

TRYING TO MAKE SENSE OF THE SENSELESS: CLASSIFYING THE SYRIAN WAR UNDER THE LAW OF ARMED CONFLICT

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I. INTRODUCTION

The violence in the Syrian war continues unabated after the most recent effort by the United States and Russia to facilitate a partial cease-fire failed.² The conflict, now entering in its sixth³ year, has exacted an immense toll on the people of Syria. Approximately half the Syrian population has been forced to leave their homes, including 4.9 million refugees who have fled to nearby Lebanon, Turkey, Jordan, Iraq and Egypt.⁴ Millions in Syria require humanitarian aid, many of them children.⁵ Unemployment has risen dramatically⁶ and life expectancy has dropped approximately 20 years.⁷

The humanitarian tragedy caused by the Syrian war makes attempts to characterize the conflict a seemingly abstract and irrelevant exercise. However, classifying the conflict is not just an academic endeavor; it is a condition precedent in determining the legal responsibilities and obligations of those engaged in the hostilities. By clearly identifying these rights and duties, conflict participants are put on notice that they are bound by the well-established humanitarian principles embedded within the law of armed conflict and responsible for any violations. Classifying the Syrian hostilities is therefore a critical first step towards

2. See, e.g., Anne Barnard, *Cease-Fire in Syria Crumbles as Government Airstrikes Kill Dozens in Northwestern Town*, N.Y. TIMES, Apr. 20, 2016, at A9 (stating that the partial cease-fire has “crumbled” and the goals of the “chief international sponsors of the talks, the United States and Russia, have dissipated.”).

3. See Richard Johnson, *Visualizing the 220,000 Lives Lost in Syria*, WASH. POST (Mar. 29, 2015), <http://www.washingtonpost.com/graphics/world/syria-220000/>.

4. *Syria Regional Refugee Response*, U.N. HIGH COMM’R FOR REFUGEES, <http://data.unhcr.org/syrianrefugees/regional.php> (last updated Apr. 6, 2017).

5. *Syria Overview*, WORLD BANK, <http://www.worldbank.org/en/country/syria/overview> (last visited May 23, 2015).

6. *Id.*

7. Lucy Westcott, *Syrian Life Expectancy Drops Over 20 Years in Four Years*, NEWSWEEK (Mar. 11, 2015, 4:37 PM), <http://www.newsweek.com/2015/03/27/syrian-life-expectancy-drops-two-decades-four-years-313145.html>.

reducing the brutality of the conflict and ensuring accountability for those participants who ignore their legal obligations.

In hopes of promoting both humanity and accountability this article intends on answering the question: what type of conflict is taking place in Syria? To conduct this analysis it is important to understand the political history of Syria and thus the article begins with a brief historical background section. Sections on the various state and non-state actors battling within Syria as well as a general overview of how conflicts are classified under international law follows. The article concludes with a classification determination for the Syrian hostilities and a reminder that all parties to the conflicts are obligated to comply with the law of armed conflict.

II. BACKGROUND TO THE CURRENT CONFLICT

A. A Brief Overview of Syria's Political History

Understanding Syria's political history is essential to fully comprehend the modern conflict. The area now known as Syria was under Ottoman rule until World War I.⁸ Following the empire's collapse, the League of Nations created a mandate recognizing Syria, which was to be ruled temporarily by France before final recognition of independence.⁹ Thus began 26 years of French rule, categorized by heavy-handed military occupation and forced regime changes.¹⁰

The British forced the French out of power in 1941.¹¹ The period following independence was tumultuous for the Syrian government, with a series of military coups and ousted dictators.¹² In 1970, Hafez al-Assad, father of the current leader Bashar al-Assad and then Defense Minister, seized power.¹³ Assad, a member of the Alawi religious minority and the

8. William R. Polk, *Understanding Syria: From Pre-Civil War to Post-Assad*, ATLANTIC (Dec. 10, 2013), <http://www.theatlantic.com/international/archive/2013/12/understanding-syria-from-pre-civil-war-to-post-assad/281989>.

9. *Id.*

10. *See id.*

11. *Id.*

12. *Id.*

13. *Id.*

socialist Baath party,¹⁴ eventually held a referendum that solidified his position as president.¹⁵

Assad's approach to governance was greatly informed by his affiliation with the Baath party which originated from a liberal student ideology developed in opposition to French rule.¹⁶ The underlying ideological basis of the movement was unity and particularly the valuing of "Arabism" above all other dividing factors, including religious sectarianism.¹⁷ It also endorsed modern secular values, including rights for women.¹⁸ In primary opposition to the Baath Party in Syria was the conservative Muslim Brotherhood, an Islamic movement which espoused the idea that Syria must be a Sunni Muslim nation.¹⁹ Indeed, a majority of the population was and is currently Sunni, and many Sunnis consider the Alawis, of which the al-Assad family belongs, to be heretics.²⁰

The Assad regime forcefully cracked-down on opposition groups.²¹ The Muslim Brotherhood led an uprising against the government in 1982.²² In response, the regime suppressed the opposition with violence, culminating in the seizure of the city of Hama, headquarters of the Muslim Brotherhood.²³ Under orders from Assad, the Syrian military killed between 10,000 and 20,000 people, many of them innocent civilians, during the siege.²⁴

Al-Assad died in 2000 and his son Bashar became president by referendum vote.²⁵ Bashar al-Assad inherited an authoritarian regime which was known to have pervasive corruption.²⁶ Many Syrians hoped that the new regime would usher in a period of reform, and in the months

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *See id.*

21. *See* Deborah Amos, *30 Years Later, Photos Emerge from Killings in Syria*, NPR (Feb. 2, 2012, 12:41 PM), <http://www.npr.org/2012/02/01/146235292/30-years-later-photos-emerge-from-killings-in-syria>.

22. *Id.*

23. DAVID W. LESCH, *SYRIA: THE FALL OF THE HOUSE OF ASSAD* 7 (2012).

24. *Id.*

25. *Id.* at 3–4.

26. *Id.* at 5.

following Bashar's ascendancy to the presidency, the country saw a rise in more open political discourse.²⁷ What some have called the "Damascus Spring" of 2000–2001, however, was quickly curtailed by the younger Assad, who had authorities arrest dissenting intellectuals and political activists.²⁸ Assad further alienated Syria's Sunni workers and peasantry through his economic policies that disproportionately benefitted elite Alawis who were close to him.²⁹ With only 13% of the population being Shia, Ismaili or Alawi Muslim³⁰ this special treatment of the Alawis disenfranchised the majority of the population and further destabilized the country.³¹

B. Other Contributing Factors to the Conflict

The political history of Syria is an important root cause of the current conflict. However, there are a number of other contributing factors that have led to hostilities. These include environmental problems, economic instability, and regional unrest. Each of these is described in more detail below.

i) Drought/ Economic Instability Prior to Arab Spring

Syria is a relatively small country—about the size of Washington State—whose economy struggled under both Hafez and Bashar al-Assad.³² Prior to 2011, the government's efforts at economic reform had increased economic growth—between 2004 and 2009, Syria's growth rate averaged approximately 5.7%.³³ However, the country's relative economic well-being was vulnerable to both unexpected external and internal pressures, including the global financial crisis, a population

27. AMNESTY INT'L, SYRIA: SMOTHERING FREEDOM OF EXPRESSION: THE DETENTION OF PEACEFUL CRITICS 3–4 (2002), available at <https://www.amnesty.org/en/documents/MDE24/007/2002/en/>.

28. *Id.*

29. Christopher Phillips, *After the Arab Spring: Power Shift in the Middle East?: Syria's Bloody Arab Spring*, LONDON SCH. ECON. & POL. SCI. 37, 38 (2012).

30. *The World Factbook: Syria*, U.S. CIA, <https://www.cia.gov/library/publications/the-world-factbook/geos/sy.html> (last updated January 12, 2017).

31. See Phillips, *supra* note 29, at 38.

32. LESCH, *supra* note 23, at 6.

33. *Syria Overview*, *supra* note 5.

boom and long-term droughts which affected its limited cropland.³⁴ Gross Domestic Product was approximately \$5,000 per capita prior to 2006, but because of the almost four-year drought, fell to approximately \$2,900 in 2010.³⁵ The drought conditions unequally burdened Syrians in rural areas who depended on agriculture to survive.³⁶ Many rural Syrians, especially in the eastern part of the country, migrated to larger cities as a result of the poor agricultural prospects, fueling already tense employment competition in those crowded areas.³⁷

ii) Arab Spring – Domino Effect

In December 2010, a Tunisian fruit vendor named Mohammed Bouazizi set himself on fire to protest perceived corruption and injustices perpetrated by the Tunisian government.³⁸ A wave of unrest ensued in that country and quickly spread to Algeria, Jordan, Egypt and Yemen.³⁹ It directly led to the ousting of the regimes in Tunisia and Egypt.⁴⁰ Ideological aims differed by country, but disaffected Arabs were primarily targeting political and economic alienation, despotic rule, and government corruption.⁴¹ Building momentum after early successes, the Arab Spring spread further to include Libya, Saudi Arabia, Iran and other countries.⁴²

Until 2011, opponents of the Assad regime had mostly refrained from public demonstrations.⁴³ Empowered by the recent events in Tunisia and Egypt, however, dissenters became more vocal and began imitating the

34. *Id.*

35. Polk, *supra* note 8.

36. *See id.* (stating that over “800,000 farmers...los[t] their entire livelihood[s], and ...85 percent of livestock died”).

37. *See Syria Overview, supra* note 5.

38. Marc Fisher, *In Tunisia, Act of One Fruit Vendor Sparks Wave of Revolution Through Arab World*, WASH. POST (Mar. 26, 2011), http://www.washingtonpost.com/world/in-tunisia-act-of-one-fruit-vendor-sparks-wave-of-revolution-through-arab-world/2011/03/16/AFjfsueB_story.html.

39. *Id.*

40. *Id.*

41. Marc Lynch, *The Big Think Behind the Arab Spring*, FOREIGN POL’Y (Nov. 28, 2011), <http://foreignpolicy.com/2011/11/28/the-big-think-behind-the-arab-spring/>.

42. *Id.*

43. Phillips, *supra* note 29, at 38.

language and tactics of protesters elsewhere in the Arab world.⁴⁴ Demonstrators used Facebook, YouTube and Twitter to organize and used slogans borrowed from other uprisings to demand regime change.⁴⁵

iii) Syrian Uprising

The widespread demonstrations seen during the Arab Spring coupled with the collapse of other dictatorial regimes emboldened the Syrian opposition to begin their own internal protests.⁴⁶ These protests eventually led to armed violence as the Syrian government responded with heavy-handed tactics in an effort to quell the reform uprising.⁴⁷ When protests demanding reform reached the town of Deraa, in southern Syria, Assad's security forces countered with violence, killing hundreds.⁴⁸ Demonstrators had been protesting the government's arrest and inhumane treatment of several local children accused of writing anti-regime graffiti on a school building.⁴⁹ In a speech before parliament later in 2011, Assad refused to apologize for the incident or offer conciliatory reforms.⁵⁰ Syrian forces opened fire on the increasing number of protesters, and violence snowballed as funerals for slain demonstrators became a catalyst for even more protests.⁵¹ The government's violent crack-down on dissent prompted the further radicalization of the opposition, and riots broke out throughout the country.⁵² Rebels split into a myriad of militarized opposition groups and violence between these emerging groups and Syrian forces increased dramatically.⁵³ Since 2011, many rebel groups have been joined by foreign fighters and supported by foreign state funding. The internal chaos has also created a vacuum for emerging groups such as the Islamic State, which has made major

44. *Id.*

45. *Id.*

46. *Id.* at 37.

47. *Id.*

48. *Id.*

49. Joe Sterling, *Daraa: The Spark that Lit the Syrian Flame*, CNN, <http://www.cnn.com/2012/03/01/world/meast/syria-crisis-beginnings/> (last updated Mar. 1, 2012, 9:32 AM).

50. Phillips, *supra* note 29, at 38.

51. *Id.* at 39.

52. *Id.*

53. See LESCH, *supra* note 23.

inroads within Syria in the past several years. Over 220,000 people have been killed since the beginning of the conflict.⁵⁴

III. ACTORS IN THE SYRIAN CIVIL WAR

The fighting in Syria has evolved into a chaotic clash between numerous state and non-state armed groups. This confusing landscape makes classifying the conflict exceedingly difficult.⁵⁵ It is therefore important to understand the major players in the hostilities in order to properly classify the conflict. A short description of the actors participating in the hostilities follows.

A. Free Syrian Army

Defecting Syrian army officers formed the Free Syria Army (FSA) in 2011.⁵⁶ The FSA has evolved into an umbrella organization which includes many Syrian rebel groups—most under the direction of the Supreme Military Council, a Syrian militant rebel leader group.⁵⁷ The Supreme Military Council, in turn, has strong ties to the Syrian National Council—essentially a Syrian rebel provisional government in exile, located in Turkey.⁵⁸ The Syrian National Council was established in 2011 in an attempt to win international support for Syrian rebels.⁵⁹ The FSA is composed of thousands of fighters, mostly Sunni Arabs, and has a fairly structured chain of command.⁶⁰ Most of the groups comprising the FSA are considered moderate rebels, and the U.S. and other nations have been

54. Johnson, *supra* note 3.

55. See generally Prosecutor v. Tadić, Case No. IT-94-1-A, Appeals Chamber Judgment (Int'l Crim. Trib. for the former Yugoslavia July 15, 1999) (highlighting the difficulty of prosecuting individuals when an internal and international armed conflict are taking place simultaneously).

56. Phillips, *supra* note 29, at 40.

57. See Aron Lund, *A New Free Syrian Army Leadership*, CARNEGIE ENDOWMENT FOR INT'L PEACE (Apr. 14, 2014), <http://carnegieendowment.org/syriaincrisis/?fa=55245>.

58. See Phillips, *supra* note 29, at 40.

59. *Id.* at 39.

60. Lund, *supra* note 57.

providing financial, arms, and training support to them for several years.⁶¹

The U.S. has assisted in arming factions within the FSA since 2012, both indirectly and later directly—including small arms and antitank missiles.⁶² The U.S. has also provided the FSA with hundreds of millions of dollars of non-lethal aid, including medical kits, food and vehicles.⁶³ In 2013, the U.S. established a covert training site in Jordan⁶⁴—and later in Qatar⁶⁵ and Turkey⁶⁶ to train fighters. Details on these training sites are understandably scarce, and it is unclear how many rebels have been trained in total. Officials did state that fewer than 1,000 rebels were trained in 2013.⁶⁷ The training has been conducted by members of the CIA's Special Activities Division, an organization that recruits heavily from former U.S. Special Operations forces, and included training on basic military skills.⁶⁸ In May 2015, 400 rebels were being trained at the Jordanian site by the U.S., with the assistance of the British and French, for the primary purpose of combating ISIS.⁶⁹ Although, with the fluid

61. Julian Borger & Nick Hopkins, *West Training Syrian Rebels in Jordan*, GUARDIAN (Mar. 8, 2013, 9:31 AM), <http://www.theguardian.com/world/2013/mar/08/west-training-syrian-rebels-jordan>.

62. See *id.*; see also Ellen Knickmeyer et. al., *Advanced U.S. Weapons Flow to Syrian Rebels*, WALL ST. J. (Apr. 18, 2014, 7:03 PM), <https://www.wsj.com/articles/advanced-u-s-weapons-flow-to-syrian-rebels-1397862200?tesla=y>.

63. Mark Landler, *U.S. Considers Resuming Nonlethal Aid to Syrian Opposition*, N.Y. TIMES (Jan. 9, 2014), <http://www.nytimes.com/2014/01/10/world/middleeast/syria-aid-may-resume-despite-fears-over-where-it-will-go.html>.

64. Borger & Hopkins, *supra* note 61.

65. Nancy A. Youssef, *Syrian Rebels Describe U.S.-Backed Training in Qatar*, PBS (May 26, 2014), <http://www.pbs.org/wgbh/pages/frontline/foreign-affairs-defense/syria-arming-the-rebels/syrian-rebels-describe-u-s-backed-training-in-qatar/>.

66. Jim Sciutto et al., *U.S. Training of Syrian Rebels Set to Begin*, CNN, <http://www.cnn.com/2015/05/06/politics/khaled-khoja-free-syrian-army-u-s-support/> (last updated May 7, 2015, 6:45 PM).

67. Greg Miller, *CIA Ramping Up Covert Training Program for Moderate Syrian Rebels*, WASH. POST (Oct. 2, 2013), http://www.washingtonpost.com/world/national-security/cia-ramping-up-covert-training-program-for-moderate-syrian-rebels/2013/10/02/a0bba084-2af6-11e3-8ade-af23cda135e_story.html.

68. *Id.*

69. Ben Jacobs & Sabrina Siddiqui, *U.S. Begins Training Syrian Rebels in Jordan to Become Anti-ISIS Force*, GUARDIAN (May 7, 2015, 13:42), <http://www.theguardian.com/world/2015/may/07/us-begins-training-syrian-rebels-jordan-anti-isis-force>.

nature of the conflict in Syria, it seems likely that these groups will also put their western training to use against regime-backed forces as well.

The U.S. has also joined with other nations to support the FSA. The U.S., Saudi Arabia,⁷⁰ Turkey and Qatar⁷¹ helped the FSA develop logistical routes for moving supplies to rebels in Syria, and provided training in communications.⁷² These countries have also established a base of operation in Turkey, close to the Syrian border, where they coordinate intelligence and communication support efforts for the rebels.⁷³

Despite its reputation as a moderate rebel group, the FSA has faced serious allegations of wartime misconduct. Human Rights Watch has accused elements of the FSA of using children as fighters,⁷⁴ kidnapping civilians,⁷⁵ and conducting indiscriminate shelling of populated areas.⁷⁶

70. The Saudi Arabian government has been a major supporter of the FSA. See Mariam Karouny, *Saudi Edges Qatar to Control Syrian Rebel Support*, REUTERS (May 31, 2013, 3:19 PM), <http://www.reuters.com/article/2013/05/31/us-syria-crisis-saudi-insight-idUSBRE94U0ZV20130531>.

71. The Qatari government has also been a primary source of funding and arms for rebel groups, some sources estimating that the small state has provided billions total. See, e.g., David Blair, *Qatar and Saudi Arabia 'Have Ignited Time Bomb by Funding Global Spread of Radical Islam'*, TELEGRAPH (Oct. 4, 2014, 10:23 PM), <http://www.telegraph.co.uk/news/worldnews/middleeast/iraq/11140860/Qatar-and-Saudi-Arabia-have-ignited-time-bomb-by-funding-global-spread-of-radical-Islam.html>. Although it is difficult to trace which groups have benefitted from Qatar's support—Qatari-supplied arms have been used by the more extreme al-Nusra groups—some have clearly gone to FSA factions. See Mark Mazzetti et al., *Taking Outsize Role in Syria, Qatar Funnels Arms to Rebels*, N.Y. TIMES (June 29, 2013), <http://www.nytimes.com/2013/06/30/world/middleeast/sending-missiles-to-syrian-rebels-qatar-muscles-in.html>.

72. Jay Solomon & Nour Malas, *U.S. Bolsters Ties to Rebels in Syria*, WALL ST. J., <http://www.wsj.com/articles/SB10001424052702303410404577464763551149048> (last updated June 13, 2012, 9:10 PM).

73. Mark Hosenball, *Exclusive: Obama Authorizes Secret U.S. Support for Syrian Rebels*, REUTERS (Aug. 1, 2012, 5:58 PM), <http://www.reuters.com/article/2012/08/01/us-usa-syria-obama-order-idUSBRE8701OK20120801>.

74. *Syria: Armed Groups Send Children into Battle*, HUM. RTS. WATCH (June 22, 2014, 8:50 PM), <http://www.hrw.org/news/2014/06/22/syria-armed-groups-send-children-battle>.

75. *Syria: Armed Opposition Groups Committing Abuses*, HUM. RTS. WATCH (Mar. 20, 2012, 1:33 PM), <http://www.hrw.org/news/2012/03/20/syria-armed-opposition-groups-committing-abuses>.

As of 2015, the FSA's manpower has deteriorated significantly, as many fighters have deserted to join more radical groups such as ISIS and Jabhat al-Nusra (now *Hay'at Tahrir al-Sham*).⁷⁷

B. Islamic Front

In late 2013, seven Islamist rebel groups combined to form the Islamic Front. These groups included the Suqour al-Sham, Liwa al-Tawhid, Jaish al-Islam, Ahrar al-Sham, Ansar al-Sham, Liwa al-Haqq and the Kurdish Islamic Front—representing both extremist Islamic militants, and more moderate Islamists and Kurds.⁷⁸ The Islamic Front appears to be in the middle of the rebel ideological spectrum, more conservative than the FSA, but not as radical as Jabhat al-Nusra (now *Hay'at Tahrir al-Sham*) or ISIS.⁷⁹ They have had multiple clashes with other rebel groups, ISIS, and Syrian forces.⁸⁰ Evidence of foreign state funding for this group is scarce, and the group most likely depends largely on private support.⁸¹

C. Hay'at Tahrir al-Sham (formerly Jabhat al-Nusra)

This radical group has roots in Al Qaeda in Iraq (AQI), and was instrumental in organizing jihadist cells in Syria, beginning in late 2011.⁸² After breaking alliance with AQI, al-Nusra pledged support to Al

76. HUMAN RIGHTS WATCH, "HE DIDN'T HAVE TO DIE": INDISCRIMINATE ATTACKS BY OPPOSITION GROUPS IN SYRIA 70–71 (2015).

77. Erin Banco, *Four Years Later, the Free Syrian Army Has Collapsed*, INT'L BUS. TIMES, (Mar. 14, 2015, 9:14 AM), <http://www.ibtimes.com/four-years-later-free-syrian-army-has-collapsed-1847116>.

78. See Loveday Morris, *Seven Syrian Islamist Rebel Groups Form New Islamic Front*, WASH. POST (Nov. 22, 2013), http://www.washingtonpost.com/world/middle_east/seven-syrian-islamist-rebel-groups-form-new-islamic-front/2013/11/22/8a504da6-53bc-11e3-9ee6-2580086d8254_story.html.

79. Aron Lund, *The Politics of the Islamic Front, Part 1: Structure and Support*, CARNEGIE ENDOWMENT FOR INT'L PEACE (Jan. 14, 2014), <http://carnegieendowment.org/syriaincrisis/?fa=54183>.

80. *Id.*

81. *Id.*

82. *Hay'at Tahrir al-Sham (Formerly Jabhat al-Nusra)*, MAPPING MILITANT ORGS., <http://web.stanford.edu/group/mappingmilitants/cgi-bin/groups/view/493> (last updated Mar. 27, 2017).

Qaeda (AQ).⁸³ As a result, al-Nusra was designated as a terror group by the U.S. and faced sanctions by the U.N.⁸⁴ In an effort to soften its image, al-Nusra rebranded itself as al-Sham in August 2016.⁸⁵ Despite the new name, al-Sham remains essentially the al-Nusra that has had violent encounters with Hezbollah, elements of the FSA, and the Syrian Armed Forces.⁸⁶ It does control areas of Syria, and has instituted some forms of governmental functions in those areas, including food distribution, health care, trash collection, and control over utilities.⁸⁷

Next to ISIS, al-Sham has recruited the majority of foreign fighters among all rebel groups in Syria.⁸⁸ The majority of these foreign fighters originated in the Middle East, but some have come from Chechnya, Europe, Australia and the U.S.⁸⁹ Al-Sham reportedly has a consistent ability to procure weapons, funding and fighters from foreign donors.⁹⁰ In 2013, Iraq accused the government of Qatar of funding then al-Nusra.⁹¹ Qatar vehemently denied the allegation, but recent reports in 2015 indicate that Qatari Intelligence officials met with group leadership

83. *Id.*

84. Mariam Karouny, *Insight – Syria’s Nusra Front May Leave Qaeda to Form New Entity*, REUTERS (Mar. 4, 2015, 6:43 AM), <http://uk.reuters.com/article/2015/03/04/uk-mideast-crisis-nusra-insight-idUKKBN0M00G620150304>.

85. See Aymenn Jawad al-Tamimi, *Al-Qa’ida Uncoupling: Jabhat al-Nusra’s Rebranding as Jabhat Fete’h al-Sham*, MIDDLE EAST FORUM (Aug. 22, 2016), <http://www.meforum.org/6219/jabhat-alnusra-rebranding> (“The nominal decoupling of the organizations was approved and coordinated with al-Qa’ida’s senior leadership and was designed to unify Islamist efforts in Syria and to make it more difficult for the United States and Russia to justify targeting the group.”).

86. MAPPING MILITANT ORGS., *supra* note 82.

87. See Daveed Gartenstein-Ross & Phillip Smyth, *How Syria’s Jihadists Win Friends and Influence People*, ATLANTIC (Aug. 22, 2013), <http://www.theatlantic.com/international/archive/2013/08/how-syrias-jihadists-win-friends-and-influence-people/278942/> (noting that these efforts may have been sporadic and greatly exaggerated by the group on social media in an effort to gain popular support).

88. MAPPING MILITANT ORGS., *supra* note 82.

89. *Id.*

90. *Id.*

91. Blake Hounshell, *Iraq Accuses Qatar of Financing Jihadi Groups in Syria*, FOREIGN POLICY (Mar. 4, 2013, 6:39 PM), <http://foreignpolicy.com/2013/03/04/iraq-accuses-qatar-of-financing-jihadi-groups-in-syria/>.

to encourage severing ties with al-Qaeda, in a plan to provide funding for the organization.⁹²

It is difficult to map the areas of Syria controlled by rebel groups such as the FSA, Islamic Front, and al-Sham, as there are many factions within those umbrella organizations.⁹³ The groups are spread throughout the region and are not geographically contiguous.⁹⁴ In contrast, it is easier to determine the territory controlled by ISIS as it is the exclusive group in many areas of Syria and Iraq.⁹⁵

D. ISIS

The Islamic State (formerly AQI), also known as the Islamic State in Iraq and Syria (ISIS or ISIL), is a militant Islamic organization primarily located in Syria and Iraq. It has a highly organized command structure and collects enough revenue from its conquered areas to make it one of the richest terror organizations in history.⁹⁶ The group's purpose is to establish a caliphate, or a political and religious Islamic state which transcends country boundaries.⁹⁷ It has controlled sizeable areas of both Iraq and Syria⁹⁸ and has created a system of government within some of those areas.⁹⁹ Indeed, an important strategy of ISIS is their attempt to

92. Tom Porter, *Syria: Qatar Plotting for Al Nusra Front to Dump al Qaeda and Challenge Isis*, INT'L BUS. TIMES (Mar. 5, 2015, 13:14), <http://www.ibtimes.co.uk/syria-qatar-plotting-al-nusra-front-dump-al-qaeda-challenge-isis-1490425>.

93. Aron Lund, *The Political Geography of Syria's War: an Interview with Fabrice Balanche*, CARNEGIE ENDOWMENT FOR INT'L PEACE (Jan. 30, 2015), <http://carnegieendowment.org/syriaincrisis/?fa=58875>.

94. *See id.*

95. *Id.*

96. *How ISIS Works*, N.Y. TIMES, <http://www.nytimes.com/interactive/2014/09/16/world/middleeast/how-isis-works.html> (last updated Sep. 16, 2014).

97. MUHAMMAD AL-'UBAYDI ET AL., *Combating Terrorism Ctr. at West Point, The Group that Calls Itself a State: Understanding the Evolution and Challenges of the Islamic State* 18 (2014).

98. *See Syria: Mapping the conflict*, BBC (July 10, 2015), <http://www.bbc.com/news/world-middle-east-22798391>. *See also* Jack Moore, *After Mosul Losses, ISIS Now Controls Less than Seven Percent of Iraq*, NEWSWEEK, (Apr. 11, 2017, 8:19 AM), <http://www.newsweek.com/mosul-isis-seven-percent-iraq-582160> (noting that as of early 2017, the group controlled less than ten percent of Iraq, down from a high of forty percent in 2014).

99. AL-'UBAYDI ET AL., *supra* note 97 at 67–8.

establish long-term governance within geographic areas it has seized, to include providing public utilities, health care, education, security and food.¹⁰⁰ It is difficult, however, to assess the success of these efforts.¹⁰¹

ISIS has been involved in numerous violent incidents with various rebel Syrian factions, Kurdish groups, the Syrian military, and Hezbollah. It is a violent and extremist group, responsible for intentionally killing thousands of civilians, including conducting public beheadings of prisoners.¹⁰² It has kidnapped and subsequently held for ransom numerous foreign journalists and aid workers in Syria.¹⁰³ ISIS has also incensed the international community by selling numerous captured historical artifacts on the black market¹⁰⁴ and blatantly destroying cultural landmarks.¹⁰⁵ The CIA estimates that the group has 20,000-31,000 fighters in its ranks in late 2014, mostly in Iraq and Syria—many of whom are foreign recruits.¹⁰⁶ The U.S. and other allies began conducting airstrikes against ISIS in Syria in 2014, and the international coalition currently includes dozens of nations.¹⁰⁷

E. Kurdish Popular Protection Units (YPG & SDF)

Unaffiliated in the conflict, the Kurdish people constitute the largest stateless nation in the world, their population divided among Turkey, Iraq, Iran and Syria.¹⁰⁸ Over one million currently reside in Syria, where they have faced years of ethnic discrimination and economic alienation

100. *Id.* at 68.

101. *Id.* at 69–70.

102. *Id.* at 87.

103. *Id.*

104. *Id.* at 61.

105. Susannah Cullinane et al., *Tracking a Trail of Historical Obliteration: ISIS Trumpets Destruction of Nimrud*, CNN, <http://www.cnn.com/2015/03/09/world/iraq-isis-heritage> (last updated Apr. 13, 2015, 8:43 PM).

106. Ceylan Yeginsu, *ISIS Draws a Steady Stream of Recruits from Turkey*, N.Y. TIMES (Sep. 15, 2014), http://www.nytimes.com/2014/09/16/world/europe/turkey-is-a-steady-source-of-isis-recruits.html?_r=0.

107. For a comprehensive list of coalition partners and their contributions see Ashley Fantz, *Who's doing what in the coalition battle against ISIS*, CNN, <http://www.cnn.com/2014/10/06/world/meast/isis-coalition-nations/> (last updated Feb. 28, 2015, 4:32 PM).

108. KERIM YILDIZ, *KURDS IN SYRIA: THE FORGOTTEN PEOPLE* 5 (2005).

under the Syrian government.¹⁰⁹ The Kurdish Popular Protection Units were created as independent, secular groups devoted to defending the Kurdish north.¹¹⁰ These units have been involved in battles with both rebel groups and Syrian forces in efforts to repel incursions into Kurdish territory.¹¹¹ They currently control sections of northeast Syria,¹¹² and have recently been joined by U.S. airstrikes in repelling ISIS from the area.¹¹³ Although there is still fragmentation among the Kurdish groups in Syria, the YPG and their political affiliates have established local courts, passed laws, and coordinated oil revenues—effectively exercising control over this discrete area of Syria in the absence of the Syrian government—with the seeming goal of creating an independent Kurdish state.¹¹⁴

F. Syrian Armed and National Defense Forces (NDF)

Assad's conventional forces numbered over 250,000 prior to 2011, but have dwindled to 125,000 after almost six years of fighting, due to casualties and desertions.¹¹⁵ Unconventional forces and militias number about 125,000.¹¹⁶ The Syrian military is accused of committing multiple

109. *Id.*

110. Aron Lund, *Syria's Kurdish Army: An Interview with Redur Khalil*, CARNEGIE ENDOWMENT FOR INT'L PEACE (Dec. 25, 2013), <http://carnegieendowment.org/syriaincrisis/?fa=54016>.

111. *Id.*

112. Sam Dagher, *A Complicated Ally: Kurds Fight Islamic State to Claim a Piece of Syria*, WALL STREET J. (Nov. 12, 2014, 8:52 PM), <http://www.wsj.com/articles/kurds-fight-islamic-state-to-claim-a-piece-of-syria-1415843557>; *Syria: Mapping the Conflict*, BBC (July 10, 2015), <http://www.bbc.com/news/world-middle-east-22798391>.

113. Ayla Albayrak et. al., *U.S.-Backed Kurds Seize Back Most of Syrian Border City Kobani*, WALL STREET J. (Jan. 26, 2015, 7:26 PM), <http://www.wsj.com/articles/kurdish-fighters-drive-islamic-state-forces-from-kobani-monitors-1422281825> (noting that the YPG fighters called in strike locations and the U.S. complied).

114. Dagher, *supra* note 112.

115. Anne Barnard et. al., *An Eroding Syrian Army Points to Strain*, N.Y. TIMES (Apr. 28, 2015), <https://www.nytimes.com/2015/04/29/world/middleeast/an-eroding-syrian-army-points-to-strain.html>.

116. *Id.*

war crimes including arbitrary arrest, torture and indiscriminate killing.¹¹⁷ Furthermore, the Syrian Armed Forces have used chemical weapons and barrel bombs against rebel groups and civilians throughout the conflict, tactics which have outraged the international community.¹¹⁸

G. State and Non-State Allies of Syria: Russia, Iran, & Hezbollah

The Syrian government receives support from Russia in the form of arms, armored vehicles, communications and surveillance equipment, drones, guided missiles, and in-country military advisors.¹¹⁹ Starting in September 2015, after a request from the Syrian government, Russian troops began supporting Assad's forces directly—conducting both air and ground operations.¹²⁰ Russia has targeted elements of Al-Sham, the FSA, ISIS, and other rebel groups.¹²¹ In March 2016, President Vladimir Putin stated that he was removing the main part of his force from Syria, as his troops had largely accomplished Russia's objectives.¹²² It is unclear how many Russian troops remain in the country.

Iran also provides significant support to the regime. Since hostilities began in 2011, the Iranian government has purportedly sent billions in monetary aid,¹²³ arms, technology¹²⁴ and its own Revolutionary Guard to

117. *World Report 2014: Syria*, HUM. RTS. WATCH, <http://www.hrw.org/world-report/2014/country-chapters/Syria> (last visited May 23, 2015).

118. *Id.*

119. Jonathan Saul, *Exclusive: Russia Steps up Military Lifeline to Syria's Assad—Sources*, REUTERS (Jan. 17, 2014, 2:48 PM), <http://www.reuters.com/article/us-syria-russia-arms-idUSBREA0G0MN20140117>.

120. Andrew E. Kramer & Anne Barnard, *Russian Soldiers Join Syria Fight*, N.Y. TIMES (Oct. 5, 2015), http://www.nytimes.com/2015/10/06/world/middleeast/russian-soldiers-join-syria-fight.html?_r=0.

121. *Syrian Rebels to Russia: Stop Bombing Us*, REUTERS (Oct. 26, 2015, 4:15 PM), <http://www.reuters.com/article/us-mideast-crisis-syria-idUSKCN0SK0QR20151026>.

122. Denis Dyomkin & Suleiman Al-Khalidi, *Putin Says Russians to Start Withdrawing from Syria, as Peace Talks Resume*, REUTERS (March 15, 2016, 4:25 AM), <http://www.reuters.com/article/us-mideast-crisis-syria-russia-pullout-idUSKCN0WG23C>.

123. Donna Abu-Nasr, *Syria Central Banker Says Iran Weighs \$1 Billion Credit Line*, BLOOMBERG (May 5, 2015, 6:16 AM), <http://www.bloomberg.com/news/articles/2015-05-05/syria-central-banker-says-iran-weighs-1-billion-credit-line>.

124. *Treasury Designates Iranian Ministry of Intelligence and Security for Human Rights Abuses and Support for Terrorism*, U.S. DEP'T OF TREASURY (Feb. 16, 2012),

assist Assad's troops.¹²⁵ Additionally, Iran-assisted foreign fighters have supported the Syrian government.¹²⁶ These are almost exclusively members of the pro-Iranian Lebanese militant group Hezbollah.¹²⁷ Long an ally of Assad's Baath party, Hezbollah has provided thousands of fighters to bolster the Syrian state military.¹²⁸

H. U.S. and other International Actors

As noted above, the U.S. has been equipping Syrian rebel groups since at least 2012. Jordan, France and the U.K. have joined with the U.S. to establish training areas for non-Islamist rebels in Jordan.¹²⁹ The U.S. and coalition partners, including the U.K, France, Australia, Bahrain, Jordan, Saudi Arabia, and the U.A.E. began conducting airstrikes against ISIS in Syria in 2014, targeting personnel, equipment and buildings.¹³⁰ The U.S. has also targeted the Khorasan Group, a group

<http://www.treasury.gov/press-center/press-releases/Pages/tg1424.aspx>. In 2012, the U.S. Treasury Department stated that the Iranian government had been providing financial, material and technological support to the Syrian regime for the purposes of assisting in the violent crack-down of dissenters. *Id.* The Treasury also stated that Iran had provided funding and weapons to AQI, had negotiated prisoner releases on behalf of AQI, and allowed the terror group free passage through Iran. *Id.* Since AQI rebranded itself to ISIS, there has been no direct evidence linking it and the Iranian government. *Id.*

125. Karl Vick, *Iranian Commander Lets Slip that Revolutionary Guard is Fighting in Syria*, TIME (May 7, 2014), <http://time.com/90807/iran-syria-revolutionary-guard/>.

126. Nicholas Blanford, *Why Iran is Standing by its Weakened, and Expensive, Ally Syria*, CHRISTIAN. SCI. MONITOR (Apr. 27, 2015), <http://www.csmonitor.com/World/Middle-East/2015/0427/Why-Iran-is-standing-by-its-weakened-and-expensive-ally-Syria>.

127. *See id.*

128. *Id.*

129. Orlando Crowcroft, *Isis News: British Soldiers in Jordan and Turkey Training Rebels to Fight Islamic State and Bashar al-Assad*, INT'L BUS. TIMES (May 19, 2015, 15:26), <http://www.ibtimes.co.uk/isis-news-british-soldiers-jordan-turkey-training-rebels-fight-islamic-state-bashar-al-assad-1502017>.

130. Dan Lamothe, *7 Countries Have Entered the Fight Against ISIS*, BUS. INSIDER (Jan. 20, 2016, 12:21 PM), <http://www.businessinsider.com/7-countries-have-entered-the-fight-against-isis-2016-1> (As of January 2016, the coalition has conducted over 6,000 airstrikes in Syria, the majority of which were carried out by the U.S.); *Operation Inherent Resolve: Targeted Operations Against ISIS Terrorists*, U.S. DEP'T OF DEFENSE, http://www.defense.gov/News/Special-Reports/0814_Inherent-Resolve (last visited May 12, 2016).

of extremists from Al-Sham and Al Qaeda.¹³¹ Despite initial reluctance by the Obama administration to involve any American troops in the ground conflict, the U.S. has sent a limited number of special operations forces to Syria.¹³² By spring 2016, there were approximately 300 American military personnel in the country, supporting domestic groups involved in the fight against ISIS.¹³³ In April 2017, in response to the Syrian government's use of chemical weapons against civilians, the U.S. military carried out airstrikes against a Syrian base.¹³⁴ Dozens of Tomahawk cruise missiles were fired at the airfield, in an attempt to destroy Syrian aircraft and infrastructure, thereby disrupting the regime's ability to use chemical weapons.¹³⁵ Russian aircraft were not affected by the strike, according to U.S. officials.¹³⁶ This was the first time that the U.S. had used force against the Syrian government during the duration of the six-year war.¹³⁷

Turkey has also played an important role in the Syrian conflict, having been involved in numerous border engagements with Kurdish forces and ISIS.¹³⁸ Syria downed a Turkish jet in 2012 after an incursion into Syrian airspace, significantly raising tensions between the countries.¹³⁹ Some sources state that Turkey has fired mortars toward

131. *Airstrikes in Syria Target Khorasan Group Terrorist Network*, U.S. DEP'T OF DEFENSE (Nov. 6, 2014), <http://www.defense.gov/News-Article-View/Article/603598>.

132. Gordon Lubold & Adam Entous, *U.S. to Send 250 Additional Military Personnel to Syria*, WALL STREET J. (Apr. 24, 2016, 5:00 PM), <http://www.wsj.com/articles/u-s-to-send-250-additional-military-personnel-to-syria-1461531600>.

133. *Id.*

134. Michael R. Gordon et. al., *Dozens of U.S. Missiles Hit Air Base in Syria*, N.Y. TIMES (Apr. 6, 2017), https://www.nytimes.com/2017/04/06/world/middleeast/us-said-to-weigh-military-responses-to-syrian-chemical-attack.html?_r=2.

135. *Id.*

136. *Id.*

137. *Id.*

138. Tim Arango, *Turkey Confirms Strikes Against Kurdish Militias in Syria*, N.Y. TIMES (Oct. 27, 2015), http://www.nytimes.com/2015/10/28/world/europe/turkey-syria-kurdish-militias.html?_r=1.

139. Liam Stack, *Turkey Vows Action After Downing of Jet by Syria*, N.Y. TIMES (June 23, 2012), <http://www.nytimes.com/2012/06/24/world/middleeast/turkey-promises-retaliation-in-response-to-downing-of-military-jet-by-syria.html>.

Syrian army positions across the border.¹⁴⁰ Turkey also shot down several Syrian aircraft for invading Turkish airspace.¹⁴¹ In November 2015, Turkey downed a Russian military jet near the Turkish-Syrian border, killing one of the pilots.¹⁴² Although U.S. and Turkish officials have stated that the jet did cross briefly into Turkey's airspace, Russia has continued to deny the allegation.¹⁴³

Finally, Israel has conducted airstrikes in Syria since the start of the conflict.¹⁴⁴ Israel has attempted to limit their involvement by targeting exclusively Hezbollah and Syrian military assets.¹⁴⁵ It has primarily done retaliatory strikes against mortar and gunfire originating from the Syrian border in the Golan Heights¹⁴⁶ and has shot down a Syrian jet after it allegedly crossed into Israeli airspace.¹⁴⁷

140. See, e.g., Tom Perry, *Syria Army Says Turkey Increases Arms Shipments to Rebels*, REUTERS (Nov. 28, 2015, 1:16 PM), <http://www.reuters.com/article/us-mideast-crisis-syria-turkey-idUSKBN0TH0KU20151128>.

141. Kareem Fahim & Sebnem Arsu, *Turkey Says It Shot Down Syrian Military Helicopter Flying in Its Airspace*, N.Y. TIMES (Sept. 16, 2013), <http://www.nytimes.com/2013/09/17/world/europe/turkey-syria.html>.

142. Dion Nissenbaum et al., *Turkey Shoots Down Russian Military Jet*, WALL ST. J., <http://www.wsj.com/articles/turkey-shoots-down-jet-near-syria-border-1448356509> (last updated Nov. 24, 2015, 7:27 PM).

143. *Id.*

144. Isabel Kershner, *Israel Will Never Give Golan Heights to Syria, Netanyahu Vows*, N.Y. TIMES (Apr. 17, 2016), <http://www.nytimes.com/2016/04/18/world/middleeast/israel-will-never-give-golan-heights-to-syria-netanyahu-vows.html>. Prime Minister Netanyahu stated that "Israel had carried out 'dozens' of [air]strikes across the Syrian [border] . . . to prevent Hezbollah from obtaining advanced weapons." *Id.*

145. See, e.g., *Israel Hits Syrian Army on Golan After 'Errant' Cross-border Fire*, REUTERS (Sept. 27, 2015, 4:36 PM), <http://www.reuters.com/article/us-mideast-crisis-syria-israel-idUSKCN0RR0X820150927>; *Syria Says Israeli Airstrikes Hit Near Damascus Airport*, TIMES OF ISR. (Nov. 11, 2015, 9:19 PM), <http://www.timesofisrael.com/syria-says-israeli-airstrikes-hit-near-damascus-airport/>.

146. See Nic Robertson & Laura Smith-Spark, *Heavy Shelling Rocks Golan Heights Area Between Syria, Israel*, CNN (Feb. 21, 2014, 11:13 AM), <http://www.cnn.com/2014/02/21/world/meast/syria-civil-war/>; Yousuf Basil & Kareem Khadder, *Israel Strikes Syrian Targets in Golan Heights After Rocket Attacks*, CNN, <http://www.cnn.com/2015/08/21/middleeast/israel-golan-heights-attacks-syria/> (last updated Aug. 21, 2015, 3:49 PM).

147. Laura Smith-Spark, *Israel Says It Shot Down Syrian Warplane Over Golan Heights*, CNN, <http://www.cnn.com/2014/09/23/world/meast/syria-israel-plane/> (last updated Sept. 23, 2014, 2:19 PM).

I. Summary

The broad spectrum of non-state and state actors engaged in Syria discussed above makes classifying the conflict under the traditional LOAC normative framework obviously challenging.¹⁴⁸ Further complicating attempts to characterize the hostilities in Syria is the historic resistance of states to acknowledge that internal fighting or situations of violence within their territory may amount to a non-international armed conflict. Yet, the ongoing intra-state violence between Syria's armed forces and a variety of non-state armed groups coupled with the hostilities between rival non-state armed groups makes it very likely the violence has crossed the threshold to be deemed a non-international armed conflict. Further, the variety of state actors involved in Syria makes the violence increasingly internationalized and thus potentially an international armed conflict. It is therefore important to understand how the law of armed conflict classifies conflicts in order to properly characterize the Syrian hostilities.

IV. A GENERAL OVERVIEW OF CONFLICT CLASSIFICATION

A. Why International Law Classifies Conflicts

The law of armed conflict,¹⁴⁹ which is primarily rooted in international conventions and customs,¹⁵⁰ is not an abstract or arcane

148. See generally Prosecutor v. Tadić, Case No. IT-94-1-A, Appeals Chamber Judgment (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999) (highlighting the difficulty of prosecuting individuals when an internal and international armed conflict are taking place simultaneously). However, the law of armed conflict is not an overly complicated body of law. It encapsulates certain straightforward, but critically important principles for regulating warfare such as the fundamental prohibition on attacking noncombatants; the essential obligation of combatants to attack only by lawful means and methods; the overarching requirement to treat individuals in captivity humanely; and the meta-principle compelling the protection of the victims of war such as prisoners of war, the wounded and sick and civilians. See, e.g., MARCO SASSÒLI ET AL., HOW DOES LAW PROTECT IN WAR? 82 (2d ed. 2006).

149. The law of armed conflict is sometimes called international humanitarian law or the law of war. See OFF. GEN. COUNS. OF THE DEP'T OF DEF., DEPARTMENT OF DEFENSE LAW OF WAR MANUAL 8 (2015) [hereinafter LAW OF WAR MANUAL]; Although the terms are often used interchangeably, in some cases, international humanitarian law may be more narrowly construed than the law of war or the law of armed conflict. *Id.* For

body of law.¹⁵¹ Rather, these rules—“which . . . protect[] persons who are not or are no longer participating in the hostilities[,] . . . restrict[] the means and methods of warfare”¹⁵² and regulate the unruly and potentially horrid aspects of an armed conflict.¹⁵³ It does this by striking a delicate balance between military necessity and humanity.¹⁵⁴ “This equilibrium permeates the entirety of [the law of armed conflict], thereby ensuring

example, international humanitarian law does not “include the law of neutrality.” *Id.* It is also important to note that the laws governing warfare fall into two general categories: *jus ad bellum* and *jus in bello*. The International Committee of the Red Cross (ICRC) notes that “[j]us ad bellum refers to the conditions under which one may resort to war or to force in general; *jus in bello* governs the conduct of belligerents during a war, and in a broader sense comprises the rights and obligations of neutral parties as well.” Robert Kolb, *Origin of the Twin Terms Jus Ad Bellum/Jus In Bello*, 320 INT’L REV. RED CROSS 553, 553 n.1 (Oct. 31, 1997).

150. The Statute of the International Court of Justice (ICJ), provides the generally recognized definitive statement of the sources of international law. Article 38 provides the following sources:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Statute of the International Court of Justice, art. 38(1), Oct. 24, 1945.

151. “The main purposes of the law of war are: protecting combatants, noncombatants, and civilians from unnecessary suffering; providing certain fundamental protections for persons who fall into the hands of the enemy, particularly prisoners of war, civilians, and military wounded, sick, and shipwrecked; facilitating the restoration of peace; assisting military commanders in ensuring the disciplined and efficient use of military force; and preserving the professionalism and humanity of combatants.” LAW OF WAR MANUAL, *supra* note 149, at 15 (citations omitted).

152. ADVISORY SERV. ON INT’L HUMANITARIAN LAW, INT’L COMM. OF THE RED CROSS, WHAT IS INTERNATIONAL HUMANITARIAN LAW? (2004).

153. GEOFFREY BEST, WAR & LAW SINCE 1945, at 3 (1994).

154. “The principle of military necessity permits a belligerent [party] to apply only that degree and kind of regulated force, not otherwise prohibited by the laws of war, required for the partial or complete submission of the enemy with the least possible expenditure of time, life, and physical resources.” GEOFFREY S. CORN ET AL., THE LAW OF ARMED CONFLICT: AN OPERATIONAL APPROACH 112 (Wolters Kluwer Law & Bus. Publishers 2012). Similarly, “[t]he principle of humanity prohibits the employment of any kind or degree of force not necessary for the purpose of war.” *Id.*

that force is applied on the battlefield in a manner allowing for the accomplishment of the mission while simultaneously taking appropriate humanitarian considerations into account.”¹⁵⁵

As a threshold matter, it is important to understand that an armed conflict will trigger the applicability of this specialized area of international law.¹⁵⁶ While there is not a definitive definition of the term “armed conflict”¹⁵⁷ it is broadly understood to “exist[] whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.”¹⁵⁸ In contrast, situations of violence not defined as an armed conflict are governed by international human rights law and the domestic law of the territorial State. If an armed conflict does exist, it is questionable whether the law of armed conflict applies in its entirety or only in part. By way of illustration, there are only combatants and prisoners of war in an international armed conflict or occupation whereas such categories with all of their rights and obligations do not apply to non-international armed conflicts. Accordingly, classifying a particular conflict is an important first step in determining the applicable law.

155. Shane R. Reeves & Jeffrey S. Thurnher, *Are We Reaching a Tipping Point? How Contemporary Challenges Are Affecting the Military Necessity-Humanity Balance*, HARV. NAT. SEC. J. (2013), http://harvardnsj.org/wp-content/uploads/2013/06/HNSJ-Necessity-Humanity-Balance_PDF-format1.pdf.

156. The law of armed conflict is also triggered by occupation or partial occupation of the territory of a High Contracting Party. Geneva Convention 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 [hereinafter GC II].

157. “In U.S. practice (and international practice in general), the meaning of this term is based in large measure on the guidance offered by the Commentaries to the four Geneva Conventions . . . [which] propose[] a number of factors to be assessed, in a totality-of-circumstances approach” to determine what “situations qualify as armed conflicts.” Geoffrey S. Corn, *Legal Classification of Military Operations*, in U.S. MILITARY OPERATIONS: LAW, POLICY, AND PRACTICE 72 (Geoffrey S. Corn, Rachel E. VanLandingham, & Shane R. Reeves eds.) (2016). For more discussion on this topic see *id.* at 72–73.

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

B. Classifying Conflicts: International or Non-International?

The law of armed conflict “does not recognize a unitary concept of [warfare] . . . [and] recognizes [only] two types of armed conflicts: international and non-international.”¹⁵⁹ As a matter of positive law, the differences between these two types of conflicts are significant, with those characterized as international far more heavily regulated than those classified as non-international.¹⁶⁰ With customary international law, however, there is much less of a distinction; the state practice is to enforce most of the same rules regardless of how a conflict is classified.¹⁶¹ While there is undoubtedly a trend towards a greater convergence of the legal norms that regulate international and non-international armed conflicts, the fundamental framework, structure, and application of the law remains rooted in the binary differentiation found in the positive law.¹⁶²

The law of armed conflict outlines the classification paradigm in Common Articles 2 and 3 to the 1949 Geneva Conventions. These articles, often called “Common Articles” as they are repeated verbatim in all four the Conventions,¹⁶³ establish the “law trigger for application of all treaty and customary international law related to their respective

159. Dapo Akande, *Classification of Armed Conflicts: Relevant Legal Concepts*, in INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS 1 (Elizabeth Wilmschurst ed., 2012). Early law of armed conflict agreements, such as the Hague Conventions of 1899 and 1907 and the 1929 Geneva Conventions, did not define the specific circumstances triggering their application.

160. The overwhelming majority of treaty provisions applying to international armed conflicts provide a detailed set of rules regulating the conduct of hostilities and the protection of victims of war. By contrast, there are a limited number of treaties or articles in treaties regulating non-international armed conflicts. See Shane R. Reeves & David Lai, *A Broad Overview of the Law of Armed Conflict in the Age of Terror*, in THE FUNDAMENTALS OF COUNTERTERRORISM LAW, 139, 142–44 (Lynne Zusman ed., 2014).

161. State practice has gone beyond existing treaty law and expanded the rules applicable to non-international armed conflicts. See Corn, *supra* note 157, at 75 (describing the law regulating non-international armed conflicts as “expanding”).

162. See Yoram Dinstein, *Concluding Remarks on Non-International Armed Conflicts*, 88 INT’L L. STUD. 399, 406–07 (2013) (discussing the trend of convergence and explaining why a full merger is impossible).

163. There are roughly twelve such articles found in the Geneva Conventions. See GARY D. SOLIS, THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR, 84–85 (2010).

category of armed conflict.”¹⁶⁴ For an international armed conflict the criteria are outlined in Common Article 2 which provides, in part, that

[T]he present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.¹⁶⁵

This article, which replaces the concept of “war” with the more flexible notion of “armed conflict” as the triggering mechanism, greatly broadened the regulation of inter-state violence.¹⁶⁶ Under Common Article 2, an international armed conflict exists when one state resorts to armed force against another regardless of the scope, intensity or duration of the violence.¹⁶⁷ It is irrelevant “how long the conflict lasts, how much slaughter takes place, or how numerous are the participating forces[,]” as the detaining of a member of the enemy force is enough to trigger Common Article 2.¹⁶⁸ As a result, the application of the law is no longer driven by anachronistic formal declarations of war but rather by “[t]he occurrence of *de facto* hostilities” between state actors.¹⁶⁹ Further, the

164. Corn, *supra* note 157, at 74.

165. GC II, *supra* note 156, art. 2.

166. In terms of triggering an international armed conflict, the intensity and duration of the fighting is not controlling in terms of the characterization of the armed conflict. The application is triggered by two or more States using their armed forces against each other. See International Committee of the Red Cross, *How is the Term “Armed Conflict” Defined in International Humanitarian Law?*, INT’L COMM. OF THE RED CROSS 1–2 (2008), <https://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf>.

167. See Corn, *supra* note 157, at 74.

168. JEAN DE PREUX WITH CONTRIBUTIONS BY FRÉDÉRIC, ET AL., COMMENTARY: III GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 23 (1960), https://www.loc.gov/rr/frd/Military_Law/pdf/GC_1949-III.pdf [hereinafter COMMENTARY, GC III] (“Even if there has been no fighting, the fact that persons covered by the Convention are detained is sufficient for its application. The number of persons captured in such circumstances is, of course, immaterial.”).

169. CORN, *supra* note 154, at 22–23. For those States that ratified Additional Protocol I to the 1949 Geneva Conventions, those provisions supplement the 1949 Geneva Conventions and expanded the definition of armed conflict to include those where “peoples are fighting against colonial domination and alien occupation and against

unilateral use of armed force by one state against another is sufficient to trigger an Article 2 conflict, even in the absence of an armed response from the second state.¹⁷⁰ The International Committee of the Red Cross (ICRC) takes an even broader view of what may constitute an international armed conflict, stating that a nonconsensual invasion by one state within the territory of another state – even if no force is directed towards the armed forces or government of the invaded state – may trigger Common Article 2.¹⁷¹

In contrast, a non-international or internal armed conflict is between governmental forces and non-governmental armed groups, or between various non-state actors within the geographic boundaries of a state

racist régimes in the exercise of their right of self-determination.” Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict (Protocol I) art. 1(4), June 8, 1977, 1125 U.N.T.S. 7 [hereinafter AP I]. This provision provides for the application of laws of international armed conflict to a category of non-international armed conflicts. Moreover, the provision was a reflection of concerns for the types of conflicts being fought during that time frame. Akande, *supra* note 159, at 49. This expansion of the term “armed conflict” is one of the reasons the U.S. has not ratified the treaty. See BOVARNICK ET AL., LAW OF WAR DESKBOOK 21 (Brian J. Bill ed., 2010). However, the U.S. finds much of Additional Protocol I and II as customary international law and is therefore obligated to follow those specific provisions when an armed conflict is triggered. See generally Michael J. Matheson, *Session One: The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, in *The Sixth Annual American Red-Cross Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT’L & POLY’L 415, 419 (1987).

170. INT’L COMM. OF THE RED CROSS COMMENTARY, I GENEVA CONVENTIONS FOR THE AMELIORATION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 81 (Knut Dorman et al. eds., 2016) [hereinafter COMMENTARY, GC I].

171. COMMENTARY, GC I. *supra* note 170. According to the ICRC, “an unconsented-to invasion or deployment of a State’s armed forces on the territory of another State – even if it does not meet with armed resistance – could constitute a unilateral and hostile use of armed force by one State against another, meeting the conditions for an international armed conflict under Article 2(1)” Further, “the use of armed force not directed against the enemy’s armed forces but only against the enemy’s territory, its civilian population and/or civilian objects . . . constitutes an international armed conflict for the purposes of Article 2(1).” *Id.*

actor.¹⁷² Different terms are used to describe such situations of internal armed violence including: civil wars, rebellion, revolution, terrorism, guerilla warfare, resistance, internal uprising, or war of self-determination.¹⁷³ Starting from the peace of Westphalia, which marked the inception of the modern sovereign States, until after World War II, international law exclusively regulated warfare between States.¹⁷⁴ However, with the drafting of the 1949 Geneva Conventions this changed as Common Article 3 began to regulate armed conflicts “not of an international character occurring in the territory of [a state.]”¹⁷⁵

Common Article 3, often called a “[c]onvention in miniature” as it applies exclusively to non-international armed conflicts and its participants,¹⁷⁶ marked one of the most important innovations in the 1949 Geneva Conventions.¹⁷⁷ As noted, this was the first time legal regulation

172. “[A]rmed conflict not of an international character occurring in the territory of one of the High Contracting Parties” is defined as a non-international armed conflict. GC II, *supra* note 156, art. 3.

173. EVE LA HAYE, WAR CRIMES IN INTERNAL ARMED CONFLICTS 5 (2008).

174. See generally Prosecutor v. Tadić, Case No. IT-94-1-A, Appeals Chamber Judgment (Int’l Crim. Trib. for the Former Yugoslavia July 15, 1999). Until World War II the laws and customs regulating warfare could become applicable to a non-international armed conflict of certain intensity through the so called doctrine of “recognition of belligerence.” Leslie C. Green, *The International Judicial Process and the Law of Armed Conflict*, in ESSAYS ON THE MODERN LAW OF WAR 218 (1998). The doctrine of belligerence was the first attempt to define the characteristics of a civil war in the eighteenth and nineteenth centuries. See LA HAYE, *supra* note 173, at 6 (discussing the four conditions needing to be satisfied before a state of belligerency could be recognized). In cases of a recognized belligerency international law categorized such conflicts as if they were a war between States. For more on the historic idea of belligerency see Rogier Bartels, *Timelines, Borderlines and Conflicts: The Historical Evolution of the Legal Divide Between International and Non-International Armed Conflicts*, 91 INT’L REV. OF THE RED CROSS 35, 50–52 (2009).

175. “[A]rmed conflict not of an international character occurring in the territory of one of the High Contracting Parties” is defined as a non-international armed conflict. See, e.g., GC II, *supra* note 156, art. 3. “Non-international armed conflict generally arises, as the ICTY noted, ‘within a state’, although the conflict need not unfold, at least entirely, within one state’s geographic borders.” HELEN DUFFY, THE “WAR ON TERROR” AND THE FRAMEWORK OF INTERNATIONAL LAW 222 (2005).

176. COMMENTARY, GC III, *supra* note 168, at 34.

177. The other law of armed conflict treaties addressing non-international armed conflicts are Additional Protocol II to the 1949 Geneva Conventions. See generally Protocol Additional to the Geneva Conventions of August 1949, and Relating to the Protection of Victims of Non-International Armed Conflict (Protocol II), June 8, 1977,

of non-international armed conflict was contained in an international instrument.¹⁷⁸ In practice, however, attempts to regulate civil wars are exceedingly difficult as there are no universal criteria for determining when internal violence has evolved into a “non-international armed conflict.”¹⁷⁹ While there are a number of criteria that may indicate the difference between an “internal disturbance” and a non-international armed conflict, these are non-binding and not universally accepted.¹⁸⁰

Further confusing efforts to qualify an internal disturbance as a non-international armed conflict, and therefore triggering the application of international law, are the different definitions of the term found in Additional Protocol II to the 1949 Geneva Conventions¹⁸¹ and the statute of the International Criminal Court (ICC).¹⁸² Protocol II limits the applicability of the law to only those situations where “dissident armed forces or other organized armed groups which, [are] under responsible command, exercise . . . control over a part of” a state.¹⁸³ Controlling sufficient territory from which to launch military operations is unique to the Additional Protocol II definition and, historically, a difficult criterion to meet for non-state armed groups.¹⁸⁴ Furthermore, this view of non-

1125 U.N.T.S. 609 [hereinafter AP II]; *See generally* Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90. Additionally, since 1949, there have been a number of treaties that applied to both international and non-international armed conflicts such as the Biological Weapons Convention, 1972; Chemical Weapons Convention, 1993; the Convention Prohibiting Anti-Personnel Landmines, 1997 among others. *See generally* Dinstein, *supra* note 162, at 30.

178. *See* LINDSAY MOIR, *THE LAW OF INTERNAL ARMED CONFLICT* 30 (2002).

179. The drafters of the Geneva Conventions wanted application of Common Article 3 to be as broad as possible. *See* COMMENTARY, GC III, *supra* note 168, at 36–37 (“No Government can object to observing, in its dealings with enemies, whatever the nature of the conflict between it and them, a few essential rules . . .”).

180. *Id.* The Geneva Conventions give a list of nonbinding criteria that include: the non-state armed group is an organized military force, under responsible command, with control of territory, respects the Law of Armed Conflict, and the state actor responds with their regular armed forces. *Id.* at 36.

181. Additional Protocol II supplements Article 3 common to the Geneva Conventions. *See generally* AP II, *supra* note 177, art. 1(2). Again, the U.S. has not ratified AP II but finds much of it as customary international law. *See* Matheson, *supra* note 169.

182. *See generally* Rome Statute of the International Criminal Court art. 8(2)(f), July 17, 1998, U.N.T.S. 90 [hereinafter Rome Statute].

183. AP II, *supra* note 177, art. 1.

184. *See* SOLIS, *supra* note 163, at 131.

international armed conflict only applies to the relations between a state's armed forces and a non-state armed group; it does not apply, by its own wording, to non-state armed groups fighting against each other.¹⁸⁵ The ICC, on the other hand, only recognizes those internal conflicts that "take place in the territory of a State when there is protracted armed conflict between government authorities and organized armed groups or between such groups."¹⁸⁶ This lack of a clear or binding definition creates a blurry line between "isolated and sporadic act[s] of violence"¹⁸⁷ and an internal armed conflict that makes knowing when international law applies a subjective decision.

C. Parallel, "Internationalized," & Transitory Armed Conflicts

While a conflict is assumed to be either international or non-international, in practice this is rarely the case. Parallel armed conflicts, "internationalized" internal wars, and transitory conflicts are more common in contemporary warfare. Applying the law in these environments is challenging and is discussed briefly below.

Parallel armed conflicts are those in which both an international and non-international armed conflict take place within a single state.¹⁸⁸ For

185. ROBERT KOLB & RICHARD HYDE, AN INTRODUCTION TO INTERNATIONAL LAW OF ARMED CONFLICTS 79 (2008).

186. Rome Statute, *supra* note 182, art. 8(2)(f). See also INT'L COMM. OF THE RED CROSS, ADVISORY SERVICE ON INTERNATIONAL HUMANITARIAN LAW, *What is International Humanitarian Law?* (2004), https://www.icrc.org/eng/assets/files/other/what_is_ihl.pdf (last visited July 25, 2016) ("International humanitarian law applies only to [international or non-international] armed conflict; it does not cover internal tensions or disturbances such as isolated acts of violence. The law applies only once a conflict has begun, and then equally to all sides regardless of who started the fighting.")

187. AP II, *supra* note 177, art. 1(2).

188. See *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶ 219 (June 27) (finding that both an international and non-international conflict were simultaneously taking place in Nicaragua). See also James Summers, *Introduction to CONTEMPORARY CHALLENGES TO THE LAW OF WAR: ESSAYS IN HONOUR OF PROFESSOR PETER ROWE* 10 (Caroline Harvey et al. eds., 2014) (noting that a simultaneous international and non-international armed conflict was found to exist in Nicaragua as there were "hostilities between the Nicaraguan government and the Contra rebels within the country and external intervention by the USA."). The International Criminal Court (ICC) came to a similar conclusion in the Uganda case. See *Prosecutor v. Dyilo*, Case No. ICC-01/04-01/06-2842, Judgment pursuant to Art. 74 of the Statute, ¶¶ 563–67 (Mar. 14, 2012), <https://www.icc-cpi.int/CourtRecords/>

example, within the Ukraine there is currently the Russian occupation of the Crimea—defined as an international armed conflict¹⁸⁹—and a non-international armed conflict in the eastern portion of the country.¹⁹⁰ Obviously, the violence and the actors are inextricably linked in the Ukraine; however, only by viewing the occupation and civil war as separate conflicts is it possible to clarify the rights, duties, and responsibilities of the participants. This theoretical pulling apart of the conflicts thus allows for application of the law despite the confusing amalgamation of state and non-state actors involved in the fighting.¹⁹¹

Perhaps an even more complicated calculation takes place when trying to determine if a foreign intervention in an ongoing civil war has “internationalized” the hostilities. International legal precedent, first in the *Tadić*¹⁹² opinion and later confirmed by the ICC in the *Lubanga*¹⁹³ decision, holds that a non-international armed conflict can evolve into an international armed conflict if an external state sufficiently controls the rebel group participating in a civil war.¹⁹⁴ While *Tadić* created the “overall control” test to make these determinations,¹⁹⁵ it left open the ability for states to influence internal armed conflicts without gaining

CR2012_03942.PDF (stating that while Uganda’s occupation of Bunia airport in the Democratic Republic of the Congo created an international armed conflict, there existed alongside a separate non-international conflict involving rebel groups in the region).

189. See GC II, *supra* note 156, art. 2.

190. Shane R. Reeves & David Wallace, *The Combatant Status of the “Little Green Men” and Other Participants in the Ukraine Conflict*, 91 INT’L L. STUD. 361, 383 (2015) (“The occupation of Crimea and the non-international armed conflict in eastern Ukraine, though inextricably linked, remain best viewed as parallel international and non-international armed conflicts.”).

191. See SOLIS, *supra* note 163, at 149 (discussing the significant practical and policy consequences flowing from battlefield determinations).

192. Prosecutor v. Tadić, Case No. IT-94-1-A, Appeals Chamber Judgment (Int’l Crim. Trib. for the Former Yugoslavia July 15, 1999) (detailing how an internal armed conflict can become an international armed conflict).

193. See Prosecutor v. Dyilo, ICC-01/04-01/06-2842 (adopting the “overall control” test asserted in the *Tadić* opinion).

194. The term “internationalized” non-international armed conflicts has also been used to describe hostilities between state and non-state groups occurring outside the territory of the state. See CORN, *supra* note 157, at 76. These extraterritorial conflicts are also often called “transnational.” See *id.* This paper uses the term to describe when a state actor has overall control over a rebel group.

195. Tadić, No. IT -94-1-A at ¶ 137.

responsibility for the rebel group.¹⁹⁶ States, for example, can provide “assistance to rebels in the form of provisions of weapons or logistical support”¹⁹⁷ but cannot have a “role in organising, coordinating or planning the military actions of the military group.”¹⁹⁸ The ambiguity of the *Tadić* “overall control” test therefore leaves a state providing assistance to a rebel group “some elbow room before its actions” are such to have internationalized an internal armed conflict.¹⁹⁹

Finally, it is also possible for an international armed conflict to transition over time into a non-international armed conflict. These situations are generally easier to recognize than an “internationalized” internal armed conflict as they start with open violence between state actors and devolve into an insurgency. A classic example of a transitory armed conflict occurred in Iraq beginning in 2003.²⁰⁰ On March 10, 2003, the United States and its coalition partners invaded Iraq triggering an international armed conflict pursuant to Common Article 2 with the full corpus of the body of law applying.²⁰¹ On May 1, 2003, major combat operations in Iraq ended²⁰² and while an occupation began, there was no shift in the applicable law.²⁰³ However, when the occupation government, the Coalitional Provisional Authority, passed control of the Iraqi nation back to an interim Iraqi government on June 28, 2004²⁰⁴ the ongoing hostilities became a non-international armed conflict regulated by the more limited rule set that applied in that circumstance.²⁰⁵

196. See generally YORAM DINSTEIN, WAR, AGGRESSION, AND SELF-DEFENCE 221–24 (5th ed. 2011) (discussing the ambiguity of the “overall control” test).

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

198. *Tadić*, No. IT -94-1-A at ¶ 137 (emphasis omitted).

199. See DINSTEIN, *supra* note 196, at 411.

200. See SOLIS, *supra* note 163, at 154.

201. *Id.*

202. *Id.*

203. It is important to note that even though the basis for the application of international law changed from an armed conflict to an occupation, the full corpus of the body of law still applied because both circumstances are governed by Common Article 2 of the 1949 Geneva Conventions. See GC II, *supra* note 156, art. 2.

204. See SOLIS, *supra* note 163, at 154.

205. *Id.*

V. CLASSIFYING THE SYRIAN CONFLICT

The Syrian conflict is described by some as the perfect depiction of the Hobbesian state of “war of all against all.”²⁰⁶ With “[v]irtually all the world powers, almost all the countries in the Persian Gulf region, numerous rebel groups and militant Islamic extremist groups fighting in alliances with or against each other[,]”²⁰⁷ characterizing the conflict is a difficult endeavor. Yet this is possible by first determining if the violence in Syria qualifies as an “armed conflict” and, if so, analyzing the facts in order to characterize the hostilities as non-international, international or both. Once characterization is determined, the relevant law with its associated obligations and rights becomes apparent.

A. Is Syria an Armed Conflict? If so, What Kind?

While it may seem absurd to ask if the violence in Syria is an armed conflict, this determination is a necessity for triggering international law.²⁰⁸ As noted above, it is generally understood that an armed conflict exists whenever there is a resort to armed force between States, or protracted armed violence between governmental authorities and organized armed groups, or between such groups within a State.²⁰⁹ Recognizing an armed conflict is not that difficult “when the armed forces of states engage in hostilities against each other.”²¹⁰ However, assessing the existence of a non-international armed conflict is, as

206. Shahir Shahidsaless, *It is Russia, not IS or al-Qaeda, that Poses Primary Threat to U.S.*, MIDDLE EAST EYE (Aug. 26, 2016, 11:06 AM), <http://www.middleeasteye.net/columns/it-russia-not-or-al-qaeda-poses-primary-threat-us-1862428491>.

207. *Id.*

208. See Corn, *supra* note 157, at 71 (“War, as a colloquial term, is routinely used to describe situations of armed hostilities. War is not, however, the defining condition that results in application of international legal conflict regulation. The trigger for applicability of this law is armed conflict, an international legal term. . . .”).

209. See *supra* notes 156–58 and accompanying text (defining the term “armed conflict”).

210. See Corn, *supra* note 157, at 72–73 (stating “neither duration nor intensity of such hostilities is relevant to the determination” as any fighting between state armed forces qualifies as an armed conflict).

discussed above, quite difficult.²¹¹ The internal conflict must be of an intensity to be deemed “protracted armed violence” and the non-state group must be sufficiently organized.²¹² While again there is no single factor in determining if a non-state group is organized, some indicators include: “the existence of a command structure[;]” disciplinary standards and mechanisms; “the existence of a headquarters;” group control of territories; “access to weapons [and] other military equipment[;] recruit[ing] and . . . training;” and coordinated military operations.²¹³ It is also important to note that while organization is required for the non-state group, it does not need to reach the same level as the military units of the State.²¹⁴

In applying this methodology to the situation in Syria, a triggering event happened on March 15, 2011 in Deraa when a small group of demonstrators gathered to protest the ill-treatment of students by the Assad regime.²¹⁵ Notwithstanding the non-violent nature of the protests, government forces responded brutally by firing on the demonstrators, which led to scores of arrests, injuries, and deaths.²¹⁶ While the response by the Assad regime was clearly an attempt to suppress any anti-government protests, the excessive use of force had the opposite effect.²¹⁷ Over the following weeks and months, protests and unrest spread to other parts of Syria, and with increased participation the government responses became more violent.²¹⁸

By August 2011, peaceful protests all but ended in Syria and were replaced by a more organized violent insurgency.²¹⁹ In response, the

211. See *supra* notes 166–71 and accompanying text (discussing the difficulty in defining a non-international armed conflict).

212. See *id.*

213. Akande, *supra* note 159, at 28–29.

214. See Terry D. Gill, *Classifying the Conflict in Syria*, 92 INT’L L. STUD. 353, 363–64 (2016) (noting that “a minimum degree of organization [is] sufficient”).

215. See generally Polk, *supra* note 8.

216. LOUISE ARIMATSU & MOHBUBA CHOUDHURY, *THE LEGAL CLASSIFICATION OF THE ARMED CONFLICTS IN SYRIA, YEMEN AND LIBYA* 7 (2014). The government forces that participated in the attacks and arrests included the Syrian armed and security forces, the civilian police, and the Alawite civilian militia (Shabbiha). *Id.*

217. See ELAYNE HANNON & HANNAH RUSSELL, *FROM PEACEFUL DEMONSTRATIONS TO ARMED CONFLICT: CONSIDERING HUMANITARIAN INTERVENTION IN THE CASE OF SYRIA* 8 (2013).

218. See ARIMATSU & CHOUDHURY, *supra* note 216, at 7.

219. *Id.* at 8.

Syrian army and security forces launched large-scale military operations to suppress the anti-government forces by shelling densely populated areas, deploying tanks to various urban areas, and using heavy weaponry.²²⁰ The brutal response by the Syrian regime brought international political pronouncements and sanctions condemning the violence.²²¹ As the savagery of the fighting increased, pleas for restraint were made, including by the leader of the ICRC delegation to Syria who, in April 2012, implored the regime and the anti-government forces to protect civilians trapped in the hostilities.²²² Syrian President Assad publicly acknowledged the intensity of the violence when he openly told his new cabinet that “[w]e live in a real state of war from all angles.”²²³

Since this pronouncement, the hostilities in Syria have progressively escalated. Clearly the fighting between the Syrian governmental authorities and the anti-governmental groups is protracted armed violence.²²⁴ What has complicated the characterization question is the myriad of actors—both state and non-state—who are involved in the Syrian conflict.²²⁵ As a general matter, governmental forces are presumed to meet the organizational criteria without a detailed analysis.²²⁶ In terms of non-state actors there are, by some accounts, as many as 1,000 armed groups.²²⁷ Some of the groups, like the FSA and ISIS, are well known. Others are small, disorganized, and extremely fluid. Finding reliable information on the size, command structure, specific functions and capacity to carry out military operations, even in regards to the larger groups, is difficult. Obviously not every group meets the organization

220. *Id.* at 7–8.

221. *Id.* at 8.

222. *Syria: ICRC Urges Full Respect for International Humanitarian Law*, ICRC (Apr. 8, 2012), <https://www.icrc.org/eng/resources/documents/news-release/2012/syria-news-2012-07-31.htm>.

223. *Syria's Assad: "We Live in a Real State of War"*, CBS NEWS (June 26, 2012, 10:16 PM), <http://www.cbsnews.com/news/syrias-assad-we-live-in-a-real-state-of-war/>.

224. See generally *Prosecutor v. Tadic*, Case No. IT-94-1-A, Decision on Appeal on Final Judgement, ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999).

225. See *Syria Crisis: Where Key Countries Stand*, BBC (Dec. 13, 2013), <http://www.bbc.com/news/world-middle-east-23849587>.

226. See generally ARIMATSU & CHOUDHURY, *supra* note 216, at 4.

227. *Guide to the Syrian Rebels*, BBC (Dec. 13, 2013), <http://www.bbc.com/news/world-middle-east-24403003>.

criteria. However, there is enough information concerning ISIS and FSA to analyze the organizational element.

In many important respects, ISIS fights more like a state actor than an insurgent group. It holds territory and conducts coordinated military operations across large portions of northern Syria and central Iraq.²²⁸ ISIS draws fighters from across the globe with recruits from approximately 74 countries.²²⁹ A report from 2015 stated that ISIS was believed to have a fighting force exceeding thirty thousand.²³⁰ Under the overall leadership of Abu Bakr al-Baghdadi, ISIS has developed a complex administrative and governance structure.²³¹ At the top of ISIS's military command structure is al-Baghdadi and two deputies both of them formerly serving as senior military leaders in Saddam Hussein's military.²³² ISIS has a number of trained, capable former Iraqi military leaders filling its ranks²³³ and are using captured "U.S.-supplied equipment, . . . [such as] tanks, artillery, armored Humvees, and mine-resistant vehicles[,]”²³⁴ in their well-coordinated military campaign. By almost any metric, ISIS meets the organization requirements to be a party to an armed conflict as it is more akin to a “pseudo-state led by a conventional army” than a rebel group.²³⁵

228. Ben Hubbard & Eric Schmitt, *Military Skill and Terrorist Technique Fuel Success of ISIS*, N.Y. TIMES (Aug. 27, 2014), <http://www.nytimes.com/2014/08/28/world/middleeast/army-know-how-seen-as-factor-in-isis-successes.html>.

229. Somini Sengupta, *Nations Trying to Stop Their Citizens From Going to Middle East to Fight for ISIS*, N.Y. TIMES (Sept. 12, 2014), http://www.nytimes.com/2014/09/13/world/middleeast/isis-recruits-prompt-laws-against-foreign-fighters.html?_r=0 (noting that the ISIS governance structure includes deputy positions, a cabinet, governors, and legislative bodies).

230. Robert Windrem, *ISIS by the Numbers: Foreign Fighter Total Keeps Growing*, NBC NEWS (Feb. 28, 2015, 8:50 AM), <http://www.nbcnews.com/storyline/isis-terror/isis-numbers-foreign-fighter-total-keeps-growing-n314731>.

231. Nick Thompson & Atika Shubert, *The Anatomy of ISIS: How the 'Islamic State' Is Run, From Oil to Beheadings*, CNN, <http://www.cnn.com/2014/09/18/world/meast/isis-syria-iraq-hierarchy/> (last updated Jan. 14, 2015, 9:11 AM).

232. Audrey Kurth Cronin, *ISIS Is Not a Terrorist Group – Why Counterterrorism Won't Stop the Latest Jihadist Threat*, FOREIGN AFFAIRS, <https://www.foreignaffairs.com/articles/middle-east/2015-02-16/isis-not-terrorist-group> (last visited Mar. 29, 2017) (explaining that Baghdadi's deputies have most likely been killed in the ongoing fighting).

233. *See id.*

234. *See id.*

235. *Id.*

While the FSA is not as sophisticated as ISIS, it still seems to meet the prerequisite organizational criteria. Originally formed in Turkey and led by Col Riad al-Asaad²³⁶ the group acts as an umbrella of secularist rebel forces primarily consisting of Syrian army deserters.²³⁷ The FSA does not operate as unified armed forces but instead as a loosely affiliated coalition of groups.²³⁸ As mentioned above, FSA is composed of thousands of fighters, has a fairly structured chain of command, and many of the groups pledge their loyalty to the 30-Supreme Military Council.²³⁹ The military council was formed, in part, because of external pressure from Qatar and Saudi Arabia, who promised more advanced weapons once the rebels had a more central command structure.²⁴⁰ Due to the military council, the FSA is generally well-armed, financed, and trained by a number of state actors including the United States. Based upon these facts, it is fair to conclude that the FSA satisfies many of the assessment factors with respect to the nature and degree of its organization.²⁴¹

Due to the sustained nature of the armed violence coupled with the level of organization of some of the anti-governmental armed groups it is clear that a non-international armed conflict currently exists in Syria. This assessment is corroborated by both a report by the United Nations Council on Human Rights (UNCHR)—stating “the intensity and duration

236. *See Guide to the Syrian Rebels*, *supra* note 227.

237. Elliot Friedland & Serabian, *Who's Who in the Syrian Civil War*, THE CLARION PROJECT 20 (Feb. 20, 2017), <https://clarionproject.org/whos-who-in-the-syrian-civil-war/>.

238. *Id.* at 21.

239. *Id.* at 20.

240. *Id.*

241. While this paper only analyzes the organizational criteria for ISIS and the FSA other non-state actors, such as al-Sham and the Kurds, also most likely meet the organizational factors. *See, e.g.*, U.N. Human Rights Council, Rep. of the Indep. Int'l Comm'n of Inquiry on the Syrian Arab Republic on Its Twenty-Seventh Session, ¶ 25–33, U.N. Doc. A/HRC/28/69 (Feb. 5, 2015) (noting that then al-Nusra had “flourished...owing to their operational efficiency and stable financial capacity”); Raja Abdulrahim & Dion Nissenbaum, *Kurds Carve Out a Home in Syria, Testing U.S. Ties with Turkey*, WALL. ST. J. (Aug. 31, 2016, 1:31 PM), <http://www.wsj.com/articles/syrias-kurds-have-carved-out-a-statelet-adding-new-snags-to-a-complex-region-1472661321> (stating that the Kurds control an areas with four million people and have established their own constitution).

of the conflict, combined with the increased organizational capabilities of anti-Government armed groups, had met the legal threshold for a non-international armed conflict²⁴²—and findings of the ICRC.²⁴³ In actuality, there are multiple non-international armed conflicts as the fighting is no longer exclusively between the Syrian government and anti-government groups, but also includes protracted violence between various organized non-state armed actors.²⁴⁴ The collapse of the Syrian state has created a void filled by many sophisticated non-state actors with various motives. Often these groups are in conflict.²⁴⁵ For example, recently the Kurdish backed Syrian Defense Forces (SDF) successfully completed a violent urban battle with ISIS for the Syrian city of Manbij.²⁴⁶ While the proliferation of non-international armed conflicts in Syria does mean the substantive protections and obligations of the relevant law apply to a greater spectrum of groups, it does not change the overall characterization of the hostilities.

B. How About an International Armed Conflict?

But is it also possible to classify the Syrian hostilities as an international armed conflict? While a number of global powers are

242. U.N. Human Rights Council, Rep. of the Indep. Int'l Comm'n of Inquiry on the Syrian Arab Republic on Its Twenty First Session, ¶ 12, U.N. Doc. A/HRC/21/50 (Aug. 16, 2012). The report specifically cited “the increased organizational capabilities of the FSA.” *Id.*

243. See Stephanie Nebehay, *Exclusive: Red Cross Ruling Raises Questions of Syrian War Crimes*, REUTERS (July 14, 2012, 3:42 PM), <http://www.reuters.com/article/2012/07/14/us-syria-crisis-icrc-idUSBRE86D09H20120714> (categorizing the conflict in Syria as a non-international armed conflict).

244. Again, hostilities between rival non-state armed groups within a state may also amount to a non-international armed conflict. See *Prosecutor v. Tadic*, Case No. IT-94-1-A, Decision on Appeal on Final Judgement, ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999). See also Gill, *supra* note 214, at 374–76 (stating there exists three non-international armed conflicts in Syria).

245. For example, Kurdish groups seem to be creating a pseudo-state in Northern Syria and Iraq, Abdulrahim & Nissenbaum, *supra* note 241, while ISIS has openly claimed a new state in the form of the caliphate. See generally Graeme Wood, *What ISIS Really Wants*, ATLANTIC (Mar. 2015), <https://www.theatlantic.com/magazine/archive/2015/03/what-isis-really-wants/384980/>.

246. See, e.g., *Updated: SDF Declares Victory in Manbij, ISIS Flees with 2,000 Civilian Human Shields*, RUDAW (Dec. 8, 2016), <http://rudaw.net/english/middleeast/syria/120820162>.

involved in Syria—including the United States, Russia, Turkey, Saudi Arabia, Israel, Iran, among others—the state actors have generally avoided confrontation. There are a few notable exceptions, however. Israel and Syria remain locked in an international armed conflict that began in 1967 and has resulted in the continual belligerent occupation of the Golan Heights for the last forty years.²⁴⁷ Israel has quietly conducted strikes against both the Syrian regime and non-state armed groups since the 2011 violence began.²⁴⁸ Additionally, the Turkish-Syrian border has been the scene of multiple air engagements—first between Syria and Turkey in 2012,²⁴⁹ and then between Turkey and Russia in 2015.²⁵⁰ While any of these engagements meet the requisite criteria to trigger an international armed conflict, the involved states have avoided escalating violence and, in the situation of Turkey and Russia, have gone so far as to give an apology for the incident.²⁵¹

Most recently, the decision by the U.S. to directly target a Syrian airbase has significantly changed the classification of hostilities within the Syrian conflict. Although the unilateral strike was limited in both scope and duration, it does reach the low threshold of hostilities for an Article 2 conflict. The U.S. resorted to the use of armed force against Syria, triggering the commonly-understood criteria for an international armed conflict.²⁵² The ICRC agrees, confirming that the situation in Syria with respect to the U.S. constitutes an international armed conflict.²⁵³

247. Shane Reeves, *What Now for the Golan Heights?*, LAWFARE (Jan. 27, 2016, 3:37 PM), <https://www.lawfareblog.com/what-now-golan-heights>.

248. See, e.g., Adam Chandler, *Report: Israel Strikes Target in Syria...Again*, ATLANTIC (Nov. 11, 2015), <http://www.theatlantic.com/international/archive/2015/11/report-israel-strikes-target-in-syria/415446/>.

249. See Stack, *supra* note 139.

250. See Nissenbaum et al., *supra* note 142.

251. See, e.g., Andrew Roth & Erin Cunningham, *Turkish President Apologizes for Downing of Russian Warplane Last Year*, WASH. POST (June 27, 2016), https://www.washingtonpost.com/world/turkey-apologizes-for-shooting-down-russian-warplane-last-year/2016/06/27/d969e0ea-3c6d-11e6-9e16-4cf01a41decb_story.html?utm_term=.50bb90ecf4da.

252. See COMMENTARY, GCI. *supra* note 170.

253. See Stephanie Nebehay, *Exclusive: Situation in Syria constitutes international armed conflict – Red Cross*, REUTERS (Apr. 7, 2017, 1:07 PM), <http://www.reuters.com/article/us-mideast-crisis-syria-redcross-idUSKBN17924T>.

Aside from these notable exceptions, most state actors involved have made conscious efforts to avoid state-on-state hostilities. Instead, external state actors seem interested in influencing the various conflicts by providing support to either the Syrian regime or non-state actors. Russia and Iran are the most ardent supporters of the Assad government²⁵⁴ but their assistance to a state actor fighting a rebel group does not change the characterization of the conflict.²⁵⁵ In contrast, a host of other nations are undoubtedly supporting non-state armed groups—including both anti-government rebels and those opposing jihadists—in Syria.²⁵⁶ This assistance has included providing weapons, military training, financial support, and even air strikes.²⁵⁷ It is important to reiterate that providing assistance is not enough to “internationalize” a non-international armed conflict; a state is required to have “overall control” of the rebel group.²⁵⁸ State practice has shown that the overall control threshold is high and the evidence in support of such control must be compelling.²⁵⁹ Yet there is no evidence that any participating state is directing or planning the military actions of these groups. On the contrary, the non-governmental groups in Syria are seemingly independent actors. As no state currently is exercising a sufficiently high

254. See *supra* notes 119–128 and accompanying text.

255. As noted earlier, an otherwise non-international armed conflict may become “internationalized” when a State intervenes on the side of a non-state armed group. See *supra* notes 192–198 and accompanying text. As Russia and Iran are supporting the State actor in the Syrian civil war their participation does not change the characterization. See Dinstein, *supra* note 162, at 412. Professor Dinstein notes: “If State B forcibly intervenes on behalf of the central government of State A against the insurgents, the armed conflict still qualifies as a NIAC—even when State B deploys in State A an expeditionary force engaged in intense hostilities against the insurgents—inasmuch as the troops of State B are not battling another State, but operating jointly with that other State (State A) to quell the insurgency.” *Id.* However, “State B cannot dispatch troops into State A—in order to fight the insurgents within the latter’s territory—against the will of the host government.” *Id.* In other words, Syria must give consent to Russia and Iran to participate on their behalf in the ongoing civil war.

256. See *supra* notes 62–95 and accompanying text.

257. See *Syria Crisis: Where Key Countries Stand*, *supra* note 225.

258. Prosecutor v. Tadic, Case No. IT-94-1-A, Decision on Appeal on Final Judgement, ¶¶ 131, 137 (Int’l Crim. Trib. for the Former Yugoslavia July 15, 1999).

259. See Dinstein, *supra* note 162, at 411 (noting that rebel group must be considered the de facto organs of the intervening state). It is worth repeating that states can provide assistance in the form of provisions, weapons, and other logistical support without crossing this threshold. See DINSTEIN, *supra* note 196, at 221–24.

level of control over these groups, “internationalization” of the non-international armed conflict in Syria through rebel groups has not taken place.

C. So What Type of Armed Conflict Exists in Syria Again?

The Syrian hostilities are primarily non-international armed conflicts, with the exception of the U.S. and Syria, which are now involved in an international armed conflict. The long-running international armed conflict between Israel and Syria can also not be ignored, nor can the violence on the Turkish border.²⁶⁰ The hostilities are therefore best characterized as parallel conflicts; international and non-international armed conflicts simultaneously occurring within Syria. Through this conflict classification paradigm it is possible to determine the applicable law as it relates to the various groups. Thus, while the vast majority of those involved in Syria will fall under the less comprehensive regulatory legal framework that governs non-international armed conflicts,²⁶¹ some

260. It is beyond the scope of this article to make a determination whether Syria and Turkey or Turkey and Russia are engaged in an international armed conflict. However, it is inarguable that the air engagements crossed the threshold for an armed conflict as defined by international law. *See, e.g.*, INT’L COMM. OF THE RED CROSS COMMENTARY, I GENEVA CONVENTIONS FOR THE AMELIORATION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 19–23 (Jean S. Pictet et al. eds., 1955) (stating that neither duration nor intensity of such hostilities is relevant to the determination of an international armed conflict).

An additional question left unanswered by this paper is whether Turkey’s recent aggression in Northern Syria against ISIS and Kurdish groups could be construed as an “occupation” therefore triggering the entirety of the law of armed conflict. *See* Lizzie Dearden, *Syrian War: More Turkish Tanks Cross Border Into al-Rai as Operation Against Isis and Kurds Enters ‘New Phase’*, INDEPENDENT (Sept. 3, 2016, 12:26 BST), <http://www.independent.co.uk/news/world/middle-east/syrian-war-more-turkish-tanks-cross-border-into-al-rai-as-operation-against-isis-and-kurds-enters-a7224271.html>; *see* Wallace & Reeves, *supra* note 190, at 373–75 (noting that “territory is considered occupied when it is actually placed under the authority of the hostile army.”).

261. Syria is not a party to Additional Protocol II. *See Treaties, States Parties and Commentaries*, ICRC, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/WebSign?ReadForm&id=475&ps=P> (last visited Sept. 4, 2016). Accordingly, as a non-international armed conflict, only Common Article 3 and customary law would apply to the situation in Syria.

participating actors will have the entirety of the law of armed conflict apply to their actions.²⁶²

VI. CONCLUSION

The relentless violence in Syria continues with a level of brutality and carnage that seems to know no rational limits. Of course, characterizing the Syrian conflict will not change this unfortunate truth. However, only by providing legal clarity is it possible to eventually protect the victims of the conflict and hold accountable perpetrators of war crimes. While this may be of little consolation to those currently enduring through the Syrian conflict, it is a critical first step to ensuring the war stops its downward spiral into unchecked savagery.

262. Most notably, the hostilities between the U.S. and Syria make both countries accountable under the more robust set of rules for international armed conflicts. This means, for example, that personnel detained in the course of hostilities between these two nations would get Prisoner of War status under the Geneva Conventions. *See* Geneva Convention relative to the Treatment of Prisoners of War, art. 4, August 12, 1949.