

If You Can Bomb It, You Can Litigate It: Climate War, Complicit States, and a World on Fire

INTRODUCTION

Humanity has never faced an existential threat like climate change, and it shows.¹ Like the apocryphal frog in a slowly heating pot of water, not noticing the danger until it is too weak to jump out, the world is dangerously close to reaching the point at which it will be too late to stop rising temperatures.² The slow pace of climate change is uniquely dangerous; it lulls nations into slow responses or prevents them from responding at all.³ So far, individual States have remained in the pot, failing to make the requisite changes to leap out as the heat rises. Indeed, some countries have

1 See, e.g., Matt McGrath, *Climate Change: Impacts 'Accelerating' as Leaders Gather for UN Talks*, BBC (Sept. 22, 2019), <https://www.bbc.com/news/science-environment-49773869>; Tara Law, *Australia's Wildfires and Climate Change are Making One Another Worse in a Vicious, Devastating Circle*, TIME (Jan. 7, 2020, 3:45 PM), <https://time.com/5759964/australian-bushfires-climate-change/>; Julia Hollingworth, *Climate Change Could Pose 'Existential Threat' by 2050: Report*, CNN (June 4, 2019, 8:06 PM), <https://www.cnn.com/2019/06/04/health/climate-change-existential-threat-report-intl/index.html>.

2 James Fallows, *The Boiled-Frog Myth: Stop the Lying Now!*, ATLANTIC (Sept. 15, 2006) <https://www.theatlantic.com/technology/archive/2006/09/the-boiled-frog-myth-stop-the-lying-now/7446/>.

3 Recent events in Brazil highlight the propensity of the international community to “turn a blind eye” to actions damaging the climate. Human-started fires in the Amazon Rainforest reached a peak in 2019. Sarah Newey, *Why Is the Amazon Burning and How Bad Are the Fires?*, TELEGRAPH (Aug. 24, 2019, 9:12 AM), <https://www.telegraph.co.uk/global-health/climate-and-people/amazon-burning-bad-fires/>. The origin of these fires are disputed; activists claim that Brazilian President Jair Bolsonaro, a noted climate change skeptic, “has given farmers and ranchers free rein to cut down trees without [sic] impunity.” *Id.* Bolsonaro has accused non-government organizations of starting the fires to undermine him. *Id.* Whoever is to blame, Brazil’s response has been confused at best. While local governments within Brazil have undertaken to improve their fire brigades, Bolsonaro initially claimed his government lacks the resources to fight the fires. Alexandria Symonds, *Amazon Rainforest Fires: Here's What's Really Happening*, N.Y. TIMES (Aug. 28, 2019), <https://www.nytimes.com/2019/08/23/world/americas/amazon-fire-brazil-bolsonaro.html>. Members of the international community tried to offer Brazil roughly \$22 million to help combat the fires, which Bolsonaro first angrily rejected, then laid out a path to accepting, then accepting in limited part from Britain. Manueal Andreoni, *Brazil Angrily Rejects Millions in Amazon Aid Pledged at G7, Then Accepts British Aid*, N.Y. TIMES (28 Aug. 2019), <https://www.nytimes.com/2019/08/27/world/americas/brazil-amazon-aid.html>. Ultimately, Bolsonaro deployed Brazil’s military to assist with fire suppression efforts. Symonds, *supra*. In the meantime, international pressure has been ineffective at actually addressing the problems that caused the fires. Meg Kelly & Sarah Cahlan, *The Brazilian Amazon Is Still Burning. Who Is Responsible?*, WASH. POST (Oct. 7, 2019, 2:00 AM), <https://www.washingtonpost.com/politics/2019/10/07/brazilian-amazon-is-still-burning-who-is-responsible/>.

even taken steps backwards⁴ despite the ever-increasing odds of global calamity.⁵ The humanitarian crisis of global climate change may still be avoided, but it will take concerted international action.⁶ This note argues that the use of force can be justified to compel individual States to address climate change in accord with international obligations, much as the use of force has been justified in the humanitarian context during the past few decades.⁷ Justifying the use of force in this context is not for the purpose of promoting military action, but rather to promote the building and strengthening of international institutions dedicated to addressing the looming threat of climate change with the seriousness afforded other international crises.

In the international community, force is justified only in the most extreme circumstances.⁸ Although often this action only consists of limited military strikes, the message is clear: the international community cares enough about what an individual State has done to support the use of force against it. Through force, the international community makes its discontent known and tries to enforce compliance with international law.⁹ Most of the

4 The United States under the Trump Administration has been the highest-profile offender of backtracking in the climate protection field in recent years. In addition to the high-profile decision to depart from the Paris Climate Accord, the administration has rolled back scores of environmental rules and regulations and, but for a series of losses in court, would have rolled back many more. Nadja Popovich, Livia Albeck-Ripka & Kendra Pierre-Louis, *The Trump Administration Rolled Back More Than 100 Environmental Rules. Here's the Full List.*, N.Y. TIMES (Jan. 20, 2021), <https://www.nytimes.com/interactive/2019/climate/trump-environment-rollbacks.html>; Oliver Millman, *'Sloppy and Careless': Courts Call Out Trump Blitzkrieg on Environmental Rules*, GUARDIAN (Feb. 20, 2018, 6:00 AM), <https://www.theguardian.com/environment/2018/feb/20/donald-trump-epa-environmental-rollbacks-court-challenges>.

5 *The Effects of Climate Change*, NASA, <https://climate.nasa.gov/effects/> (last visited Jan. 23, 2021) (outlining the present and future effects of climate change).

6 John Schwartz, *Will We Survive Climate Change?*, N.Y. TIMES (Nov. 19, 2018), <https://www.nytimes.com/2018/11/19/science/climate-change-doom.html>.

7 See *infra* Section III.

8 See generally Elena Lazar, *The Use of Force in International Law—Justification or Abuse*, J.L. & ADMIN. SCIS. 261 (SPECIAL ISSUE) (2015); Katie Peters, *International Law and the Use of Force*, 4 QUEENSL. U. TECH. L. & JUST. J. 1 (2004).

9 Even the nominally isolationist President Trump joined France and Britain in responding with force when Syria's Assad used chemical weapons against his own citizens. The strikes were limited to military sites used to manufacture chemical weapons. W.J. Hennigan, *Trump Orders Strikes on Syria over Chemical Weapons*, TIME (Apr. 13, 2018, 9:05 PM), <https://time.com/5240164/syria-missile-strikes-donald-trump-chemical-weapons/>. The United Kingdom published its legal position on the strikes, justifying its use of force as humanitarian intervention which met three requisite conditions: The presence of convincing evidence of "extreme humanitarian distress on a large scale, requiring immediate

internationally accepted military actions in the late 20th and early 21st centuries have been justified under such a theory, from UN intervention in the Kosovo War¹⁰ to the global War on Terror.¹¹ In effect, the international community accepts force only in the most dire circumstances.¹² The use of force is a sign that the international community takes an issue seriously.¹³ It is surprising and disturbing, then, that the international community has been so tepid in its response to States' disinterested or nonexistent efforts to address climate change.¹⁴

This note explores the legal feasibility of using force to compel countries to action on climate change.¹⁵ It does so to argue that, because using force

and urgent relief"; objective clarity that "there is no practicable alternative to the use of force if lives are to be saved"; and necessity and proportionality of the strike, "limited in time and scope to achieve [the relief of humanitarian suffering]." *Policy Paper: 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](https://www.gov.uk/government/publications/syria-action-uk-government-legal-position/syria-action-uk-government-legal-position).

10 The UN justified using force in the Kosovo war on humanitarian grounds. Nicole Dellers & John Burroughs, *Jus Ad Bellum: Law Regulating Resort to Force*, 30 HUM. RTS. 8, 11 (2003).

11 Legal justifications for the global war on terror are discussed at length below. See *infra* Section II.C.

12 While I primarily mean military force, the most extreme examples of human rights violations are met with *legal* force as well. The genocides in Yugoslavia and Rwanda were met not only by military force but also by international criminal tribunals designed to punish the perpetrators. Int'l Crim. Trib. for the Former Yugoslavia, UNITED NATIONS, <https://www.icty.org/> (last visited Jan. 23, 2021); *The ICTR in Brief*, UNITED NATIONS, <https://unictr.irmct.org/en/tribunal> (last visited Jan. 23, 2021).

13 In the international context, "seriously" means not just that States are willing to use force in response to violations but also that international treaties and agreements have real teeth. The UN Convention against Torture, for example, states in no uncertain terms that States Parties shall not allow torture under any "exceptional circumstances whatsoever" and shall not "expel, return . . . or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture," among other requirements. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment arts. 2, 3, Dec. 10, 1984, 1465 U.N.T.S. 85.

14 Figures from the Pope to massive collections of climate scientists have expressed their dismay at the tepid international response to the climate crisis. See Chico Harlan, *Pope Francis Lists the World Crises from the Obscure to the Existential, Saying 2020 Is off to a Rough Start*, WASH. POST (Jan. 9, 2020, 6:44 AM), https://www.washingtonpost.com/world/europe/pope-francis-lists-the-world-crises-from-the-obscure-to-the-existential-saying-2020-is-off-to-a-rough-start/2020/01/09/4703a208-32ce-11ea-971b-43bec3ff9860_story.html; Denise Chow, *More Than 11,000 Scientists Issue Fresh Warning: Earth Faces a Climate Emergency*, NBC NEWS (Nov. 5, 2019, 3:55 PM), <https://www.nbcnews.com/science/environment/more-11-000-scientists-issue-fresh-warning-earth-faces-climate-n1076851>.

15 To be clear at the outset, use of force in this context could only be justified if it were limited in scope. Military action has a detrimental impact on the environment. Fossil fuel emissions in the United States context are illustrative. "In its quest for security, the United States spends more on the military than any other country in the world . . . all this capacity for and use of military force requires a great deal

to compel action on climate change can be justified in the same way as using force to address humanitarian crises such as torture and genocide, the international community is obliged to treat States unwilling to address their contributions to climate change in the same way it treats those violating human rights. It does not advocate for States to use force but for States to recognize the severity of the crisis and act accordingly. This note begins by comparing the efficacy and enforceability of the Paris Agreement to the Rome Statute, international responses to the climate crisis and extreme human rights violations respectively. In comparing the two, this note seeks to highlight the gulf between what the international community *can* do when so moved, as evinced by the Rome Statute, and the weakness of what it *chose* to do with the Paris Agreement. This note then surveys traditional use-of-force justifications before finally proposing a model by which limited use of force against nations that refuse to address environmental concerns could be justified using existing theories of *jus ad bellum*.¹⁶ Ultimately, this note calls for strong international legislation requiring

of energy, most of it in the form of fossil fuel.” Neta C. Crawford, *Pentagon Fuel Use, Climate Change and the Costs of War*, WATSON INST. FOR INT’L & PUB. AFFS., 1 (Jun. 12, 2019), <https://watson.brown.edu/costsofwar/files/cow/imce/papers/2019/Pentagon%20Fuel%20Use,%20Climate%20Change%20and%20the%20Costs%20of%20War%20Final.pdf>. For example, between 2001 and 2017, “DOD emissions for all military operations . . . are estimated to be about 766 million metric tons of CO₂e,” or about 48 million metric tons per year. *Id.* at 2. This puts the military operations of the United States alone roughly even with Bulgaria for CO₂ emissions. *Fossil CO₂ Emissions of All World Countries—2018 Report*, EUR. COMM’NS JRC SCI. FOR POL’Y REP., 56 (2018), <https://ec.europa.eu/jrc/en/publication/fossil-co2-emissions-all-world-countries-2018-report>. Beyond the burning of fossil fuels to produce and use military equipment, large-scale use of force often results in environmental devastation. The wars in Iraq, Afghanistan, and Pakistan, for example, have wrought considerable damage to the natural environments in these and the surrounding countries. “Air pollution from military vehicles and weaponry has adversely affected public health among civilians in the war zones and US service members. Heavy military vehicles have raised more dust than usual, particularly in Iraq and Kuwait, and service members’ exposures to inhaled toxins from that dust have correlated with respiratory disorders that often prevent them from continuing to serve and performing everyday activities such as exercise. The water supply in the war zones has been contaminated by oil from military vehicles and depleted uranium from ammunition. Along with the degradation of the natural resources in these countries and a radical destruction of forest cover, the animal and bird populations have also been adversely affected.” Bridget Guarasci, Robert Miller & Mac Skelton, *Costs of War: Environmental Costs*, WATSON INST. FOR INT’L & PUB. AFFS. (2015), <https://watson.brown.edu/costsofwar/costs/social/environment>. Thus, anything more than a highly limited strike would defeat the ultimate purpose of slowing or halting climate change.

¹⁶ *Jus ad bellum* are the “conditions under which States may resort to war or to the use of armed force in general.” *What Are Jus ad Bellum and Jus in Bello?*, INT’L COMM. RED CROSS (Jan. 22, 2015), <https://www.icrc.org/en/document/what-are-jus-ad-bellum-and-jus-bello-0>. These conditions are discussed in detail in Section II. See *infra* Section II.

individual State action on climate change enforced by an international court similar in scope and jurisdiction to the International Criminal Court.

COMPARING ROME TO PARIS: TWO VASTLY DIFFERENT RESPONSES TO
IMMENSE HUMANITARIAN CONCERNS

A. Paris Agreement

The most recent effort by the international community to address climate change on a global level was the Paris Agreement, which entered into force on November 4, 2016.¹⁷ The Paris Agreement modified the United Nations Framework Convention on Climate Change with the stated goal of “bring[ing] all nations into a common cause to undertake ambitious efforts to combat climate change and adapt to its effects, with enhanced support to assist developing countries to do so.”¹⁸ The Agreement currently has 195 signatories and 190 parties¹⁹ and espouses valuable and aspirational goals, from limiting global temperature increases to no more than 2 degrees Celsius²⁰ to enhancing climate change education, training, public awareness, and access to information.²¹ Unfortunately, the Paris Agreement lacks any meaningful way to compel compliance with its articles. Indeed, the Paris Agreement *requires* only three actions of its signatories: provide a national greenhouse gas inventory report,²² provide climate change impact and adaptation reports, and submit to an explicitly “non-adversarial and non-punitive” review board of technical experts to analyze their reports.²³

The Paris Agreement does not provide for any way to compel compliance with even these “requirements,” let alone the more meaningful

17 Paris Agreement art. 2, Dec. 12, 2015, 55 I.L.M. 740 [hereinafter Paris Agreement].

18 *The Paris Agreement*, UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE, <https://unfccc.int/process-and-meetings/the-paris-agreement/what-is-the-paris-agreement> (last visited Jan. 24, 2021).

19 Status of the Paris Agreement, UNITED NATIONS TREATY COLLECTION (last visited Feb. 2, 2021), https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-d&chapter=27&clang=_en.

20 Paris Agreement, *supra* note 17, art. 2.

21 *Id.* art. 12.

22 *Id.* art. 13(7).

23 *Id.* arts. 13(8), 15.

steps called for (but not required) in other articles.²⁴ Indeed, recent events have shown that the Agreement also does not have the ability to keep signatory States (like the United States) in the Agreement.²⁵ The United States example also illustrates the ineffectiveness of the Agreement to compel countries to change course. One year after Trump announced his intent to depart from the Agreement, American performance on reaching goals laid out by the Agreement actually *improved*.²⁶ If a country may announce its intention to withdraw from the Agreement, signaling intent not to adhere to the articles therein, and still improve its climate protection performance, the strength with which the Paris Agreement addresses climate change is rendered highly suspect.

Indeed, the United States' "improvement" still lags well behind the requirements needed to meet the Paris Agreement's goals.²⁷ Under the Paris Agreement, signatories set their own emission goals.²⁸ These goals do not reflect net emission reductions required to meet the 2 degree Celsius maximum set out by the Agreement, but merely reflect what the individual

24 Many of the articles merely amount to a joint recognition of the damage potential of climate change and the need to stall or reverse its effects. *See, e.g., id.* arts. 7–8. Others, such as Article 5, recommend but do not require environmentally conscious steps: "Parties should take action to conserve and enhance, as appropriate, sinks and reservoirs of greenhouse gases . . . including forests." *Id.* art. 5.

25 President Trump's plan to withdraw from the Agreement was widely telegraphed and many hoped that other world leaders would be able to talk the American president into staying. Gwynne Taraska & Andrew Light, *How the G20 Could Save Paris Climate Deal from Trump*, CLIMATE CHANGE NEWS (Feb. 15, 2017, 1:00 PM), <https://www.climatechangenews.com/2017/02/15/coalition-of-nations-could-save-paris-agreement-from-trump/>. While some like French President Emmanuel Macron attempted to do so, Trump withdrew from the Agreement on June 1, 2017. John Irish & Marine Penetier, *France's Macron to Try to Convince Trump to Back Paris Accords: Diplomats*, REUTERS (May 24, 2017, 3:59 AM), <https://www.reuters.com/article/us-france-g7-climatechange/frances-macron-to-try-to-convince-trump-to-back-paris-accords-diplomats-idUSKBN18K0XY>; Press Release, White House, Statement by President Trump on the Paris Climate Accord (June 1, 2017), <https://it.usembassy.gov/statement-president-trump-paris-climate-accord/>. Although there is a process for leaving the Rome Statute in Article 127—notice and a one-year delay until withdrawal takes effect—States are still held to their obligations as signatories. Rome Statute of the International Criminal Court art. 25, Dec. 31, 2000, 2187 U.N.T.S. 3 [hereinafter Rome Statute]. A State seeking to withdraw from the Statute must still cooperate with investigations, fulfill financial obligations, and refrain from prejudicing matters before the Court at the time of withdrawal. *Id.*

26 Chris Mooney, *Trump Withdrew from the Paris Climate Deal a Year Ago. Here's What Has Changed.*, WASH. POST (June 1, 2018, 9:26 AM), <https://www.washingtonpost.com/news/energy-environment/wp/2018/06/01/trump-withdrew-from-the-paris-climate-plan-a-year-ago-heres-what-has-changed/>.

27 *Id.*

28 Paris Agreement, *supra* note 17, art. 4(2).

signatory wants to achieve.²⁹ In short, the Paris Agreement leaves too much to the good-faith participation of signatories and lacks any means of enforcing cooperation. As the United States has shown, relying on such good faith is naïve at best. In a world where some signatories are preparing to benefit from the otherwise ill-effects of climate change,³⁰ the Agreement simply does not go far enough.

B. *The Rome Statute*

The Rome Statute of the International Criminal Court (“the Rome Statute”), adopted on July 17, 1998 by 120 States,³¹ established the International Criminal Court (“ICC”). The ICC has jurisdiction over only “the most serious crimes of concern to the international community as a whole”: genocide, crimes against humanity, war crimes, and the crime of aggression.³² The Rome Statute’s preamble makes clear that the ICC is an explicit reaction to the “unimaginable atrocities that deeply shock the conscience of humanity” suffered by millions during the twentieth century.³³ The preamble further outlines that the goal of the ICC is to “put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes.”³⁴

29 Even the goals set by the more environmentally-friendly Obama administration “would ultimately [have been] too little, at least if the [A]greement’s formal objectives are to be taken seriously.” Mooney, *supra* note 26.

30 Russia and China in particular among large powers have been taking steps to monetize climate change, vying for control of northern stretches of ice that could become shipping lanes as the Earth warms and the ice melts. Luiza Ch. Savage, *How Russia and China Are Preparing to Exploit a Warming Planet*, POLITICO (Aug. 29, 2019, 5:11 AM), <https://www.politico.com/story/2019/08/29/russia-china-climate-change-1691698>.

31 About the ICC, INT’L CRIM. CT., <https://www.icc-cpi.int/about> (last visited Jan. 24, 2021). For a full list of adopting States, see *The States Parties to the Rome Statute*, INTERNATIONAL CRIMINAL COURT, https://asp.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx.

32 Rome Statute, *supra* note 25. For exhaustive definitions of the four listed crimes, see *id.* arts. 5–9.

33 *Id.* pmb1.

34 *Id.*

This is a lofty goal, but the ICC has a fair amount of power to achieve it. Article 4 of the Rome Statute gives the ICC international legal personality³⁵ and “such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes.”³⁶ The ICC may exercise its functions with a fairly broad reach, as it has jurisdiction where: “crimes were committed by a State Party national, or in the territory of a State Party, or in a State that has accepted the jurisdiction of the Court; or the crimes were referred to the ICC Prosecutor by the United Nations Security Council.”³⁷ In effect, the ICC can reach into any State under the right circumstances and exercise its jurisdiction over State and non-State actors alike.

Once it does so, the Rome Statute provides the ICC with a bevy of tools to seek justice. The ICC Prosecutor has substantial power to conduct thorough, independent investigations in the territory of a State.³⁸ Once the Prosecutor’s findings are submitted to a Pre-Trial Chamber, that Chamber may take actions including issuing warrants of arrest or summonses to appear, similar to a common law grand jury.³⁹ Arrest warrants are submitted to and enforced by States Parties, which must take steps immediately upon receipt to arrest the person in question “in accordance with its laws and the provisions of [Rome Statute] Part 9.”⁴⁰ Part 9 requires that States Parties

35 International legal personality refers to a concept which underpins much of international law in which individual bodies such as States are thought of as “moral persons, with their own will and understanding, as well as rights and obligations.” M.N.S. Sellers, *International Legal Personality*, 11 IUS GENTIUM 67, 68 (2005). Entities with such personality have the “capacity to perform legal acts in the international plane.” P.R. Menon, *The Legal Personality of International Organizations*, 4 SRI LANKA J. INT’L L. 79, 80 (1992). While the ICC’s legal personality is likely not quite as broad as a sovereign State’s, it does encompass the three main features of international legal personality: “the treaty making power, the right to entertain diplomatic relations with other subjects of international law, and active and passive international responsibility.” Sascha Rolf Lüder, *The Legal Nature of the International Criminal Court and the Emergence of Supranational Elements in International Criminal Justice*, 84 INT’L REV. RED CROSS 79, 82–83 (2002).

36 Rome Statute, *supra* note 17, art. 4.

37 *How the Court Works*, INT’L CRIM. CT., <https://www.icc-cpi.int/about/how-the-court-works/Pages/default.aspx#legalProcess> (last visited Jan. 24, 2021).

38 Rome Statute, *supra* note 17, art. 54. These powers include the collection and examination of evidence, questioning those being investigated, witnesses, and victims, and seeking the cooperation of any State involved. The Prosecutor may also enter into arrangements and agreements with States to facilitate their cooperation and take whatever measures are necessary to maintain the confidentiality of privileged information. *Id.* art. 54(3).

39 *Id.* art. 58(1), (7).

40 *Id.* art. 59.

“cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.”⁴¹

The ICC has used these levers of power with varying degrees of success. For example, while some arrest warrants issued by the ICC have resulted in the surrender of their targets,⁴² many others have yet to yield results.⁴³ Furthermore, much like the Paris Agreement, the Rome Statute assigns no consequences to powerful States who decide to withdraw their compliance with the ICC.⁴⁴ Finally, the ICC has been the target of accusations of a Eurocentric bias that borders on racism.⁴⁵ While the Rome Statute does not inherently lend itself to this last problem, it is a weakness that merits

41 *Id.* art. 86. In addition to the execution of arrest warrants, cooperation often includes “transferring arrested persons to the ICC detention centre in The Hague, freezing suspect’s assets, and enforcing sentences.” *How the Court Works*, *supra* note 37.

42 *See, e.g.*, Case Information Sheet for *Prosecutor v. Yekatom*, ICC-01/14-01/18, <https://www.icc-cpi.int/CaseInformationSheets/yekatom-nga%C3%AFssoEn.pdf> (last updated 2021); Case Information Sheet for *Prosecutor v. Bemba*, ICC-01/05-01/13, <https://www.icc-cpi.int/CaseInformationSheets/Bemba-et-alEng.pdf> (last updated 2018).

43 *See, e.g.*, Case Information Sheet for *Prosecutor v. Al Bashir*, ICC-02/05-01/09, <https://www.icc-cpi.int/CaseInformationSheets/albashirEng.pdf> (last updated 2018); Case Information Sheet for *Prosecutor v. Al-Werfalli*, ICC-01/11-01/17, <https://www.icc-cpi.int/CaseInformationSheets/alwerfalliEng.pdf> (last updated 2018); Case Information Sheet for *Prosecutor v. Gaddafi*, ICC-01/11-01/11, <https://www.icc-cpi.int/CaseInformationSheets/gaddafiEng.pdf> (last updated 2019).

44 The United States’ hostility under the last two Republican administrations is illustrative of the weakness of the ICC in this situation. Although the United States initially signed the Rome Statute under President Clinton, the Bush Administration “unsigned” the treaty and worked not only to convince other countries to abandon it, but also to ensure Americans would not be extradited from foreign States to the ICC. Curits A. Bradley, *U.S. Announces Intent Not to Ratify International Criminal Court Treaty*, AM. SOC’Y INT’L L. (May 11, 2002), <https://www.asil.org/insights/volume/7/issue/7/us-announces-intent-not-ratify-international-criminal-court-treaty>; Ian Williams, *John Bolton’s Greatest Hits Are Failures*, CBS NEWS (Dec. 5, 2006, 11:33 AM), <https://www.cbsnews.com/news/john-boltons-greatest-hits-are-failures/>. The Obama administration reversed course, working to strengthen ties with the ICC and serving as an observer for the Court. *Obama Administration*, AM. NGO COAL. FOR INT’L CRIM. CT., <https://www.amicc.org/obama-administration> (last visited Jan. 24, 2021). However, the Trump administration has resumed its attacks on the ICC, with Secretary of State Mike Pompeo going so far as to refuse visas to employees of the ICC while former National Security Advisor John Bolton declared that “the ICC is already dead to us.” Carol Morello, *U.S. Will Not Give Visas to Employees of the International Criminal Court*, WASH. POST (Mar. 15, 2019, 11:06 AM), https://www.washingtonpost.com/world/national-security/us-will-not-give-visas-to-employees-of-the-international-criminal-court/2019/03/15/f44087d4-78df-494a-aa58-d91749eab9b2_story.html. For an examination of the ICC’s ability to succeed absent US support, see Irene Marinakis, *A Weak ICC: Can the ICC Succeed Without U.S. Participation*, 5 EYES ON ICC 125 (2008).

45 Awol K. Allo, *The ICC’s Problem Is Not Overt Racism, It Is Eurocentricism*, AL JAZEERA (July 28, 2018), <https://www.aljazeera.com/indepth/opinion/icc-problem-simple-racism-eurocentricism-180725111213623.html>; Adam Withnall, *Gambia Pulls out of ‘Racist’ ICC amid Fears of a Mass African Exodus*, INDEPENDENT (Oct. 26, 2016, 2:32 PM), <https://www.independent.co.uk/news/world/africa/gambia-international-criminal-court-south-africa-burundi-withdrawal-rome-statute-a7381336.html>.

mention. These weaknesses aside, the ICC has been broadly effective since its inception, especially given the Court's novel function.⁴⁶ It has secured several high-profile judgements against perpetrators of crimes against humanity and genocide⁴⁷ and has a number of pending cases against others suspected of similar acts.⁴⁸

C. *A Practical Comparison*

The Rome Statute and the ICC show the lengths the international community can go to face problems it recognizes as sufficiently pressing. The ICC was a reaction to the atrocities of the twentieth century.⁴⁹ The international community took a substantial step toward changing the murderous course of previous years, establishing the ICC with the aim to collectively provide a scheme by which individual States and actors would be held accountable for actions which were so devastating to human life.

Although the threat to life it sought to address has broader, if less immediate and horrifying, implications than the four crimes covered in the Rome Statute, the Paris Agreement shows no such strength. Signatory states can largely ignore their commitments under the Agreement without consequence. The Paris Agreement sets no mandatory conduct, compels no real action, and accordingly has only limited effect. Where the Rome Statute established an independent body with international legal personality to carry out its goals, the Paris Agreement set up a system of self-reporting left wide open to dismissal and fraud.

The contrast is striking. Rome shows what the international community can do; Paris shows what it has limited itself to. This decision does not

46 See Linda E. Carter, *The International Criminal Court in 2021*, 18 SW. J. INT'L L. 199 (2011) ("the momentum of the ICC is likely to lead to increased acceptance, legitimacy, and impact on accountability for international crimes."). For the opposite view, see Makau Mutua, *The International Criminal Court: Promise and Politics*, 109 AM. SOC'Y INT'L L. PROC. 269 (2015).

47 *International Criminal Court Fast Facts*, CNN (11 Nov. 2019, 3:15 PM), <https://www.cnn.com/2016/07/18/world/international-criminal-court-fast-facts/index.html>.

48 *The Court Today*, INT'L CRIM. CT., <https://www.icc-cpi.int/iccdocs/PIDS/publications/TheCourtTodayEng.pdf> (last visited Jan. 14, 2020).

49 In addition to such infamous genocides as the Holocaust and the Rwandan genocide, the twentieth century saw a host of massacres any one of which could easily be similarly classified. Adam Taylor, *It Wasn't Just the Armenians: The Other 20th Century Massacres We Ignore*, WASH. POST (Apr. 24, 2015, 1:20 PM), <https://www.washingtonpost.com/news/worldviews/wp/2015/04/24/it-wasnt-just-the-armenians-the-other-20th-century-massacres-we-ignore/>.

reflect the relative “seriousness” of the two issues. If the use of force, that greatest expression of international disapproval, can be justified to compel action on climate change, the dissonance between the Paris Agreement and the Rome Statute is revealed as nonsensical and action at least as firm as that encoded in the ICC is called for to address climate change.

II. LEGAL JUSTIFICATIONS FOR USE OF FORCE

A. *From Aquinas to World War II*

To analyze whether use of force can be legally justified in the climate context, it helps first to track the development and constriction of *jus ad bellum*. One of the most influential theories of the prerequisites for military action was “just war” theory as refined by Thomas Aquinas. Aquinas, expounding on theories originally laid down by Ambrose and Augustine of Hippo,⁵⁰ identified “three requisites for a war to be just.”⁵¹ First, a State’s sovereign must initiate the war; no private citizen may do so.⁵² Second, the cause of war must be just. Augustine defined just causes as those “which avenge injuries . . . where a nation or city has to be chastised for having either neglected to punish the wicked doings of its people, or neglected to restore what has been wrongfully taken away.”⁵³ Last, the use of force must be for the intention of “promoting good or avoiding evil.”⁵⁴

This justification for conflict was modified in the seventeenth century by a “more pragmatic duel-like Roman conception of war as a military conflict between two equals, both acting for their respective strategic interests.”⁵⁵ This approach to justification was typified by a move away from the moralistic foundations of “just war” theories to waging war for reasons “accepted by state practice.”⁵⁶ In the European context that spawned these justifications, justifiable war included wars of colonization and other

50 J. Daryl Charles, *Presumption Against War or Presumption Against Injustice?: The Just War Tradition Reconsidered*, 47 J. CHURCH & ST. 335, 340 (2005).

51 *St. Thomas Aquinas Discusses the Three Conditions for a Just War (1265–74)*, ONLINE LIBR. LIBERTY, <https://oll.libertyfund.org/quotes/130> (last visited Jan. 30, 2021).

52 *Id.*

53 *Id.*

54 *Id.*

55 Jochen von Bernstorff, *The Use of Force in International Law before World War I: On Imperial Ordering and the Ontology of the Nation-State*, 29 EUR. J. INT’L L. 233, 240 (2018).

56 *Id.* at 241.

foreign interventions not necessarily contemplated by Aquinas.⁵⁷ Slowly, “just war” theory was supplanted by this realist approach; “just war” simply could not keep up with the needs of Western powers.. As colonial expansion stretched across the globe, war became a tool not of moral or religious right, as Aquinas advocated, but a cynical means of acquiring territory and influence.⁵⁸

The Hague Conferences of 1899 and 1907 formally codified this pragmatic approach to justifying force, requiring only “prior meditation and arbitration before waging war” and largely omitting mention of “legitimate or illegitimate reasons for the use of force.”⁵⁹ In any event, even these restrictions were largely ignored in the run-up and outbreak of World War I.⁶⁰ A complex web of interlocking alliances, disparate interests, and cynical calculations, rather than notions of a moral cause to promote good or avoid evil, sparked the global conflict.⁶¹ Far from preventing war, or even setting requirements to start it, the Hague Conferences succeeded only in “legitimiz[ing] the slaughtering of millions of soldiers as ‘lawful’ killings.”⁶²

States reacted to the horrors of World War I by abandoning the permissive Hague Conferences and creating new legal constraints on the use of force through new pacts⁶³ and accords and through the newly-conceived League of Nations.⁶⁴ Though these constraints achieved some amount of

⁵⁷ *Id.*

⁵⁸ *Id.* at 241–42, 245.

⁵⁹ *Id.* at 242–44. The Hague Convention rules were generally quite weak, applying only to wars between major powers and not applicable “when it came to violence *vis-à-vis* ‘non-civilized’ peoples.” *Id.* Furthermore, even the language purportedly controlling the major States was weak, including the modifier “as far as circumstances allow” to the requirement to submit to arbitration. *Id.*; Pacific Settlement of International Disputes (Hague, 1), July 29, 1899, 32 Stat. 1779.

⁶⁰ Both sides of the conflict ignored, to some extent, the strictures of the Hague Conferences and traditional notions of *jus ad bellum*. Von Bernstorff, *supra* note 55, at 255.

⁶¹ See CHRISTOPHER CLARK, *THE SLEEPWALKERS: HOW EUROPE WENT TO WAR IN 1914* (2014).

⁶² Von Bernstorff, *supra* note 55.

⁶³ See, e.g., The Kellogg-Briand Pact, 1928, OFF. OF HISTORIAN, <https://history.state.gov/milestones/1921-1936/kellogg> (last visited Jan. 30, 2021) (representing an agreement to outlaw war).

⁶⁴ See League of Nations Covenant art. 12(1) (expressing agreement between the Members of the League to submit “to arbitration or to inquiry by the Council” any matter potentially leading to “a rupture” and not to “resort to war until three months after” the arbitration or inquiry concludes).

initial success,⁶⁵ Nazi Germany's wars of domination and the outbreak of World War II showed the ultimate weakness of these efforts.⁶⁶ Just as the Hague Conferences and more amorphous *jus ad bellum* theories could not head off World War I, so too were the League of Nations and other interwar efforts found wanting. It was in this atmosphere, faced with two devastating global conflicts allowed in part by the weaknesses of codified *jus ad bellum* requirements, that the international community agreed to the UN Charter and subsequent Cold War-era limitations on the use of force.

B. *The UN Charter and Modern Justifications*

The UN Charter sought to codify and limit the ability of individual States to unilaterally use force. Article 2(4) guarantees that member States shall not use force "against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."⁶⁷ Article 51 protects the right of member States to engage in "individual or collective self-defence if an armed attack occurs" against them,⁶⁸ while Article 41 allows the Security Council to "take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security" when measures not involving the use of force⁶⁹ are or would be inadequate.⁷⁰ Though the Cold War strained this system to its limit, effectively neutralizing the effectiveness of the Security Council early on, the substantive laws of the Charter were at least nominally

65 The international agreement to arbitrate before resorting to war, as codified in League of Nations Covenant art. 12(1), saw success in such cases as The Naulilaa Case. MARK WESTON JANIS & JOHN E. NOYES, *INTERNATIONAL LAW CASES AND COMMENTARIES* 732 (5th ed. 2014) (citing Naulilaa Case (Port. v. Ger.), 2 R.I.A.A. 1011 (1928) (authors' translation from the French)). Here, Germany retaliated against Portugal for the latter State's killing of three Germans and imprisonment of two others following a series of misunderstandings. Germany attacked a Portuguese outpost at Naulilaa, killing many and causing severe property damage. Rather than escalate the conflict the two States submitted to arbitration. The arbitral body found that neither State violated the "law of nations" but that Germany had not followed the necessary conditions of lawful "reprisal." It had not made a demand which went unsatisfied, nor responded proportionally. However, Germany was liable only for damages traceable to direct interaction with the Portuguese at Naulilaa and other sites of attack, and not for an "indigenous rebellion" that occurred shortly after the German attack. The arbitral body thus required the distinguishing of the two categories of damages, and the matter was resolved without further escalation. JANIS & NOYES, *supra*.

66 Kellogg-Briand Pact, *supra* note 63.

67 U.N. Charter art. 2, ¶4.

68 *Id.* art. 50.

69 *Id.* art. 41.

70 *Id.* art. 42.

abided by, by both the United States and the Soviet Union, as well as their allies.⁷¹

Post-Cold War use of force justifications have evolved further, though still with an eye towards fitting within the UN Charter's framework.⁷² Modern uses of force are generally justified through appeals to a State's national security necessities.⁷³ Several exceptions to the framework have been advanced,⁷⁴ but only the use of force for humanitarian intervention has been received with anything approaching international acceptance.⁷⁵ At its inception the Global War on Terror stretched the limited conception of *jus ad bellum* found in the UN Charter further still.⁷⁶ Ultimately, three major categories of legal justifications for the use of force emerged: humanitarian intervention, self-defense, and threats to international peace and security.⁷⁷

71 Louis Henkin, *Law and War After the Cold War*, 15 MD. J. INT'L L. & TRADE 147, 148 (1991). Henkin notes that much of the military action carried out by the United States and Russia was justified by claiming that military forces were invited by the nation hostilities were conducted in. This allowed the States to circumvent Article 2(4)'s restriction on using military force in violation of another State's territorial integrity. Henkin took heart that, whether or not the militaries were actually invited, the legal gymnastics engaged in by both the U.S. and Russia signified respect for Article 2(4) and the "abiding vigor of the law of the Charter." *Id.* at 148-49.

72 In many ways, the outlines of Aquinas' "just war" theory live on, his three-part test replaced with the UN Charter's strictures. A "just war," today conceptualized as a lawful war, is now simply military action for the purpose of self-defense. Ian Hurd, *Permissive Law on the International Use of Force*, 109 AM. SOC'Y INT'L L. PROC. 63, 65 (2015).

73 *Id.* at 63.

74 These include humanitarian intervention, intervention to support self-determination, intervention for socialism, and intervention for democracy. Janis & Noyes, *supra* note 65, at 751 (citing LOUIS HENKIN, STANLEY HOFFMANN, JEANE J. KIRKPATRICK, ALLAN GERSON, WILLIAM D. ROGERS & DAVID J. SCHEFFER, *RIGHT V. MIGHT: INTERNATIONAL LAW AND THE USE OF FORCE* (1989)).

75 *Id.*; see *Policy Paper: Syria Action—UK government Legal Position*, *supra* note 9.

76 "National security needs" have been held up as rationale for ever more tenuous exertions of military force: "The argument runs that human rights abuses in other States are themselves dangerous to our society, that global terrorism is bred in failing States, and that even a potential weapon of mass destruction programme, or the mere existence of a 'rogue' regime, requires pre-emption." Jutta Brunnee & Stephen J. Toope, *The Use of Force: International Law After Iraq*, 53 INT'L & COMP. L.Q. 785, 789-90 (2004) (also collecting arguments to this effect "from a range of different political and theoretical vantage points").

77 *Id.* at 792. These three categories are discussed in detail in Sections III.A-C.

III. PROPOSED JUSTIFICATION FOR USE OF FORCE IN THE CLIMATE CHANGE CONTEXT

History shows that justifying any use of force is not merely a philosophical pursuit. Any analysis depends in no small part on the relative power of the State engaging in the use of force.⁷⁸ President Bush's justifications of the Second Iraq War were widely questioned,⁷⁹ but were never formally challenged.⁸⁰ Similarly, Russia's recent annexation of Crimea,⁸¹ despite constituting a clear violation of UN Charter Article 2(4), was met with condemnation⁸² and sanctions⁸³ but has not been subjected to

78 See Hurd, *supra* note 72, at 66 ("The effort to separate international law as a distinct domain from international power politics is hopeless—the two are intimately connected: international law enhances and limits state power; it is also shaped by it.").

79 Esther Pan, *IRAQ: Justifying the War*, COUNCIL ON FOREIGN RELS. (Feb. 2, 2005), <https://www.cfr.org/backgrounder/iraq-justifying-war>.

80 Though plenty has been written questioning the legality of the war, no attempts to challenge the U.S. government in a formal legal setting have been undertaken in the international community. See e.g., David Krieger, *The War on Iraq as Illegal and Illegitimate*, NUCLEAR AGE PEACE FOUND. (Mar. 15, 2005), <https://www.wagingpeace.org/the-war-on-iraq-as-illegal-and-illegitimate/>; Owen Bowcott, *Was the War Legal? Leading Lawyers Give Their Verdict*, GUARDIAN (Mar. 2, 2004, 3:28 AM), <https://www.theguardian.com/politics/2004/mar/02/uk.internationaleducationnews>.

81 Steven Lee Myers & Ellen Barry, *Putin Reclaims Crimea for Russia and Bitterly Denounces the West*, N.Y. TIMES (Mar. 18, 2014), <https://www.nytimes.com/2014/03/19/world/europe/ukraine.html>.

82 Condemnation did not come swiftly; only in March 2019 did NATO and the EU formally condemn Russia's 2014 annexation of Crimea. *NATO, EU Condemn Russia's 2014 Seizure of Crimea*, ASSOCIATED PRESS (Mar. 18, 2019), <https://apnews.com/article/a827c28f416243e984c9b329bc638cc0>.

83 The EU recently extended sanctions against Russia for another year over the annexations. Council of the European Union Press Release, *Illegal Annexation of Crimea and Sevastopol: EU Extends Sanctions by One Year*, (June 20, 2019), <https://www.consilium.europa.eu/en/press/press-releases/2019/06/20/illegal-annexation-of-crimea-and-sevastopol-eu-extends-sanctions-by-one-year/>. The U.S. has extended sanctions as well, although President Trump resisted the move, signaling doubt about the U.S.'s participation in sanctioning Russia's violations going forward. *U.S. Imposes New Sanctions on Russia for Crimea, Investments*, REUTERS (Nov. 8, 2018, 12:29 PM), <https://www.reuters.com/article/us-usa-russia-sanctions/u-s-imposes-new-sanctions-on-russia-for-crimea-investments-idUSKCN1ND2S3>; Patricia Zengerle, *Trump Administration Holds Off on New Russia Sanctions, Despite Law*, REUTERS (Jan. 29, 2018, 5:49 PM), <https://www.reuters.com/article/us-usa-russia-sanctions/trump-administration-holds-off-on-new-russia-sanctions-despite-law-idUSKBN1F12V7>.

any kind of legal resolution or effective international response.⁸⁴ Less powerful nations are generally not afforded the same lax responses.⁸⁵ With these realities in mind, the following analysis relies on a purely textual interpretation of international law combined with accepted notions of *jus ad bellum*.⁸⁶

84 Crimea is, after all, still under Russian control. Steven Pifer, *Five Years After Crimea's Illegal Annexation, the Issue Is No Closer to Resolution*, BROOKINGS (Mar. 18, 2019), <https://www.brookings.edu/blog/order-from-chaos/2019/03/18/five-years-after-crimeas-illegal-annexation-the-issue-is-no-closer-to-resolution/>.

85 The recent Iranian oil tanker controversy is illustrative of this disparity. A series of incidents, all attributed to Iran but absent at least publicly available evidence, in part prompted UK-controlled Gibraltar to seize an Iranian oil tanker. Iran responded by seizing a British oil tanker. The two parties agreed to return the respective tankers after some litigation on the matter in Gibraltar courts, but the international response did not end there. After the incidents, the U.S. created the “international maritime security construct” designed to “deter Iranian intervention against oil tankers in the area.” Bahrain, Australia, the UK, Saudi Arabia, and the United Arab Emirates count among the signatories. This rapid and fairly potent international response lies in sharp contrast to responses undertaken in the face of potential Russian or American UN Charter violations. Michael Saff, *Iran to Release British-Flagged Tanker Seized in Strait of Hormuz*, GUARDIAN (Sept. 22, 2019, 3:20 PM), <https://www.theguardian.com/world/2019/sep/22/iran-to-release-british-flagged-tanker-seized-in-strait-of-hormuz> (summarizing the incidents as the “alleged use of explosives against four oil tankers in the Gulf of Oman in May [2019], suspicious fires on two tankers in the same area in June and the attempted seizure of [a] British vessel in July”); Jorge Guerrero, *Iran Condemns, US Applauds Britain's Seizure of Iranian Oil Tanker at Gibraltar*, FRANCE 24 (July 4, 2019, 11:52 PM), <https://www.france24.com/en/20190704-iran-us-uk-syria-sanctions-seizure-iranian-oil-tanker>.

86 To do otherwise would render the analysis meaningless to this note's purpose of highlighting the legal severity of climate change. Countries in positions of immense power can functionally justify any use of force under the below categories, inasmuch as there will be little to no meaningful challenge to their justifications, however flimsy. Claiming that the EU as a collective could “get away with” launching a missile at a particularly pollutive factory does little to highlight the seriousness of climate change on its own merits. Focusing purely on the face and spirit of international law lays bare the threat of climate change absent the murkiness of global power structures.

A. *Humanitarian Intervention*

Use of force in humanitarian intervention is an ancient idea, though one that has fallen out of favor since World War II.⁸⁷ Returning to the international stage to justify NATO involvement in Serbia at the height of the Kosovo War,⁸⁸ the canon combines in its modern form a clever reading of the self-defense doctrine of the UN Charter and the “humanitarian requirements, human rights abuses by states, and invisible enemies” of the twenty-first century.⁸⁹

This emergent doctrine is rather simple: “[E]ven in the absence of an escalated armed conflict, the protection of basic human rights and state-sponsored armed aggression should allow for legitimate and legal humanitarian intervention by the international community unilaterally or by affected states.”⁹⁰ Justifications built in this framework have been broadly employed as recently as the NATO intervention in Libya and the U.S.-led airstrikes in Syria.⁹¹

“Humanitarian intervention” has already been used quite broadly to justify force in the twenty-first century, both to directly address the causes

⁸⁷ “There is also another question, whether a war for the subjects of another be just, for the purpose of defending them from injuries by their ruler. Certainly it is undoubted that ever since civil societies were formed, the ruler of each claimed some especial right over his own subjects . . . [But] if a tyrant . . . practices atrocities towards his subjects, which no just man can approve, the right of human social connection is not cut off in such case.” Andrew Field, *The Legality of Humanitarian Intervention and the Use of Force in the Absence of United Nations Authority*, 26 *MONASH U. L. REV.* 339, 342 (2000) (Hugo Grotius, 2 *De Jure Belli ac Pacis* 438 (Whewell trans., 1853) (1625)); *id.* at 334.

⁸⁸ *Id.* at 339. Despite NATO’s reliance on the humanitarian intervention justification, there is still considerable debate over the legality of the justification. Monica Anne Spitzer, *Eroding Sovereignty: A Humanitarian Intervention Justification for the Use of Force Against Non-State Terrorist Actors*, 34 *U. LA VERNE L. REV.* 289, 296 (2013); Vincent O. Nmehielle & John-Mark Iyi, *Obama’s Africa Policy on Human Rights, Use of Force and Humanitarian Intervention: In Whose Interest*, 7 *FLA. A & M U. L. REV.* 29, 42 (2011) (noting that some consider humanitarian intervention a use of force justification limited to powerful states).

⁸⁹ See Rohini Sen, *Use of Force and the Humanitarian Face of Intervention in the 21st Century*, 32 *WIS. INT’L L.J.* 457, 460 (2014).

⁹⁰ *Id.* at 463.

⁹¹ See *Policy Paper: Syria Action—UK government Legal Position*, *supra* note 9; Matthew Green, *To What Extent Was the NATO Intervention in Libya a Humanitarian Intervention?*, *E-INT’L RELS.* (Feb. 6, 2019), <https://www.e-ir.info/2019/02/06/to-what-extent-was-the-nato-intervention-in-libya-a-humanitarian-intervention/>; Theo Farrell, *Are the US-Led Air Strikes in Syria Legal—And What Does It Mean if They Are Not?*, *TELEGRAPH* (Sept. 23, 2014), <https://www.telegraph.co.uk/news/worldnews/middleeast/syria/11116792/Are-the-US-led-air-strikes-in-Syria-legal-and-what-does-it-mean-if-they-are-not.html>.

of humanitarian crises⁹² and to send messages of disapproval.⁹³ Taking the doctrine at face value, the damage wrought by climate change fits within the humanitarian intervention justification. Any given State could make a reasonable claim that the basic human rights of its citizens are being threatened by something like a rogue climate actor.⁹⁴ The doctrine does not necessarily require an armed conflict – an aggrieved nation could take actions to head off the worst polluters in an effort to secure the human rights of its citizens. If, as scientists now predict, dire effects of climate change will be felt in as little as forty years,⁹⁵ there is even a cognizable imminence (at least in the glacial scope of climate disaster). Indeed, climate change proceeds with a Newtonian inertia that by many accounts already requires immediate and potent change to stall and reverse.⁹⁶

It is hardly an open question that climate change will have serious detrimental impacts on human rights broadly.⁹⁷ Some have even wondered whether the rights of future generations are implicated by the inaction of the international community.⁹⁸ An atrocious chemical strike perpetrated by Assad in Syria was enough to justify force to prevent future humanitarian atrocities of the same kind.⁹⁹ It is not too far a leap to suggest that similar

92 For example, “no-fly zones,” usually foreign-State imposed restrictions on a State’s ability to operate military aircraft in an area and enforced by military force, are often considered and employed to prevent humanitarian crises and atrocities. John M. Broder, *U.S. and Allies Weigh Libya No-Fly Zone*, N.Y. TIMES (Feb. 27, 2011), <https://www.nytimes.com/2011/02/28/world/europe/28military.html>.

93 The missile strikes on Syria following a 2018 chemical attack did not practically disable the regime’s ability to use chemical weapons but sent a symbolic message of extreme disapproval of the attacks. *See supra* note 92.

94 A “rogue climate actor” would be a State which intentionally or knowingly causes extreme pollution. For instance, the recent case of Australia’s mishandling of the fires in its territory would likely not rise to the level of “rogue climate actor,” as the Australian response is likely a result of mere negligence. Giovanni Torre, *Australia Bushfires: Scott Morrison Admits Regret over His Response to Fires and Promises Inquiry*, TELEGRAPH (Jan. 12, 2020), <https://www.telegraph.co.uk/news/2020/01/12/australia-bushfires-scott-morrison-admits-regret-response-fires/>. Had the Australian government been intentionally setting the fires, they would probably qualify.

95 Jennifer Ludden & Christopher Joyce, *New U.S. Climate Assessment Forecasts Dire Effects on Economy, Health*, NPR (26. 26, 2018, 4:59 PM), <https://www.npr.org/2018/11/26/670812889/what-you-need-to-know-about-the-new-u-s-climate-assessment>.

96 *Is It Too Late to Prevent Climate Change?*, NASA, <https://climate.nasa.gov/faq/16/is-it-too-late-to-prevent-climate-change/> (last updated Jan. 25, 2021).

97 *See supra* notes 1, 4, 5.

98 Astra Taylor, *Bad Ancestors: Does the Climate Crisis Violate the Rights of Those Yet to Be Born?*, GUARDIAN (Oct. 1, 2019, 1:00 PM), <https://www.theguardian.com/environment/2019/oct/01/bad-ancestors-climate-crisis-democracy>.

99 *See supra* note 9.

force could be used against a State whose actions have less immediate but far broader implications for not just their citizens, but those of every nation.

One practical bar to applying humanitarian intervention doctrine to this context is the problem of traceability. In every intervention undertaken under the doctrine thus far, there has been a distinct actor taking clear actions in violation of specific citizens' rights.¹⁰⁰ However, it would be possible to identify a particularly egregious rogue climate actor and use force to send a message to the broader community of rogue climate actors, much as the force used against the Assad regime sent a message reaffirming international disavowal of chemical weapons as a legitimate tool of warfare.¹⁰¹ Alternatively, the sheer scale of the threat posed by the continuation of the international community's environmental course could justify the use of force in more fringe cases. The international community will often accept, if not fully embrace, the use of force to prevent mass casualties.¹⁰²

100 See *supra* notes 91-92.

101 Cf. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, *opened for signature* Jan. 13, 1993, 1975 U.N.T.S. 45.

102 The killing of Osama bin Laden, although justified under the broad Obama Doctrine interpretation of self-defense, could feasibly have been justified under humanitarian intervention grounds given the threat to human rights posed by the former al Qaeda leader's continued operation. Cf. Pete Williams, *Bin Laden Killing Was Legally Justified, Holder Says*, NBC NEWS (May 4, 2011, 3:26 AM), http://www.nbcnews.com/id/42900659/ns/world_news-south_and_central_asia/t/bin-laden-killing-was-legally-justified-holder-says/#.Xh6_QchKiUk.

B. Self-Defense

Self-defense has been broadly accepted in the international community as a justification for the use of force since at least the seventeenth century.¹⁰³ While the precise features of the self-defense justification have changed over the years, interpretation of UN Charter Article 51 and historical precedent have illuminated a set of guiding principles.¹⁰⁴ Self-defense requires at a minimum the threat of an imminent, armed attack.¹⁰⁵ The use of force must be a last resort, with no practical alternative.¹⁰⁶ Finally, the use of force in self-defense is justifiable in the face of imminent or actual attack from non-State actors as well as States, though it must be in conformity with *jus in bello*.¹⁰⁷

The use of force to combat climate threats is potentially justifiable under self-defense theory. Environmentally irresponsible States are not carrying out armed attacks or presenting any threat of doing so (at least as far as their environmental policy is concerned). Armed attacks implicate at the very least some kind of intentional, aggressive action.¹⁰⁸ Even in the nearly

103 See *Hugo Grotius*, STAN. ENCYC. PHIL. <https://plato.stanford.edu/entries/grotius/#JusWarDoc> (last updated Jan. 8, 2021) (listing self-defense as one of the justifications of war); Ian Brownlie, *The Use of Force in Self-Defense*, 37 BRIT. Y. B. INT'L L. 183, 184–87 (1961) (citing several examples of nineteenth century writers expounding on the use of force in self-defense).

104 See *The Chatham House Principles of International Law of the Use of Force in Self-Defense*, 55 INT'L & COMP. L.Q. 963, 964–71 (2006). These principles do not represent the final word on self-defense but are at least an acceptable starting point for the purposes of this note. The Obama Doctrine, for example, broadened the scope of the self-defense justification considerably. Memorandum Opinion for the Attorney General, Authority to Use Military Force in Libya, 35 O.L.C. 20 (2011), <https://fas.org/irp/agency/doj/olc/libya.pdf>. Recent use of force decisions under the Trump Administration indicate attempts at still further broadening self-defense doctrine. See *supra* note 85.

105 *Chatham House Principles*, *supra* note 104, at 964–65 (“[T]he threat of an imminent attack . . . is widely, though not universally, accepted.”).

106 *Id.* at 966.

107 *Id.* at 969, 971. *Jus in bello* is the international humanitarian law to be followed in the conducting of war and is formed by a complex web of international norms, treaties, and conventions. *What Are Jus ad Bellum and Jus in Bello?*, *supra* note 16; *International Human Rights Law*, UNITED NATIONS HUM. RTS. OFF. HIGH COMM’R, <https://www.ohchr.org/en/professionalinterest/pages/internationalaw.aspx> (last visited Jan. 31, 2021).

108 “Attacks” under the Geneva Convention, for example, are “acts of violence against the adversary, whether in offense or in defence.” Protocols Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 49(1), June 8, 1977, 1125 U.N.T.S. 3, June 8, 1977. Even this definition does not necessarily encompass all forms of attack. The classification of cyber warfare has proven vexing (is a cyberattack “armed” for the purposes of self-defense doctrine?), but even such “attacks” involve malicious, direct action rogue climate actions generally do not display. Michael N. Schmitt, “Attack” as a Term of Art in *International Law: The Cyber Operations Context*, 4TH INT’L CONF. ON CYBER CONFLICT 283, 286 (2012).

inconceivable event that a State's climate action was cognizable as an "armed attack," it is unlikely a State seeking to use force to stop the climate action would meet the vital imminence requirement.¹⁰⁹ Damages from climate change are not "imminent,"¹¹⁰ and it is not at all clear that the actions (or inaction) of one State constitutes a cognizable "threat" to any other individual State.¹¹¹ For a State's environmental decision to constitute an attack justifiable with an armed response, it would have to imminently threaten the lives of another State's citizens.¹¹²

There is a possible argument that "imminence" and "attack" are flexible terms, especially when the gravity of harm is particularly high, as it is in the

109 The importance of imminence in analyzing the legality of use of force as justified by self-defense is well illustrated in the recent U.S. assassination of Iranian General Qasem Soleimani. Following President Trump's order to kill the general on January 3, 2020, his administration attempted to justify the killing as an act of self-defense. Mustafa Salim, Missy Ryan, Liz Sly & John Hudson, *In Major Escalation, American Strike Kills Top Iranian Commander in Baghdad*, WASH. POST (Jan. 3, 2020, 2:02 AM), https://www.washingtonpost.com/world/national-security/defense-secretary-says-iran-and-its-proxies-may-be-planning-fresh-attacks-on-us-personnel-in-iraq/2020/01/02/53b63f00-2d89-11ea-bcb3-ac6482c4a92f_story.html; Karen DeYoung, *Senior Administration Officials Struggle to Explain Intelligence Behind Killing of Soleimani*, WASH. POST (Jan. 12, 2020, 8:50 PM), https://www.washingtonpost.com/national-security/senior-administration-officials-struggle-to-explain-intelligence-behind-killing-of-soleimani/2020/01/12/daf7e896-3582-11ea-bf30-ad313e4ec754_story.html. The main hurdle the administration faced was the lack of intelligence pointing toward an imminent threat. While some, including the president, claimed that Soleimani was about to carry out attacks on four U.S. embassies, others in the administration stated at most that there "was an intent to target the U.S. embassy in Baghdad," raising doubts that American lives were imminently threatened. *Id.* This apparent lack of imminence led some commentators to reason that the assassination was not justifiable under self-defense theories and thus was illegal under international law. Neil Schoenherr, *WashU Expert: Soleimani Killing Likely Unlawful*, SOURCE (Jan. 7, 2020), <https://source.wustl.edu/2020/01/washu-expert-soleimani-killing-not-legal/>.

110 Even the most alarmist of estimates posits "12 years to save the planet." Michael Le Page, *Climate Change: How Long Do We Really Have to Save the Planet from Catastrophe?*, POST MAG. (Jan. 19, 2019, 10:00 PM), <https://www.scmp.com/magazines/post-magazine/long-reads/article/2182663/climate-change-how-long-do-we-really-have-save>.

111 China, the world's largest gross carbon dioxide emitter at 10.06GT, accounts for only 28% of the top twenty gross carbon dioxide emitters from fuel combustion; hardly the particularity of such justifications as the post-9/11 Authorization for Use of Military Force. *Each Country's Share of CO2 Emissions*, UNION CONCERNED SCIENTISTS (Aug. 12, 2020), <https://www.ucsusa.org/resources/each-country-share-co2-emissions>; Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

112 José Luis Aragon Cardiel, Amanda Davis & Lauranne Macherel, *Modern Self-Defense: The Use of Force Against Non-Military Threats*, 49 COLUM. HUM. RTS. L. REV. 99, 132 (2018). The authors also posit several examples of historical events that may have constituted environmental attacks amenable to a "self-defense" use of force response, such as "the British destroying two major dams in the Ruhr Valley during World War II, killing 1,300 people" and "the Chinese dynamiting the Huayankow dyke on the Yellow River during the Second Sino-Japanese War in 1938, killing several hundred thousand people." *Id.* Their last example, the Iraqi burning of Kuwaiti oil wells during the 1991 Gulf War, is particularly interesting. It is suggested that, had the action not taken place during an ongoing conflict, the burnings alone (absent any casualties) would have justified a "self-defense" action. *Id.*

climate context. An oft-repeated warning from climate scientists is that, in order to head off the worst effects of climate change, the world needs to start making changes within the next few years.¹¹³ As such, an imminent attack of the environmental variety could merely be described as something like intentional or knowing pollution. A State which knowingly caused such extreme pollution could be said to have launched an imminent attack that would merely take decades to land – as though they had fired a missile into the air that traveled for years. The irreversibility of rogue climate action could create a sense of imminent attack without imminent effects, perhaps forging (albeit certainly not paving) a path to legal use of force through the self-defense justification in the environmental context.

C. *Threats to International Peace and Security*¹¹⁴

Where humanitarian intervention and self-defense justifications arise out of a mixture of international common and statutory law, justifying the use of force to address a “threat to international peace and security” is a distinctly statutory effort. Article 42 of the UN Charter allows the UN Security Council (“UNSC”) to “take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security.”¹¹⁵ In effect, threats the UNSC identifies and classifies under Article 42 may legally be met with force. The UNSC uses this power, though often without explicit reference, for efforts such as the establishment of peacekeeping missions.¹¹⁶ If the Security Council were to reach a consensus that a State’s climate actions constituted a threat to international

113 See Bob Berwyn, *What Does ‘12 Years to Act on Climate Change’ (Now 11 Years) Really Mean?*, INSIDE CLIMATE NEWS (Aug. 27, 2019), <https://insideclimatenews.org/news/27082019/12-years-climate-change-explained-ipcc-science-solutions>; Jonathan Watts, *We Have 12 Years to Limit Climate Change Catastrophe, Warns UN*, GUARDIAN (Oct. 8, 2018, 2:23 AM), <https://www.theguardian.com/environment/2018/oct/08/global-warming-must-not-exceed-15c-warns-landmark-un-report>.

114 This Part departs somewhat from the limited, facial analysis outlined in the introduction to this Section. Unlike self-defense and humanitarian intervention, this justification for war is, at least under the UN Charter, the sole purview of the UN Security Council. U.N. Charter, art. 42.

115 *Id.*

116 The tenets of Article 42 were used to justify such UN interventions as those in Rwanda, Somalia, and Yugoslavia in the 1990s. Links to Actions with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression Under Article 42 of the U.N. Charter, UNITED NATIONS SEC. COUNCIL, <https://www.un.org/securitycouncil/content/repertoire/actions> (last visited Jan. 31, 2021).

peace and security under Article 42, use of force would necessarily be justified by statute to address the threat.

Functionally, however, it is highly unlikely that the UNSC would ever reach such a consensus in the current international climate.¹¹⁷ First, the very nature of meeting the threat of climate change with force against individual States is a radical departure from the normal peacekeeping goals of Article 42 applications. Further, not all members of the UNSC¹¹⁸ are so concerned with climate change as to advocate for *any* international response, let alone a response which constitutes the UNSC's approval of military action.¹¹⁹ In effect, a State seeking to compel climate action through the use of force faces a slim prospect of success by turning to the UNSC and Article 42.

117 The Security Council has been unable, for example, to successfully agree to a resolution meaningfully addressing the threat to international security represented by the Syrian civil war, despite the deaths of many non-Syrians in the course of the conflict. *See, e.g., Security Council Rejects Two Draft Resolutions on Situation in Syria amid Divisions over Idlib Truce, Armed Groups*, UN (Sep. 19, 2019), <https://www.un.org/press/en/2019/sc13956.doc.htm>; PAUL CONROY, UNDER THE WIRE: MARIE COLVIN'S FINAL ASSIGNMENT (2013) (discussing a fatal attack on a foreign media center by the Syrian military in Homs, Syria that killed famous journalist Marie Colvin and other foreign journalists). The ability of the Council's permanent members to unilaterally veto resolutions means that it is exceptionally difficult to get resolutions implicating competing interests through the Security Council. Michelle Nichols, *Russia Casts 13th Veto of U.N. Security Council Action During Syrian War*, REUTERS (Sept. 19, 2019, 11:16 AM), <https://www.reuters.com/article/us-syria-security-un/russia-casts-13th-veto-of-un-security-council-action-during-syrian-war-idUSKBNIW42CJ>.

118 The UNSC is composed of five permanent members, China, France, the Russian Federation, the United Kingdom, and the United States, as well as ten non-permanent members elected by the General Assembly for two-year terms. Current Members of the U.N. Security Council, UNITED NATIONS SEC. COUNCIL, <https://www.un.org/securitycouncil/content/current-members> (last visited Jan. 31, 2021).

119 *See supra* note 30. The United States under the Trump administration would likely display similar reticence, having watered-down or outright denied even symbolic measures against climate change in recent years. Emily Stewart, *The US Got Its Own Section in the G20 Statement on Climate Change*, VOX (Dec. 3, 2018, 10:30 AM), <https://www.vox.com/policy-and-politics/2018/12/3/18123684/trump-g20-climate-change-paris-agreement>; Jeff Mason, *Trump, on Climate, Says He Won't Jeopardize U.S. Wealth on 'Dreams'*, REUTERS (Aug. 26, 2019, 11:07 AM), <https://www.reuters.com/article/us-g7-summit-trump-climatechange/trump-on-climate-says-he-wont-jeopardize-u-s-wealth-on-dreams-idUSKCNI1VG1RU>.

D. Conclusion

Use of force in response to climate change is reasonably justifiable under the doctrine of humanitarian intervention and is potentially justifiable under both self-defense doctrine and Article 42 designation. The fact that there are potential justifications for the use of force in addressing climate change is indicative of the gravity of the harm faced. Genocide, human rights violations, war crimes, and crimes of aggression have each at times been successfully cited to justify the use of force in intervention. Naturally, these heinous crimes were also met with substantial nonmilitary international effort. Crimes were codified, jurisdictional lines expanded, and most importantly, courts were established. Although it appears that force would be justifiable to compel action on climate change, the international response to the ever-growing environmental crisis created by State actions has been lukewarm at best. The Paris Agreement is not enough.

It bears restating that use of force is a counterproductive response to climate change. War is costly in every sense of the word, be it in human lives, resources, or further harm to the environment. This exercise is intended to highlight the gravity of the threat to human lives posed by the warming earth rather than to advocate for military action against polluters.

That said, the international response to climate change must be escalated to keep pace with the response to crimes such as genocide and human rights violations. Though this escalation could take many forms, the experience of the Rome Statute illustrates that the way forward must include stark codification of international climate law¹²⁰ and the establishment of a court with the power to enforce these laws.¹²¹ Though not without its failures and detractors, the ICC and the Rome Statute have proven successful at binding nations to a course bent on eradicating four of the worst crimes humanity can commit. As it stands, humanity is well on its way to committing a fifth: the wholesale destruction of our environment and

120 Just what form these laws should take is beyond the competence of this writer. A panel of scientists and policymakers would be needed to find a nexus between what is required to stave off the worst effects of climate change and what is feasible for any given State to accomplish. Incentives might well be required to get nations on board; as States were and are resistant to the Rome Statute, a similar climate statute would undoubtedly face great hurdles.

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the extinction of our species. A similar system to that established by the Rome Statute may be our best hope at achieving similar success and preventing, and perhaps even reversing, the impending doom of manmade climate change.

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