member States may violate the independence of another State if the Security Council so authorizes.⁵⁰

The Security Council is charged with the primary duty to maintain international peace and security, and the U.N. Charter grants it broad power to execute that mission.⁵¹ Under Chapter VII of the Charter, the Security Council may determine there is a “threat to the peace, breach of peace, or act of aggression” and act appropriately in response.⁵² Article 41 provides the first options, allowing for “measures not involving the use of armed force,” including interruption of economic relations, severance of diplomatic relations, and interruption of rail, sea, air and communication.⁵³ If those measures are inadequate, the Security Council may then authorize military intervention.⁵⁴ To maintain peace, the Security Council can consider any situation and is not limited to military threats.⁵⁵

The Security Council has authorized military intervention to respond in part to environmental threats. However, when it has authorized force, it has done so only in the context of armed conflict.⁵⁶ Additionally, the Security Council has declared an environmental threat a “threat to the peace.”⁵⁷ In 2014, as Ebola spread through West Africa, the Security Council declared

⁴⁹ See *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. V. U.S.), Judgment, 1986 I.C.J. 14, ¶ 191 (June 27).

⁵⁰ See U.N. Charter, arts. 39, 42.

⁵¹ *Id.* art. 24.

⁵² *Id.* art. 39.

⁵³ *Id.* art. 41.

⁵⁴ *Id.* art. 42.

⁵⁵ The drafters of the U.N. Charter purposefully did not define “threat to the peace,” “breach of peace,” or “act of aggression” in order to give the Security Council wide latitude to determine what threats may require a U.N. response. Wright, *supra* note 24, at 277.

⁵⁶ See S.C. Res. 814 (Mar. 26, 1993) (finding a threat to the peace and security in part due to “crippling famine and drought” along with civil strife, violence, and widespread lack of rule of law in Somalia); S.C. Res. 940 (July 31, 1994) (finding a threat to peace and security in Haiti in part due to “the desperate plight of Haitian refugees” along with civil turmoil).

⁵⁷ S.C. Res. 2177 (Sept. 18, 2014) (declaring Ebola a “threat to international peace and security” under Chapter VI powers). The Security Council has issued other resolutions dealing with solely humanitarian or environmental concerns but has not gone so far as to label them threats to the peace. See S.C. Res. 986 (Apr. 14, 1995) (establishing a program which funded humanitarian relief for Iraqi citizens from Iraqi oil exports under Chapter VII of the U.N. Charter); S.C. Res. 2532 (July 1, 2020) (stating that COVID-19 was “likely to endanger maintenance of international peace and security”).

the spread of the virus a threat to peace and security, marking the first time for an environmental threat alone, though no force was authorized.⁵⁸

Authorizing military intervention on the sole basis of an environmental threat would be a departure from the U.N.'s response to these threats.⁵⁹ As a resolution has declared an environmental threat a "threat to international peace and security"⁶⁰ and others have cited environmental threats to authorize military intervention in the context of conflict, the precedent requires only marginal extension. But Security Council members may disagree on stretching this power further and any one of the five permanent members of the Security Council can veto a resolution.⁶¹ In December 2021, the Security Council considered a resolution under its Chapter VII powers, which would have specifically labeled climate change as a threat to international peace and security.⁶² Despite having the support of twelve members of the Security Council, it failed because Russia, a permanent member, vetoed it.⁶³ However, a U.N. response would likely garner the most support in the international community and be the strongest claim under international law.

B. Responding to an Environmental Threat Under Self-Defense

In addition to the U.N. authorization, States may also have recourse under their "inherent right of individual or collect self-defence."⁶⁴ This right of self-defense comes from both the U.N. Charter and customary international law.⁶⁵

By its plain language, the U.N. Charter makes clear that a State can claim self-defense only in response to an "armed attack," and only until the

⁵⁸ S.C. Res. 2177, *supra* note 57.

⁵⁹ Evans, *supra* note 33, at 26–27.

⁶⁰ S.C. Res. 2177, *supra* note 57

⁶¹ U.N. Charter, art. 27, ¶ 3. The Security Council is comprised of fifteen members of the U.N. with China, France, Russia, the United Kingdom, and the United States as the five permanent members. *Id.* art. 23, ¶ 1. Substantive votes require nine affirmative votes with the concurrence of all the permanent members. *Id.* art. 27, ¶ 3.

⁶² *Security Council Fails to Adopt Resolution Integrating Climate-Related Security Risk into Conflict-Prevention Strategies*, UNITED NATIONS (Dec. 13, 2021), <https://www.un.org/press/en/2021/sc14732.doc.htm>.

⁶³ *Id.* Russia and India voted against the resolution, while China abstained. *Id.*

⁶⁴ U.N. Charter, art. 51.

⁶⁵ Wright, *supra* note 24, at 287.

Security Council can respond.⁶⁶ By its plain meaning, an environmental threat would not constitute an “armed attack,” even if that threat crosses borders or causes physical damage.⁶⁷

Beyond the language in the U.N. Charter, self-defense is also considered *jus cogens*, which is a norm under customary international law that States cannot violate.⁶⁸ In 1937, following a British attack on a U.S. ship, letters exchanged between the countries documented the requirements to claim anticipatory self-defense under customary international law.⁶⁹ As long as the two requirements of “necessity” and “proportionality” were met, a State could use force to respond to a threat regardless of the potential of an “armed attack.”⁷⁰ Nevertheless, the requirement for an armed attack also exists in customary international law.⁷¹ The International Court of Justice (ICJ) has defined the threshold for an “armed attack” under customary international law and ruled actions may qualify because of their “scale and effects” if they would have been classified as an armed attack if carried out by regular armed forces.⁷² The actions must be significant, and even some uses of force or intervention in internal affairs of States will not qualify.⁷³ Finally, there is a consensus that an “imminent armed attack” also qualifies as an “armed attack,” though a “pre-emptive attack” cannot be justified.⁷⁴

⁶⁶ *Id.*

⁶⁷ While a biological weapon would qualify, an environmental threat for the purposes of this article is neither a State nor a non-State actor.

⁶⁸ *Id.* “*Jus cogens*” is a “peremptory norm” that is “accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted.” Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331.

⁶⁹ Necessity requires the threat be “instant, overwhelming, leaving no choice of means, and no moment for deliberation,” and the response must be proportional and do “nothing unreasonable or excessive, since the act justified by the necessity of self-defense, must be limited by the necessity and kept clearly within it.” Michael K. Murphy, *Achieving Economic Security with Swords as Ploughshares: The Modern Use of Force to Combat Environmental Degradation*, 39 VA. J. INT’L L. 1181, 1208 (1999).

⁷⁰ *Id.*

⁷¹ Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶ 195 (June 27).

⁷² *Id.*

⁷³ *Id.* (holding that “assistance to rebels in the form of the provision of weapons or logistical or other support” does not constitute an “armed attack”).

⁷⁴ Wright, *supra* note 24, at 298.

In the few articles that address a military response to environmental threats, most propose self-defense as the preferred invocation to justify a military response.⁷⁵ These arguments presume either an environmental threat can constitute an “armed attack” based on its effects or no “armed attack” is required under customary international law.⁷⁶ However, as it requires liberal interpretations of self-defense under both Article 51 of the U.N. Charter and customary international law, it is not the best justification to address an environmental threat.

C. Responding to an Environmental Threat Under State Responsibility

There is a “no harm principle” in international law under which States must refrain from activities that cause cross-boundary damage. Generally, this results from a State’s failure to prevent activities in its territory, but it can also apply to action taken by a State.⁷⁷ The ICJ, in an advisory opinion on the legality of nuclear weapons, stated that the

environment is not an abstraction, but represents the living space, the quality of life and the very health of human beings, including generations unborn. The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.⁷⁸

⁷⁵ See Murphy, *supra* note 69, at 1218–19 (arguing that “military force may only be used in self-defense if the environmental crisis threatens a state with immediate harm on the same level as an armed attack”); José Luis Aragón Cardiel et al., *Modern Self-Defense: The Use of Force Against Non-Military Threats*, 49 COLUM. HUM. RTS. L. REV. 99, 103 (2018) (proposing a test to allow military force in self-defense in response to a non-military threat if the effect is equivalent to an “armed attack”); Craig Martin, *Climate Wars and Jus Ad Bellum: Part II*, OPINIO JURIS (Aug. 13, 2020), <http://opiniojuris.org/2020/08/13/climate-wars-and-jus-ad-bellum-part-ii> (arguing to expand conditions for self-defense to address climate threats).

⁷⁶ Murphy, *supra* note 69, at 1206; Cardiel et al., *supra* note 75; Martin, *supra* note 75.

⁷⁷ *Draft Articles*, *supra* note 48, at 31.

⁷⁸ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, ¶ 29 (July 8). Through various treaties and customary international law, there is a State responsibility to protect the environment. See *Trail Smelter (U.S. v. Can.)*, 3 R.I.A.A. 1905, 1965 (Arb. Trib. 1941) (“[N]o State has the right to use or permit the use of its territory in

While this obligation exists, however, the doctrine of State responsibility allows for only certain measures in response, none of which includes a military intervention.⁷⁹

States have used low-level uses of force to prevent environment threats in the past.⁸⁰ An environmental example occurred when the Liberian oil tanker *Torrey Canyon* went aground in British territorial waters in 1967, spilling vast amounts of oil.⁸¹ After other measures failed, the United Kingdom (U.K.) bombed the ship to burn the oil.⁸² This example took place in British territorial waters; there is no instance of using a theory of State responsibility to violate another State's sovereignty.⁸³

Instead, responsible States must make full reparation for any injuries their wrongful acts cause.⁸⁴ While the theory of State responsibility does give strength to a justification for intervention, as States owe a responsibility to prevent environmental threats, it has not extended the ability to intervene in another State's affairs under current international law.

such a manner as to cause injury by fumes in or to the territory of another."); United Nations Convention on the Law of the Sea arts. 192–196, Dec. 10, 1982, 1833 U.N.T.S. 397 (requiring States to protect and preserve the marine environment).

⁷⁹ Necessity permits a State to take an otherwise wrongful act if it "is the only way for the State to safeguard an essential interest against a grave and imminent peril." *Draft Articles, supra* note 48, at 80. But this cannot be used to violate jus cogens, which includes the prohibition on the use of force. *See id.* at 84–85. While considerations akin to necessity under State responsibility may have a role in humanitarian intervention, the commentary to Article 25 explicitly states that Article does not cover it. *Id.* at 84. Additionally, countermeasures are allowed under Article 49, but Article 50 specifically states they "shall not affect the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations." *Id.*

⁸⁰ *Id.* at 82.

⁸¹ *Id.*

⁸² *Id.*

⁸³ However, a theory of necessity has been invoked to protect the environment in international areas. *See id.* at 81–82. In 1893, Russia invoked the theory to protect fur seals on the high seas and Canada did the same in 1994 to protect fishing stocks, leading to the boarding and arrest of a Spanish fishing ship. *Id.*

⁸⁴ *See id.* at 96.

D. Responding to an Environmental Threat Under Humanitarian Intervention

Following World War II and the establishment of the U.N., international law regarding intervention and the use of force centered on preventing a conflict between States.⁸⁵ Following the collapse of the Soviet Union, however, most threats to international peace and security have come from “intra-national crises of a wide variety,” which are generally considered within the domestic control of the State in which they are occurring.⁸⁶

Recognizing this, an independent commission found that NATO’s intervention in Kosovo in 1999 was “illegal, yet legitimate” following bombing of the region based on humanitarian necessity.⁸⁷ The commission found “humanitarian intervention is not consistent with the U.N. Charter if conceived as a legal text, but that it may, depending on the context, nevertheless, reflect the spirit of the Charter.”⁸⁸ This gap between legality and legitimacy concerned the commission, which stressed the need for a humanitarian intervention doctrine.⁸⁹ However, there is still no accepted standard under international law.

Only a few States have used humanitarian intervention as the basis to justify military intervention and the use of force.⁹⁰ The U.K., along with Belgium, argued that humanitarian intervention permitted NATO airstrikes in Kosovo, and the most explicit justification came two decades later from the U.K. to justify airstrikes in Syria.⁹¹

In April 2018, the U.K. stated it attacked Syria “to alleviate the extreme humanitarian suffering of the Syrian people by degrading the Syrian regime’s chemical weapons capability and deterring their further use.”⁹² The U.K. claimed that, under international law, it could take measures

⁸⁵ INDEP. INT’L COMM’N ON KOSOVO, THE KOSOVO REPORT: CONFLICT, INTERNATIONAL RESPONSE, LESSONS LEARNED 185 (2000).

⁸⁶ *Id.*

⁸⁷ *Id.* at 186.

⁸⁸ *Id.*

⁸⁹ *Id.* at 186–87.

⁹⁰ See Cardiel et al., *supra* note 75, at 140–44.

⁹¹ *See id.*

⁹² *Syria Action – UK Government Legal Position*, PRIME MINISTER’S OFF. (Apr. 14, 2018), <https://www.gov.uk/government/publications/syria-action-uk-government-legal-position/syria-action-uk-government-legal-position>.

to “alleviate overwhelming humanitarian suffering” in exceptional circumstances.⁹³ The legal basis for the use of force was humanitarian intervention, which the U.K. government stated required three conditions:

- (i) there is convincing evidence, generally accepted by the international community as a whole, of extreme humanitarian distress on a large scale, requiring immediate and urgent relief;
- (ii) it must be objectively clear that there is no practicable alternative to the use of force if lives are to be saved; and
- (iii) the proposed use of force must be necessary and proportionate to the aim of relief of humanitarian suffering and must be strictly limited in time and in scope to this aim (i.e. the minimum necessary to achieve that end and for no other purpose).⁹⁴

The U.K. argued these elements were satisfied due to the Syrian regime’s use of chemical weapons dating back to 2013, the death of nearly 1,000 people with hundreds more injured as a result, and evidence that Syria would continue to use chemical weapons leading to “further suffering.”⁹⁵ It also noted half of the Syrian population had been displaced, “with over 13 million people in need of humanitarian assistance.”⁹⁶ The U.K. stated that Russia repeatedly blocked actions at the U.N. Security Council and, as a result, diplomatic actions, sanctions, and U.S. unilateral airstrikes were insufficient to deter “extreme humanitarian distress on a large scale.”⁹⁷ The U.K. concluded, in this exceptional scenario, the “overwhelming humanitarian necessity” justified military intervention.⁹⁸ The intervention was limited to specific targets aimed exclusively at “averting a humanitarian catastrophe” in Syria and was the minimum intervention necessary.⁹⁹

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

Aside from State practice, the International Commission on Intervention and State Sovereignty (ICISS) provided additional guidance in its 2001 report on the “responsibility to protect.”¹⁰⁰ The report noted that even States with the strongest opposition to intervention still acknowledged there must be some exception for cases that “‘shock the conscience of mankind,’ or which present such a clear and present danger to international security, that they require coercive military intervention.”¹⁰¹ The International Commission on Intervention and State Sovereignty acknowledged there are no universally accepted factors, but summarized the consensus as requiring six thresholds: “*right authority, just cause, right intention, last resort, proportional means and reasonable prospects.*”¹⁰²

Additionally, ICISS stated, “military action for limited human protection purposes cannot be justified if in the process it triggers a larger conflict.”¹⁰³ In these cases, States will be unable to save certain people because the cost of intervening would be too high. The Commission acknowledged this would likely preclude action against any permanent member of the U.N. Security Council or other world powers.¹⁰⁴ However, the failure to intervene in one case should not preclude an intervention in all cases.¹⁰⁵ Additionally, some environmental threats may become existential threats to populations where the damage caused by the conflict is less than the damage that would result from the threat spreading across the region or globe.¹⁰⁶

The report also provides greater detail than the U.K.’s published criteria. To establish a “just cause,” ICISS outlined scenarios, one of which included “large scale loss of life” regardless of State action, inaction, or intent.¹⁰⁷ The Commission also provided several examples that would typically be considered “conscience-shocking.”¹⁰⁸ It specifically included

¹⁰⁰ ICISS REPORT, *supra* note 38.

¹⁰¹ *Id.* para. 4.13. However, ICISS also stated if there was any consensus about who should be authorizing humanitarian interventions, it is the U.N. Security Council should be the organ to make the determination as to whether a breach of State sovereignty is required. *Id.* para. 6.14.

¹⁰² *Id.* para. 4.16.

¹⁰³ *Id.* para. 4.41.

¹⁰⁴ *Id.* para. 4.42.

¹⁰⁵ *Id.*

¹⁰⁶ *See* Martin, *supra* note 75.

¹⁰⁷ ICISS REPORT, *supra* note 38, para. 4.19.

¹⁰⁸ *Id.* para. 4.20.

“overwhelming natural or environmental catastrophes, where the state concerned is either unwilling or unable to cope, or call for assistance, and significant loss of life is occurring or threatened.”¹⁰⁹ Further, ICISS stated humanitarian intervention can be legitimate as an anticipatory measure.¹¹⁰ Otherwise, the international community would be “in the morally untenable position of being required to wait” for the situation to begin before they could act.¹¹¹ This provide the best framework for dealing with environmental threats if there is no U.N. or diplomatic response, as it allows for intervention to prevent a threat in advance and permits addressing threats for humanitarian reasons without regard for the intervening State’s interests.

However, critics argue it will lead to abuse and even more conflict.¹¹² As the Kosovo commission noted, the main problems with humanitarian catastrophes is their prevention is frequently a political rather than a legal issue.¹¹³ The cynical view is humanitarian intervention will not occur unless it is in the political interest of the intervening State or coalition.¹¹⁴ Should the United States choose to intervene to prevent an environmental disaster, there will be suspicion, as in Kosovo, that “‘humanitarian intervention’ is a new name for Western domination.”¹¹⁵ However, even if a State will only intervene when it benefits its own national security, there will be important humanitarian benefits if environmental threats are mitigated or prevented.¹¹⁶

IV. Standardizing Military Intervention to Respond to an Environmental Threat

The United State should analyze any potential justification to address environmental threats in the context of its focus on inter-State competition,

¹⁰⁹ *Id.*

¹¹⁰ *Id.* para. 4.21.

¹¹¹ *Id.*

¹¹² Preventing significant environmental threats outweighs the risk of abuse and additional conflict. Martin, *supra* note 75 (arguing when a threat is “existential,” such as climate change, “the risk posed by the potentially increased incidence of armed conflict is dwarfed by the existential risk”).

¹¹³ INDEP. INT’L COMM’N ON KOSOVO, *supra* note 83, at 187.

¹¹⁴ *See id.* at 188–89.

¹¹⁵ *Id.*

¹¹⁶ *See* April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities, 42 Op. O.L.C. 1, 11 (2018) (stating that while the United States “is not the world’s policeman,” foreign disorder threatens its interests); Martin, *supra* note 75 (stating that environmental threats may become “existential” threats).

mainly with China and Russia.¹¹⁷ According to its National Security Strategy (NSS), the United States “will continue to lead the world in humanitarian assistance” and will provide its capabilities to those in need due to both man-made and natural disasters.¹¹⁸ While this generally means providing funding, supplies, and support to humanitarian programs rather than military intervention, the United States has recognized the importance of military humanitarian operations to international security.¹¹⁹

The United States often views international relations in binary terms: States are either “at peace” or “at war.”¹²⁰ This is also the general framework for the law of war. However, the United States is in “continuous competition” with its adversaries, and its military must be prepared to compete across the full spectrum of conflict.¹²¹ China and Russia operate on “the edges of international law” and blur the line between civil and military goals.¹²² They are content to accrue small gains, slowly moving the standard of what is acceptable under international law.¹²³

This adds additional risk to a potential intervention on the basis of an environmental threat. States could accuse the United States of violating sovereignty for its own gain as well, particularly as only a few States have accepted humanitarian intervention as international law.¹²⁴ But the United States should strive to meet its competition where it has legal justification to do so, and humanitarian intervention is a legally justifiable position in

¹¹⁷ WHITE HOUSE, *supra* note 20, at 42.

¹¹⁸ *Id.*

¹¹⁹ *April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities*, 42 Op. O.L.C. at 11 (stating that the United States has a national security interest in promoting regional stability and mitigating humanitarian disasters).

¹²⁰ *Id.* at 28.

¹²¹ *Id.*

¹²² *Id.* at 27; U.S. DEP’T OF DEF., SUMMARY OF THE 2018 NATIONAL DEFENSE STRATEGY OF THE UNITED STATES OF AMERICA: SHARPENING THE AMERICAN MILITARY’S COMPETITIVE EDGE 2 (2018).

¹²³ WHITE HOUSE, *supra* note 20, at 28.

¹²⁴ See Cardiel et al., *supra* note 75, at 140–44.

this context.¹²⁵ The United States should keep “the widest range of legal options” available in order to “compete, deter, and win.”¹²⁶

The primary response methods should be diplomacy and multilateral organizations, which would galvanize support to address the problem. A unilateral response in which the United States intervenes to curb an environmental threat could alienate States, allowing a competitor to seize the narrative and offer its own counter-assistance and influence. However, if all diplomatic measures fail, and the U.N. is unable to respond, the United States should consider all feasible options, including intervention based on humanitarian assistance due to the serious impact of environmental threats.¹²⁷

This threshold should contain safeguards to avoid provoking a larger conflict or accusations of an illegal violation of sovereignty. Absent safeguards, other States could accuse the United States of acting as an imperial power and using force to achieve its own objectives. In many cases, the information environment will be a crucial factor. If the United States demonstrates how its military intervention will prevent a global catastrophe and save lives, it is more likely the international community will accept a potential justification. The United States’ adversaries would also likely try to take the perceived vacated moral high ground and provide a contrast to the United States. However, in some cases, the risk may be worth it. The

¹²⁵ Russia and China have indicated that they do not consider environmental threats ones that require intervention. In the context of the AIDS epidemic, Russia stated that disease “is not a source of conflicts, but conflicts create conditions that contribute to the spread of the epidemic and also complicate efforts to curb it.” Evans, *supra* note 33, at 23. Additionally, neither China nor Russia called Ebola a “threat to the peace” during debate in the Security Council, though both voted for the resolution. *Id.* at 26; see S.C. 7268 Meeting, U.N. Doc. S/PV.7268 (Sept. 18, 2014).

¹²⁶ See U.S. DEP’T OF AIR FORCE, JUDGE ADVOC. GEN.’S CORPS, JAG CORPS FLIGHT PLAN 2020: BRIDGING THE STRATEGIC TO THE TACTICAL AND BACK (2020).

¹²⁷ The United States has never relied on humanitarian intervention. Michael P. Scharf, *Striking a Grotian Moment: How the Syria Airstrikes Changed International Law Relating to Humanitarian Intervention*, 19 CHI. J. INT’L L. 586, 608 (2019). It has, however, justified military action in part based on humanitarian concerns. April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities, 42 Op. O.L.C. 1, 14–15 (2018) (citing missions in Iraq, Haiti, Somalia, and Bosnia). These concerns have even played “primary” basis in some cases, including a response to an environmental threat in Somalia as U.S. troops deployed to areas “most affected by famine and disease.” *Id.* at 15.

loss of life or destruction may be so widespread or devastating that targeted military force is the only way to prevent wider harm.

As ICISS recognized, this threshold will likely never be met against a United States' near-peer competitor, like China or Russia.¹²⁸ Military intervention against one of these countries would likely begin a series of retaliatory and escalatory acts that could potentially lead to a greater loss of life and destruction than what the United States is trying to prevent.¹²⁹

While there is a paucity of scholarship on military intervention in response to environmental threats, three articles that have addressed the topic have argued that self-defense is the more appropriate framework to justify intervention.¹³⁰ The international law practitioners who drafted *Modern Self-Defense: The Use of Force Against Non-Military Threats* argued an "armed attack" should be evaluated by the magnitude of its effects to allow a self-defense response to non-military threats.¹³¹ The authors do concede humanitarian response is a better "fit" than self-defense, as it offers a better explanation rather than "attempting to characterize a non-military event, such as refugee flows or an environmental catastrophe, as an armed attack."¹³² However, the authors state because it exists in the U.N. Charter, self-defense provides a stronger justification for a use of force in response to an environmental threat.¹³³

While self-defense and humanitarian intervention reinforce each other in this context, humanitarian intervention would be the more appropriate justification, as relying on self-defense would hamper potential responses. For example, the United States may not be able to respond under self-defense if an environmental threat only causes a regional crisis that does not cross its borders. Additionally, a justification under self-defense requires expanding the definition beyond what is accepted as the international norm.¹³⁴ Using humanitarian intervention also goes beyond current norms,

¹²⁸ ICISS REPORT, *supra* note 38, para. 4.42.

¹²⁹ *Id.* If an environmental threat rises to a substantial probability of widespread damage, a large conflict may still be justified if it will be less damaging than the environmental threat. See discussion *supra* Section III.D.

¹³⁰ See *supra* note 75.

¹³¹ Cardiel et al., *supra* note 75, at 138.

¹³² *Id.* at 139.

¹³³ *Id.*

¹³⁴ Additionally, the ICJ found the United States' arguments to intervene in matters within domestic control of a State based on collective self-defense and protection of human rights to

but it can be tailored more appropriately to address the humanitarian concerns of environmental threats and to permit responses before the threats spread. If the United States can add rationale showing the necessity of its response to protect its own interests, it may avoid opposition and enjoy additional support in the international community, but the primary justification for military intervention should be humanitarian intervention.

The United States should utilize the U.K.'s basis for humanitarian intervention and adopt it, with some modifications, to allow for a response to environmental threats.¹³⁵ The U.K. test requires evidence of "extreme humanitarian distress" and while this is a good threshold for ongoing events, preemptive action may be required.¹³⁶ Merging ICISS's comments with the U.K. test would allow for the most flexibility under a legally justifiable position.

The criteria for military intervention in the case of an environmental threat should be:

- (1) There is evidence that extreme humanitarian distress on a large scale, requiring immediate and urgent relief, is occurring or will occur;
- (2) There is no practicable alternative to the military intervention if lives are to be saved;
- (3) The State concerned is unwilling or unable to handle the environmental threat or consent to assistance; and
- (4) The proposed military intervention and potential use of force is necessary and proportionate to the aim of

be insufficient to justify military intervention. *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. 14, ¶ 268 (June 27).

¹³⁵ While the United States has never recognized a right of humanitarian intervention, it did tell the Security Council that it "worked in lock step" with the U.K. and was "in complete agreement" regarding the Syria airstrikes for which the U.K. relied on humanitarian intervention. Scharf, *supra* note 127. While the United States' justification did not solely rely on humanitarian invention, one scholar argued statement before the Security Council could be an implicit adoption of the principle. *Id.*

¹³⁶ *Syria Action – UK Government Legal Position*, *supra* note 92; ICISS REPORT, *supra* note 38, at 33.

humanitarian suffering, is strictly limited in time and scope to this aim, and will not exceed the suffering it prevents.

The proposed test would allow the United States to prevent or mitigate environmental threats regardless of whether it is directly affected. Even if the threat does not reach U.S. borders, the United States should intervene, as humanitarian crises and regional disorder threaten its national security. This test also allows for action without waiting for the environmental threat to spread or intensify. If there is evidence of a future threat, the United States may take action immediately to prevent it. Additionally, this test also focuses on a State's action or inaction in addition to the magnitude of the environmental threat, emphasizing a State's responsibility and ensuring intervention in another State's affairs is appropriate based on its failure respond to the threat.¹³⁷ Finally, it also ensures the response will be measured to address only the environmental issue. The United States should strive to maximize its ability to act, and this legally cognizable justification allows the United States to continue to compete in international law.

V. Conclusion

The United States has never based a use of force solely on humanitarian grounds; however, it has used force on multiple occasions to preserve regional stability.¹³⁸ Additionally, it has cited "U.S. interest in mitigating humanitarian disasters" as a justification for military deployments, though never as the sole justification for military intervention.¹³⁹ This would be an expansion of what the United States has considered international law but would allow it to have all options at its disposal. The first choices to handle an environmental threat should remain diplomacy and U.N. procedures. If those fail, however, the United States should use every option to respond as necessary to prevent a widespread disaster. This article's proposed test would allow the United States to retain flexibility under international law to respond to the novel threats facing the country.

¹³⁷ See Martin, *supra* note 75. While a State may not initially cause an environmental threat, action will be justified against States that contribute to or worsen the spread of the threat through action or inaction.

¹³⁸ April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities, 42 Op. O.L.C. 1, 11 (2018).

¹³⁹ *Id.*