
INTERNATIONAL LAW STUDIES

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U.S. NAVAL WAR COLLEGE



Syria: Can International Law Cope? Workshop Report

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92 INT'L L. STUD. 340 (2016)

Volume 92

2016

Published by the Stockton Center for the Study of International Law

ISSN 2375-2831

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I. INTRODUCTION

The conflicts in Syria have generated legal complexities unseen in modern history. More than one thousand organized armed groups¹ and sixty States² are involved in myriad non-international armed conflicts—and possibly an international armed conflict—spread across Syria and Iraq. States have invoked individual self-defense, collective self-defense and humanitarian intervention as the basis for their action, which has taken the form of air-

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1. Eric Schmitt & Mark Mazzetti, *U.S. Intelligence Official Says Syrian War Could Last for Years*, NEW YORK TIMES (July 20, 2013), <http://www.nytimes.com/2013/07/21/world/middleeast/us-intelligence-official-says-syrian-war-could-last-for-years.html> (the U.S. Defense Intelligence Agency estimates as many as 1,200 groups).

2. *The Global Coalition to Counter ISIL*, U.S. DEPARTMENT OF STATE, <http://www.state.gov/s/seci/> (last visited May 9, 2016).

strikes, direct ground action and use of proxy forces as of early 2016. To this bloody mix, more than 10,000 foreign fighters have traveled to fight in the region.

There have been innumerable war crimes,³ including the first State use of chemical weapons since 1988.⁴ The conflicts have further provided a fertile spawning ground for the Islamic State of Iraq and Syria (ISIS),⁵ an organized armed group notable for its size (an estimated 19,000–25,000 members),⁶ territorial control (controlling approximately 20,000 square miles of territory across those two States) and metastasization to other areas.⁷

In order to examine the legal issues raised by the conflicts, the Stockton Center for the Study of International Law at the U.S. Naval War College and the Center for the Rule of Law at the U.S. Military Academy convened a three-day workshop in November 2015. This event brought together academics; representatives from the United Nations, the International Committee for the Red Cross, non-governmental organizations and States—the United Kingdom, the Netherlands, Canada and the United States. Members of U.S. government included representatives from the U.S. Department of State, all branches of the U.S. Department of Defense, including U.S. Central Command, the unified component responsible for U.S. securi-

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

4. Commission of Inquiry Report 5, *supra* note 3, ¶ 139.

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

6. CHRISTOPHER M. BLANCHARD & CARLA E. HUMUD, CONG. RESEARCH SERV., R43612, *THE ISLAMIC STATE AND U.S. POLICY* (Feb. 9, 2016).

7. *Iraq and Syria: ISIL's Reduced Operating Areas as of April 2015*, U.S. DEPARTMENT OF DEFENSE, http://www.defense.gov/Portals/1/features/2014/0814_iraq/20150410_ISIL_Map_Unclass_Approved.pdf (last visited May 31, 2016) (figures in this release indicate ISIS controlled approximately 25,000 square miles).

ty interests in the Middle East. Attendees included four U.S. and allied general officers and other senior policy advisors.

The workshop sought to examine the question posed by its title: can international law cope with the situation in Syria? It is a question that has ramifications for the viability of international law well beyond the confines of events in Syria. The intent of this report is to survey the key issues that were raised during the workshop and serve as an introduction to the articles that follow in this forum.

II. BACKGROUND TO THE CONFLICTS IN SYRIA

The conflicts find their origins in the brutal repression of anti-government protests in early 2011. Protests first occurred following the arrest (and alleged torture) in early March by the Syrian government of more than a dozen teenagers in Dar'a who had painted anti-regime messages on the their school's wall.⁸ Within days, the Syrian government initiated a crack-down with internal security forces.⁹ By late March the Syrian government had deployed the Fourth Armored Division, commanded by President Bashar al Assad's brother, to quell the protests.¹⁰ Throughout the spring of 2011, the protests escalated rapidly in size and geographic dispersion¹¹ and the number of opposition groups and their organization grew correspondingly. The most prominent opposition group, the Free Syrian Army (FSA), formed in a Turkish refugee camp that summer.¹²

8. *Guide: Syria Crisis*, BBC (Apr. 9, 2012), <http://www.bbc.com/news/world-middle-east-13855203> (reporting fourteen students were arrested after painting the slogan "The people want the downfall of the regime").

9. *UN Human Rights Council Calls for Investigation into Alleged Abuses in Syria*, UN NEWS CENTER (Apr. 29, 2011), <http://www.un.org/apps/news/story.asp?NewsID=38237&> (The Deputy High Commissioner for the Human Rights indicated that by the end of April, 2011 "[t]anks have been deployed and shelled densely-populated areas. The delivery of food has been impeded. Access to electricity has been cut. And transportation systems have been shut down. There have been reports of snipers firing on persons attempting to assist the injured or remove dead bodies from public areas.").

10. *Guide: Syria Crisis*, *supra* note 8.

11. On March 25, for instance, more than 100,000 people protested in Dar'a. *Dozens of Syrians Reported Killed in Darra*, CNN (Apr. 26, 2011), <http://www.cnn.com/2011/WORLD/meast/03/25/syria.unrest/>.

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

On September 12, the United Nations established the Commission of Inquiry with the mission “to investigate all alleged violations of international human rights law . . . in . . . Syria[] . . . to establish the facts and circumstances that may amount to such violations and of the crimes perpetrated and, where possible, to identify those responsible”¹³ The Commission has since issued a series of reports on the conflicts detailing the conduct of hostilities.¹⁴

On August 3, the President of the Security Council issued a statement condemning the “widespread violations of human rights and the use of force against civilians by the Syrian authorities.”¹⁵ This did little to staunch the spread of violence in the country. By late fall, the Syria government was engaged in military operations in all major metropolitan areas.¹⁶ In November, the Arab League took the highly unusual step of suspending Syria’s membership, based on the government’s response to the protests.¹⁷

In January 2012, al-Qaeda began operations in Syria as the al-Nusra Front (also known as al-Qaeda in the Levant or Jabhat al-Nusra).¹⁸ The

13. Human Rights Council Res. S-17/1, Situation of Human Rights in the Syrian Arab Republic, ¶ 13, U.N. Doc. A/HRC/S-17/2 (Aug. 22, 2011), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G11/169/88/PDF/G1116988.pdf?OpenElement>.

14. For a list of some Commission Reports, see *supra* note 3. For the Commission’s mandate, see Commission of Inquiry Report 1, *supra* note 3, ¶ 4 (“to investigate all alleged violations of international human rights law since March 2011 in the Syrian Arab Republic, to establish the facts and circumstances that may amount to such violations and of the crimes perpetrated and, where possible, to identify those responsible with a view of ensuring that perpetrators of violations, including those that may constitute crimes against humanity, are held accountable”).

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

16. Commission of Inquiry Report 1, *supra* note 3, ¶ 39.

17. Neil MacFarquhar, *Arab League Votes to Suspend Syria over Crackdown*, NEW YORK TIMES (Nov. 12, 2011), http://www.nytimes.com/2011/11/13/world/middleeast/arab-league-votes-to-suspend-syria-over-its-crackdown-on-protesters.html?_r=0. (Eighteen of the twenty-two members voted to suspend their membership. Only Yemen and Lebanon opposed the action). See also Commission of Inquiry Report 1, *supra* note 3, Summary & ¶ 8 (Noting that in November the Office of the United Nations High Commissioner for Human Rights had found that 3,500 civilians had been killed by State forces since March, 2011. The Commission report found “[t]he substantial body of evidence gathered by the commission indicates that . . . gross violations of human rights have been committed by Syrian military and security forces since the beginning of the protests.”).

18. Despite their affiliation with al-Qaeda the focus of this group thus far has been on Assad rather than the West. Al-Qaeda leader Ayman al-Zawahiri has specifically directed the al-Nusra Front to concentrate operations on Syria and cease operations against the West. See Charles Lister, *An Internal Struggle: Al Qaeda’s Syrian Affiliate is Grappling with its*

violence intensified dramatically during the spring and summer of 2012. The Commission found the existence of a non-international armed conflict (NIAC) in its third report, released on August 16.¹⁹ This report also documented numerous war crimes committed by pro-government militias (the Shabbiha).²⁰

In November, the opposition forces convened in Turkey for a conference to further organize themselves.²¹ The groups established a thirty-person council (the Supreme Military Council) charged with coordinating all military opposition forces in Syria.²²

Hezbollah²³ and ISIS began operations in Syria in early 2013.²⁴ The Syrian government first used chemical weapons during this period of time.²⁵ From 2013 through late summer 2014, the scale of violence remained broadly constant. The United States began airstrikes on ISIS targets in Syria

Identity, THE WORLD REPORT (May 31, 2015), http://www.huffingtonpost.com/charles-lister/an-internal-struggle-al-q_b_7479730.html.

19. Commission of Inquiry Report 3, *supra* note 3, ¶ 3.

20. *Id.*, ¶¶ 59, 83, 85, 88, 101, 112, 126–29, 156.

21. ELIZABETH O'BAGY, INSTITUTE FOR THE STUDY OF WAR, MIDDLE EAST SECURITY REPORT 5: THE FREE SYRIAN ARMY, (2013), <http://www.understandingwar.org/sites/default/files/The-Free-Syrian-Army-24MAR.pdf>. See also *Statement on the Formation of the Supreme Military Council Command of Syria*, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, <http://carnegieendowment.org/syriaincrisis/?fa=50445> (last visited May 4, 2016).

22. O'BAGY, *supra* note 21, at 9; *Statement on the Formation of the Supreme Military Council Command*, *supra* note 21.

23. Commission of Inquiry Report 4, *supra* note 3, at ¶ 24. See also MARISA SULLIVAN, INSTITUTE FOR THE STUDY OF WAR, MIDDLE EAST SECURITY REPORT 19: HEZBOLLAH IN SYRIA (2014), http://www.understandingwar.org/sites/default/files/Hezbollah_Sullivan_FINAL.pdf.

24. Umberto Bacchi, *ISIS: Timeline of the Islamic State*, INTERNATIONAL BUSINESS TIMES (June 29, 2015), <http://www.ibtimes.co.uk/isis-timeline-islamic-state-1508465>.

25. Commission of Inquiry Report 5, *supra* note 3, at ¶ 139 (reports on chemical weapons use in Khan Al-Asal (Aleppo) on 19 March, Uteibah (Damascus) on 19 March, Sheikh Maqsood neighborhood (Aleppo) on 13 April and Saraqib (Idlib) on 29 April).

in September 21, 2014.²⁶ Russian airstrikes in Syria began a year later in September 2015.²⁷

As of May 2016, a ceasefire was in place in Syria. The ceasefire was negotiated by the United States and Russia as co-chairs of the “International Syria Support Group.”²⁸ United Nations-sponsored peace talks chaired by the U.N. Special Envoy for Syria, Staffan de Mistura, are being held in Geneva between opposition forces and the Syrian government as this is written.²⁹

III. SELECTED LEGAL ISSUES DISCUSSED AT THE WORKSHOP

The international law issues presented by the conflicts in Syria are complex and broad ranging, spanning the *jus ad bellum* and *jus in bello*, as well as other bodies of law including domestic law, human rights law and refugee law. The complexity of the issue demanded robust framing. To that end, the workshop opened with an overview of the geopolitical history of the region. A later session explored the attitude of ISIS to various international law issues encountered in the workshop. That discussion focused on the ideology of ISIS—an ideology deeply rooted in their reading of Islamic theology and jurisprudence but inimical towards more mainstream Islamic theology. Importantly, the ISIS view of Islam rejects the modern system of international law.

Given the scale of the conflicts (more than sixty States participating in some aspect of the conflicts), perhaps the most fundamental issues are those concerning use of force. The first legal block of the workshop addressed these issues. After reviewing the legal framework—Article 2(4) of

26. Helene Cooper & Eric Schmitt, *Airstrikes by U.S. and Allies Hit ISIS Targets in Syria*, NEW YORK TIMES (Sept. 22, 2014), <http://www.nytimes.com/2014/09/23/world/middleeast/us-and-allies-hit-isis-targets-in-syria.html>. See generally *Operation Inherent Response: Targeted Operations against ISIL Terrorists*, U.S. DEPARTMENT OF DEFENSE, http://www.defense.gov/News/Special-Reports/0814_Inherent-Resolve (last visited May 9, 2016).

27. Patrick J. McDonnell, W.J. Hennigan & Nabih Bulos, *Russia Launches Airstrikes in Syria Amid U.S. Concern about Targets*, LOS ANGELES TIMES (Sept. 30, 2015), <http://www.latimes.com/world/europe/la-fg-kremlin-oks-troops-20150930-story.html>.

28. *Statement of the International Syria Support Group*, EEAS (Nov. 14, 2015) http://eeas.europa.eu/statements-eeas/2015/151114_03_en.htm.

29. Karen Zraick, *Syria Talks Are Complicated by Competing Opposition Groups*, N.Y. TIMES (Jan. 29, 2016), http://www.nytimes.com/2016/01/30/world/middleeast/syria-talks-geneva-opposition.html?_r=0.

the UN Charter³⁰ and its exceptions³¹—discussion turned to the specific facts presented by the conflicts in Syria. The use of force was considered in several broad categories: support to Syrian rebel groups, military support to the Syrian government and operations against ISIS.

Participants addressed the legal ramifications which flow from third-party support to rebel groups. One issue considered was whether U.S. programs supporting rebels could trigger the armed attack threshold. This analysis centered on the International Court of Justice's *Nicaragua* decision and the gap viewed by many to exist between Article 2(4) and Article 51.³² It was noted that if one accepts the existence of a gap this could prevent the victim State from acting in self-defense because the support to rebel groups, while amounting to a use of force under 2(4), would not constitute an armed attack. A number of participants agreed that U.S. support had not triggered Syria's right to self-defense, thus appropriate responses from Syria would be limited to non-forcible countermeasures.³³

Discussion turned to the concept of "unable or unwilling" as a grounds for justifying the use of force in circumstances where a State fails to prevent its territory from being used by a third party to mount an attack against another State.³⁴ This argument has been explicitly endorsed by Aus-

30. Article 2(4) of the UN Charter prohibits the "threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations." *See also* *Armed Activities on the Territory of Congo (Dem. Rep. of the Congo v. Uganda)*, 2005 I.C.J. 168, ¶ 35 (Dec. 19).

31. There are two Charter-based exceptions—Security Council action pursuant to Article 39 and 42 and self-defense pursuant to Article 51. Other exceptions include consent and (arguably) humanitarian intervention.

32. On the gap between these two articles, see *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)* 1986 I.C.J. 226, ¶ 190 (June 27) [hereinafter *Nicaragua*].

33. On non-forcible countermeasures, see generally SECRETARIAT, UNITED NATIONS LEGISLATIVE SERIES, MATERIALS ON THE RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS 150–51, U.N. Doc. ST/LEG/SER.B/25, U.N. Sales No. E.12.V.12 (2012) (2012).

34. The United States has argued that it may act in self-defense in another State where that State is "unwilling or unable to prevent the use of its territory for such attacks." Permanent Rep. of the United States of America to the U.N., Letter dated September 23, 2014 from the Permanent Rep. of the United States of America to the United Nations addressed to the Secretary-General, U.N. Doc. S/2014/695 (Sept. 23, 2014). For an excellent and comprehensive article on the "unwilling or unable" test, see Ashley S. Deeks, "Unwilling or Unable": *Toward a Normative Framework for Extraterritorial Self-Defense*, 52 VIRGINIA JOURNAL OF INTERNATIONAL LAW 483 (2012). On State responsibility, see Draft Articles on Responsibility of States for Internationally Wrongful Acts art. 20, Report of

tralia³⁵ and Turkey,³⁶ and implicitly endorsed by the United Kingdom,³⁷ France³⁸ and Iraq.³⁹ It was noted that some alternatives to “unwilling or

the International Law Commission, 53d Sess., Apr. 23–June 1, July 2–Aug. 10, 2001, U.N. Doc. A/56/10, GAOR 56th Sess., Supp. No. 10 (2001), *reprinted in* [2001] 2 YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 32, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2) (“Valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent.”); ANTONIO CASSESE, INTERNATIONAL LAW 369 (2d ed. 2005) (“by express consent a State may authorize the use of force on its territory whenever, being the object of an ‘armed attack,’ it resorts to individual self-defense and in addition authorizes a third State to assist in ‘collective self-defense’”).

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

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

37. Permanent Rep. of the United Kingdom of Great Britain and Northern Ireland to the U.N., Identical letters dated November 25, 2014 from the Permanent Rep. of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the Secretary-General and the President of the Security Council, U.N. Doc. S/2014/851 (Nov. 25, 2014) (“[T]he United Kingdom of Great Britain and Northern Ireland is taking measures in support of the collective self-defence of Iraq . . . by striking ISIL sites and military strongholds in Syria, as necessary and proportionate measures.”). *See also* 20 July 2015, Parl Deb. HC (2015) col. 1236 (UK), <http://www.publications.parliament.uk/pa/cm201516/cmhansrd/cm150720/debtext/150720-0001.htm> (Statement by Michael Fallon, “Actions by American, Canadian and other forces in Syria are legal because they contribute to the collective self-defence of the legitimate Government of Iraq where the Government of Syria are unwilling and unable to deal with ISIL at its source in northern Syria.”).

38. Permanent Rep. of France to the U.N., Identical letters dated September 8, 2015 from the Permanent Rep. of France to the United Nations addressed to the Secretary-General and the President of the Security Council, U.N. Doc. S/2015/745 (Sept. 8, 2015) (“In accordance with Article 51 of the Charter of the United Nations, France has taken

unable” include the concepts of “harbor and support” and “ungoverned spaces.”⁴⁰ Finally, discussion addressed U.S. actions against the al-Nusra Front.

The next block examined conflict classification in Syria. A number of participants agreed that there were at least three broad categories of NIACs in Syria: (1) those between various opposition groups and the Syrian government and Russia; (2) those between various States and ISIS; and (3) those between opposition groups fighting among themselves. Some participants also maintained that there exists a NIAC between Turkey and the Syrian Kurds, and a NIAC between the United States and al Nusra. Further, one participant argued that there was a brief international armed conflict between Turkey and Russia arising from the Turkish shoot down of the Russian aircraft.

Discussion in this section considered the date on which a NIAC first existed.⁴¹ Participants recalled first the International Criminal Tribunal for the former Yugoslavia’s *Tadić* test which requires “protracted armed violence between governmental authorities and organized armed groups or

actions involving the participation of military aircraft in response to attacks carried out by ISIL from the territory of the Syrian Arab Republic.”).

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

40. On these concepts, see generally Monica Hakimi, *Defensive Force against Non-State Actors: The State of Play*, 91 INTERNATIONAL LAW STUDIES 1 (2015).

41. NIACs are governed by Common Article 3 of the 1949 Geneva Conventions and, where applicable, 1977 Additional Protocol I. Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3, Aug. 12, 1949, 75 U.N.T.S. 31 [hereinafter GC I]; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 3, Aug. 12, 1949, 75 U.N.T.S. 85 [hereinafter GC II]; Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 75 U.N.T.S. 135 [hereinafter GC III]; Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter GC IV]; Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609.

between such groups within a State.”⁴² Of particular interest was the intensity criterion of the test.⁴³ The group addressed the question of whether the intensity of violence needed to be separately calculated between each party to the conflict, or whether the general level of intensity of violence in Syria sufficed to incorporate other organized armed groups that may themselves carry out only minor acts of violence. One participant asked whether the intensity criteria could be entirely satisfied by violence conducted by only one party to the conflict. This could occur if, for instance, the Syrian government carried out significant acts of violence against an organized armed group, but the group did not respond with violence.

Discussion then turned to the geographic applicability of Common Article 3⁴⁴ and the customary law of armed conflict (LOAC) in a NIAC. Some participants argued that LOAC applies in the territory of a State into which the conflict has “spilled over.”⁴⁵ Others argued to the contrary, noting that there are two alternatives: conflict follows the person or conflict is limited to the territory of the State.⁴⁶ Despite some disagreement on this topic, many considered that the question of whether or not LOAC applies in spill-over conflicts is particularly relevant for determining the law applicable to detention operations and post-conflict prosecutions.

42. Prosecutor v. Tadić; Case No. IT-94-1-AR-72, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int’l Crim. Trib. for the former Yugoslavia Oct. 2, 1995).

43. The intensity criterion is widely accepted to encompass both temporal and a gravity elements. Prosecutor v. Haradinaj, Case No. IT-04-84-T, Judgment, ¶ 49 (Int’l Crim. Trib. for the former Yugoslavia Apr. 3, 2008).

44. GC I–IV, *supra* note 41, art. 3.

45. For the view that LOAC applies to spill-over conflicts, see INTERNATIONAL COMMITTEE OF THE RED CROSS, INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY CONFLICTS, Report Prepared for the 31st International Conference of the Red Cross and Red Crescent, 31IC/11/5.1.2, 9–11 (Oct. 2011); Jelena Pejić, *The Protective Scope of Common Article 3: More than Meets the Eye*, 93 INTERNATIONAL REVIEW OF THE RED CROSS 189, 194 (2011) (“[C]ertain NIACs originating within the territory of a single state between government armed forces and one or more organized armed groups have also been known to ‘spill over’ into the territory of neighbouring states. Leaving aside other legal issues that may be raised by the incursion of foreign armed forces into neighbouring territory (violations of sovereignty and possible reactions of the armed forces of the adjacent state that could turn the fighting into an international armed conflict), it is submitted that the relations between parties whose conflict has spilled over remain at a minimum governed by Common Article 3 and customary IHL.”).

46. For the view that a conflict follows the parties to that conflict, see generally Michael N. Schmitt, *Charting the Legal Geography of Non-International Armed Conflict*, 90 INTERNATIONAL LAW STUDIES 1 (2014).

The second day of the workshop opened with a presentation on the issue of arming, training and employing proxies in Syria. The use of proxies implicates the principle of non-intervention;⁴⁷ the prohibition on the use of force;⁴⁸ State responsibility;⁴⁹ Common Article 1 of the Geneva Conventions, which requires “[p]arties undertake to respect and to ensure respect for the present Convention in all circumstances;”⁵⁰ and the territorial State’s right of self-defense. These issues raised the policy question of what steps could be taken by a government to ensure the proxy force complies with LOAC. Some of the suggestions included:

- Ensuring the leaders of the proxy group have sufficient control over their subordinates in order to ensure compliance with LOAC;
- Directing assistance away from entities within the proxy force that are likely to commit—or have previously committed—LOAC violations;
- Training the proxy force in LOAC compliance; and
- Conditioning support on compliance with LOAC and then monitoring proxy implementation.

The next topic addressed was the legal implications arising from the presence of foreign fighters, as well as various States’ approaches to implementing Security Council Resolutions 2170⁵¹ and 2178.⁵² The discussion here focused on pragmatic issues faced by States: where is the line between incitement to violence and freedom of expression in developing national legislation, what is “terrorist intent” within the meaning of the Security Council resolutions⁵³ and when is an act considered to be terrorism and not

47. *Nicaragua*, *supra* note 32, ¶ 202. *See also Armed Activities*, *supra* note 30, ¶ 205 (The International Court of Justice in *Nicaragua* found “the principle forbids all States or groups of States to intervene directly or indirectly in internal or external affairs of other States.”).

48. *Nicaragua*, *supra* note 32, ¶ 228 (“arming and training” rebels “can certainly be said to involve the threat or use of force against Nicaragua”).

49. *Id.*, ¶¶ 109, 115 (The sponsoring State may be liable for the actions of the proxy where the proxy is acting on behalf of the sponsor or where the sponsoring State has effective control over the proxy.).

50. GC I–IV, *supra* note 41, art. 1.

51. S.C. Res. 2170 (Aug. 15, 2014).

52. S.C. Res. 2178 (Sept. 24, 2014).

53. In Resolution 1566 terrorist acts are defined as those

just a criminal offense. The discussion of these issues focused on specific questions, e.g., in the context of foreign fighters, the role of social media and the presence of recruiters who encourage foreign fighter participation and international criminal culpability for acts relating to foreign fighters. With regard to the latter question, at least one participant expressed a belief that that the Rome Statute⁵⁴ provides jurisdiction over foreign fighters who are nationals of States party.

The participants then addressed the law governing the conduct of hostilities in Syria. The prominence of customary law applicable in NIACs as the most relevant legal regime and the dearth in treaty law (largely limited to Common Article 3) were highlighted. There was discussion on the methods of warfare employed by the parties to the various conflicts.⁵⁵ The use of human shields generally was extensively discussed, particularly in light of the U.S. position set out in the Department of Defense's *Law of War Manual*.⁵⁶ Opinions reflected all three positions in the debate: (1) all human shields (involuntary or voluntary) should be protected as civilians for the purposes of targeting; (2) voluntary human shields are directly participating in hostilities and thus lose their protected status and are subject to direct attack; and (3) human shields, while not directly targetable, may be disregarded in the proportionality calculation. Some proponents of the sec-

criminal attacks . . . committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, and all other acts which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature, and *calls upon* all States to prevent such acts and, if not prevented, to ensure that such acts are punished by penalties consistent with their grave nature.

S. C. Res. 1566 (Oct. 8, 2004).

54. Rome Statute of the International Criminal Court arts. 5, 12(2)(b), July 17, 1998, 2187 U.N.T.S. 90.

55. An extensive catalogue of the methods and means of hostilities employed in Syria can be found in the U.N. Independent International Commission of Inquiry reports, *supra* note 3.

56. For a discussion on the issue of human shields in the *DoD Law of War Manual*, see Adil Ahmad Haque, *Off Target: Selection, Precaution, and Proportionality in the DoD Manual*, 92 INTERNATIONAL LAW STUDIES 31 (2016) (discussing proportionality and human shields in the context of the 2015 U.S. Department of Defense *Law of War Manual*).

ond and third positions argued that allowing an adversary to take advantage of human shields would encourage their use.

The group next considered war crimes in Syria. It was pointed out again, and acknowledged by a number of participants, that only Common Article 3 and customary international law apply as Syria is not a party to Additional Protocol II. Various mechanisms for accountability were addressed including the International Criminal Court (ICC),⁵⁷ domestic prosecutions and ad-hoc international or hybrid tribunals. There was discussion regarding the possibility of Security Council referral under Article 13(b) of the Rome Statute.⁵⁸ Notwithstanding a possible referral, there remained open the question of whether or not the ICC would have jurisdiction over use of chemical weapons as a standalone crime.⁵⁹

The conflicts in Syria present a situation of unprecedented complexity for modern international law. Indeed, one might consider the situation in Syria a real-world case study in the huge diversity of legal issues that may surround an armed conflict. Unfortunately, although unsurprisingly, the workshop did not result in a solution, or even consensus.

At best, perhaps, one can hope for post-conflict accountability. It may be that the most important question arising from this conflict is not the number of NIACs or the exact date when IHL applied or whether the ICC has jurisdiction over the use of chemical weapons, but rather whether the present system of international law can effectively regulate a modern conflict such as has been seen in Syria.

57. Rome Statute, *supra* note 54, art. 5. Syria is not a party to the Rome Statute, thus ICC jurisdiction over Syrian nationals fighting in Syria can only come from a referral from the Security Council. *Id.*, art. 13.

58. *Id.*, arts. 5, 13(b).

59. For more on this issue, see Alex Whiting, *The International Criminal Court, the Islamic State, and Chemical Weapons*, JUST SECURITY (Nov. 4, 2015), <https://www.justsecurity.org/27359/icc-islamic-state-chemical-weapons/>; Dapo Akande, *Can the ICC Prosecute for Use of Chemical Weapons in Syria?*, EJIL: TALK! (Aug. 23, 2015), <http://www.ejiltalk.org/can-the-icc-prosecute-for-use-of-chemical-weapons-in-syria/>; Jillian Blake & Aqsa Mahmud, *A Legal "Red Line"? Syria and the Use of Chemical Weapons in Civil Conflict*, 61 UCLA LAW REVIEW 244 (2013).