

Syria: A Case Study in International Law

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I. INTRODUCTION

The geographic scope of the conflict in Syria, the number and nature of the parties involved, and the brutality of the violence have combined to create a situation that implicates an extraordinary range of international law issues.

The Syrian conflict is comprised of myriad non-international armed conflicts—and arguably several international armed conflicts—being waged by the Syrian Government, ISIS¹, as many as a thousand organized armed groups,² several dozen States,³ and more than ten thousand foreign fighters.⁴ This has resulted in at least 450,000 dead,⁵ more than four-and-a-half-million refugees,⁶ and six-and-a-half-million internally displaced Syrians.⁷ The conflict has spawned innumerable

¹ This organization is alternatively known as the Islamic State for Iraq and the Levant (ISIL), the Islamic State (IS), or by its Arabic acronym, Daesh. See Maria Vultaggio, *ISIL, ISIS, Islamic State, Daesh: What's the Difference*, INTERNATIONAL BUSINESS TIMES (Nov. 16, 2015) <http://www.ibtimes.com/isil-isis-islamic-state-daesh-whats-difference-2187131>.

² Eric Schmitt & Mark Mazzetti, *U.S. Intelligence Official Says Syrian War Could Last for Years*, N.Y. TIMES (Jul. 20, 2013) http://www.nytimes.com/2013/07/21/world/middleeast/us-intelligence-official-says-syrian-war-could-last-for-years.html?_r=0 (the U.S. Defense Intelligence Agency estimates as many as 1,200 small groups).

³ *The Global Coalition to Counter ISIL*, U.S. DEPT. OF STATE, <http://www.state.gov/s/seci/> (last visited Aug. 30, 2016).

⁴ Thomas Hegghammer, *The Rise of Muslim Foreign Fighters: Islam and the Globalization of Jihad*, INT'L SECURITY, Winter 2010/11 at 53, 53.

⁵ Priyanka Boghani, *A Staggering New Death Toll for Syria's War—470,000*, FRONTLINE (Feb. 11, 2016), <http://www.pbs.org/wgbh/frontline/article/a-staggering-new-death-toll-for-syrias-war-470000/>.

⁶ *Syrian Arab Republic*, U.N. OFFICE FOR THE COORDINATION OF HUMANITARIAN AFFAIRS, <http://www.unocha.org/syria> (last visited Aug. 30, 2016).

⁷ *Id.*

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war crimes,⁸ including daily direct attacks on civilians,⁹ multiple uses of chemical weapons,¹⁰ and countless indiscriminate attacks using artillery,¹¹ cluster munitions,¹² barrel bombs¹³ and fuel-air bombs.¹⁴

State involvement is an issue of singular complexity. Participant States are conducting operations in Syria based on a variety of arguments, including individual self-defense, collective self-defense, consent, and (arguably) humanitarian intervention.¹⁵ Some States have relied on a single legal basis for their actions in Syria, while others cite multiple bases.¹⁶ Depending on the State, the nature of their involvement ranges from logistical support, to arming and training proxy forces, to direct action on the ground and in the air.¹⁷

The conflict in Syria presents an opportunity to consider the international law issues both in the context of Syria and more broadly with regards to all armed conflicts. After a review of the origins of the conflict, this article is divided into two broad parts: issues arising in the *jus ad bellum* and those arising in *jus in bello*. In the first part, the article considers questions regarding the use of force in Syria, including

⁸ See generally, U.N. Human Rights Council, *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, U.N. Doc. A/HCR/S-17/2/Add.1 (Nov. 23, 2011) [hereinafter Report 1]; U.N. Human Rights Council, *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, U.N. Doc. A/HRC/19/69 (Feb. 22, 2012) [hereinafter Report 2]; U.N. Human Rights Council, *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, U.N. Doc. A/HRC/21/50 (Aug. 16, 2012) [hereinafter Report 3]; U.N. Human Rights Council, *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, U.N. Doc. A/HRC/22/59 (Feb. 5, 2013) [hereinafter Report 4]; U.N. Human Rights Council, *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, U.N. Doc. A/HRC/23/58 (Jul. 18, 2013) [hereinafter Report 5].

⁹ See Report 1, *supra* note 8; Report 2, *supra* note 8; Report 3, *supra* note 8; Report 4, *supra* note 8; Report 5, *supra* note 8.

¹⁰ See *id.*

¹¹ See generally, Report 3, *supra* note 8.

¹² *Id.*

¹³ See generally, Report 4, *supra* note 8, 39.

¹⁴ See generally, Report 2, *supra* note 8.

¹⁵ See *infra* Section III.

¹⁶ See *infra* Section III.

¹⁷ See *Syria Crisis: Where Key Countries Stand*, BBC NEWS (Oct. 30, 2015), <http://www.bbc.com/news/world-middle-east-23849587>.

issues arising from the arming and training of proxies. This part will focus largely on the actions of the United States, as its activities have implicated many of the topics addressed in this section. The second part addresses issues of conflict classification, the conduct of hostilities, the nature of foreign fighters, and the implications of a cease-fire.

II. BACKGROUND

The conflict finds its origins in the brutal repression of anti-government demonstrations in early 2011. The first protests occurred in February following the arrest and alleged torture of several teenagers who had painted revolutionary slogans on the wall of their school in the southern city of Dar'a.¹⁸ Within weeks, the Syrian government responded with a violent crackdown utilizing both internal security forces and the military.¹⁹ By May, military operations had commenced in a number of other cities, including Baniyas, Homs, Ar Rastan, and the outskirts of Damascus.²⁰ In response, a number of opposition groups began forming throughout the country.²¹

While violence between the government and opposition forces continued in southern Syria, Syrians who had fled to Turkey began

¹⁸ *Guide: Syria Crisis*, BBC NEWS (Apr. 9, 2012), <http://www.bbc.com/news/world-middle-east-13855203> (reporting 14 students were arrested after painting the slogan “The People Want to Downfall of the Regime”).

¹⁹ *Statement by the Deputy High Commissioner for the Human Rights Council Special Session on Syria*, OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS (Apr. 29, 2011), <http://newsarchive.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10968&LangID=E> (By the end of April, 2011 “[t]anks have been deployed and shelled densely-populated areas. The delivery of food has been impeded. Access to electricity has been cut. And transportation systems have been shut down. There have been reports of snipers firing on persons attempting to assist the injured or remove dead bodies from public areas.”).

²⁰ *Syria: Tanks “Deploy Around Rastan” After Protests*, BBC NEWS (May 4, 2011), <http://www.bbc.com/news/world-middle-east-13279262>.

²¹ ELIZABETH O’BAGY, INSTIT. FOR THE STUDY OF WAR, MIDDLE EAST SECURITY REPORT 9: THE FREE SYRIAN ARMY (Mar. 2013), <http://www.understandingwar.org/sites/default/files/The-Free-Syrian-Army-24MAR.pdf>; Liam Stack, *In Slap at Syria, Turkey Shelters Anti-Assad Fighters*, N.Y. TIMES (Oct. 27, 2011), <http://www.nytimes.com/2011/10/28/world/europe/turkey-is-sheltering-antigovernment-syrian-militia.html>.

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coalescing into groups seeking to provide political structure and support to the opposition movement. In July, defectors from the Syrian military formed the Free Syrian Army (FSA) in a refugee camp in Turkey.²² Less than a month later, the Syrian National Council, which would later become the most prominent opposition group, was established in Istanbul.²³

The violence continued to spread through the summer of 2011, escalating to the point that, on August 3, the United Nations Security Council issued a presidential statement expressing “its grave concern at the deteriorating situation in Syria,” condemning the widespread violations of human rights and the Syrian authorities’ use of force against civilians by, and calling on “the Syrian authorities to alleviate the humanitarian situation.”²⁴

The United Nations Human Rights Council took the additional step of establishing the Commission of Inquiry under the auspices of the UN Human Rights Council in September.²⁵ The Commission’s mandate is

to investigate all alleged violations of international human rights law . . . in . . . Syria[, . . . to establish the facts and circumstances that may amount to such violations and of the crimes perpetrated and, where possible, to identify those responsible with a view of ensuring that perpetrators of violations, including those that may constitute crimes against humanity, are held accountable.²⁶

By late 2011, the FSA counted twenty-two loosely organized separate military forces as subordinate units fighting in a very loose

22 JOSEPH HOLLIDAY, INST. FOR THE STUDY OF WAR, MIDDLE EAST SECURITY REPORT 3: SYRIA’S ARMED OPPOSITION 14 (Mar. 2012), http://www.understandingwar.org/sites/default/files/Syrias_Armed_Opposition.pdf.

23 Louise Arimatsu & Mohbuba Choudhury, *The Legal Classification of the Armed Conflicts in Syria, Yemen, and Libya*, CHATHAM HOUSE, 10 (Mar. 2014), https://www.chathamhouse.org/sites/files/chathamhouse/home/chatham/public_html/sites/default/files/20140300ClassificationConflictsArimatsuChoudhury1.pdf.

24 *Statement by the President of the Security Council*, U.N. Doc. S/PRST/2011/16 (Aug. 3, 2011).

25 Report 1, *supra* note 8, at 4.

26 *Id.*

organization,²⁷ and by November, the Syrian government had commenced military operations throughout the country.²⁸ The Syrian government's crackdown was so intense that, in the same month, the Arab League took the extraordinary step of suspending Syria's membership.²⁹ Near the same time, the Human Rights Council, noting that 3,500 civilians had been killed by State forces since March, concluded, "The substantial body of evidence gathered by the commission indicates that . . . gross violations of human rights have been committed by Syrian military and security forces since the beginning of the protests."³⁰

By January 2012 the *al-Nusra* Front (also known as *al-Qaeda* in the Levant or *Jabhat al-Nusra*) began operations against the Syrian government.³¹ In March, the FSA announced the establishment of the Joint Military Command of the Syrian Revolution and creation of "local military councils" in various cities.³² The intent of the reorganization was to solidify the structure of the FSA.³³

²⁷ Report 1, *supra* note 8, at 15.

²⁸ *Id.* at 10 (this includes operations in Dar'a, Homs, Hama, Dayr Az Zawr, Damascus, Alqaseer, Bab Amr, Bab Al Sibaa, Bab Hood, and Karm Al Zaitoon).

²⁹ Neil MacFarquhar, *Arab League Votes to Suspend Syria Over Crackdown*, N.Y. TIMES (Nov. 12, 2011), <http://www.nytimes.com/2011/11/13/world/middleeast/arab-league-votes-to-suspend-syria-over-its-crackdown-on-protesters.html> (eighteen of the twenty-two members voted to suspend their membership; only Yemen and Lebanon opposed the action).

³⁰ Report 1, *supra* note 8, at 8.

³¹ Despite their affiliation with *al-Qaeda*, their focus thus far has been on Assad rather than the west. *Al-Qaeda* leader Ayman al-Zawahiri has specifically directed the *al-Nusra* Front to focus operations on Syria and cease operations against the west. See Charles Lister, *An Internal Struggle: Al Qaeda's Syrian Affiliate is Grappling with its Identity*, WORLD REPORT (May 31, 2015), http://www.huffingtonpost.com/charles-lister/an-internal-struggle-al-q_b_7479730.html.

³² Report 3, *supra* note 8, at 61.

³³ O'BAGY, *supra* note 21. In its second report, the United Nations Independent Commission of Inquiry on the Syrian Arab Republic (Commission of Inquiry) used the term FSA "to refer to any local armed group whose members identify themselves as belonging to the FSA, without this necessarily implying that the group has been recognized by the FSA leadership or obeys the command of the FSA leadership abroad." Report 2, *supra* note 8, at 6. The Commission of Inquiry found the FSA lacked the requisite organization to trigger application of the law of armed conflict. *Id.*

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In its third report released in August, the Commission of Inquiry documented “corroborated accounts of indiscriminate shelling” in cities throughout Syria,³⁴ and further detailed tactics being employed by the Syrian government:

Most unlawful killings occurred in the context of attacks against the strongholds of anti-Government armed groups. According to the most prominent pattern, attacks began with a blockade of the area and shelling, followed by an assault by ground forces, including special forces and *Shabbiha*. Snipers were used extensively. On securing the area, Government forces undertook house-to-house searches. Defectors, activists and fighting-age men were systematically sought out during these operations. Wounded or captured anti-Government fighters were executed. In some cases, family members of fighters, defectors and activists, as well.³⁵

This report also documented both the first use of chemical weapons by the Syrian government in September,³⁶ and the involvement of pro-government militias (the *Shabbiha*).³⁷ As documented by the Commission of Inquiry, the *Shabbiha* have been used to commit many of the ethnically charged war crimes.³⁸ By the end of the year, the FSA had moved their headquarters from Turkey to northern Syria³⁹ and convened a large meeting in Antalya, Turkey to create a unified command and select new leadership.⁴⁰

34 Report 3, *supra* note 8, at 17.

35 *Id.* at 12.

36 *Id.* at 21.

37 *Id.* at 8. “*Shabbiha*” is also often romanized “*Shabiha*.”

38 Report 3, *supra* note 8, at 1 (“The *Shabbiha* were identified as perpetrators of many of the crimes described in the present report.”).

39 Anne Barnard & Hania Mourtada, *Rebels Announce Move of Headquarters From Turkey to “Liberated” Syria Territory*, N.Y. TIMES (Sept. 22, 2012), <http://www.nytimes.com/2012/09/23/world/middleeast/rebels-move-command-from-turkey-to-syria.html>.

40 Bassem Morue & Ben Hubbard, *Syria Rebels Get New Leadership in Bid to Unite*, AP (Dec. 8, 2012), <http://bigstory.ap.org/article/syrian-rebels-create-new-unified-military-command> (“Disorganization has bedeviled Syria’s rebel movement

The conflict widened throughout 2013. The Commission's fourth report, dated February 5, 2013, reported Hezbollah involvement,⁴¹ and the use of chemical weapons in four additional attacks in 2013.⁴² Early 2013 also marked the initiation of action by ISIS within Syria.⁴³ At one point, ISIS controlled more than 34,000 square miles of territory in Syria and Iraq in 2014, and counted an estimated 30,000 as members.⁴⁴

Between 2013 and 2015 the violence steadily escalated. In this period there have been several events of particular importance to the shape of the conflict. First, on the night of May 15, 2015, U.S. special operations executed a raid in al-Amr in eastern Syria designed to capture Abu Sayyaf, a senior leader in ISIS.⁴⁵ This is, to date, one of only two publically acknowledged U.S. military operations on the ground in Syria. Second, on September 23, 2014, the U.S.-led coalition began airstrikes within Syria.⁴⁶ Third, Russia began airstrikes in Syria on

since its birth late last year [T]he movement has never actually been an army.”); *Syrian Rebels Elect Head of New Military Command*, REUTERS (Dec. 8, 2012), <http://www.reuters.com/article/us-syria-crisis-rebels-idUSBRE8B70AJ20121208>.

41 Report 4, *supra* note 8, at 57; see also MARISA SULLIVAN, INSTIT. FOR THE STUDY OF WAR, MIDDLE EAST SECURITY REPORT 19: HEZBOLLAH IN SYRIA (Apr. 2014), HTTP://WWW.UNDERSTANDINGWAR.ORG/SITES/DEFAULT/FILES/HEZBOLLAH_SULLIVAN_FINAL.PDF.

42 Report 5, *supra* note 8, at 21 (“on Khan Al-Asal (Aleppo), on 19 March; Uteibah (Damascus) on 19 March; Sheikh Maqsood neighbourhood (Aleppo) on 13 April; and Saraqib (Idlib), on 29 April”).

43 Report 4, *supra* note 8, at 12. Other reports show ISIS initiating operations in Syria in March 2013. See Umberto Bacchi, *ISIS: Timeline of the Islamic State*, INT'L BUS. TIMES (Jun. 29, 2015), <http://www.ibtimes.co.uk/isis-timeline-islamic-state-1508465>. As is unfortunately well understood at this point, ISIS “is a transnational Sunni Islamist insurgent and terrorist group that has seized areas of Iraq and Syria since 2013, threatening the wider region.” Christopher M. Blanchard et. al, *The “Islamic State” Crisis and U.S. Policy*, CONG. RES. SERV. (Jun. 11, 2015).

44 Report 4, *supra* note 8, at 12.

45 *Statement by NSC Spokesperson Bernadette Meehan on Counter-ISIL Operation in Syria*, WHITE HOUSE OFF. OF PRESS SECRETARY (May 16, 2015), <https://www.whitehouse.gov/the-press-office/2015/05/16/statement-nsc-spokesperson-bernadette-meehan-counter-isil-operation-sy-1>.

46 President Barack Obama, *Statement by the President: Airstrikes in Syria* (Sept. 23, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/09/23/statement-president-airstrikes-syria>.

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September 30, 2015,⁴⁷ and Turkey shot down a Russian fighter jet allegedly over Turkish airspace on November 24, 2015.⁴⁸ Finally, several cease-fires have taken effect and fallen apart.⁴⁹

III. JUS AD BELLUM

A. *Use of Force*

Article 2(4) of the UN Charter prohibits the “threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.”⁵⁰ The prohibition on the use of force is considered a preemptory norm.⁵¹ There are two charter-based exceptions—U.N. Security Council action pursuant to Articles 39 and 42 of the charter, and self-defense pursuant to Article 51.⁵² Extra-charter based exceptions include consent, and (arguably) humanitarian intervention.

47 Patrick J. McDonnell, W.J. Hennigan & Nabith Bulos, *Russia Launches Airstrikes in Syria amid U.S. Concern about Targets*, L.A. TIMES (Sep. 30, 2015), <http://www.latimes.com/world/europe/la-fg-kremlin-oks-troops-20150930-story.html>.

48 Tulay Karadeniz & Maria Kiselyova, *Turkey Downs Russian Warplane Near Syria Border, Putin Warns of “Serious Consequences,”* REUTERS (Nov. 25, 2015), <http://www.reuters.com/article/us-mideast-crisis-syria-turkey-idUSKBN0TD0IR20151124>.

49 The first cease-fire was orchestrated by the U.S. and Russia as co-chairs of the “International Syria Support Group;” a separate, parallel peace process has been championed by UN Special Envoy for Syria, Staffan de Mistura. See *Statement of the International Syria Support Group*, EUROPEAN UNION (Nov. 14, 2015), http://eeas.europa.eu/statements-eeas/2015/151114_03_en.htm; Tom Miles et. al., *U.N. Announces Start of Syria Peace Talks as Government Troops Advance*, REUTERS (Feb. 1, 2016), <http://www.reuters.com/article/us-mideast-crisis-syria-idUSKCN0VA2OT>.

50 *Armed Activities on the Territory of Congo (Dem. Rep. of the Congo v. Uganda)*, 2005 I.C.J. 168, ¶ 35 (Dec. 19, 2005) [hereinafter *Armed Activities*].

51 *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)* 1986 I.C.J. 226, ¶ 190 (June 27, 1986) [hereinafter *Nicaragua*]; see also *Draft Articles on the Law of Treaties with Commentaries 1966*, [1966] 2 Y.B. Int’l L. Comm’n 187, 247, U.N. Doc. A/CN.4/SER.A/1966/Add. 1 [hereinafter *Articles*] (“[T]he law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of *jus cogens*.”).

52 U.N. Charter art. 39, 42.

Where a State acts in self-defense or with the consent of the territorial State, the basis of action provides a legal justification for taking actions that would otherwise violate Article 2(4). The basis of action also provides legal justification to the principle of customary international law that requires “every State to respect the territorial sovereignty of others.”⁵³

1. Exceptions to the Prohibition

i. Self-Defense

Article 51 of the UN Charter provides that States have an “inherent right of individual or collective self-defense if an armed attack occurs.”⁵⁴ Self-defense is the most commonly invoked grounds for action in Syria. This section will first consider self-defense generally, then collective self-defense, then individual self-defense against non-State actors.

Beyond the requirement of an armed attack, the exercise of self-defense (whether individual or collective) must be necessary,⁵⁵ proportional,⁵⁶ and immediate.⁵⁷ To be necessary, the use of force must be required “because no practicable alternative means of redress is within [the State’s] reach.”⁵⁸ Proportionality, in turn, requires the force

⁵³ *Nicaragua*, 1986 I.C.J. 226, ¶ 213.

⁵⁴ U.N. Charter, art. 51.

⁵⁵ *Nicaragua*, 1986 I.C.J. 226, ¶ 94 (“[W]hether the response to the [armed] attack is lawful depends on observance of the criteria of the necessity and the proportionality of the measures taken in self-defence.”); *Oil Platforms (Iran v. U.S.)*, 2003 I.C.J. 161, ¶ 43 (Nov. 6, 2003) (“[T]he criteria of necessity and proportionality must be observed if a measure is to be qualified as self-defence.”).

⁵⁶ *Nicaragua*, 1986 I.C.J. 226, ¶ 94; *Oil Platforms (Iran v. U.S.)*, 2003 I.C.J. 161, ¶ 198 (Nov. 6, 2003).

⁵⁷ YORAM DINSTEIN, *WAR, AGGRESSION, AND SELF-DEFENCE* 230 (5th ed. 2011) (“In fact, the two conditions of necessity and proportionality are accompanied by a third condition of immediacy. Immediacy has not been expressly recognized by the Court, but customary international law fully confirms its existence.”) (citations omitted); *see also* THE HANDBOOK OF THE INTERNATIONAL LAW OF MILITARY OPERATIONS 196 (Terry D. Gill & Dieter Fleck eds. 2010) [hereinafter Gill & Fleck] (“[T]he exercise of self-defense is also subject to the well-established conditions of necessity, proportionality, and immediacy.”).

⁵⁸ DINSTEIN, *supra* note 57, at 208.

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used by the aggrieved State to be no more than necessary to neutralize the attack and prevent future attacks.⁵⁹ Immediacy requires the “victim state act only within the ‘window of opportunity,’ that is, the period within which the defensive response must be launched to be effective.”⁶⁰

To date, neither Iraq nor Syria is known to have acted outside its respective territory. Rather, both States have invoked their right to self-defense and invited third-party States to act in collective self-defense on their behalf.⁶¹ The United States,⁶² France,⁶³ United Kingdom,⁶⁴

⁵⁹ Louise Arimatsu & Michael N. Schmitt, *Attacking “Islamic State” and the Khorasan Group: Surveying the International Law Landscape*, 53 COLUM. J. TRANSNAT’L L. BULL. 1, 16 (2014).

⁶⁰ Mary Ellen O’Connell & Michael N. Schmitt, *International Law and the Use of Drones* 10, CHATHAM HOUSE (Oct. 21, 2010), <https://www.chathamhouse.org/sites/files/chathamhouse/public/Research/International%20Law/il211010drones.pdf>.

⁶¹ Permanent Rep. of Iraq to the U.N., Letter dated Sept. 20, 2014 from Permanent Rep. of Iraq to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2014/691 (Sept. 22, 2014) (“ISIL has established a safe haven outside Iraq’s borders that is a direct threat to the security of our people and territory The presence of this safe haven has made our borders impossible to defend and exposed our citizens to the threat of terrorist attacks It is for these reasons that we, in accordance with international law and the relevant bilateral and multilateral agreements, and with due regard for complete national sovereignty and the Constitution, have requested the United States of America to lead international efforts to strike ISIL sites and military strongholds, with our express consent.”).

⁶² Permanent Rep. of the United States of America to the U.N., Letter dated Sept. 23, 2014 from the Permanent Rep. of the United States of America to the United Nations addressed to the Secretary-General, U.N. Doc. S/2014/695 (Sept. 23, 2014) (“ISIL and other terrorist groups in Syria are a threat not only to Iraq, but also to many other countries, including the United States and our partners in the region and beyond. States must be able to defend themselves, in accordance with the inherent right of individual and collective self-defence, as reflected in Article 51 of the Charter of the United Nations . . .”).

⁶³ Permanent Representative of France to the U.N., Identical letters dated Sept. 8, 2015 from the Permanent Representative of France to the United Nations addressed to the Secretary-General and the President of the Security Council, U.N. Doc. S/2015/745 (Sept. 9, 2015).

⁶⁴ Permanent Rep. of the United Kingdom of Great Britain and Northern Ireland to the U.N., Letter dated Dec. 3, 2015 from the Permanent Rep. of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2015/928 (Dec. 3, 2015).

Germany,⁶⁵ and Australia⁶⁶ have based their operations in Syria against ISIS for the collective self-defense of Iraq.⁶⁷

The right to collective self-defense can be found in Article 51, which enshrines “the inherent right of individual or collective self-defense.”⁶⁸ This provision of Article 51 was included at the request of Latin American countries that wished to affirm the legality of their regional collective security organizations,⁶⁹ and is now regarded as a matter of customary international law.⁷⁰ Collective self-defense requires the victim State to form the view that it has been subject to an attack and actually request assistance from other States.⁷¹ The assisting State too has the obligation to independently verify that its actions comply with the requirements for self-defense. Interestingly, as Claus Kreß points out, this is perhaps only the second time in history—the other being post-9/11—that collective self-defense has been invoked against an attack from a non-State actor.⁷²

65 Charge d'affaires a.i. of the Permanent Mission of Germany to the U.N., Letter dated Dec. 10, 2015 from the Charge d'affaires a.i. of the Permanent Mission of Germany to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2015/946 (Dec. 10, 2015).

66 Permanent Rep. of Australia to the U.N., Letter dated Sept. 9, 2015 from the Permanent Rep. of Australia to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2015/693 (Sept. 9, 2015).

67 Note that Israel has acknowledged conducting operations in Syria “to prevent weapons from being delivered to Israel’s enemies.” Tia Goldenberg, *Netanyahu Says Israel Acts in Syria “From Time to Time,”* AP (Dec. 1, 2015), <https://www.yahoo.com/news/netanyahu-says-israel-acts-syria-time-time-145917303.html?ref=gs>.

68 U.N. Charter, art. 51.

69 T.D. Gill, *The Temporal Dimension of Self-Defence: Anticipation, Pre-emption, Prevention and Immediacy*, 11 J. CONFLICT & SEC. L. 361, 363 (2006).

70 *Nicaragua*, 1986 I.C.J. 226, ¶¶ 193-94.

71 *Nicaragua*, 1986 I.C.J. 226, ¶ 199 (concluding that the requirement of a request by the State which is the victim of the alleged attack is additional to the requirement that such a State should have declared itself to have been attacked).

72 Claus Kreß, *The Fine Line Between Collective Self-Defense and Intervention by Invitation: Reflections on the Use of Force against ‘IS’ in Syria*, JUST SEC. (Feb. 17, 2015), <https://www.justsecurity.org/20118/clauss-krebs-force-isil-syria/> (“In the case of the use of force against the Islamic State in Syria, this right has, again for the first time I believe, acquired the center stage of State practice.”); U.N. Charter, art. 51.

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To act in accordance with Article 51, there must first be an “armed attack” on the State invoking the right to self-defense. In *Nicaragua*, the International Court of Justice defined “armed attack” to include both actions by “regular armed forces” as well as “the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to an actual armed attack conducted by regular forces.”⁷³

The Court further held that operations must achieve sufficient “scale and effect” so as to distinguish them from “a mere frontier incident.”⁷⁴ The “scale and effect” test is also commonly used to describe the trigger for acts of violence committed by organized armed groups acting on behalf of a State against another State.⁷⁵

While it is clear that ISIS operations meet the scale and effects condition for an armed attack, the group has not been sent “by or on behalf of a State.” This begs the question of whether a State can respond in self-defense to a non-State actor acting on its own accord. The right of a State to exercise self-defense against such a group is a matter of some debate.⁷⁶ The traditional view supported by International Court of Justice (ICJ) jurisprudence holds that the Article 51 right to self-defense applies only “in the case of an armed attack by one State against another State.”⁷⁷ Since 9/11, however, scholarship and State practice has

⁷³ *Nicaragua*, 1986 I.C.J. 226, ¶ 195 (citations omitted).

⁷⁴ *Id.* Yoram Dinstein has characterized this level of force as the “use of force producing (or liable to produce) serious consequences, epitomized by territorial intrusions, human casualties or considerable destruction of property.” DINSTEIN, *supra* note 57.

⁷⁵ Gill & Fleck, *supra* note 57, at 190 (“Additionally, an armed attack can be carried out by an organized armed group which is capable of mounting an armed attack carried out by a State.”).

⁷⁶ See, e.g., Monica Hakimi, *Defensive Force Against Non-State Actors: The State of Play*, 91 INT’L L. STUD. 1 (2015) (describing the debate regarding the application of Article 51 to actions by non-State affiliated organized armed groups).

⁷⁷ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 139 (July 9, 2004). *But cf.*, Separate Opinion of Judge Higgins ¶ 33 (“There is, with respect, nothing in the text of Article 51 that thus stipulates that self-defense is available only when an armed attack is made by a State”); see also *Armed Activities*, *supra* note 50, ¶ 146 (finding the attack on Uganda was not attributable to the Democratic Republic of Congo and that “the legal

evolved to allow for defensive force in response to acts by a non-State actor.⁷⁸

In the case at hand, the United States has further argued an individual right to self-defense with regards to “military actions in Syria against *al-Qaida* elements in Syria known as the Khorasan Group to address terrorist threats that they pose to the United States and our partners and allies.”⁷⁹ The UK too, on at least one occasion, has acted in Syria in individual self-defense.⁸⁰

The United States claims a right to individual self-defense as against the Khorasan Group and the *al-Nusra* Front. The United States, however, has not been the subject of an armed attack from the Khorasan Group or the *al-Nusra* Front. That said, the *al-Nusra* Front—and by extension, the Khorasan Group—is an affiliate of *al-Qaeda*, an organized armed group that has conducted armed attacks against the

and factual circumstances for the exercise of the right of self-defense by Uganda against the DRC were not present”).

⁷⁸ See Arimatsu & Schmitt, *supra* note 59 (providing a comprehensive discussion on the debate); see also CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 160–61 (2nd ed. 2004) (noting that the US and Israel had on multiple occasions prior to 9/11 “invoked Article 51 to justify the use of force in response to terrorist attacks on nationals abroad.”); Ruth Wedgwood, *Responding to Terrorism: The Strikes Against Bin Laden*, 24 YALE J. INT’L L. 559, 565 (1999) (“If a host country permits the use of its territory as a staging area for terrorist attacks when it could shut those operations down, and refuses requests to take action, the host government cannot expect to insulate its territory against measures of self-defense.”); DINSTEIN, *supra* note 57, 268–70; Kreß, *supra* note 72 (“[T]he wording of Article 51 of the UN Charter supports the idea, neither systematic nor teleological considerations contradict it and the pre-Charter history of self-defense claims in cases of non-State armed attacks certainly goes back to the beginning of the 19th century.”).

⁷⁹ Permanent Rep. of the United States of America to the U.N., Letter dated Sept. 23, 2014 from the Permanent Rep. of the United States of America to the United Nations addressed to the Secretary-General, U.N. Doc. S/2014/695 (Sept. 23, 2014).

⁸⁰ Permanent Rep. of the United Kingdom of Great Britain and Northern Ireland to the U.N., Letter dated Sept. 7, 2015 from the Permanent Rep. of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2015/688 (Sept. 8, 2015) (“On 21 August 2015, armed forces of the United Kingdom of Great Britain and Northern Ireland carried out a precision air strike against an ISIL vehicle in which a target known to be actively engaged in planning and directing imminent armed attacks against the United Kingdom was travelling. This air strike was a necessary and proportionate exercise of the individual right of self-defence of the United Kingdom.”).

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United States with sufficient scale and effects to trigger the right of self-defense. With sufficient linkage between the groups, the U.S. has a valid basis for individual self-defense as to the Khorasan Group and *al-Nusra* Front in Syria.

The United States has argued that it may act in self-defense of Iraq in Syria, where Syria is “unwilling or unable to prevent the use of its territory” by ISIS for attacks into Iraq.⁸¹ This position appears to have been expressly endorsed by Australia⁸² and Turkey⁸³, and implicitly endorsed by the United Kingdom,⁸⁴ France⁸⁵ and Iraq.⁸⁶ The “unwilling

81 Permanent Rep. of the United States of America to the U.N., Letter dated Sept. 23, 2014 from the Permanent Rep. of the United States of America to the United Nations addressed to the Secretary-General, U.N. Doc. S/2014/695 (Sept. 23, 2014).

82 Permanent Rep. of Australia to the U.N., Letter dated Sept. 9, 2015 from the Permanent Rep. of Australia to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2015/693 (Sept. 9, 2015) (“The Government of Syria has, by its failure to constrain attacks upon Iraqi territory originating from ISIL bases within Syria, demonstrated that it is unwilling or unable to prevent those attacks In response to the request for assistance by the Government of Iraq, Australia is therefore undertaking necessary and proportionate military operations against ISIL in Syria in the exercise of the collective self-defence of Iraq.”).

83 Chargé d’affaires a.i. of the Permanent Mission of Turkey to the U.N., Letter dated July 24, 2015 from the Chargé d’affaires a.i. of the Permanent Mission of Turkey to the United Nations addressed to the President of the Security Council, U.N. Doc S/2015/563 (July 24, 2015) (“It is apparent that the regime in Syria is neither capable of nor willing to prevent these threats emanating from its territory, which clearly imperil the security of Turkey and the safety of its nationals . . . Individual and collective self-defence is our inherent right under international law, as reflected in Article 51 of the Charter of the United Nations.”).

84 Permanent Rep. of the United Kingdom of Great Britain and Northern Ireland to the U.N., Identical letters dated Nov. 25, 2014 from the Permanent Rep. of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the Secretary-General and the President of the Security Council, U.N. Doc. S/2014/851 (Nov. 26, 2014) (“[T]he United Kingdom of Great Britain and Northern Ireland is taking measures in support of the collective self-defence of Iraq . . . by striking ISIL sites and military strongholds in Syria, as necessary and proportionate measures.”); *see also* 20 July 2015, Parl Deb HC (2015) col. 1199 (UK), <http://www.publications.parliament.uk/pa/cm201516/cmhansrd/cm150720/debtext/150720-0001.htm>. (Michael Fallon, Secretary of State for Defence, Statement to Parliament: “Actions by American, Canadian and other forces in Syria are legal because they contribute to the collective self-defence of the legitimate Government of Iraq where the Government of Syria are unwilling and unable to deal with ISIL at its source in northern Syria.”).

and unable”⁸⁷ argument is not without criticism and has been the subject of much debate among scholars.⁸⁸

There are two broad views. The first view, as described by Michael Schmitt and Louise Arimatsu, holds that “the territory of the States where the non-State actors are located is inviolable absent an exception that applies to the State itself.”⁸⁹ The competing view argues that sovereignty is not inviolable and must be balanced against the right to self-defense.⁹⁰

85 Permanent Representative of France to the U.N., Identical letters dated Sept. 8, 2015 from the Permanent Representative of France to the United Nations addressed to the Secretary-General and the President of the Security Council, U.N. Doc. S/2015/745 (Sept. 9, 2015) (“In accordance with Article 51 of the Charter of the United Nations, France has taken actions involving the participation of military aircraft in response to attacks carried out by ISIL from the territory of the Syrian Arab Republic.”).

86 Permanent Rep. of Iraq to the U.N., Annex to Letter dated Sept. 20, 2014 from Permanent Rep. of Iraq to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2014/691 (Sept. 22, 2014) (“ISIL has established a safe haven outside Iraq’s borders that is a direct threat to the security of our people and territory The presence of this safe haven has made our borders impossible to defend and exposed our citizens to the threat of terrorist attacks It is for these reasons that we, in accordance with international law and the relevant bilateral and multilateral agreements, and with due regard for complete national sovereignty and the Constitution, have requested the United States of America to lead international efforts to strike ISIL sites and military strongholds, with our express consent.”).

87 OFFICE OF GEN. COUNSEL DEP’T OF DEF., DEPARTMENT OF DEFENSE LAW OF WAR MANUAL 1049 (2015) [hereinafter DOD LAW OF WAR MANUAL] (“In addition, the United States has expressed the view that consent is not required when the territorial State is unwilling or unable to prevent its territory from being used by non-State armed groups as a base for launching attacks.”).

88 See, e.g., Kevin Jon Heller, *The Absence of Practice Supporting the “Unwilling or Unable” Test*, OPINIO JURIS (Feb. 17, 2015), <http://opiniojuris.org/2015/02/17/unable-unwilling-test-unstoppable-scholarly-imagination/>. For an excellent and comprehensive article on the “Unwilling or Unable” test, see Ashley S. Deeks, *“Unwilling or Unable”: Toward a Normative Framework for Extraterritorial Self-Defense*, 52 VA. J. INT’L L. 483 (2012).

89 Arimatsu & Schmitt, *supra* note 59, at 16 n.64 (citing IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 275–278 (1963)).

90 *Id.* at 5 n.15 (citing Corfu Channel case (U.K. v. Alb.), 1949 I.C.J. 4, 43 (Apr. 9, 1949) (individual opinion of Judge Alvarez)); see also U.N. Permanent Rep. of the United States of America to the U.N., Letter dated Sept. 23, 2014 from the Permanent Rep. of the United States of America to the United Nations addressed to the Secretary-General, U.N. Doc. S/2014/695 (Sept. 23, 2014).

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The second view is reflected in the *Lotus* case, where Justice John Bassett Moore, writing for the dissent in the Permanent Court of International Justice, argued that “[i]t is well settled that a State is bound to use due diligence to prevent the commission within its dominions of criminal acts against another nation or its people.”⁹¹ In the *Corfu Channel* case, the ICJ unequivocally endorsed Moore’s dissent in *Lotus*, holding that a State has an obligation “not to allow knowingly its territory to be used for acts contrary to the rights of other States.”⁹² This principle, of course, would extend to knowingly allowing your territory to be used by an organized armed group that is conducting military attacks on another State. In this instance, Syria is aware—and cannot prevent—armed attacks by ISIS from their territory into Iraq.

ISIS has made clear its desire to control and administer territory within Iraq. They have repeatedly and unequivocally resisted attempts for a negotiated settlement. Further, the military actions from both Iraq and Syria have yet to neutralize the threat. Given this, it would appear that U.S. action in Syria is necessary, proportional, and immediate.

ii. Consent

The Articles of State Responsibility reflect the widespread consensus that “[v]alid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent.”⁹³ The United States and others are acting with the consent of Iraq within the territory of Iraq.⁹⁴ Russia, conversely, appears to be acting with the consent of Syria.

91 S.S. *Lotus* (Fr. v. Turk.) 1927 P.C.I.J. (ser. A) No. 10, at 88 (Sept. 7, 1927) (Moore, J., dissenting) (citing *United States v. Arizona*, 120 U.S. 479 (1887)).

92 *Corfu Channel* (U.K. v. Alb.), 1949 I.C.J. 4, 22 (Apr. 9, 1949).

93 Mahmoud Mohamed Al-Naman (Rapporteur), Report of the International Law Commission on the Work of its Fifty-Third Session, U.N. Doc. A/56/589 10 (Nov. 26, 2001); see also ANTONIO CASSESE, *INTERNATIONAL LAW* 369 (2d ed. 2005) (“[B]y explicit consent a State may authorize the use of force on its territory whenever, being the object of an ‘armed attack’, it resorts to individual self-defence and in addition authorizes a third State to assist in ‘collective self-defence.’”).

94 Permanent Rep. of Iraq to the U.N., Letter dated Sept. 20, 2014 from Permanent Rep. of Iraq to the United Nations addressed to the President of the Security Council,

Given the substantial potential for abuse, the concept of consent is not without limits.⁹⁵ There are several generally accepted criteria regarding the validity of consent. First, consent must be freely given; it cannot be the product of coercion, trickery, or force.⁹⁶ Second, consent must be secured “by a State in advance or even at the time it is occurring”⁹⁷ and may be revoked by the consenting State at any time.⁹⁸ Third, the consent must be “actually expressed.”⁹⁹ Finally, consent must be given by an agent with authority to give consent on behalf of the State.¹⁰⁰

As opposed to Iraq, Syria has not formally consented to the use of force by any State except Russia on its territory. Nevertheless, it is conceivable that the U.S. and its coalition partners are acting in Syria with the *implicit* consent of the Syrian government. Whether the U.S. and its coalition partners are acting in Syria with consent turns on the third criterion: the requirement that consent be “actually expressed.”¹⁰¹ Here “actually” should not be read to mean “explicitly.” Consent need

U.N. Doc. S/2014/691 (Sept. 22, 2014) (“[W]e . . . have requested the United States of America to lead international efforts to strike ISIL sites and military strongholds, with our express consent.”).

⁹⁵ DINSTEIN, *supra* note 57, at 121 (“A perennial problem relating to consent is the possibility of abuse.”); *see also* Ashley S. Deeks, *Consent to the Use of Force and International Law Supremacy*, 54 HARV. INT’L L.J. 1 (2013).

⁹⁶ *Articles on Responsibility of States for Internationally Wrongful Acts*, [2001] 2 Y.B. Int’l L. Comm’n 31, 73, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2).

⁹⁷ *Id.*

⁹⁸ *Nicaragua*, 1986 I.C.J. 226; *Armed Activities*, *supra* note 50.

⁹⁹ *Articles on Responsibility*, *supra* note 96 (“Consent must be freely given and clearly established. It must be actually expressed by the State rather than merely presumed on the basis that the State would have consented if it had been asked.”); *see also* CASSESE, *supra* note 93, at 370 (“[C]onsent must be freely given . . . it must be real as opposed to merely ‘apparent.’”).

¹⁰⁰ *Articles on Responsibility*, *supra* note 96.

¹⁰¹ *Id.*

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not take a particular form, nor must it be in writing.¹⁰² Consent can be implicit so long as it is clearly established.¹⁰³

The ICJ has also endorsed the concept that consent can be informal, if not implicit. In the *Armed Activities* case, the ICJ considered the Democratic Republic of the Congo's (DRC) objection to the presence of Ugandan troops in its territory.¹⁰⁴ The court found that consent existed despite the lack of formal agreement requesting or consenting to the Ugandan troops.¹⁰⁵ The court found support for consent in two places:

[B]oth the absence of any objection to the presence of Ugandan troops in the DRC in the preceding months, and the practice subsequent to the signing of the Protocol, support the view that the continued presence as before of Ugandan troops would be permitted by the DRC by virtue of the Protocol.¹⁰⁶

Presently, Syria has neither formally requested nor publically consented to U.S. action in its country. To the contrary, the Syrian Foreign Minister remarked that “[a]ny strike which is not co-ordinated with the government will be considered as aggression.”¹⁰⁷ More importantly, Syria has filed two letters with the President of Security

¹⁰² *State Responsibility*, [1979] 2 Y.B. Int'l L. Comm'n 1, 35, U.N. Doc.

A/CN.4/SERA/1979/Add.1 (Part 1) (“In the first place, we should emphasize that the consent in question must have been validly expressed No special condition as to form is required for its expression . . .”).

¹⁰³ *Id.* (“[C]onsent can be expressed or tacit, explicit or implicit, provided, however, that it is clearly established.”).

¹⁰⁴ *Armed Activities*, *supra* note 50.

¹⁰⁵ *Id.* ¶¶ 45–46; *see also* Maritime Delimitation and Territorial Questions Between Qatar and Bahrain, Jurisdiction and Admissibility (Qatar v. Bahr.), Judgment, 1994 I.C.J. 112, ¶¶ 21–30 (July 1, 1994) (noting that the Minutes from meetings between Qatar and Bahrain “do not merely give an account of discussions and summarize points of agreement and disagreement. They enumerate the commitments to which the Parties have consented. They thus create rights and obligations in international law for the Parties. They constitute an international agreement.”).

¹⁰⁶ *Armed Activities*, *supra* note 50, at 197.

¹⁰⁷ *Syria Offers to Help Fight ISIS but Warns Against Unilateral Air Strikes*, GUARDIAN (Aug. 26, 2014), <http://www.theguardian.com/world/2014/aug/26/syria-offers-to-help-fight-isis-but-warns-against-unilateral-air-strikes>.

Council which address use of force within Syria. Both letters are worth brief consideration.

The first letter dated September 21, 2015, declares that “[i]f any State invokes the excuse of counter-terrorism in order to be present on Syrian territory without the consent of the Syrian Government, whether on the country’s land or in its airspace or territorial waters, its actions shall be considered a violation of Syrian sovereignty.”¹⁰⁸ By a strict reading of this sentence, only actions that “invoke the excuse of counter-terrorism” would trigger a requirement for consent. It is unclear why Syria would limit its objection to just “counter-terror” actions. The letter also inexplicably does not reference the United States, though it does reference “States” generally, and the United Kingdom, Australia, and France specifically.¹⁰⁹ To fully understand this letter, it should be read in conjunction with the second letter.

The second letter dated a day later, states that “The United States, Britain, France, Canada and Australia have sought to justify their intervention in Syria by citing the fight against ISIL. They have invoked Article 51 of the Charter of the United Nations, but have not consulted with the Syrian Government.”¹¹⁰ Interestingly here the letter refers not to “consent” but rather to “consultation.” Conceivably, this could be read as Syria not demanding that they consent, but only that other countries “consult” with them before force is used in Syria. A more accurate and fair reading would be to read the two letters together and conclude that Syria is in fact expressing their lack of consent to the use of force on their territory without—at minimum—their consultation on

¹⁰⁸ Permanent Representative of the Syrian Arab Republic to the U.N., Identical letters dated Sept. 17, 2015 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council, U.N. Doc. S/2015/719 (Sep. 21, 2015).

¹⁰⁹ Permanent Representative of the Syrian Arab Republic to the U.N., Identical letters dated Sept. 17, 2015 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council, U.N. Doc. S/2015/719 (Sep. 21, 2015).

¹¹⁰ Permanent Representative of the Syrian Arab Republic to the U.N., Identical letters dated Sept. 17, 2015 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council, U.N. Doc. S/2015/727 (Sep. 22, 2015).

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the matter. Reading the letters together would also remove any doubt as to whether the first letter applied to the United States.

Despite Syria's apparent objection to the use of force by the United States, Syria has not taken any defensive actions against the United States,¹¹¹ despite having a robust integrated air defense system.¹¹² President Assad has also acknowledged that his government receives information regarding U.S. airstrikes from third parties.¹¹³ Finally, Syria recently agreed to a cease-fire, which, by its terms, does not apply to actions against ISIS or *al-Nusra*¹¹⁴ despite the fact that the U.S. is engaged in daily airstrikes against both ISIS and *al-Nusra* in Syria.¹¹⁵ In sum, it would seem that implied consent would be a very tenuous, but colorable, basis for the use of force in Syria.

Regardless of whether or not Syria has consented to U.S. activity on its territory, one may ask whether or not the United States should still be required to coordinate military actions with the Syrian government. Indeed, the Syrian government has made statements indicating their willingness to "cooperate and coordinate" with any State in the fight against ISIS.¹¹⁶ Claus Kreß has argued that the United States'

111 Philip Ewing, *Syria Could Threaten U.S. Warplanes*, POLITICO (Oct. 9, 2014), <http://www.politico.com/story/2014/10/syria-united-states-warplanes-111748> (quoting U.S. Department of Defense spokesman Rear Admiral John Kirby, "We don't have perfect knowledge about why they [Syria] do what they do, or why they don't do what they don't do. All I can tell you is their approach, from an air defense perspective, has been passive").

112 See Roba Alhenawi, *Syria Says it Shot Down U.S. Drone*, CNN (Mar. 17, 2015), <http://www.cnn.com/2015/03/17/middleeast/syria-us-drone/> (the only apparent action was a Syrian claim that it shot down a U.S. drone).

113 Tom Perry, *Syria Gets Information on U.S.-led Air Strikes via Iraq: Assad*, REUTERS (Feb. 10, 2015), <http://www.reuters.com/article/us-mideast-crisis-syria-united-states-idUSKBN0LE0FW20150210>.

114 *Joint Statement of the United States and the Russian Federation, as Co-Chairs of the ISSG, on Cessation of Hostilities in Syria*, U.S. DEP'T OF STATE (Feb. 22, 2016), <http://www.state.gov/r/pa/prs/ps/2016/02/253115.htm>.

115 Press Release, U.S. Cent. Command, *Military Airstrikes Continue Against ISIL Terrorists in Syria and Iraq* (Mar. 3, 2016), <http://www.centcom.mil/news/press-release/march-3-military-airstrikes-continue-against-isil-terrorists-in-syria-and-i>.

116 *Syria Will Help US Fight Terrorism, Says Walid Muallem*, BBC NEWS (Aug. 25, 2014), <http://www.bbc.com/news/world-middle-east-28927246> (quoting Syrian Foreign Minister Walid Muallem: "Syria is ready to cooperate and coordinate all efforts, whether regional or international, to combat terrorism.").

acceptance to intervene on behalf of a “criminal regime” such as Syria “would amount, by virtue of the conditions attached to the invitation by the regime, to a violation of the duty not to assist another State in the commission of serious violations of international law, including war crimes and actions rising to the level of crimes against humanity.”¹¹⁷ This is an interesting argument that is beyond the scope of this article, but deserve further discussion.

A final issue of consent concerns the question as to whether the government of Syria is in fact authorized to provide consent, as opposed to the National Coalition of Syria (or some other opposition group). While a number of States have provided some level of recognition of the opposition government, this recognition has been strictly political. A government represents the State as long as it is in “effective control of that state.”¹¹⁸ This is true even in instances in which the “regime in effective control of a state” is “not recognized by other governments.”¹¹⁹ A fair question, however, is whether the government of Syria is in fact in “effective control” of the State of Syria.

It must be recognized that there exists a presumption in favor of established governments.¹²⁰ Hersch Lauterpacht writes, “So long as the revolution has not been fully successful, and so long as the lawful government, however adversely affected by the fortunes of the civil war, remains within national territory and asserts its authority, it is presumed to represent the State as a whole.”¹²¹ Recognition of a rebel government—“whatever its prospects”—while a “lawful government offers resistance which is not ostensibly hopeless or purely nominal” constitutes premature recognition.¹²² This, as Lauterpacht points out “is

¹¹⁷ Kreß, *supra* note 72.

¹¹⁸ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 203 (AM. LAW INSTIT. 1987).

¹¹⁹ *Id.*

¹²⁰ HERSCH LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW 93 (1947); *see also* Ralph Wilde et al., *Recognition of States: the Consequences of Recognition or Non-Recognition in UK and International Law*, CHATHAM HOUSE (Feb. 2010) (quoting JAMES R. CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 51 (2d ed. 2006) ([T]here is a general presumption which “favours the continuity and disfavors the extinction of an established State.”)).

¹²¹ LAUTERPACHT, *supra* note 120.

¹²² *Id.* at 94.

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a tortious act against the lawful government; it is a breach of international law.”¹²³ Thus, the Assad regime is currently the legal government of Syria and would be solely authorized to provide consent to the use of force within Syrian territory.

iii. Humanitarian Intervention

The UN Charter does not provide an express exception for the use of force on humanitarian grounds. To the contrary, in the *Nicaragua* case, the ICJ found “while the United States might form its own appraisal of the situation as to respect for human rights in Nicaragua, the use of force could not be the appropriate method to monitor or ensure such respect.”¹²⁴ Yet, arguments have been made that there is an emerging norm permitting humanitarian intervention as the basis for the use of force.¹²⁵ The foundation of these arguments are instances of State practice which met little international resistance, including the Economic Community of West African States’ interventions in Liberia and Sierra Leone and NATO’s intervention in the Federal Republic of Yugoslavia.¹²⁶

To the extent that one accepts the emergence of a new norm, the use of force would likely be limited by two factors. In the first instance, the level of suffering that forms the basis of the intervention “must be very high before [the right] vests, generally at a level understood to involve ‘gross and systematic’ human rights violations.”¹²⁷ Secondly the use of force would need to be limited to actions necessary to alleviate the suffering.¹²⁸

¹²³ *Id.* at 95.

¹²⁴ *Nicaragua*, 1986 I.C.J. 226, ¶ 268.

¹²⁵ See generally DINSTEIN, *supra* note 57, at 73–75 (discussing the emerging debate on the issue).

¹²⁶ See Michael N. Schmitt, *Legitimacy versus Legality Redux: Arming the Syrian Rebels*, 7 J. NAT’L SEC. L. & POL’Y 139 (2013).

¹²⁷ *Id.* at 151–52.

¹²⁸ See, e.g., U.K. Prime Minister’s Office, *Chemical Weapon Use by Syrian Regime: UK Government Legal Position*, GOV.UK (Aug. 29, 2013), <https://www.gov.uk/government/publications/chemical-weapon-use-by-syrian-regime-uk-government-legal-position/chemical-weapon-use-by-syrian-regime-uk-government-legal-position-html-version>.

Of all the countries participating in the conflict in Syria, only the United Kingdom has publically invoked humanitarian intervention as the grounds for the use of force. On August 29, 2013, the UK Prime Minister's Office issued a statement articulating the grounds for humanitarian intervention in Syria.¹²⁹ Based on the use of chemical weapons in Eastern Damascus on August 21, 2013, the statement declares the use of force would be permitted "in order to alleviate the scale of the overwhelming humanitarian catastrophe in Syria by deterring and disrupting the further use of chemical weapons by the Syrian regime."¹³⁰ While the statement provides explicit criteria, there is scant legal analysis.¹³¹ Unsurprisingly, the UK has not relied on this position.¹³²

B. *Arming and Training Proxies*

Based on publically available information, there appears to be or have been two U.S. programs designed to train rebels in Syria, both of which have apparently ended.¹³³ In the first, a covert program run by the

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ Jack Goldsmith, *UK Legal Position on Humanitarian Intervention in Syria*, LAFARE (Aug. 29, 2013, 9:38 AM), <https://www.lawfareblog.com/uk-legal-position-humanitarian-intervention-syria> ("The UK 'legal position' contains not a bit of legal analysis.").

¹³² Permanent Rep. of the United Kingdom of Great Britain and Northern Ireland to the U.N., Identical letters dated Nov. 25, 2014 from the Permanent Rep. of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the Secretary-General and the President of the Security Council, U.N. Doc. S/2014/851 (Nov. 26, 2014) (the UK noted that it was "taking measures in support of the collective self-defence of Iraq as part of international efforts led by the United States"); Prime Minister David Cameron, Statement to Parliament about Iraq: Coalition Against ISIL (Sept. 26, 2014), <http://www.publications.parliament.uk/pa/cm201415/cmhansrd/cm140926/debtext/140926-0001.htm#1409266000252> (in testimony to Parliament on September 26, 2014, Prime Minister David Cameron stated, "In this case it could not be clearer that we are acting at the request of a sovereign state, and if we were to act in Syria, I believe that would be the legal basis too: collective self-defence against ISIL which threatens Iraq.").

¹³³ See Tara McKelvey, *Arming Syrian Rebels: Where the US Went Wrong*, BBC NEWS MAG. (Oct. 10, 2015), <http://www.bbc.com/news/magazine-33997408>; Michael

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Central Intelligence Agency (CIA), trusted rebels were provided weapons and ammunition “to help moderate rebels fight the Assad regime.”¹³⁴ The other program, run by the Department of Defense (DoD), was designed to train and equip rebel forces for operations against ISIS.¹³⁵

Depending on the way the programs were administered, they may raise two issues in international law. First, the programs may have constituted a “use of force” within the meaning of 2(4) of the UN Charter.¹³⁶ Secondly, the programs may implicate the principle of nonintervention and raise questions of State responsibility for the actions of proxies.

1. Use of Force

With regard to the Article 2(4) issues related to arming and training proxies, the *Nicaragua* court famously found that “arming and training” rebels “can certainly be said to involve the threat or use of force against Nicaragua.”¹³⁷ The CIA program in Syria allegedly provided small arms, small arms ammunition, antitank missiles, and nonlethal aid including communications equipment, food, and medical supplies.¹³⁸ Furthermore, the program was run from a command center within

D. Shear et al., *Obama Administration Ends Effort to Train Syrians to Combat ISIS*, N.Y. TIMES (Oct. 9, 2015), http://www.nytimes.com/2015/10/10/world/middleeast/pentagon-program-islamic-state-syria.html?_r=0.

¹³⁴ Adam Entous, *Covert CIA Mission to Arm Syrian Rebels Goes Awry*, WALL ST. J. (Jan. 26, 2015), <http://www.wsj.com/articles/covert-cia-mission-to-arm-syrian-rebels-goes-awry-1422329582>.

¹³⁵ Barbara Starr et al., *US Suspending Program to Train and Equip Syrian Rebels*, CNN (Oct. 9, 2015), <http://www.cnn.com/2015/10/09/politics/us-syria-rebels-arms-program-suspended/>.

¹³⁶ *Nicaragua*, 1986 I.C.J. 226, ¶ 228 (“[A]rming and training” rebels “can certainly be said to involve the threat or use of force against Nicaragua.”).

¹³⁷ *Id.*

¹³⁸ Ernesto Londoño & Greg Miller, *CIA Begins Weapons Delivery to Syrian Rebels*, WASHINGTON POST (Sep. 11, 2013), https://www.washingtonpost.com/world/national-security/cia-begins-weapons-delivery-to-syrian-rebels/2013/09/11/9fcf2ed8-1b0c-11e3-a628-7e6dde8f889d_story.html.

Syria.¹³⁹ The number of weapons provided is uncertain, but it has been reported that the program is “significantly larger than the failed \$500 million Pentagon program.”¹⁴⁰ If these facts are true, there can be little question that, absent legal justification such as self-defense, the covert CIA program violated Article 2(4) of the U.N. Charter.¹⁴¹

The nature of the arms and training provided to rebels under the DoD program is similar to the arms and training under the CIA program. Unlike the CIA program (and the U.S. program addressed in the *Nicaragua* case), the DoD program in Syria was not directed at the State. Thus, arguably, the DoD program did not implicate Article 2(4) because the use of force was not directed at a State.¹⁴²

As a threshold matter, it is not clear whether the DoD could in fact control the ultimate use of the arms provided under the program, which is important because, as discussed below the United States will be responsible for violations of the law that arise from operations over which it exerted “effective control.”¹⁴³ It has sought to achieve certainty in this matter through a combination of vetting, rebel assurances, and monitoring.¹⁴⁴ The efficacy of this approach is questionable—a problem

¹³⁹ Entous, *supra* note 134.

¹⁴⁰ Anne Barnard & Karam Shoumali, *U.S. Weaponry Is Turning Syria Into Proxy War With Russia*, N.Y. TIMES (Oct. 12, 2015),

<http://www.nytimes.com/2015/10/13/world/middleeast/syria-russia-airstrikes.html>.

¹⁴¹ See Schmitt, *supra* note 126, at 142 (“There is, therefore, little doubt that the provision of lethal aid directly to the Syrian rebel forces would amount to a ‘use of force,’ at least by the generally accepted standards of the ICJ set forth in *Nicaragua*. Absent a justification for such use, the provision of lethal aid would violate the U.N. Charter’s prohibition on the use of force, as well as the analogous prohibition resident in customary international law.”).

¹⁴² See generally, *Interview with President Barack Obama*, NBC NEWS MEET THE PRESS September 7, 2014 (“our attitude towards Assad continues to be that you know, through his actions, through using chemical weapons on his own people, dropping barrel bombs that killed innocent children that he, he has foregone legitimacy. But when it comes to our policy and the coalition that we’re putting together, our focus specifically is on ISIL.”), <http://www.nbcnews.com/meet-the-press/president-barack-obamas-full-interview-nbcs-chuck-todd-n197616>.

¹⁴³ *Nicaragua*, 1986 I.C.J. 226, ¶ 115.

¹⁴⁴ See Christopher M. Blanchard & Amy Belasco, *Train and Equip Program for Syria: Authorities, Funding, and Issues for Congress*, CONG. RESEARCH SERV. (Jun. 9, 2015).

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that has been publically acknowledged.¹⁴⁵ Even assuming, arguendo, that the provided arms and training were exclusively used against ISIS, the program still raises the specter of a 2(4) violation, particularly given the legislative language establishing the DoD program. The DoD declares that the purpose of the program is

to provide assistance, including training, equipment, supplies, sustainment and stipends, to appropriately vetted elements of the Syrian opposition and other appropriately vetted Syrian groups or individuals for the following purposes: defending the Syrian people from attacks by the Islamic State of Iraq and the Levant (ISIL), and *securing territory controlled by the Syrian opposition*; protecting the United States, its friends and allies, and the Syrian people from the threats posed by terrorists in Syria; and *promoting the conditions for a negotiated settlement to end the conflict in Syria*.¹⁴⁶

The directive to “secure territory” does not specify against whom that territory is to be secured. In Syria, the opposition is just as likely to secure territory against the Syrian government as against ISIS. Further, the language regarding the promotion of a negotiated settlement specifically refers to the Syrian government. It is difficult to see how the provision of arms and training for the purpose of “promoting the conditions for a negotiated settlement” could not implicate the use of force against the Syrian government.

Accepting that elements of the U.S. programs violated the prohibition on the use of force potentially triggers Syria’s right to self-defense. A State’s right to act in self-defense arises when it has suffered an “armed attack.” The difference in language between Article 2(4)

145 Helen Cooper, *Few U.S.-Trained Syrians Still Fight ISIS, Senator Are Told*, N.Y. TIMES (Sep. 16, 2015), <http://www.nytimes.com/2015/09/17/world/middleeast/isis-isil-syrians-senate-armed-services-committee.html> (“Only four or five Syrian individuals trained by the United States military to confront the Islamic State remain in the fight, the head of the United States Central Command told a Senate panel on Wednesday, a bleak acknowledgment that the Defense Department’s \$500 million program to raise an army of Syrian fighters has gone nowhere.”).

146 Consolidated and Further Continuing Appropriations Act of 2015, Pub. L. 113-235, § 9016, 128 Stat. 2130 (2014) (emphasis added).

(“use of force”) and Article 51 (“armed attack”) has led to significant discussion regarding the nature of this difference in terminology. The ICJ in the *Nicaragua* case, for example, found that some uses of force may not constitute an attack under Article 51.¹⁴⁷ In a minority view, the United States holds that there is no gap between Article 51 and 2(4), thus any use of force would constitute an armed attack and thus trigger a right to act in self-defense.¹⁴⁸ Under such a reading, the CIA program would trigger a Syrian right to self-defense.

The more widely accepted position would hold that the U.S. actions through the proxy program are unlikely to trigger Syria’s right to self-defense, as they would not rise to the level of an armed attack by the United States on Syria. Professor Schmitt, for example, has analyzed this issue and concluded: “[E]ven if the U.S. transfer of arms to the Syrian rebels qualifies as an unlawful use of force, Syria may not respond in self-defense with any measures that amount to a use of force.”¹⁴⁹ Rather, Syria’s recourse would be the imposition of peaceful countermeasures, retorsions, or action through the Security Council.¹⁵⁰

Aside from violating Article 2(4), there also exists the issue of State responsibility for the actions of the United States’ proxies. The court in *Nicaragua* addressed this question and found that establishing responsibility would require a determination of the level of dependence the proxy has with respect to its sponsor. The court reasoned:

[T]he relationship of the *contras* to the United States Government was so much one of dependence on the one side and control on the other that it would be right to equate the Contras, for legal purposes, with an organ of the United States Government, or as acting on behalf of that Government.¹⁵¹

147 *Nicaragua*, 1986 I.C.J. 226, ¶ 210.

148 DOD LAW OF WAR MANUAL, *supra* note 87, at 47 (“The United States has long taken the position that the inherent right of self-defense potentially applies against any illegal use of force.”).

149 Schmitt, *Legitimacy*, *supra* note 126, at 142.

150 See generally *U.N. Legislative Series: Materials on the Responsibility of States for Internationally Wrongful Acts*, ch. V, art. 22, U.N. Doc. ST/LEG/SER.B/25 (2012).

151 *Nicaragua*, 1986 I.C.J. 226, ¶ 109.

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Thus, the court imposed liability for the proxy's actions when the sponsoring State exerted "effective control of the operations in the course of which the violations were committed."¹⁵²

The degree of control exerted by the United States over proxy forces has not, of course, been publically detailed. Looking at news reports, congressional testimony, and public statements, one can paint a reasonable picture of the program. Even with this limited data, the CIA program does not seem to rise to the level of "effective control."

Proxy forces were selected in order to ensure they would operate in accordance with U.S. policies.¹⁵³ Once identified, proxy forces in Syria would request weapons from U.S. officials, who would then allocate resources without explanation.¹⁵⁴ When the program began to supply Tube-launched, Optically tracked, Wire-guided (TOW) antitank missiles, the CIA instituted certain limitations, which were reported in the *Wall Street Journal*:

The CIA limited who got TOWs and how many . . . [t]rusted commanders also were instructed to film their use of the TOWs in battle so the CIA could monitor them and offer pointers on how to use the missiles more effectively. Commanders got permission later to post some of the videos online as propaganda.¹⁵⁵

The programs were apparently administered from an operations center in Syria that allowed U.S. officials to field requests from their partner forces.¹⁵⁶ One official familiar with the U.S. covert program characterized the provision of arms as "tightly controlled."¹⁵⁷ Effective control requires "the State's instructions were given, in respect of each

152 *Id.* ¶ 115; see also *Articles on Responsibility*, *supra* note 96, at 47 ("The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.").

153 *Nicaragua*, 1986 I.C.J. 226, ¶ 115.

¹⁵⁴ Entous, *supra* note 134.

¹⁵⁵ Entous, *supra* note 134.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

operation in which the alleged violations occurred.”¹⁵⁸ Based upon publically available information, it does not appear that this level of control rises to the level of effective control.

2. Principle of Nonintervention

The principle in international law against the interference in another State’s affairs can be violated by a State absent the use of force. The ICJ in *Nicaragua* found “the principle forbids all States or groups of States to intervene directly or indirectly in internal or external affairs of other States.”¹⁵⁹ The court further elaborated, noting,

A prohibited intervention must . . . bear[] on matters in which each State is permitted . . . to decide freely. . . . Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones. The element of coercion, which defines, and indeed forms the very essence of, prohibited intervention, is particularly obvious in the case of an intervention which uses force, either in the direct form of military action, or in the indirect form of support for subversive or terrorist armed activities within another State.¹⁶⁰

In Syria, the United States programs supplied nonlethal assistance in the form of training, food, communications equipment, and medical supplies; and lethal assistance in the form of small arms, small arms ammunition, and TOW antitank missiles.¹⁶¹ Such actions are of precisely the nature envisioned by the *Nicaragua* case and prohibited by the principle of nonintervention. Notwithstanding the apparent wrongfulness of these practices, there are circumstances precluding wrongfulness which should be considered. For example, where actions

¹⁵⁸ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serbia and Montenegro)*, 2007 I.C.J. Rep. 43 ¶ 400 (Feb. 26, 2007).

¹⁵⁹ *Nicaragua*, 1986 I.C.J. 226, ¶ 205; *see also Armed Activities*, *supra* note 50, ¶ 205.

¹⁶⁰ *Nicaragua*, 1986 I.C.J. 226, ¶ 205.

¹⁶¹ Londoño & Miller, *supra* note 138.

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have been taken in individual or collective self-defense, such a justification would preclude the wrongfulness of the action.

At this point, a distinction should be made between the DoD and CIA programs. As a general principle of State responsibility, which organ of government is taking the action is immaterial.¹⁶² In the case at hand, however, there is a distinction based on the purposes of the two programs. The purpose of the DoD program is self-defense, and would thus not violate the principle of nonintervention. The purpose of the CIA program is to support anti-Syrian government forces and would thus appear to violate the principle of nonintervention.

IV. JUS IN BELLO

A. *Conflict Classification*

The existence and nature of a given conflict governs the applicability of law. The application of force in the various non-international armed conflicts (NIACs) in Syria will be governed by the Law of Armed Conflict (LOAC), customary international law, and international human rights law (IHRL).¹⁶³ In an international armed conflict (IAC), applicable treaty law including the 1949 Geneva Conventions in addition to IHRL and customary international law apply.¹⁶⁴ In a conflict below

¹⁶² G.A. Res. 56/83, Responsibility of States for Internationally Wrongful Acts, ch. 2, art. 4 (Jan. 28, 2002) (“The conduct of any State organ shall be considered an act of that State under international law . . . whatever position it holds in the organization of the State . . .”).

¹⁶³ Gill & Fleck, *supra* note 57, at 72.

¹⁶⁴ Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 2, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 2, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention (III) Relative to the Treatment of Prisoners of War art. 2, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War art. 2, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter “Common Article 2”].

the threshold of armed conflict, only IHRL, customary international law, and the domestic law of the State would apply.¹⁶⁵

1. International Armed Conflicts

The existence of an IAC is determined based on the criteria set forth in Common Article 2, which apply the conventions “to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties.”¹⁶⁶ Thus, the conflict must be (1) between two States and (2) the conflict must be “armed.”

The International Committee of the Red Cross’s (ICRC) official commentary to this article presents a very broad view of the Article 2 criteria, noting:

Any difference arising between two States and leading to the intervention of armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of the state of war. It makes no difference how long the conflict lasts or how much slaughter takes place.¹⁶⁷

The International Criminal Tribunal for the former Yugoslavia (ICTY) in *Tadić* endorsed this view, holding that “an armed conflict exists whenever there is a resort to armed force between States.”¹⁶⁸ This view

¹⁶⁵ Gill & Fleck, *supra* note 57, at 49 (“International humanitarian law begins to apply with the start of an armed conflict International human rights law applies at all times.”).

¹⁶⁶ Common Article 2, *supra* note 164.

¹⁶⁷ COMMENTARY TO GENEVA CONVENTION III RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 23 (Jean Pictet ed., 1960) (“Any difference arising between two States and leading to the intervention of armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of the state of war. It makes no difference how long the conflict lasts, or how much slaughter takes place.”).

¹⁶⁸ Prosecutor v. Tadić, Case No. IT-94-1-AR72, Decision on Defense Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

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is widely, but not universally, accepted¹⁶⁹ and continues to be the subject of considerable debate.¹⁷⁰

In the entirety of the conflict in Syria thus far, there have been arguably two IACs. The first likely existed between Turkey and Russia arising from the shooting down of the Russian military jet. In this incident, there was an unmistakable use of armed force by Turkey against Russia, regardless of the fleeting nature of the conflict.¹⁷¹

The second possible IAC occurred from the use of force against the territory of a non-consenting State, for example, the use of force by the U.S. and coalition partners against ISIS targets in Syrian territory. Some have argued, persuasively in this author's opinion, that the use of force within the territory of a State, even if not directed at that State, constitutes the use of force against the State.¹⁷² This position, however, is not universally accepted.¹⁷³

¹⁶⁹ See, e.g., *Final Report of the Meeting of Armed Conflict in International Law*, INT'L L. ASS'N 2 (2010) ("The Committee, however, found little evidence to support the view that the Conventions apply in the absence of fighting of some intensity.").

¹⁷⁰ See, e.g., Adil Ahmad Haque, *Between the Law of Force and the Law of Armed Conflict*, JUST SEC. (Oct. 13, 2016), <https://www.justsecurity.org/33515/law-force-law-armed-conflict/>; Terry Gill, *Letter to the Editor from Professor Terry Gill on Classification of International Armed Conflict*, JUST SEC. (Oct. 14, 2016), <https://www.justsecurity.org/33569/letter-editor-prof-terry-gill-classification-international-armed-conflict/>; Kenneth Watkin, *Letter to the Editor: "Lines in the Sand"—A Reply to Professor Haque*, JUST SEC. (Oct. 24, 2016), <https://www.justsecurity.org/33792/letter-editor-lines-sand-a-reply-professor-haque/>.

¹⁷¹ See generally CLAUDE PILLOUD ET AL., COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF AUGUST 12 1949 at 40 (Yves Sandoz et al. eds., 1988) ("[H]umanitarian law also covers any dispute between two States involving the use of their armed forces. Neither the duration of the conflict, nor its intensity, play a role: the law must be applied to the fullest extent required by the situation of the persons and the objects protected by it.").

¹⁷² See, e.g., Dapo Akande, *Classification of Armed Conflicts: Relevant Legal Concepts*, in INTERNATIONAL LAW AND CLASSIFICATION OF CONFLICTS 59 (Elizabeth Wilmshurst, ed., 2012) ("Most controversy in this area centres around the cases where a foreign State fights against a non-state group in the territorial State but without the consent of the territorial State. In the view of this author . . . in such circumstances, there will be an armed conflict between the foreign State and the territorial State."); Ashley S. Deeks, *Consent to the Use of Force and International Law Supremacy*, 54 HARV. INT'L L.J. 1, 13 (2013) ("U.N. Charter Article 2(4) generally is understood to preclude the use of force by one state in another state's territory, even if that use of force is not directed against the territorial state."); Eugene V. Rostow, *The Legality of*

Finally, an IAC can occur through the internationalization of the conflict. Internationalization occurs when a NIAC becomes an IAC due to the control exerted by a State over the organized armed group that is party to the NIAC.¹⁷⁴ This is generally seen to occur when States exert “overall control” of partner forces.¹⁷⁵

This level of control “must comprise more than the mere provision of financial assistance or military equipment or training.”¹⁷⁶ But, it does not go so far as to require the State to “plan all the operations of the units dependent on them, choose their targets, or give specific instructions concerning the conduct of military operations and any alleged violations of international humanitarian law.”¹⁷⁷ Rather, the control required is “deemed to exist when a State . . . has a role in organising, coordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group.”¹⁷⁸

Looking to the nature of the relationship between the United States and rebel forces, it does not appear to rise to the level where the United States possesses “overall control” of the rebel forces, and thus the

the International Use of Force by and from States, 10 YALE J. INT’L L. 286 (1985), http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=3132&context=fss_papers (“it could be said with confidence that states could not use force internationally to attack the territorial integrity or political independence of other states”); Elizabeth Wilmshurst, *Principles of International Law on the Use of Force by States in Self-Defense* (Chatham House, ILP WP 05/01, 2005) (“For the purpose of Article 51, an armed attack includes not only an attack against the territory of the State, including its airspace and territorial sea, but also attacks directed against emanations of the State, such as its armed forces or embassies abroad.”).

¹⁷³ Akande, *supra* note 172, at 61 (“The view that any use of force by a State on the territory of another without the consent of the latter brings into effect an international armed conflict between the two States has some support from scholars, though it is probably not the majority view in the existing literature”) (citations omitted).

¹⁷⁴ See generally Akande, *supra* note 172, at 57–62.

¹⁷⁵ Prosecutor v. Tadić, Case No. IT-94-1-A, Appeals Chamber Judgment, ¶ 131, (Int’l Crim. Trib. for the Former Yugoslavia July 15, 1999). *But see* Akande, *supra* note 172, at 57–62 (noting that there are three approaches to characterizing when internationalization occurs).

¹⁷⁶ Prosecutor v. Tadić, Case No. IT-94-1-A, Appeals Chamber Judgment, ¶ 137, (Int’l Crim. Trib. for the Former Yugoslavia July 15, 1999)

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

conflict in Syria, at least with regards to the involvement of the United States, remains an NIAC.

2. Non-International Armed Conflicts

As with IACs, there is no codified definition of NIAC in international law. Additional Protocol II is perhaps the natural starting point for a conflict classification analysis for a NIAC, as the protocol exclusively concerns NIACs.¹⁷⁹ Additional Protocol II, however, only assist to the extent that it describes what does *not* constitute a NIAC; specifically, “internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, and other acts of a similar nature.”¹⁸⁰

The most widely accepted test for the existence of an NIAC comes from the ICTY in *Tadić*.¹⁸¹ There, the Appeals Chamber found that an NIAC exists when there is a situation of “protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.”¹⁸² This expression of the law has also been adopted by the International Criminal Court.¹⁸³

This test requires, first, sufficiently intense violence. This intensity criteria is regarded to encompass both the length of the conflict and scale of violence.¹⁸⁴ Citing to *Tadić*, the ICTY in *Haradinaj* provided a list of

¹⁷⁹ Note, however, Additional Protocol II is not applicable to the conflict in Syria as it only applies to certain conflicts “which take place in the territory of a High Contracting Party.” Protocol Additional to the Geneva Conventions of the 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art.1, June 8, 1977, 1125 U.N.T.S. 609.

¹⁸⁰ Rome Statute of the International Criminal Court art. 8(2)(f), July 17, 1998, 2187 U.N.T.S. 90 (NIACs exclude “situations of internal disturbance and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.”).

¹⁸¹ Prosecutor v. Tadić, Case No. IT-94-1-AR72, Decision on Defense Motion for Interlocutory Appeal on Jurisdiction (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

¹⁸² *Id.* ¶ 70.

¹⁸³ Rome Statute of the International Criminal Court art. 8(2)(f), July 17, 1998, 2187 U.N.T.S. 90.

¹⁸⁴ Prosecutor v. Haradinaj, Case No. IT-04-84-T, Judgment, ¶ 49 (Int’l Crim. Trib. for the Former Yugoslavia Apr. 3, 2008) (“The criterion of protracted armed violence has therefore been interpreted in practice, including by the *Tadić* Trial Chamber itself, as referring more to the intensity of the armed violence than to its duration.”); *see also*

“indicative factors” which can be used to evaluate the intensity criteria, including:

the number, duration and intensity of individual confrontations; the type of weapons and other military equipment used; the number and calibre of munitions fired; the number of persons and type of forces partaking in the fighting; the number of casualties; the extent of material destruction; and the number of civilians fleeing combat zones.¹⁸⁵

The court further noted that “[t]he involvement of the UN Security Council may also be a reflection of the intensity of a conflict.”¹⁸⁶ The *Tadić* standard of intensity has been most rigorously applied to Syria by the United Nation’s Commission of Inquiry.

The Commission’s first report addressed events in Syria from March 2011 through November 23, 2011.¹⁸⁷ In this time period, the Commission “was unable to verify the level of the intensity of combat between Syrian armed forces and other armed groups.”¹⁸⁸ As of the date of the report, the Syrian government was employing large-scale military force in coordinated operations across the country.¹⁸⁹ Indeed the violence was sufficiently intense that the President of the Security Council issued a public statement on the levels of violence, and the Arab League suspended Syria’s membership. The Commission was also unable to confirm a NIAC in their second report (February 22, 2012).¹⁹⁰ The Commission reached this conclusion despite findings on the use of

Akande, *supra* note 172, at 30 (“While the word ‘protracted’ suggests that the criterion relates exclusively to the time over which armed conflict takes place, it has come to be accepted that the key requirement here is the intensity of the force.”).

¹⁸⁵ *Haradinaj*, Case No. IT-04-84-T, ¶ 49.

¹⁸⁶ *Id.*

¹⁸⁷ U.N. Human Rights Council, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, U.N. Doc. A/HRC/S-17/s/Add.1 (Nov. 23, 2011).

¹⁸⁸ *Id.* at 18, ¶ 99.

¹⁸⁹ *Id.* at 10, ¶¶ 38–39 (this included operations in Dar’a, Homs, Hama, Dayr Az Zawr, Damascus, Alqaseer, Bab Amr, Bab Al Sibaa, Bab Hood, and Karm Al Zaitoon).

¹⁹⁰ Report 2, *supra* note 8, at 6 (“While the commission is gravely concerned that the violence in certain areas *may* have reached the requisite level of intensity”) (emphasis added).

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snipers, tanks, anti-aircraft guns, mortars, “bombardment with heavy weapons,” and “large-scale” army operations.¹⁹¹

These are at first blush curious findings. The verbiage “unable to verify,” however, seems to indicate their failure to find this criteria satisfied was an evidentiary rather than factual problem. By the Commission’s third report (August 16, 2012), it acknowledged the requisite level of violence was met.¹⁹²

The second *Tadić* criterion relates to the organization element of the parties to the conflict. By definition, at least one party to the conflict must be a non-State armed group. In the words of *Tadić*, this non-State armed group must be sufficiently organized as to constitute an “organized armed group.”¹⁹³ This requirement has generally been read to require “a certain level of organization with a command structure.”¹⁹⁴ In a series of cases, the ICTY had occasion to examine the organizational element from *Tadić*.¹⁹⁵ In *Haradinaj*, the ICTY considered whether the Kosovo Liberation Army (KLA) was an organized armed group within the meaning articulated by *Tadić*. After conducting an extensive review of ICTY case law, the court applied to following criteria:

¹⁹¹ *Id.* at 10–11.

¹⁹² Report 3, *supra* note 8, at 1.

¹⁹³ Prosecutor v. *Tadić*, Case No. IT-94-1-AR72, Decision on Defense Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

¹⁹⁴ Akande, *supra* note 172, at 28.

¹⁹⁵ See Prosecutor v. *Haradinaj*, Case No. IT-04-84-T, Judgment, ¶¶ 52–59 (Int’l Crim. Trib. for the Former Yugoslavia Apr. 3, 2008) (citing Prosecutor v. *Delalić et al.*, Case No. IT-96-21-T, Judgment, ¶¶ 182–187 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998)); Prosecutor v. *Milošević*, Case No. IT-02-54-T, Decision on Motion for Judgment of Acquittal, ¶¶ 23–24 (Int’l Crim. Trib. for the Former Yugoslavia June 16, 2004); Prosecutor v. *Limaj et al.*, Case No. IT-03-66-T, Judgment, ¶¶ 98–124 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 30, 2005); Prosecutor v. *Hadžihasanović and Kubura*, Case No. IT-01-47, Judgment, ¶¶ 14, 20, 23, 25 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 15, 2006); Prosecutor v. *Martić*, Case No. IT-95-11-T, Judgment, ¶¶ 41, 343 (Int’l Crim. Trib. for the Former Yugoslavia June 12, 2007); Prosecutor v. *Mrkšić et al.*, Case No. IT-95-13/1-T, Judgment, ¶¶ 39–40, 407–408 (Int’l Crim. Trib. for the Former Yugoslavia Sept. 27, 2007).

level of organization of the KLA: the existence of KLA headquarters and command structure; the existence of KLA disciplinary rules and mechanisms; territorial control exerted by the KLA; the ability of the KLA to gain access to weapons and other military equipment; to recruit members; to provide them with military training; to carry out military operations and use tactics and strategy; and to speak with one voice.¹⁹⁶

The first two reports of the Commission of Inquiry were focused on the Free Syrian Army (FSA), which was the most prominent opposition group at the time. Still, the Commission of Inquiry was “unable to verify that the Free Syrian Army (FSA), local groups identifying themselves as such or other anti-government armed groups had reached the necessary level of organization” to trigger an NIAC under *Tadić*.¹⁹⁷ As the Commission of Inquiry explained in the context of the FSA, “there is no reliable information on the size, structure, capability and operations of this body.”¹⁹⁸ By the third report (August 16, 2012) the Commission of Inquiry found both the requisite intensity and organization to trigger the legal threshold for an NIAC.¹⁹⁹

Despite the Commission’s findings, some continue to question the nature and composition of the FSA.²⁰⁰ Specifically, it is speculated that

¹⁹⁶ *Haradinaj*, Case No. IT-04-84-T, ¶ 60.

¹⁹⁷ Report 2, *supra* note 8, at 6.

¹⁹⁸ Report 1, *supra* note 8, at 8, ¶ 29.

¹⁹⁹ Report 3, *supra* note 8, at 1. The ICRC found the existence of a NIAC as of July 17, 2012; see *Syria: ICRC and Syrian Arab Red Crescent maintain aid effort amid increased fighting*, ICRC OPERATIONAL UPDATE (Jul. 17, 2012), <http://www.icrc.org/eng/resources/documents/update/2012/syria-update-2012-07-17.htm>. (“The ICRC concludes that there is currently a non-international (internal) armed conflict occurring in Syria opposing Government Forces and a number of organised armed opposition groups operating in several parts of the country (including, but not limited to, Homs, Idlib and Hama).”).

²⁰⁰ Aron Lund, *The Non-State Militant Landscape in Syria*, THE CTR. FOR COMBATING TERRORISM SENTINEL, Aug. 27, 2013, at 23, 23. (“the FSA has always been more of a brand name than an actual organization.”). Tellingly, the Congressional Research Service fails to even mention the FSA as one of the “Select Anti-Assad Groups” in its report to Congress. Christopher M. Blanchard et al., *Armed Conflict in Syria: Overview and U.S. Response*, CONG. RESEARCH SERV. (Oct. 9, 2015), <https://fas.org/sgp/crs/mideast/RL33487.pdf>; see also Jamie Dettmer, *Shifting Allegiances, A Free-for-All in Northern Syria*, VOICE AM. NEWS (Feb. 17, 2016),

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the FSA does not possess the level of control and organization assessed by the Commission of Inquiry or claimed publically by the FSA.²⁰¹ Given the scarcity of information coming out of Syria, it is difficult to assess these conflicting claims. The Commission's approach to the FSA, however, does merit comment.

After finding the FSA sufficiently organized, the Commission has failed to revisit the nature and organization of the group in the intervening three years. Given the dynamic nature of the conflict, it seems wise to occasionally revisit the conditions for the existence of the NIAC. Furthermore, the Commission uses the term "FSA" to refer to "any local armed group whose members identify themselves as belonging to the FSA."²⁰² This practice creates a false heuristic that automatically equates rebel groups with the FSA.

When considering the existence and nature of NIACs in Syria, it is important to consider relationships between organizations. As noted above, there are a number of groups affiliated to some degree with the FSA. Similarly, there are groups affiliated with ISIS. Where opposition groups are sufficiently independent from another affiliated group (e.g., the *Jaish al Fatah* as distinct from the Southern Front), and meet the *Tadić* criteria, they will be engaged in their own NIAC with the Syrian government.

Thus, the government of Syria is likely involved in individual NIACs with ISIS, the *al-Nusra* Front and the Kurdish People's Protection Units (YPG), and a number of independent opposition groups such as *Jaish al Fatah* and the Southern Front. Furthermore, many of these groups are involved in NIACs with one another. Finally, the United States and coalition States are engaged in NIACs against ISIS and the *al-Nusra* Front in Syria. With respect to all NIACs in Syria, the

<http://www.voanews.com/a/shifting-allegiances-a-free-for-all-in-northern-syria/3194684.html>; Erin Banco, *Syrian Rebel Groups Merge to Take on Assad in Dera'a, But Deep Divisions Remain*, INT'L BUS. TIMES (Jun. 26, 2015), <http://www.ibtimes.com/syrian-rebel-groups-merge-take-assad-deraa-deep-divisions-remain-1984616> (noting the FSA "has all but dissipated.").

²⁰¹ Lund, *supra* note 200.

²⁰² Report 2, *supra* note 8, at 6.

conduct of hostilities will be governed by LOAC, customary international law, and IHRL.²⁰³

A related issue concerns the geographic applicability of Common Article 3 and customary LOAC in a NIAC.²⁰⁴ This issue would arise in the context of Syria where a member of ISIS leaves the region with the intent to conduct hostilities elsewhere.²⁰⁵ It is widely accepted that LOAC is applicable within the entirety of the State engaged in the NIAC so long as the acts are “closely related” to hostilities.²⁰⁶ There is disagreement, however, on the whether LOAC applies outside the territory of the State in which it is occurring.

The first view holds that it does not apply outside the State regardless of whether the conflict was fully contained within the State.²⁰⁷ Under this approach, the LOAC would be inapplicable to the traveling ISIS fighter outside of Iraq or Syria.

A second approach, championed by the ICRC, argues that LOAC “spills over” beyond the territorial borders to encompass organized armed groups operating in border regions.²⁰⁸ Thus acts of violence

203 Gill & Fleck, *supra* note 57, at 72; *see also* Derek Jinks, *International Human Rights Law in Time of Armed Conflict*, in *THE OXFORD HANDBOOK OF INTERNATIONAL LAW IN ARMED CONFLICT* (Andrew Clapham & Paola Gaeta eds., 2014) (discussing the interaction between IHRL and LOAC).

204 Jelena Pejic, *The Protective Scope of Common Article 3: More than Meets the Eye*, 93 INT’L REV. RED CROSS 1, 6 (2011)

205 Honorable James R. Clapper, Director of National Intelligence, DNI Clapper Opening Statement on the Worldwide Threat Assessment (Feb. 9, 2016), [https://www.dni.gov/files/documents/2016-02-](https://www.dni.gov/files/documents/2016-02-09SASC_open_threat_hearing_transcript.pdf)

09SASC_open_threat_hearing_transcript.pdf (ISIS has “attempted or conducted scores of attacks outside Syria and Iraq in the past 15 months.”).

206 Prosecutor v. Tadić, Case No. IT-94-1-AR72, Decision on Defense Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 60–70 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) (“The geographical and temporal frame of reference for internal armed conflicts is similarly broad It is sufficient that the alleged crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict.”).

207 *See generally* Michael N. Schmitt, *Charting the Legal Geography of Non-International Armed Conflict*, 90 INT’L L. STUDY. 1 (2014) (noting that “[s]upport for this approach is found in a plain meaning interpretation of Common Article’s ‘in the territory of one of the High Contracting Parties’ text.”). *Id.* at 9.

208 *See, e.g.*, INT’L COMM. OF THE RED CROSS, INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY CONFLICTS 9–11 (Oct. 2011); Pejic, *supra*

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committed by a member of an organized armed group outside the “spillover” area of the conflict would not be considered part of the conflict and thus, LOAC and Common Article 3 would be inapplicable.²⁰⁹ Under this approach, the LOAC would be applicable to the traveling ISIS fighter in Turkey near the Syrian border, but not outside the border regions.

A third approach embraces the concept of a non-geography focused NIAC in which a participant carries with them NIAC regardless of the geographic location.²¹⁰ Under this approach, LOAC would remain applicable to the ISIS fighter regardless of their geographic location as long as they continue to take a direct part in hostilities.²¹¹

B. The Conduct of Hostilities and Accountability

This section will first address the use of force by the U.S. and partners in Syria, and the use of force by the Syrian government, ISIS, and the Syrian opposition. The final section will briefly address individual liability and State responsibility.

The *jus in bello* is anchored by the principle of distinction, which requires parties to a conflict to distinguish between lawful targets—combatants, military objects, and civilians engaged in direct participation in hostilities—from unlawful targets: civilians, civilian objects, and those *hors de combat*.²¹² Civilians are defined as all

note 4, at 6 (“[C]ertain NIACs originating within the territory of a single state between government armed forces and one or more organized armed groups have also been known to ‘spill over’ into the territory of neighbouring states.”).

²⁰⁹ Pejic, *supra* note 204.

²¹⁰ See generally Schmitt, *Geography*, *supra* note 207.

²¹¹ Note: this does not address the *jus ad bellum* issues related to targeting such an individual. See Schmitt, *Geography*, *supra* note 207, at 17.

²¹² Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) art.57(2)(a)(1), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter “Protocol I”] (The article requires the attacker “do everything feasible to verify that the objectives to be attacked are neither civilian nor civilian objects and are not subject to special protection but are military objectives.”); see also *id.* at art. 57(b) (defining indiscriminate attacks as those causing “incidental loss . . . which would be excessive in relation to the concrete and direct military advantage anticipated.”).

persons who are not members of the armed forces,²¹³ whereas combatants include: armed forces of a State;²¹⁴ members of a militia or volunteer corps that belong to a State;²¹⁵ members of a *levée en masse*,²¹⁶ and members of organized armed groups.²¹⁷ Civilians and civilian objects are protected from attack “unless and for such time as they take a direct part in hostilities.”²¹⁸ The requirement to distinguish between civilians and civilians directly participating in hostilities is a norm of customary international law and applies with equal weight to NIACs.²¹⁹

Civilian objects have been defined by Article 52 of Additional Protocol I, which prohibits targeting all objects that “are not military objectives.”²²⁰ Military objectives are those which, “by their nature, location, purpose or use make an effective contribution to military

213 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW VOLUME 1: RULES 17, r. 5 (2005) (“Civilians are persons who are not members of the armed forces. The civilian population comprises all persons who are civilians.”).

214 Protocol I, *supra* note 212, at art. 43(2); DOD LAW OF WAR MANUAL, *supra* note 87, ¶ 4.3.3; *see also* Michael N. Schmitt & Eric W. Widmar, “*On Target*”: *Precision and Balance in the Contemporary Law of Targeting*, 7 NAT’L. SEC. L. & POL’Y 379, 384.

215 DOD LAW OF WAR MANUAL, *supra* note 87, ¶ 4.3.3; *see also* NILS MELZER, INT’L COMM. OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION UNDER INTERNATIONAL HUMANITARIAN LAW 22 (2009) (“[A]ll armed actors showing a sufficient degree of military organization and belonging to a party to the conflict must be regarded as part of the armed forces of that party.”).

216 Geneva Convention (III) Relative to the Treatment of Prisoners of War, art. 4(6), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; DOD LAW OF WAR MANUAL, *supra* note 87, ¶ 4.3.3.

217 Schmitt & Widmar, *supra* note 214, at 385 (“Consensus has emerged in the past decade as to another group of individuals who do not qualify as civilians for the purpose of targeting—members of ‘organized armed groups.’”); *see also* DOD LAW OF WAR MANUAL, *supra* note 87, ¶ 5.8.3 (“Like members of an enemy State’s armed forces, individuals who are formally or functionally part of a non-State armed group that is engaged in hostilities may be made the object of attack because they likewise share in their group’s hostile intent.”).

218 Protocol I, *supra* note 212, at art. 51(3).

219 HENCKAERTS & DOSWALD-BECK, *supra* note 213, at 3, r. 1 (“State practice establishes [distinction] as a norm of customary international law applicable in both international and non-international armed conflicts.”).

220 Protocol I, *supra* note 212, at art. 52(1).

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action,” and whose “total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.”²²¹

The recent conflicts in Iraq and Afghanistan brought into stark contrast the difficulty in defining direct participation in hostilities. This led to a multiyear effort by the ICRC to publish interpretive guidance on the issue.²²² The ICRC’s classification of what constitutes direct participation in hostilities has generally found widespread support.²²³ The report also addressed membership in an organized armed group. Here, the ICRC’s membership criterion as those exercising a “continuous combat function” in the group has been met with considerably more criticism.²²⁴

Further, the LOAC requires all attacks be proportional; that is, the “direct military advantage anticipated” must be excessive in relation to the expected “incidental loss of civilian life, injury to civilians, [and] damage to civilian objects.”²²⁵ Finally, Article 57 of Additional Protocol I requires all feasible precautions in the attack, including a requirement that “constant care” be taken to “spare the civilian population, civilians, and civilian objects.”²²⁶

221 *Id.* at art. 52(2); DOD LAW OF WAR MANUAL, *supra* note 87, at 206 (quoting CCW AMENDED MINES PROTOCOL art. 2(6) (“Military objectives, insofar as objects are concerned, include ‘any object which by its nature, location, purpose or use makes an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.’”)).

222 MELZER, *supra* note 215.

223 Schmitt & Widmar, *supra* note 214, at 387 (“The ICRC’s Interpretive Guidance, in an approach that has been widely accepted.”).

224 *See, e.g.*, Michael N. Schmitt, *Deconstructing Direct Participation in Hostilities: The Constitutive Elements*, 42 N.Y.U. J. INT’L L. & POL. 697 (2010) (arguing that all members of an organized armed group may be targeted regardless of their function in the group).

225 Protocol I, *supra* note 212, at art. 57(2)(a)(iii); *see also id.* at art. 51(5)(b) (“an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”).

226 Protocol I, *supra* note 212, at art. 57(1); *see also* DOD LAW OF WAR MANUAL, *supra* note 87, at 195 (“Combatants must take feasible precautions in conducting attacks to reduce the risk of harm to civilians and other protected persons and objects.”).

1. Syria, ISIS and the Opposition

The violence on the part of the Syrian government, ISIS, and to some extent, the Syrian opposition, has been particularly acute. International organizations and NGOs have been active in documenting the atrocities committed in the conflict.²²⁷ The most comprehensive and independent examination of the conduct of hostilities has been conducted by the U.N. Independent Commission of Inquiry.

While it is beyond the scope of this article to go through all the Commission's findings, it is worth noting that the Commission has documented several uses of chemical weapons,²²⁸ snipers,²²⁹ tanks,²³⁰ anti-aircraft guns,²³¹ mortars,²³² thermobaric bombs,²³³ "bombardment with heavy weapons,"²³⁴ and "large-scale" army operations.²³⁵ They have also documented instances of siege warfare,²³⁶ sexual violence,²³⁷ torture,²³⁸ the targeting of medical clinics²³⁹ and the military occupation of civilian objects.²⁴⁰ Further, the Commission "found reasonable grounds to believe that war crimes, including murder, extrajudicial execution, and torture, had been perpetrated by organized anti-

²²⁷ See, e.g., *Syria*, HUMAN RIGHTS WATCH, <https://www.hrw.org/middle-east/n-africa/syria> (last visited Aug. 30, 2016); *Syrian Refugees*, HUMAN RIGHTS FIRST, <http://www.humanrightsfirst.org/topics/syria> (last visited Aug. 30, 2016); *Uncovering Human Rights Abuses in Syria*, AMNESTY INT'L (Oct. 23, 2015), <https://www.amnesty.org/en/latest/news/2015/10/uncovering-human-rights-abuses-in-syria/>.

²²⁸ Report 5, *supra* note 8, at 21.

²²⁹ *Id.* at 10, 19.

²³⁰ *Id.* at 19.

²³¹ Report 2, *supra* note 8, at 11.

²³² Report 3, *supra* note 8, at 17.

²³³ Report 5, *supra* note 8, at 6.

²³⁴ Report 2, *supra* note 8, at 11.

²³⁵ *Id.* at 10–11.

²³⁶ Report 5, *supra* note 8, at 21.

²³⁷ *Id.* at 15–16; Report 3, *supra* note 8, at 17–18.

²³⁸ Report 5, *supra* note 8, at 1.

²³⁹ Report 3, *supra* note 8, at 20.

²⁴⁰ *Id.* at 19.

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government armed groups.”²⁴¹ The Commission and other groups have also found LOAC violations committed by opposition forces.²⁴²

2. United States

In the context of the current conflict in Syria, the majority of questions arising from U.S. and coalition actions have concerned attacks on objects. Specifically, questions have been raised concerning the targeting of ISIS oil tankers²⁴³ and the targeting of ISIS cash reserves.²⁴⁴ The U.S. has acknowledged striking both ISIS-controlled oil tankers²⁴⁵ and ISIS-controlled cash stockpiles.²⁴⁶ Both sets of targets were attacked in order to disrupt ISIS’s efforts to fund their operations.²⁴⁷

Assuming—as appears the case—that the attacks otherwise complied with the LOAC, the question is whether oil tankers and cash are military

241 *Id.* at 2.

242 *See, e.g.*, Report 4, *supra* note 8, at 52 (“Video footage of anti-Government armed groups summarily executing captured Government soldiers and affiliated militia members, informers and people believed to be members of the *Shabbiha* is publicly available.”).

243 *See, e.g.*, Ken Watkin, *Targeting “Islamic State” Oil Facilities*, 90 INT’L L. STUD. 499 (2014); Beth Van Schaack, *Targeting Tankers Under the Law of War (Part 1)*, JUST SEC. (Dec. 12, 2015) <https://www.justsecurity.org/28064/targeting-tankers-law-war-part-1/>.

244 *See, e.g.*, Dalphné Richemond-Barak, *Is Money a Legitimate Target?* JUST SEC. (Feb. 10, 2016) <https://www.justsecurity.org/29255/money-legitimate-target/>.

245 Jim Miklaszewski, *U.S. Destroys 280 ISIS Oil Trucks in Syrian City of Deir es-Zor*, NBC NEWS (Nov. 23, 2015) <http://www.nbcnews.com/storyline/isis-terror/u-s-destroys-280-isis-oil-trucks-syrian-city-deir-n468126>.

246 Barbara Starr, *U.S. Bombs “Millions” in ISIS Currency Holdings*, CNN (Jan. 13, 2016), <http://www.cnn.com/2016/01/11/politics/us-bombs-millions-isis-currency-supply/>.

247 Michael R. Gordon, *U.S. Warplanes Strike ISIS Oil Trucks in Syria*, N.Y. TIMES (Nov. 16, 2015), http://www.nytimes.com/2015/11/17/world/middleeast/us-strikes-syria-oil.html?_r=0.) (quoting Colonel Steven H. Warren, Department of Defense Spokesman who said the strikes were “designed to attack the distribution component of ISIL’s oil smuggling operation and degrade their capacity to fund their military operations”); Luis Martinez, *U.S. Airstrikes Destroy More than \$500 Million in ISIS Cash Reserves*, ABC NEWS (Feb. 17, 2016), <http://abcnews.go.com/International/us-airstrikes-destroy-500-million-isis-cash-reserves/story?id=37010061> (“Beginning last fall, the U.S. also began targeting ISIS ‘cash distribution centers’ in Syria where ISIS stored hard cash used for its operations.”).

objectives. Additional Protocol I provides useful guidance on this question. While the United States is not party to Additional Protocol I, 174 States are, and the United States regards large portions of the protocol as customary law.²⁴⁸ Additional Protocol I defines military objectives to include those which “by their nature, location, purpose or use make an effective contribution to military action.”²⁴⁹ The U.S. has interpreted this to include a contribution to the “war-fighting or war-sustaining capability of an opposing force.”²⁵⁰ This interpretation has been the subject of debate.²⁵¹

²⁴⁸ See Michael J. Matheson, *Remarks in Session One: The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT’L L. & POL’Y 419 (1987).

²⁴⁹ Protocol I, *supra* note 212, at art. 52(2).

²⁵⁰ DOD LAW OF WAR MANUAL, *supra* note 87, at 210.

²⁵¹ See, e.g., DINSTEIN, *supra* note 57, at 95 (“An American attempt . . . to substitute the words ‘military action’ by the idiom ‘war-fighting or war-sustaining capability’ goes too far.”). The U.S. cites historical practice as support for their position, including the Union destruction of the Confederacy’s cotton and coalition destruction of narcotics infrastructure during the conflict in Afghanistan. DOD LAW OF WAR MANUAL, *supra* note 87, at 264. *But see* Ken Watkin, *Targeting “Islamic State” Oil Facilities*, 90 INT’L L. STUD. 499 (2014) (noting that “a 2009 Report to the Committee on Foreign Relations in the United States Senate indicates the authorization to use lethal force in this context in Afghanistan caused some countries to question ‘whether the killing of traffickers and destroying drug labs complied with international law’”) (citations omitted). Support for this position can further be found in the ICRC’s 1956 Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War. *Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War ICRC, 1956*, INT’L COMMITTEE OF THE RED CROSS, <https://ihl-databases.icrc.org/ihl/INTRO/420?OpenDocument> (last visited Feb. 22, 2017); MICHAEL BOTHE, KARL JOSEPH PARTSCH & WALDEMAR A. SOLF, *NEW RULES FOR VICTIMS OF ARMED CONFLICTS* 324 (1982) (“[M]ilitary objectives include activities providing administrative and logistical support to military operations”); W. Hays Parks, *Asymmetries and the Identification of Legitimate Military Objectives*, in *INTERNATIONAL HUMANITARIAN LAW FACING NEW CHALLENGES* 100 (Wolff Heintschel von Heineff ed., 2007) (“War-sustaining and/or war-fighting reflect State practice.”); HUMANITARIAN POLICY AND CONFLICT RESEARCH, *MANUAL ON INTERNATIONAL LAW APPLICABLE TO AIR AND MISSILE WARFARE* r. 23 (2013) (“Objects which may qualify as military objectives . . . include, but are not limited to, factories, lines and means of communications (such as airfields, railway lines, roads, bridges and tunnels); energy producing facilities; oil storage depots; transmission facilities and equipment.”).

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This article need not weigh in on the breadth of Article 52. The focus of the inquiry here is on whether the targeted oil tankers and cash reserves make an *effective contribution* to the *military* action of ISIS and whether their destruction offers a definite military advantage to the United States. Oil and cash are best categorized as military objectives by their purpose—that is, their intended future use.²⁵²

Determining the intended future use of an object is a precarious exercise. As Professor Schmitt has cautioned, where “the intended future use of an object is not perfectly clear, the attacker must act reasonably given the information available at the time of the strike.”²⁵³ Whether a given attack on an oil tanker or cash reserve will result in a definite military advantage to the U.S. will depend on the details of a given strike. If, for example, the oil was being driven directly to fuel a piece of military hardware, then its destruction will offer a clear military advantage. Robust intelligence on the nature of the target combined with post-destruction analysis can help better inform targeting decisions.

The destruction of these categories of targets is complicated by the fact that ISIS acts as a State-like entity, providing a range of noncombat services to civilians. Identifying which portion of the cash is going to sustain the war effort and which portion is going to construct civilian schools would be extremely difficult. Thus, absent intelligence on the target, it is difficult to determine the nature of the military advantage that might be gained by the target’s destruction.

3. Accountability

1. Individual Liability

Individuals, of course, may be individually criminally liable for violations of LOAC.²⁵⁴ A number of fora are available to prosecute

252 COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 at 636, ¶ 2022 (Yves Sandoz, Christophe Swinarski & Bruno Zimmermann eds., 1987) (“The criterion of ‘purpose’ is concerned with the intended future use of an object, while that of ‘use’ is concerned with its present function.”).

253 Schmitt & Widmar, *supra* note 214.

254 Rome Statute of the International Criminal Court art. 5, July 17, 1998, 2187 U.N.T.S. 90.

violations of the LOAC, including domestic courts, *ad hoc* international tribunals such as the International Criminal Tribunal for the Former Yugoslavia,²⁵⁵ hybrid tribunals such as the Extraordinary Chambers in the Courts of Cambodia,²⁵⁶ or the International Criminal Court (ICC).

Currently no tribunals are possessed of cases arising from Syria. The most likely forum is the ICC, through jurisdiction there is not a forgone conclusion. As opposed to many other international tribunals, the jurisdiction of the ICC is complementary to national criminal jurisdiction.²⁵⁷ Thus, the court will only exercise jurisdiction in cases in which the State is “unwilling or unable genuinely to carry out the investigation or prosecution.”²⁵⁸

Syria, however, is not a party to the Rome Statute, thus ICC jurisdiction over crimes committed in Syria by Syrians can only come from a referral from the Security Council.²⁵⁹ At this time, a referral appears unlikely given the close relationship between the Syrian government and Russia.²⁶⁰ Assuming the Security Council does refer the case, there exists an open question as to whether or not the ICC would have jurisdiction over use of chemical weapons as a stand-alone crime.²⁶¹ The issue arises from the text of the Rome Statute and the

255 UNITED NATIONS INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, <http://www.icty.org/> (last visited July 2, 2016).

256 Extraordinary Chambers in the Courts of Cambodia, <http://www.eccc.gov.kh/en> (last visited July 2, 2016).

257 Rome Statute of the International Criminal Court art. 1, July 17, 1998, 2187 U.N.T.S. 90 (the jurisdiction of the ICC “shall be complementary to national criminal jurisdictions.”).

258 *Id.* at art. 17.

259 *Id.* at art. 13.

260 See *Russia Opposes Syria Crisis War Crimes Court Referral*, REUTERS (Jan. 15, 2013), <http://www.reuters.com/article/syria-crisis-russia-idUSL6N0AKCNB20130115> (Russia has referred to efforts to secure an ICC referral as “ill-timed and counterproductive”).

261 See Alex Whiting, *The International Criminal Court, the Islamic State, and Chemical Weapons*, JUST SEC. (Nov. 4, 2015), <https://www.justsecurity.org/27359/icc-islamic-state-chemical-weapons/>; Dapo Akande, *Can the ICC Prosecute for Use of Chemical Weapons in Syria?*, EJIL: TALK! (Aug. 23, 2015), <http://www.ejiltalk.org/can-the-icc-prosecute-for-use-of-chemical-weapons-in-syria/>; Jillian Blake & Aqsa Mahmud, *A Legal “Red Line”? Syria and the Use of Chemical Weapons in Civil Conflict*, 61 UCLA L. REV. DISCOURSE 244 (2013), <http://www.uclalawreview.org/pdf/discourse/61-16.pdf>.

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removal during the drafting process of explicit reference to a prohibition on the use of chemical weapons.²⁶² Resolution—or even comment—on this issue is well beyond the scope of this article.

2. State Responsibility

Beyond individual liability for violations of the LOAC, there exists the question of attributing violations to a State. Actions may be attributable to the State in three instances. First, when the actor is acting as an actual or de facto State official.²⁶³ This would not extend to an actor's purely private conduct, but would extend to actions taken *ultra vires*.²⁶⁴ Second, where the actor is in the pay, acting on direct instructions, and under the supervision of the State with the orders to carry out specific tasks.²⁶⁵ In these circumstances, the individual acts carried out at the supervision or direction of the State will be attributable to the State. Finally, there are those instances in which the State exercises effective control over a group.²⁶⁶

²⁶² William A. Schabas, *Chemical Weapons: Is it a Crime?*, HUM. RIGHTS DOCTORATE BLOG (Apr. 29, 2013), <http://humanrightdoctorate.blogspot.co.uk/2013/04/chemical-weapons-is-it-crime.html>.

²⁶³ Prosecutor v. Tadić, Case No. IT-94-1-A, Appeals Chamber Judgment, ¶ 109, (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999) (quoting Difference Relating to the Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, 199 I.C.J. Rep. 62 (Apr. 29, 1999): “[T]he Court [in *Nicaragua*] clearly started from a basic assumption, which the same Court recently defined as ‘a well-established rule of international law’ that a State incurs responsibility for acts in breach of international obligations committed by individuals.”); *Articles, supra* note 51, at art. 4, Commentary (“Where such a person acts in an apparently official capacity, or under colour of authority, the actions in question will be attributable to the State.”).

²⁶⁴ *Id.* (“The case of purely private conduct should not be confused with that of an organ functioning as such but acting *ultra vires* or in breach of the rules governing its operation. In this latter case, the organ is nevertheless acting in the name of the State: this principle is affirmed in article 7.”).

²⁶⁵ *Nicaragua*, 1986 I.C.J. 226, ¶ 86; *Articles, supra* note 51, at art. 8 (“The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.”).

²⁶⁶ *Articles, supra* note 51, at art. 8.

The actions of Syrian government forces are clearly attributable to the government of Syria. Similarly, the actions of Hezbollah in Syria are likely attributable to Iran where there are indications that Hezbollah's actions in Syria are at the direction and control of Iran.²⁶⁷ Violations of LOAC committed by members of the opposition forces are unlikely attributable to a State. As discussed above, the relationship between the United States and their partner forces, for example, does not appear to rise to the requisite level of control.

The relationship between the Syrian government and the *Shabbiha*, however, does appear to be sufficiently close to attribute the actions of the *Shabbiha* to the government of Syria. The organization by its nature is secretive—the term “*shabbiha*” translates to ghost.²⁶⁸ It is not without note that the Commission of Inquiry defines government forces to include the *Shabbiha*.²⁶⁹ This is perhaps a reflection of the myriad of reports that show the *Shabbiha* acting in conjunction with government forces.²⁷⁰ The history of the *Shabbiha* demonstrates the inextricable

²⁶⁷ The precise nature of the Iranian support and control of Hezbollah is uncertain. One report notes the Iranian Quds Force “has coordinated with [Hezbollah] to train government and pro-Assad forces inside Syria.” WILL FULTON ET AL., INST. FOR THE STUDY OF WAR, IRANIAN STRATEGY IN SYRIA 21 (May 2013), <http://www.understandingwar.org/sites/default/files/IranianStrategyinSyria-1MAY.pdf>. Another report notes that an Iranian commander “directs operations in Syria and oversees Iranian arms shipments to Hezbollah.” SULLIVAN, *supra* note 41, at 14. This same report notes that Hezbollah “coordinates closely with Syrian and Iranian commanders at the operational and strategic level.” *Id.* at 23. Further, the Iranian Quds force and the Syrian “military high command operate a headquarters in Damascus where they coordinate operations across the country. A senior Hezbollah commander is also co-located at this headquarters” *Id.* at 23–24.

²⁶⁸ YAVUZ GUÇTURK, THE LOSS OF HUMANITY: THE HUMAN RIGHTS DIMENSION OF THE CIVIL WAR IN SYRIA 20 n. 2 (2014) (“*Shabbiha* literally means ghost or phantom in Arabic.”).

²⁶⁹ *See supra* note 8.

²⁷⁰ Report 4, *supra* note 8.

[The witness] related how two tanks entered her street with some 50 *Shabbiha* accompanying them Government forces shelled Daraya from 20 to 24 August, after which they moved into the town together with *Shabbiha* Members of the *Shabbiha* and possibly members of the Iranian Republican Guard accompanied the army Reports from credible sources suggest that *Shabbiha* deployed together with the army A woman from Homs

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relationship with the Syrian government. As one author has noted, “President Assad, and his father Hafez before him, used the *Shabiha* to terrorise Syrians into obedience, brainwashing the militia into believing the Sunni majority was their enemy.”²⁷¹ It further appears that membership is drawn from Alawite communities and the Assad family itself.²⁷² The government also allegedly supplies weapons to the group.²⁷³

A news article recounts a series of meetings in which “Maher al-Assad, the president’s brother, planned ‘the making of the *shabiha*’—and others in which they commanded it to do their ‘dirty work’ by shooting unarmed opposition activists.”²⁷⁴ This account details how the government “appointed leaders for militias across the country; released prisoners from ‘death row’ to join the force; and then provided the financing and the weapons that they needed in order to act.”²⁷⁵ Given

described a ground invasion by the army and *Shabbiha* in October 2012 A young woman from Dara’a described “*Shabbiha* and security forces” invading her town on 22 November In September, a neighbourhood in Homs was searched by Government security forces and ‘*Shabbiha*’ On 14 October, a mixture of Air Force Intelligence, Military Security Intelligence and *Shabbiha* entered the town of Mhajjah, Dara’a In well-corroborated accounts, the army, Air Force Intelligence, Military Intelligence and *Shabbiha* entered Tafas in late November and burned multiple houses and shops. *Id.* 55–119.

271 Harriet Alexander & Ruth Sherlock, *The Shabiha: Inside Assad’s Death Squads*, TELEGRAPH (Jun. 2, 2012), <http://www.telegraph.co.uk/news/worldnews/middleeast/syria/9307411/The-Shabiha-Inside-Assads-death-squads.html>.

272 *Syria Unrest: Who are the Shabiha?*, BBC (May 29, 2012), <http://www.bbc.com/news/world-middle-east-14482968>.

273 Hugh MacLeod & Annasofie Flamand, *Inside Syria’s Shabiha Death Squads*, TORONTO STAR (June 15, 2012), https://www.thestar.com/news/world/2012/06/15/inside_syrias_shabiha_death_squads.html (recalling a member of the *Shabbiha* “[p]acking up the Kalashnikovs, pistols, machine guns and grenades he said were given to him ‘by the government’”).

274 Salwa Amor & Ruth Sherlock, *How Bashar al-Assad Created the Feared Shabiha Militia: an Insider Speaks*, TELEGRAPH (Mar. 23, 2014), <http://www.telegraph.co.uk/news/worldnews/middleeast/syria/10716289/How-Bashar-al-Assad-created-the-feared-shabiha-militia-an-insider-speaks.html>.

275 *Id.*

these facts, the government of Syria likely exercises effective control of the *Shabbiha* militia.

C. *Foreign Fighters*

The issue of foreign fighters in Syria is a particularly acute problem. There are between 3,000–13,000 fighters in Syria, which is a historically high number of foreign fighters in a conflict.²⁷⁶ The fighters come from a diverse group of countries including Saudi Arabia, Libya, Jordan, Lebanon, Tunisia, France, Germany, and the UK. The largest States in Europe sending fighters (by proportion of population) are Austria, Belgium, Denmark, the Netherlands, Norway, and Sweden.²⁷⁷

Before the attendant legal issues are addressed, it is prudent to provide some background on the very concept of a foreign fighter. The phenomenon emerged in the 1980s in Afghanistan, and was grounded in the radical ideology of Abdallah Azzam.²⁷⁸ There is a relative dearth of scholarship given the relatively small scale of the phenomenon until the recent conflict in Syria. Whereas we see an excess of 10,000 foreign fighters in Syria, only three past conflicts have attracted more than 1,000 foreign fighters: Bosnia and Herzegovina, Afghanistan, and Iraq.²⁷⁹

This emerging problem has resulted in increased scholarship and a struggle to properly define the concept. United Nations Security Council Resolution 2178 provides that foreign fighters are “individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, including in connection with armed conflict.”²⁸⁰ This is perhaps a sufficiently functional definition for the purposes of the resolution, but it does not survive close scrutiny. As an initial matter, the definition limits foreign fighters to those seeking to commit acts of

²⁷⁶ Peter R. Neumann, *Foreign Fighter Total in Syria/Iraq now Exceeds 20,000; Surpasses Afghanistan Conflict in the 1980s*, INT’L CTR. FOR THE STUDY OF RADICALIZATION AND POL. VIOLENCE (Jan. 26, 2015), <http://icsr.info/2015/01/foreign-fighter-total-syriairaq-now-exceeds-20000-surpasses-afghanistan-conflict-1980s/>.

²⁷⁷ *Id.*

²⁷⁸ Hegghammer, *supra* note 4, at 73.

²⁷⁹ *Id.*

²⁸⁰ S.C. Res. 2178 (Sep. 24, 2014).

terrorism; a term that eludes definition, but most certainly would exclude a number of those actors in Syria universally regarded as foreign fighters. Second, the definition does not address the issue of motivation. This is crucial, as a fighter motivated by financial remuneration has different status under international law from a non-financially motivated fighter. In actuality, a foreign fighter motivated by money is a mercenary.²⁸¹

Other organizations and scholars have proffered more realistic and functional definitions. The Geneva Academy, for instance, adopted the following: “A foreign fighter is an individual who leaves his or her country of origin or habitual residence to join a non-state armed group in an armed conflict abroad and who is primarily motivated by ideology, religion, and/or kinship.”²⁸² This is in keeping with the definition proffered by Thomas Hegghammer, a social scientist writing in *International Security*, who defines a foreign fighter as an agent who (1) has joined, and operates within the confines of, an insurgency; (2) lacks citizenship of the conflict state or kinship links to its warring factions; (3) lacks affiliation to an official military organization; and (4) is unpaid.²⁸³ The difference between these two definitions is the element of pay; in the Geneva Academy definition, the fighter must be “primarily motivated by ideology, religion, and/or kinship” whereas Hegghammer requires that the individual not be paid.

It would seem that Hegghammer is attempting to distinguish foreign fighters from mercenaries, who, under Article 47 of Additional Protocol I (API) must be “motivated to take part in hostilities essentially by the desire for private gain.”²⁸⁴ Both definitions above are essentially variants on the definition of mercenary found in Article 47 of API. Yoram Dinstein and others have highlighted the difficulty in parsing out primary motivations from financial motivations.²⁸⁵ That difficulty is no

²⁸¹ Protocol I, *supra* note 212, at art. 47.

²⁸² *Academy Briefing No. 7: Foreign Fighters under International Law* 6, GENEVA ACADEMY (Oct. 2014), https://www.geneva-academy.ch/joomlatools-files/docman-files/Publications/Academy%20Briefings/Foreign%20Fighters_2015_WEB.pdf.

²⁸³ Hegghammer, *supra* note 4, at 57–58.

²⁸⁴ Protocol I, *supra* note 212, at art. 47.

²⁸⁵ YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 57 (2d. ed. 2010).

less so with foreign fighters. The distinction is critical as mercenaries are prohibited by international law.

Assuming foreign fighters are not mercenaries, what then is their status under international law? Broadly, as a category they are neither specifically prohibited nor protected. Indeed, the title “foreign fighter” does not create any obligation or right under LOAC. The only legal importance of being a “foreign fighter” comes from Security Council Resolutions 2170 and 2178. Acting under Chapter VII, UNSCR 2170 “[c]alls upon all Member States to take national measures to suppress the flow of foreign terrorist fighters to, and bring to justice, in accordance with applicable international law.”²⁸⁶ The resolution further expresses the Security Council’s readiness “to consider listing those recruiting for or participating in the activities of ISIL, [*al-Nusra* Front] and all other individuals, groups, undertakings and entities associated with Al-Qaida under the Al-Qaida sanctions regime, including through financing or facilitating, for ISIL or [*al-Nusra* Front], of travel of foreign terrorist fighters.”²⁸⁷

Also acting under Chapter VII, UNSCR 2178 reiterates 2170’s call on States “to cooperate in efforts to address the threat posed by foreign terrorist fighters” and take actions to prevent “foreign terrorist fighters from crossing their borders.”²⁸⁸ Taken together, these resolutions unquestionably recognize the threat posed by foreign fighters. They also correctly recognize the problem of how to treat the State of origin, States of transit, and the State in which the foreign fighter is fighting. They do not, of course, change the status or provide combatant immunity of the foreign fighter in an armed conflict.

D. *Cease-Fire*

A final point should be made regarding the various cease-fires and the ongoing peace process, as both raise the prospect of an end to hostilities and attendant questions concerning the applicability of LOAC during the twilight of a conflict. On February 27, 2016, the first cease-

²⁸⁶ S.C. Res. 2170 (Aug. 15, 2014).

²⁸⁷ *Id.*

²⁸⁸ *Id.*

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fire went into effect in Syria.²⁸⁹ The terms of the cease-fire include prohibitions on attacks and promises to allow for the provision of humanitarian aid.²⁹⁰ The agreement does not apply to attacks on ISIS or *al-Nusra*.²⁹¹ The cease-fire was short-lived and violence has resumed across the country.

As a general proposition, it has been suggested that where a conflict is no longer an IAC or NIAC, then LOAC ceases to apply.²⁹² This principle makes sense, particularly when read together with a corollary that holds a conflict ceases to be a conflict after the “close of military operations and a general conclusion of peace.”²⁹³ This corollary is taken from the ICTY, which warned in the *Gotovina* case,

Once the law of armed conflict has become applicable, one should not lightly conclude that its applicability ceases. Otherwise, the participants in an armed conflict may find themselves in a revolving door between applicability and

²⁸⁹ *Joint Statement of the United States and the Russian Federation, as Co-Chairs of the ISSG, on Cessation of Hostilities in Syria*, U.S. DEP’T OF STATE (Feb. 22, 2016), <http://www.state.gov/r/pa/prs/ps/2016/02/253115.htm>.

²⁹⁰ *Id.*

²⁹¹ *Id.*

²⁹² Marko Milanovic, *The End of Application of International Humanitarian Law*, 96 INT’L REV. RED CROSS 163, 170 (2014) (citing Derek Jinks, *The Temporal Scope of Application of International Humanitarian Law in Contemporary Conflicts* 3 (Harvard Program on Humanitarian Policy and Conflict Research Jan. 2003), www.hpcrresearch.org/sites/default/files/publications/Session3.pdf; Jann Kleffner, *Scope of Application of International Humanitarian Law*, in THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW (Dieter Fleck, ed., 3d ed. 2013).

²⁹³ *Prosecutor v. Gotovina*, Case No. IT-06-90-T, Judgment (Trial Chamber), ¶ 169, (Int’l Crim. Trib. For the Former Yugoslavia Apr. 15, 2011); *see also* *Prosecutor v. Tadić*, Case No. IT-94-1-AR72, Decision on Defense Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) (“International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.”).

non-applicability, leading to a considerable degree of legal uncertainty and confusion.²⁹⁴

The termination of an NIAC is, as one commentator has noted, “a rather more difficult issue.”²⁹⁵ Neither Common Article 3 nor Additional Protocol II provide for the termination of their application. Addressing this issue, Professor Marko Milanovic identifies two options for gauging the end of an NIAC. In the first, the *Tadić* test applies symmetrically, thus where some hostilities continue, the NIAC continues.²⁹⁶ The second approach would find an NIAC terminated when the level of violence falls below “protracted armed violence” for some degree of permanence and stability.

Despite the numerous cease-fires, the violence in Syria has continued to a significant degree with regard to all NIACs.²⁹⁷ Thus, regardless of the approach one adopts, as of the time of writing, LOAC continues to apply to all NIACs in Syria. Determining when a given NIAC in Syria has ended will have to be considered on an ad hoc basis for each NIAC. Thus, it is possible that a cease-fire could lead to protracted peace between the Syrian government and all Syrian opposition forces, which would end the NIAC between those groups, but would have no impact on, the continuing NIAC between Syria and ISIS.

V. CONCLUSION

The conflict in Syria is not an aberration. Rather, it is likely a prototype for the future: conflicts driven by some combination of sectarian, tribal, or ethnic divisions and fueled by proxy involvement. The issues of international law presented by such conflicts are significant and complex. One might view the conflict in Syria and

²⁹⁴ *Gotovina*, Case No. IT-06-90-T, Judgment (Trial Chamber), ¶ 169.

²⁹⁵ SANDESH SIVAKUMARAN, *THE LAW OF NON-INTERNATIONAL ARMED CONFLICT* 252 (2012).

²⁹⁶ Milanovic, *supra* note 292, at 179.

²⁹⁷ See, e.g., *Claims of Violations Test Syria's Fragile Truce*, AL JAZEERA (Feb. 28, 2016), <http://www.aljazeera.com/news/2016/02/claims-violations-test-syria-conditional-truce-160228165404818.html>; *Russia Says Registered Eight Syria Ceasefire Violations in Last 24 Hours*, REUTERS (Mar. 7, 2016), <http://www.reuters.com/article/us-mideast-crisis-syria-violations-idUSKCN0W91PF>.

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reasonably conclude such conflicts are sufficiently novel and complex so as to render impossible the object and purpose of LOAC.

I do not believe that to be the case. The conflict in Syria highlights many of the ongoing debates in international law: the legitimacy of humanitarian intervention as grounds for the use of force; the alleged gap between Article 2(4) and Article 51 of Additional Protocol I; the geographic scope of the applicability of LOAC; self-defense against a non-State actor; and the legitimacy of targeting war-sustaining objects. The very fact that the Syrian conflict highlights so many fault lines indicates the law is applicable, though its application is, at times, uncertain. The Syrian conflict provides an opportunity to better understand these lacunae and continually seek to strengthen the framework of applicable law.