
INTERNATIONAL LAW STUDIES

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Mapping War Crimes in Syria

Beth Van Schaack

92 INT'L L. STUD. 282 (2016)

Volume 92

2016

Published by the Stockton Center for the Study of International Law

ISSN 2375-2831

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I. INTRODUCTION

War crimes have been a consistent feature of the Syrian conflict since its inception. The Syrian people have been subjected to deliberate, indiscriminate, and disproportionate attacks; the misuse of conventional, unconventional, and improvised weapons and weapon systems; industrial-grade custodial abuses,¹ including deaths in detention; unrelenting siege warfare; the denial of humanitarian aid and what appears to be the deliberate use of starvation as a weapon of war; sexual violence, including sexual enslavement of Yezidi women and girls and sexual torture of men and boys in detention; and the intentional destruction of cultural property. Thousands of Syrians have disappeared without a trace, many of them victims of enforced disappearances. The emergence of the Islamic State of Iraq and the Levant/Daesh (ISIL) introduced a new set of ruthless perpetrators who have brought the violence to an even more alarming level of brutality. In addition to war crimes under international humanitarian law (IHL), the Syrian people have experienced other crimes under international criminal law, including crimes against humanity,² summary execution, terrorism and, potentially,

1. Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, ¶ 82, U.N. Doc. A/HRC/23/58 (July 18, 2013) (finding torture to be “endemic” in Syrian prisons and detention centers). The Commission produced a chilling thematic report on deaths in detention—due both to torture as well as inhuman living conditions—throughout Syria, including in clandestine and makeshift detention centers established by non-State armed groups. See U.N. Human Rights Council, *Out of Sight, Out of Mind: Deaths in Detention in the Syrian Arab Republic* U.N. Doc. A/HRC/31/CRP.1 (Feb. 3, 2016), http://www.ohchr.org/Documents/HRBodies/HRCouncil/CoISyria/A-HRC-31-CRP1_en.pdf. The scale of these custodial abuses first came to light in photographs secreted from the country in 2013 by a former forensic photographer codenamed “Caesar.” See *Syria: Stories Behind Photos of Killed Detainees*, HUMAN RIGHTS WATCH (Dec. 16, 2015), <https://www.hrw.org/news/2015/12/16/syria-stories-behind-photos-killed-detainees>. The U.S. FBI subsequently authenticated these photographs. Stav Ziv, *Syria Torture Photos ‘Depict Real People and Events’: FBI Report*, NEWSWEEK (July 22, 2015), <http://www.newsweek.com/syria-torture-photos-depict-real-people-and-events-fbi-report-356057>.

2. Crimes against humanity are a constellation of acts made criminal by international law when they are committed as part of a widespread or systematic attack against a civilian population. Crimes against humanity can be charged regardless of whether there is an armed conflict and irrespective of the conflict’s classification. See Beth Van Schaack, *The Definition of Crimes Against Humanity: Resolving the Incoherence*, 37 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 787 (1999).

genocide against ethno-religious minorities.³ These extreme levels of violence, coupled with the lack of any apparent progress until very recently toward reaching a political resolution of the conflict, have generated a massive refugee crisis in the region and beyond. More than 4.5 million people (out of a population of twenty-two million) have fled across Syria's borders, more than seven million are internally displaced, and half the population needs humanitarian assistance in the form of food and/or shelter.⁴ The situation—described in 2014 by U.S. Director of National Intelligence James Clapper as an “apocalyptic disaster”—remains grave and continues to deteriorate, without an end in sight.⁵

The Syrian conflict has one of the most well-documented international crime bases in history. Under the auspices of the U.N. Human Rights Council, the Independent International Commission of Inquiry on the Syrian Arab Republic (COI) has been working 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 to ensuring that perpetrators of violations, including those that may constitute crimes against humanity, are held accountable.⁶

3. See Beth Van Schaack, *ISIL = Genocide?*, JUST SECURITY (Aug. 29, 2014), <https://www.justsecurity.org/14435/isis-genocide/>; European Parliament, Resolution on Systematic Mass Murder of Religious Minorities by ISIS, EUR. PARL. DOC. P8_TA-PROV(2016)0051, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2016-0051+0+DOC+PDF+V0//EN>. The U.S. Holocaust Museum and Memorial documented the commission of genocide against the Yezidi people in northern Iraq. See NAOMI KIKOLER, “OUR GENERATION IS GONE”: THE ISLAMIC STATE’S TARGETING OF IRAQI MINORITIES IN NINEWA (2015), <https://www.ushmm.org/m/pdfs/Iraq-Bearing-Witness-Report-111215.pdf>.

4. See SYRIA REGIONAL REFUGEE RESPONSE, <http://data.unhcr.org/syrianrefugees/regional.php> (last visited Apr. 18, 2016); *Syria IDP Figures Analysis*, IDMC, <http://www.internal-displacement.org/middle-east-and-north-africa/syria/figures-analysis> (last visited Apr. 18, 2016).

5. Courtney Kube, *Syria Crisis: “Apocalyptic Disaster,” Clapper Says*, NBS NEWS (Feb. 11, 2014), <http://www.nbcnews.com/news/world/syria-crisis-apocalyptic-disaster-clapper-says-n27466>.

6. 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), http://www.lcil.cam.ac.uk/sites/default/files/LCIL/documents/arabspring/syria/Syria_32_Report_Human_Rights_Council_17th_Special_Session.pdf.

Since its inception in 2011, the COI has issued multiple broad-spectrum and thematic reports, tracing the dramatic deterioration of the situation in Syria. Although the Assad regime has barred the Commission from undertaking investigations in the country, the COI has managed to fulfil its mission through skype calls within Syria; interviews with refugees, defectors, and witnesses in the diaspora; secreted documents and postings on social media; and other investigative techniques. In addition to describing the patterns of violence, it has also generated a list of perpetrators that remains under seal in Geneva.⁷ Alongside the COI, several fact-finding missions and investigative bodies convened by the U.N. Security Council and the Organisation for the Prohibition of Chemical Weapons (OPCW) are tracking the use of chemical weapons in Syria⁸ and apportioning responsibility.⁹ In the non-governmental sector, multiple international and Syrian documentation centers are securing potential evidence in digital vaults, churning out a steady stream of human rights reports,¹⁰ conducting statistical data analysis,¹¹ and even compiling detailed dossiers on potential defendants for future prosecutions.¹² From the grassroots, citizen journalists have uploaded millions of digital images and thousands of hours of footage of the carnage.¹³ Together, these documentation efforts have catalogued the commission of almost every war crime known to humankind. The assumption is that this information will lay the groundwork for a whole range of transi-

7. Raja Abdulrahim, *Syria's Bashar Assad Implicated in War Crimes*, U.N. Rights Chief Says, LOS ANGELES TIMES (Dec. 2, 2013), <http://articles.latimes.com/2013/dec/02/world/la-fg-wn-syria-bashar-assad-war-crimes-un-20131202>; Stephanie Nebehay, *War Crimes Evidence in Syria Solid Enough for Indictment*: U.N., REUTERS (Mar. 18, 2014), <http://www.reuters.com/article/us-syria-crisis-warcrimes-idUSBREA2H0PH20140318>.

8. See, e.g., Executive Council, OPCW, *Reports of the OPCW Fact-Finding Mission in Syria*, EC-M-48/DEC.1 (Feb. 4, 2015), https://www.opcw.org/fileadmin/OPCW/EC/M-48/ecm48_dec01_e_.pdf.

9. See S.C. Res. 2235 (Aug. 7, 2015).

10. See, e.g., SYRIAN OBSERVATORY FOR HUMAN RIGHTS, <http://www.syriahr.com/en/> (last visited Apr. 18, 2016).

11. See, e.g., *Syria*, HRDAG, <https://hrdag.org/syria/> (last visited Apr. 18, 2016).

12. Mark Kersten, *What Counts as Evidence of Syria's War Crimes?*, JUSTICE IN CONFLICT (Oct. 29, 2014) (describing the work of the Commission on International Justice and Accountability); Julian Borger, *Syria's Truth Smugglers*, THE GUARDIAN (May 12, 2015), <http://www.theguardian.com/world/2015/may/12/syria-truth-smugglers-bashar-al-assad-war-crimes>.

13. Chloe Lowe, *Syria: A War Reported by Citizen-Journalists, Social Media*, RADIO FREE EUROPE (June 20, 2012), <http://www.rferl.org/content/syria-war-reported-by-citizen-journalists-social-media/24630841.html>.

tional justice mechanisms—in the event that there is ever a transition—including criminal accountability.

There is a substantial body of international law governing the commission of war crimes in Syria. Legal guideposts include the Geneva Conventions and their two Additional Protocols,¹⁴ the Rome Statute of the International Criminal Court (ICC Statute),¹⁵ a suite of treaties dedicated to the use and prohibition of certain weapons,¹⁶ and the International Committee of the Red Cross's (ICRC) monumental customary international law (CIL) study.¹⁷ Although the various IHL treaties are well-established and well-subscribed to by States, they contain only rudimentary provisions on war crimes when committed in non-international armed conflicts (NIACs), which is presumptively—but not definitively—how the conflict(s) in Syria would be characterized. Likewise, national penal codes and the ICC Statute do not codify all potential war crimes, particularly (and again) when it comes to acts of violence committed in NIACs. Because of gaps in the ICC Statute, the ICC Prosecutor would not be able to prosecute as war crimes many of the acts of violence that are so salient in the Syrian conflict, even if a referral to the ICC is forthcoming.¹⁸ This article thus advances the

14. See Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV]; Protocol Addition to the Geneva Conventions of August 12, 1949 and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter API]; 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 [hereinafter APII].

15. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter ICC Statute].

16. See *IHL Treaties and the Regulation of Weapons*, CANADIAN RED CROSS, <http://www.redcross.ca/how-we-help/international-humanitarian-law/what-is-international-humanitarian-law/weapons-and-international-humanitarian-law/ihl-treaties-and-the-regulation-of-weapons> (listing treaties and subject matter) (last visited May, 3, 2016).

17. 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) [hereinafter ICRC CIL Study].

18. Because Syria is not a party to the ICC Statute, the ICC would have plenary jurisdiction only in the event that the U.N. Security Council effectuates a referral of the situation in Syria to the Court. Otherwise, the ICC has jurisdiction only over potential crimes committed on the territory of Syria by nationals of ICC States Parties. ICC Statute, *supra*

claim that CIL retains a continuing primacy in determining accountability for war crimes. CIL, as a more unified body of law that does not depend so starkly on conflict classification, is critical to evaluating the legality of the actions of armed actors in Syria. Even CIL, however, contains ambiguities; in particular, it is often unclear when conduct that may be *prohibited* is also *criminal* under IHL.

Notwithstanding the dogged documentation efforts and the extant legal framework, there has been no meaningful accountability for the abuses in Syria committed for want of two key predicates: jurisdiction and political will. If the latter emerges, the former could easily follow. A number of juridical options exist even absent a transition—domestic trials in third States, trials before an ad hoc tribunal dedicated to the conflict, and a referral to the ICC—that could be pursued alone, sequentially, or concurrently. Only an ad hoc tribunal premised on CIL, however, will have the potential to prosecute the full panoply of war crimes being committed in Syria.

This article engages these issues in several parts. It begins by briefly presenting the international law framework applied to determine when an armed conflict began in Syria, how this conflict is classified under international law, and which multilateral treaties and customary rules are applicable. This framework will be utilized to determine which war crimes can be prosecuted, which tribunals might have jurisdiction, and which perpetrators may be made subject to indictment.¹⁹ The article focuses on some open legal and factual issues around certain potential war crimes that are particularly salient in the Syrian conflict, but that have been under-theorized and rarely prosecuted.²⁰ It demonstrates that many of these war crimes could not be easily prosecuted before the ICC or under any domestic war crimes

note 15, arts. 12–13. This includes foreign fighters from the United Kingdom and other ICC member States who have joined the fight. See Jennifer Trahan, *New Paths to Accountability for Crimes in Syria and Iraq (Including ICC Jurisdiction over Foreign Fighters)*, JUST SECURITY (Nov. 12, 2014), <https://www.justsecurity.org/17308/paths-accountability-crimes-syria-iraq-including-icc-jurisdiction-foreign-fighters/>.

19. David Turns, *The International Humanitarian Law Classification of Armed Conflicts in Iraq Since 2003*, in *THE WAR IN IRAQ: A LEGAL ANALYSIS* 97, 98 (Raul (Pete) Pedrozo ed., 2010) (Vol. 86, U.S. Naval War College International Law Studies) (noting that the determination of the nature of an armed conflict has “very real significance for the military forces engaged in the conflict, for it impacts directly such practical military activities as the status of the participants, their consequent classification and treatment after capture by an opposing party, the conduct of hostilities and the use of weaponry”).

20. This submission focuses primarily on the applicability of IHL and the war crimes prohibitions. Many of the crimes at issue could be prosecuted as crimes against humanity or even genocide.

statutes that hew closely to the IHL treaties, given the stark divergence between treaty law and CIL when it comes to NIACs in general and to prosecutable war crimes in particular. These observations offer support for proposals to develop an ad hoc tribunal dedicated to the Syrian conflict, as sketched out in the final section. Taken together, the article illustrates the continued utility of CIL to ensure that evolutions in the law can be adjudicated notwithstanding the tendency of treaties toward normative ossification.

II. INTERNATIONAL LAW FRAMEWORK

There is no definitive agreed-upon date for the initiation of the armed conflict within Syria—a necessary predicate²¹ for the prosecution of war crimes²² under IHL. The requirement to establish a starting date sets this class of crime apart from other international crimes (e.g., crimes against humanity and genocide) that do not depend upon the existence of an armed conflict.²³ Most non-governmental and academic accounts place the start of the conflict in Syria sometime in late 2011 or early 2012. While these determinations constitute valuable sources of evidence,²⁴ the applicability of IHL ultimately depends on the facts on the ground and not all observers have had the requisite battlefield access. As a result, any court seeking to adjudicate potential war crimes will need to conduct a detailed analysis to determine when the IHL threshold was crossed and whether it has been crossed within Syria as a whole or within specific areas experiencing

21. *Syria: Applicable International Law*, RULAC, http://www.geneva-academy.ch/RULAC/applicable_international_law.php?id_state=211 (last visited Apr. 18, 2016).

22. *How is the Term “Armed Conflict” Defined in International Humanitarian Law*, ICRC (Mar. 2008), <https://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf>.

23. *See, e.g.*, INTERNATIONAL CRIMINAL LAW: THE ESSENTIALS 107–19 (Ronald S. Slye & Beth Van Schaack eds., 2009) (discussing elements employed to internationalize crimes).

24. For example, the Syrian COI estimated that the IHL threshold was crossed as early as February 2012. Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, Annex II, ¶¶ 2–3, U.N. Doc. A/HRC/21/50 (Aug. 16, 2012), http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session21/A-HRC-21-50_en.pdf. Prior to that point, the COI analyzed the violence in Syria with reference to human rights law and the prohibition against crimes against humanity. *See, e.g.*, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, ¶¶ 101–8, U.N. Doc. A/HRC/S-17/2/Add.1 (Nov. 23, 2011) (concluding that crimes against humanity may have been committed during the period under review).

armed violence.²⁵ Indeed, there may have been pockets of armed conflict emerging in Rastan, Homs, Idlib, and elsewhere in the fall of 2011 that would trigger the applicability of IHL and, with it, the war crimes prohibitions. Identifying the point at which IHL applied to the conflict will be crucial if borderline incidents are subject to prosecution, such as the apparently deliberate attack on a media center in Homs on February 22, 2012.²⁶

The range of war crimes that may be charged in connection with any particular armed conflict is contingent on whether the conflict is an international armed conflict (IAC) or a NIAC. The Syrian conflict—really a web of conflicts—by and large implicates the law governing NIACs. (One exception is the long-time occupation of the Golan Heights, which remains governed by the Fourth Geneva Convention.)²⁷ In terms of conflict classification, it is possible to identify several overlapping NIACs: conflicts pitting the Assad regime against non-State opposition groups; the conflict between the Assad regime and al-Qaeda affiliates such as the al Nusra Front or the Khorasan Group; conflicts between competing opposition groups including the Kurdish People’s Protection Unit;²⁸ and the conflicts between ISIL and all of the above.²⁹ These NIAC determinations are not necessarily conclusive or permanent and may change as events on the ground evolve. Some observers, including the ICRC in its recent *Commentary* to Geneva Convention I, are increasingly willing to treat the use of armed force by

25. Prosecutor v. Tadić, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 69 (Int’l Crim. Trib. for the former Yugoslavia Oct. 2, 1995) (noting that the treaties, including Common Article 3, apply outside the “narrow geographic context of the actual theater of combat operations”).

26. See Peter Beaumont, *Were Marie Colvin and Journalists Deliberately Targeted by Syria’s Army?*, THE GUARDIAN (Feb. 23, 2012), <http://www.theguardian.com/media/2012/feb/23/marie-colvin-journalists-targeted-syria>. War correspondent Marie Colvin died in this attack. As a U.S. citizen, her death could be prosecuted as a war crime under the U.S. War Crimes Act, 18 U.S.C. §2441.

27. *Occupied Golan: ICRC Mitigates Some Effects of Occupation*, ICRC (Mar. 2, 2010), <https://www.icrc.org/eng/resources/documents/update/israel-golan-update-020310.htm>; Jodi Rudoren, *As Syria Reels, Israel Looks to Expand Settlements in Golan Heights*, NEW YORK TIMES (Oct. 2, 2015), http://www.nytimes.com/2015/10/03/world/middleeast/syria-civil-war-israel-golan-heights.html?_r=0. See S.C. Res. 497, paras. 1–3 (Dec. 17, 1981) (determining the applicability of the Fourth Geneva Convention to the Golan Heights).

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

29. See CHRISTOPHER M. BLANCHARD ET AL., CONG. RESEARCH SERV., RL33487, ARMED CONFLICT IN SYRIA: OVERVIEW AND U.S. RESPONSE (Oct. 9, 2015), <https://www.fas.org/sgp/crs/mideast/RL33487.pdf>. See Terry D. Gill, *Classifying the Conflict in Syria*, 92 INTERNATIONAL LAW STUDIES (2016) (forthcoming).

one State in the territory of another State without the latter's consent as an IAC, even if the armed forces of the two States are not directly embattled.³⁰ Under this approach, once the U.S. coalition began to engage ISIL in Syria without Syrian consent the conflict transformed into an IAC.

There is little treaty law—as distinct from CIL—governing the commission of war crimes in Syria. The foundational treaties devoted to regulating the means and methods of warfare, the 1899 and 1907 Hague Conventions and their annexes, apply only to IACs and do not contain penal provisions.³¹ The 1949 Geneva Conventions (designating so-called grave breaches that are subject to universal criminal jurisdiction³²) protect certain vulnerable classes of person—such as civilians and prisoners of war—but they also apply for the most part to IACs.³³ Common Article 3 of those treaties governs all NIACs, but does not designate its list of prohibitions as crimes per se.³⁴ Syria has not ratified Additional Protocol II (APII), which

30. INTERNATIONAL COMMITTEE FOR THE RED CROSS, COMMENTARY TO GENEVA CONVENTION I FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN THE ARMED FORCES IN THE FIELD ¶ 237 (2d ed. 2016), https://www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=BE2D518CF5DE54EAC1257F7D0036B518-66_B (“Any unconsented-to military operations by one State in the territory of another State should be interpreted as an armed interference in the latter’s sphere of sovereignty and thus may be an international armed conflict under Article 2(1).”); *id.* at ¶ 260 (“Should the third State’s intervention be carried out without the consent of the territorial State, it would amount to an international armed conflict between the intervening State and the territorial State.”).

31. *See, e.g.*, Convention No. II with Respect to the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803, T.S. 403; Regulations Respecting the Laws and Customs of War on Land, annexed to Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2227, T.S. No. 539 [hereinafter Hague Regulations].

32. *Universal Jurisdiction over War Crimes*, ICRC (Mar. 2014), <https://www.icrc.org/eng/assets/files/2014/universal-jurisdiction-icrc-eng.pdf>.

33. *Grave Breaches Specified in the 1949 Geneva Conventions and in Additional Protocol I of 1977*, ICRC (Jan. 31, 1998), <https://www.icrc.org/eng/resources/documents/misc/57jp2a.htm>.

34. Common Article 3 provides:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ‘hors de combat’ by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

amplifies the treaty law governing certain NIACs that involve violence between governmental forces and armed non-State actors (but not violence between different non-State actors) and some showing of territorial control and operational acumen by rebel forces.³⁵ Additional Protocol I (API)—which Syria ratified in 1983—melds the Geneva Conventions’ grave breaches regime with the Hague Conventions’ rules on means and methods, but it applies only to IACs, defined in Article 1 to include those involving people “fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination.”³⁶ Although some opposition movements have in the past agreed to be bound by API via declarations issued under Article 96(3),³⁷ this idiosyncratic standard has rarely, if ever, been formally applied in practice and may or may not encompass armed conflicts—like the one in Syria—fought to unseat an authoritarian regime.³⁸

-
- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
 - (b) taking of hostages;
 - (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
 - (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

See, e.g., Geneva Convention IV, *supra* note 14.

35. According to Article 1 of APII, the treaty applies to

all armed conflicts which are not covered by [Protocol I] and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.

36. According to Article 1 of API, the treaty applies to armed conflicts governed by the 1949 Geneva Conventions and

armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

37. This provision states, “The authority representing a people engaged against a High Contracting Party in an armed conflict of the type referred to in Article 1 . . . may undertake to apply the Conventions and this Protocol in relation to that conflict by means of a unilateral declaration addressed to the depositary.”

38. Noelle Higgins, *The Application of International Humanitarian Law to Wars of National Liberation*, JOURNAL OF HUMANITARIAN ASSISTANCE (2004), <http://sites.tufts.edu/jha/files/2011/04/a132.pdf>.

Because of the limitations of these treaties, most of the analysis below of particular war crimes will rely upon CIL, which now penalizes many breaches of IHL—even those first articulated in treaties that do not conceptualize violations of their terms as criminal conduct—regardless of whether they are committed in an IAC or a NIAC.³⁹ Thus, although the Hague Conventions, Common Article 3, and APII contain no express war crimes provisions, many violations of their terms now give rise to individual criminal responsibility across the conflict spectrum as a matter of CIL. In 1998, the drafters of the ICC Statute went a long way toward collapsing the distinction between NIACs and IACs in Article 8, the war crimes provision. This article invites the prosecution of (a) grave breaches of the Geneva Conventions (Article 8(2)(a)) in IACs; (b) certain serious violations of Common Article 3 committed against persons taking no active part in a NIAC (Article 8(2)(c)); and (c) other enumerated violations of the laws and customs of war that are applicable in IACs (Article 8(2)(b)) and NIACs (Article 8(2)(e)). The latter provisions depart significantly from APII's scope of application in that they are triggered by situations in which “there is protracted armed conflict” between a State and non-State groups or between non-State groups, without requiring a showing of territorial control, responsible command, or the ability to conduct sustained operations.⁴⁰ Article 8(2)(e)'s list of war crimes is exhaustive, however, and the ICC is governed by a strong articulation of the principle of legality (*nullum crimen sine lege*), which prohibits the prosecution of anyone for an act that was not criminal at the time it was committed, so there is little room for expansion or innovation.⁴¹

As will be discussed in greater detail below, the ICC Statute's listing of acts constituting war crimes remains more extensive for IACs as compared

39. See ICRC CIL Study, *supra* note 17, r. 156; Sarah Cleveland, *Harmonizing Standards in Armed Conflict*, EJIL: TALK! (Sept. 8, 2014), <http://www.ejiltalk.org/harmonizing-standards-in-armed-conflict/>.

40. According to Article 8(2)(4):

Paragraph 2 (c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.

For APII's scope of application, see *supra* notes 35 and 36.

41. See ICC Statute, *supra* note 15, art. 22(2) (“The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.”).

to NIACs, even taking into account the 2010 amendments that sought to partially harmonize the two regimes' treatment of weapons crimes.⁴² Thus, if an ICC referral is ever forthcoming, conflict classification will remain relevant with respect to prosecutable war crimes, including many that have come to define the Syrian conflict.⁴³ Likewise, if the only courts available to prosecute war crimes in Syria are domestic courts, they too may have a limited reach, because individual States may not have codified the full range of war crimes with respect to NIACs.⁴⁴ If members of the international community or a regional body ever establish an ad hoc tribunal dedicated to this conflict, these juridical architects will enjoy greater license to expand the list of prosecutable war crimes to better reflect violations on the ground and contemporary CIL.

With this in mind, the following section will explore the law governing some defining features of the potential war crimes being committed in the Syrian conflict with reference to IHL treaties, the ICC Statute, and CIL prohibitions. The ICRC's CIL study, the jurisprudence of international criminal tribunals,⁴⁵ and pronouncements of the Security Council, Human Rights Council and other multilateral bodies will be looked to as the sources of CIL.⁴⁶ Of particular note is Rule 156 of the CIL study,⁴⁷ which contains an extensive list of war crimes considered by the ICRC to be part of CIL. Even this list, however, remains somewhat indeterminate when it comes to NIACs. There are certain instances in the CIL study in which the ICRC identifies a prohibition under IHL as applicable across the conflict spectrum, but has not yet confirmed an international consensus in terms of State practice and *opinio juris*, the two components of CIL, on whether the breach of such a prohibition constitutes a prosecutable war crime.

42. See *infra* text accompanying notes 132–33.

43. On ICC referrals, see *supra* note 18.

44. American University Washington College of Law's War Crimes Research Office has conducted a detailed analysis of national war crimes legislation. See *Universal Jurisdiction over War Crimes*, WAR CRIMES RESEARCH OFFICE, <https://www.wcl.american.edu/war-crimes/documents/2013-05-16UJChart.pdf> (last visited Apr. 18, 2016).

45. See Allison Marston Danner, *When Courts Make Law: How the International Criminal Tribunals Recast the Laws of War*, 59 VANDERBILT LAW REVIEW 1 (2006).

46. See Marko Divac Öberg, *The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ*, 16 EUROPEAN JOURNAL OF INTERNATIONAL LAW 879 (2006).

47. Rule 156 of the CIL study lists those war crimes it deems to be part of CIL.

III. WAR CRIMES IN SYRIA

A. *Deliberate, Indiscriminate, and Disproportionate Attacks on Civilians*

The foundational IHL principle of distinction, which underlies a number of war crimes, requires all parties to a conflict to distinguish between lawful and unlawful targets.⁴⁸ The law governing the direct targeting of civilians, civilian objects, and other protected persons and things is relatively straightforward and applies across the conflict spectrum. These prohibitions would enable the prosecution of those responsible for deliberate attacks on bakeries and markets in opposition-controlled territory.⁴⁹ These rules would also enable the prosecution of those who deliberately target hospitals or medical personnel,⁵⁰ which enjoy special protection under IHL,⁵¹ and journalists, who increasingly do too.⁵² All these crimes could

48. Key rules from the ICRC CIL study include Rule 1 (“The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians.”); Rule 7 (“The parties to the conflict must at all times distinguish between civilian objects and military objectives. Attacks may only be directed against military objectives. Attacks must not be directed against civilian objects.”); Rule 10 (“Civilian objects are protected against attack, unless and for such time as they are military objectives.”). Rule 156 treats violations of these rules as war crimes.

49. See Ole Solvang & Anna Neistat, *Death from the Skies, Deliberate and Indiscriminate Air Strikes on Civilians*, HUMAN RIGHTS WATCH (Apr. 10, 2013), <https://www.hrw.org/report/2013/04/10/death-skies/deliberate-and-indiscriminate-air-strikes-civilians>. Civilians and others who are *hors de combat* are also protected from mistreatment while in formal and informal detention. Priyanka Motaparthi & Nadim Houry, *If the Dead Could Speak: Mass Deaths and Torture in Syria’s Detention Facilities*, HUMAN RIGHTS WATCH (Dec. 16, 2015), <https://www.hrw.org/report/2015/12/16/if-dead-could-speak/mass-deaths-and-torture-syrias-detention-facilities>.

50. Report of the Independent International Commission of Inquiry on the Syrian Arab Republic 10, U.N. Doc. A/HRC/31/68 (Feb. 11, 2016), <http://www.ohchr.org/Documents/HRBodies/HRCouncil/CoISyria/A-HRC-31-68.pdf> (“The targeting of hospitals, medical personnel and transport, and the denial of access to medical care remain an ingrained feature of the Syrian conflict.”). Russia has also been implicated in such attacks. See *Russia Rejects Syria War Crimes Claim over Hospital Attacks*, BBC (Feb. 16, 2016), <http://www.bbc.com/news/world-middle-east-35586886>.

51. It is unlawful to deliberately target a hospital, even one treating combatants who are considered *hors de combat* and thus immune from deliberate attack, unless it is being used for non-medical military purposes such that it has lost its protection. See ICRC CIL Study, *supra* note 17, r. 35 (“Directing an attack against a zone established to shelter the wounded, the sick and civilians from the effects of hostilities is prohibited.”); *id.*, r. 156; ICC Statute, *supra* note 15, arts. 8(2)(b)(ix), 8(2)(e)(iv) (listing the crime of intentionally

easily be prosecuted by the ICC or under most domestic war crimes statutes, so long as the latter penalized such crimes when committed in NIACs. Beyond such direct and deliberate attacks, however, the ICC Statute's war crimes provisions diverge from CIL and depend in meaningful ways on conflict classification. National penal codes that hew closely to the terms of the IHL treaties will contain similar limitations.

These omissions in the ICC Statute generate some conspicuous gaps when it comes to war crimes. For example, the ICC cannot prosecute the crime of deliberately inflicting terror among the civilian population, even though this crime has a strong treaty basis in both IACs⁵³ and NIACs⁵⁴ and in CIL.⁵⁵ (Inexplicably, it is not specifically included in Rule 156, either). The International Criminal Tribunal for the former Yugoslavia (ICTY) Prosecutor generally employed this prohibition to charge those responsible for attacking populated areas, particularly when there were limited civilian

directing attacks on "hospitals and places where the sick and wounded are collected" as prosecutable in IACs and NIACs).

52. Beth Van Schaack, *Attacks on Journalists a War Crime*, JUST SECURITY (Aug. 20, 2014), <https://www.justsecurity.org/14179/attacks-journalists-war-crime/>; ICRC CIL Study, *supra* note 17, r. 34 ("Civilian journalists engaged in professional missions in areas of armed conflict must be respected and protected as long as they are not taking a direct part in hostilities."). In 2006, the Security Council approved a resolution dedicated to the protection of journalists. *See* S.C. Res. 1738 (Dec. 22, 2006). In response to the deliberate targeting of journalists in Syria, the General Assembly issued Resolution 68/163 condemning such attacks and urging States to bring perpetrators to justice. G.A. Res. 68/163 (Feb. 21, 2014). *See also* Human Rights Council Res. 26/23, U.N. Doc. A/HRC/RES/26/23, ¶ 7 (June 27, 2014) (decrying attacks on journalists).

53. Article 51(2) of API states: "The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited." The treaty at Article 85(3)(a) designates this offense as a grave breach giving rise to individual criminal responsibility.

54. Article 13(2) of APII is identical to API Article 51(2). This charge has been described as an "amplification of the absolute prohibition on attacking civilians and the prohibition on indiscriminate attacks." K.J. Riordan, *Shelling, Sniping and Starvation: The Law of Armed Conflict and the Lessons of the Siege of Sarajevo*, 41 VICTORIA UNIVERSITY OF WELLINGTON LAW REVIEW 149, 165 (2010).

55. ICRC CIL Study, *supra* note 17, art. 2 ("Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited."). The statutes of the international criminal tribunals for Rwanda (Article 4(d)) and Sierra Leone (Article 3(d)) both allowed for the prosecution of the war crime of "acts of terrorism." *See, e.g.*, Statute of the Special Court for Sierra Leone art. 3(d), Jan.16, 2002, 2178 U.N.T.S. 145.

deaths.⁵⁶ In ruling on these charges, the ICTY confirmed that the actual infliction of death or serious bodily harm is not a required element of the crime of inflicting terror on the civilian population;⁵⁷ what matters is that the defendant acted with the *intent* to spread terror.⁵⁸ This crime was deemed separate and distinct from the counts alleging the commission of unlawful attacks against civilians, including direct, indiscriminate, and disproportionate attacks.⁵⁹

Similarly, the crime of attacking an undefended site⁶⁰ can only be prosecuted before the ICC in IACs (Article 8(2)(b)(v)).⁶¹ For an area to be considered undefended according to Article 59 of API, armed actors must remove all combatants and weaponry from the area, “no hostile use shall be made of fixed military installations or establishments,” and “no activities in support of military operations shall be undertaken” in the area to ensure its legal protection.⁶² These standards, which generally exclude sites behind an active front line, are relatively difficult to meet in modern warfare, which

56. See Prosecutor v. Galić, Case No. IT-98-29-T, Judgment, ¶¶ 86–138 (Int’l Crim. Trib. for the former Yugoslavia Dec. 5, 2003) [hereinafter *Galić* Trial Judgment] (finding the crime of terror to have formed part of CIL at the time the defendants acted).

57. Prosecutor v. Milošević, Case No. IT-98-29/1-A, Appeals Chamber Judgment, ¶ 33 (Int’l. Crim. Trib. for the former Yugoslavia Nov. 12, 2009).

58. *Id.* ¶ 37.

59. *Id.* ¶ 39.

60. In armed conflicts of the past, heavily populated urban areas were at times declared to be “open cities,” which is to say that they were, in essence, undefended and immune from direct attack. See Riordan, *supra* note 54, at 153. Such localities were deemed “open” in the sense that they were susceptible to occupation by an adverse party. Article 59 of API provides that a belligerent may declare as a “non-defended locality any inhabited place near or in a zone where armed forces are in contact which is open for occupation by an adverse Party.”

61. The 1907 Hague Regulations provides that “[t]he attack or bombardment, by whatever means, towns, villages, dwellings or buildings which are undefended is prohibited.” Hague Regulations, *supra* note 31, art. 25. Attacking an undefended area is also a prosecutable war crime under the U.S. War Crimes Act, which incorporates this provision. 18 U.S.C. § 2441(c)(2) (2006).

62. Making an undefended locality and demilitarized zones the object of attack is a grave breach under API (Article 85(3)(d)), but not APII which contains no penal regime.

may explain why this crime has rarely been prosecuted.⁶³ The CIL study includes this crime in Rule 156, regardless of conflict classification.⁶⁴

This bifurcation between treaty law and CIL, and between crimes prosecutable in IACs versus NIACs, is also apparent when it comes to the penal law governing indiscriminate,⁶⁵ and disproportionate⁶⁶ attacks, both of which find expression in Rule 156. The former involves attacks that are not directed at a specific military objective or that involve a method or means of warfare that cannot be directed at a military objective or whose effects cannot be limited.⁶⁷ The prohibition against area bombardment,⁶⁸ applicable under CIL in IACs and NIACs, is a distinct subset of indiscriminate attack.⁶⁹ Disproportionate attacks are those that generate “incidental loss of

63. William J. Fenrick, *Attacking the Enemy Civilian as a Punishable Offense*, 7 DUKE JOURNAL OF COMPARATIVE & INTERNATIONAL LAW 539, 549–50 (1997).

64. See also ICRC CIL Study, *supra* note 17, r. 37 (“Directing an attack against a non-defended locality is prohibited” regardless of conflict classification”).

65. Indiscriminate attacks are defined as those:

- (a) which are not directed at a specific military objective;
- (b) which employ a method or means of combat which cannot be directed at a specific military objective; or
- (c) which employ a method or means of combat the effects of which cannot be limited as required by international humanitarian law; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.

Id., r. 12.

66. *Id.*, r. 14 (“Launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited.”).

67. Article 52 of API defines “military objectives” as “those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.”

68. ICRC CIL Study, *supra* note 17, r. 13 (“Attacks by bombardment by any method or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects is prohibited.”)

69. This prohibition is implicated by recent campaign calls to “carpet bomb” ISIL. Pamela Engel, *Ted Cruz Doubles Down on Vow to “Carpet Bomb” ISIS*, BUSINESS INSIDER (Jan. 28, 2016), <http://www.businessinsider.com/ted-cruz-isis-carpet-bomb-strategy-2016-1>. Although not a term of art, the concept of carpet bombing is generally understood to mean an indiscriminate attack against a large area without regard to the presence of civilians or civilian objects. Even if it were lawful, the practice would be senseless and wasteful in the era of precision guided munitions. See Danielle L. Infeld, *Precision-Guided Munitions Demonstrated Their Pinpoint Accuracy in Desert Storm; But is a Country Obligated to Use*

civilian life and damage to civilian objects [that is] excessive in relation to the concrete and direct military advantage anticipated.”⁷⁰

Under the ICC Statute, disproportionate attacks can be prosecuted only when committed within an IAC.⁷¹ Of even greater import for events in Syria, the ICC Statute contains no provision criminalizing indiscriminate attacks—regardless of conflict classification. As such, when it comes to NIACs, the ICC Prosecutor can only charge intentional attacks on civilians and civilian objects. These gaps in the ICC regime have implications for the Court’s ability to prosecute a range of crimes being committed in Syria, including those involving unconventional, improvised, and prohibited weapons and weapon systems in the absence of sufficient evidence establishing that civilians were directly targeted.

B. *Unconventional and Improvised Weapons and Weapon Systems*

IHL is premised on the idea that the means and methods of warfare are not without limit. This principle finds expression in general prohibitions applicable in all conflicts against the use of weapons and other methods of warfare that cannot be directed at a military objective⁷² or that are of a na-

Precision Technology to Minimize Collateral Civilian Injury and Damage?, 26 GEORGE WASHINGTON JOURNAL OF INTERNATIONAL LAW AND ECONOMICS 109 (1992).

70. API, Article 57, indicates that an attack must be suspended if it becomes apparent that

the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

See Prosecutor v. Gotovina and Markač, Case No. IT-06-90-A, Appeals Chamber Judgment, ¶¶ 64–67 (Int’l. Crim. Trib. for the former Yugoslavia Nov. 16, 2012) (overturning the Trial Chamber’s findings that defendants orchestrated indiscriminate attacks in a Serbian separatist entity in Croatia). For a cogent critique of this verdict and its underlying reasoning, see Marko Milanovic, *The Gotovina Omnishambles*, EJIL: TALK! (Nov. 18, 2012), <http://www.ejiltalk.org/the-gotovina-omnishambles/>.

71. ICC Statute, *supra* note 15, art. 8(2)(b)(iv) (Allowing the prosecution of “intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.”).

72. ICRC CIL Study, *supra* note 17, r. 71 (“The use of weapons which are by nature indiscriminate is prohibited.”).

ture to cause superfluous injury or unnecessary suffering,⁷³ as well as in more specific bans or limits on the use of particular weapons and weapon systems. Many of the underlying IHL treaties dedicated to the use of identified weapons adopt a regulatory or disarmament—rather than a penal—paradigm and apply only to IACs.⁷⁴ As such, prosecutions would need to proceed under CIL or under more general IHL rules prohibiting direct, indiscriminate, disproportionate, or terror attacks against the civilian population or those prohibiting the infliction of unnecessary suffering. The CIL study includes the use of prohibited weapons as a CIL war crime in both IACs and NIACs,⁷⁵ although there is some equivocation over which weapons are per se forbidden for lack of a clear international consensus.⁷⁶

The IHL rules on weapons can be particularly important because they protect combatants and other armed actors who may be the object of attack, as well as civilians who may not be the object of attack unless they directly participate in hostilities. As discussed below, some weapons and weapon systems in use in Syria are inherently unlawful and indiscriminate; others are being used in ways that cannot possibly discriminate between the civilian population and civilian objects and combatants and military objectives; still others cause unnecessary suffering and superfluous injury.⁷⁷ The

73. ICRC CIL Study, *supra* note 17, r. 70. The concept of “unnecessary suffering” has been defined by the International Court of Justice as “a harm greater than that unavoidable to achieve legitimate military objectives.” *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, ¶ 78 (July 8).

74. Three weapons conventions apply expressly to NIACs. *See* Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, Oct. 10, 1980, 1342 U.N.T.S. 137; Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction art. I, Jan. 13, 1993, 1974 U.N.T.S. 45 [hereinafter CWC]; Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, Sept. 18, 1997, 2056 U.N.T.S. 211. The Conventional Weapons Convention, which was amended in 2001 to apply to NIACs, is accompanied by five protocols that apply to particular weapons, weapon features and weapon systems: weapons employing undetectable fragments, landmines and booby-traps, incendiary weapons, blinding lasers, and explosive remnants of war.

75. *See* ICRC CIL Study, *supra* note 17, rr. 70–86.

76. *See id.*, r. 70.

77. Suha Maayeh & Phil Sands, *From Dumb Bombs to Precision Weapons, Assad Regime Ramps Up Airstrikes on Rebels*, THE NATIONAL (Oct. 14, 2014), <http://www.thenational.ae/world/middle-east/from-dumb-bombs-to-precision-weapons-assad-regime-ramps-up-airstrikes-on-rebels> (noting the use of more precise weaponry by the regime, presumably due to Russian upgrades).

use of chemical weapons in particular, which are subject to an absolute ban under international law, highlights the disjuncture between the ICC Statute and CIL. There is little precedent for the prosecution of weapons crimes; the use of all these prohibited and problematic weapons in Syria offers an opportunity to generate modern jurisprudence concerning these munitions if war crimes prosecutions are forthcoming.

1. Barrel Bombs

The warring parties in Syria have deployed a number of munitions that by design or in their usage are incapable of distinguishing between civilians and combatants, or between civilian objects and military objectives. For example, barrages of barrel bombs have come to represent the brutality of the Assad regime.⁷⁸ These improvised containers are filled with bulk explosives, incendiaries, and fragmentation media, and then dropped from helicopters and other aircraft.⁷⁹ There are also indications that chemical agents, such as chlorine, have been included within these encasements⁸⁰ and that their release has been sequenced in such a way as to maximize the impact on first responders.⁸¹

Although there is no treaty or CIL rule governing barrel bombs per se, the COI invoked the IAC/NIAC customary prohibition against indiscriminate attacks, specifically the ban on area bombardment, in condemning their use. In particular, it concluded that the use of barrel bombs in “densely populated areas with high concentrations of civilians” amounted to “area bombardment,” a form of indiscriminate attack specifically

78. According to the Syrian Observatory of Human Rights, Syrian regime helicopters have dropped over 22,000 barrel bombs. *The Russian Air Force Kill 403 Civilians, including 166 Women and Children, and about 7000 Civilians Killed in 13 Months of Airstrikes Carried out by the Regime Air Forces*, SOHR (Nov. 20, 2015), <http://www.syriaohr.com/en/?p=38346>.

79. Eliot Higgins, *A Brief Open Source History of the Syrian Barrel Bomb*, BELLINCAT (July 8, 2015), <https://www.bellingcat.com/news/mena/2015/07/08/a-brief-open-source-history-of-the-syrian-barrel-bomb/>.

80. Mohammed Najib & Jeremy Binnie, *Syrian Pilot Details Helicopter Operations*, IHS JANE'S 360 (July 12, 2015), <http://www.janes.com/article/52910/syrian-pilot-details-helicopter-operations>.

81. Clarissa Ward, *White Helmets: Inside Look at Syria's First Responders*, CBS NEWS (Mar. 16, 2015), <http://www.cbsnews.com/news/white-helmets-inside-look-at-syrias-first-responders/>.

prohibited under IHL, and that the “bombardments spread terror among the civilian population.”⁸²

The use of barrel bombs has also generated widespread condemnation in the Security Council and elsewhere.⁸³ In Resolution 2139, for example, the Council demanded

that all parties immediately cease all attacks against civilians, as well as the indiscriminate employment of weapons in populated areas, including shelling and aerial bombardment, such as the use of barrel bombs, and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering.⁸⁴

The Resolution also called for an end to impunity for all violations of IHL and reaffirmed that those who committed or were otherwise responsible for the violations “be brought to justice.”⁸⁵ It tasked the Secretary-General to report on the implementation of this and related resolutions aimed at curbing abuses in Syria. In his twenty-first such report, the Secretary-General concluded that indiscriminate attacks, including the use of barrel

82. Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, Annex VI, ¶ 4, A/HRC/25/65 (Feb. 12, 2014). *See also* Human Rights Council Res. 26/23, *supra* note 52, ¶ 7 (declaring that the “indiscriminate use of barrel bombs” may amount to a war crime or a crime against humanity).

83. In November, the Third Committee, with broad international support, tabled a resolution that, *inter alia*, strongly condemned

all violations and abuses of international human rights law and all violations of international humanitarian law committed against the civilian population, in particular all indiscriminate attacks, including the use of barrel bombs in civilian areas and against civilian infrastructure, and demands that all parties immediately demilitarize medical facilities and schools and comply with their obligations under international law.

Social, Humanitarian & Cultural Committee, Situation of Human Rights in the Syrian Arab Republic, ¶ 1, U.N. Doc. A/C.3/70/L.47 (Nov. 2, 2015). It also demanded the cessation of “all indiscriminate attacks in civilian areas and public spaces, including those involving the use of terror tactics, airstrikes, barrel and vacuum bombs, chemical weapons and heavy artillery.” *Id.* ¶ 2. *See also* Human Rights Council Res. 29/L.4, ¶ 7 U.N. Doc. A/HRC/29/L.4 (June 29, 2015).

84. S.C. Res. 2139 (Feb. 22, 2014).

85. *Id.*, ¶ 13. Later, in Resolution 2165, the Security Council voiced “grave alarm in particular at the continuing indiscriminate attacks in populated areas, including an intensified campaign of aerial bombings and the use of barrel bombs in Aleppo and other areas.” S.C. Res. 2165, pmbl., para. 10 (July 14, 2014).

bombs, remain prevalent, despite Syrian assurances to the contrary.⁸⁶ The Assad regime has consistently disavowed their use; however, recovered cell phone videos have disproved these denials.⁸⁷ Notwithstanding these denunciations, the attacks continue.⁸⁸

There is some relevant legal precedent attesting to the illegality of barrel bombs. For instance, the ICTY Appeals Chamber affirmed Dragomir Milošević's guilt of "acts or threats of violence the primary purpose of which is to spread terror among the civilian population" based on his order to use "modified air bombs" against civilians during the siege of Sarajevo.⁸⁹ The ICTY noted that these were "a highly inaccurate weapon, sometimes even described as uncontrollable, yet with extremely high explosive force."⁹⁰ Milošević was also charged with conducting a coordinated campaign of sniper and shelling attacks against the civilian population of Sarajevo amounting to the crimes against humanity of murder and inhumane acts, as well as the war crime of committing an "unlawful attack against civilians."⁹¹

2. Cluster Munitions

Cluster munitions have been air-dropped and ground-launched by Syrian forces (since mid-2012) and by ISIL (since late 2014) in multiple opposition-controlled locations around Syria.⁹² Human Rights Watch has recorded the use of advanced Russian-made cluster munitions following Russia's

86. See, e.g., U.N. Secretary-General, Report of the Secretary-General on the Implementation of Security Council Resolutions 2139 (2014), 2165 (2014), and 2191 (2014), U.N. Doc. S/2015/862 (Nov. 11, 2015), http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2015/862 [hereinafter Secretary-General Report].

87. Kayla Ruble, *Newly Discovered Video Allegedly "Exposes Assad's Lies on Barrel Bombs,"* VICE NEWS (May 21, 2015), <https://news.vice.com/article/newly-discovered-video-allegedly-exposes-assads-lies-on-barrel-bombs>.

88. *Syria: New Spate of Barrel Bomb Attacks*, HUMAN RIGHTS WATCH (Feb. 24, 2015), <https://www.hrw.org/news/2015/02/24/syria-new-spate-barrel-bomb-attacks>.

89. *Milošević*, *supra* note 57, ¶ 273.

90. *Id.*

91. *Id.* ¶ 4.

92. *Technical Briefing Note: Use of Cluster Munitions in Syria*, HUMAN RIGHTS WATCH (Apr. 4, 2014), <https://www.hrw.org/news/2014/04/04/technical-briefing-note-use-cluster-munitions-syria>. Human Rights Watch has not yet documented the use of cluster munitions by opposition groups, which do not operate aircraft. See *Russia/Syria: Extensive Recent Use of Cluster Munitions*, HUMAN RIGHTS WATCH (Dec. 20, 2015), <https://www.hrw.org/news/2015/12/20/russia/syria-extensive-recent-use-cluster-munitions>.

September 2015 intervention, suggesting either that Russia is using cluster munitions itself or is providing them to the Syrian air force.⁹³ There is no indication that the U.S.-led coalition has used cluster munitions in Operation Inherent Resolve, although these weapons were deployed—not without controversy—in Operation Allied Force in Kosovo in 1999,⁹⁴ in Operation Enduring Freedom in Afghanistan in 2001 and onward,⁹⁵ and in Operation Iraqi Freedom in 2003.⁹⁶

Cluster munitions are weapons that eject a payload of sub-munitions (bomblets or other fragmentation elements) from a dispenser upon contact or at a preset altitude. They are classified as combined effect munitions because their payload may exert anti-material, anti-armor, anti-personnel, and incendiary effects. When unguided, cluster munitions are relatively inaccurate, manifesting a high lateral error factor. Even when guided by the addition of a tail kit or infrared imager, they can generate a wide lethal radius since they distribute their sub-munitions over a large “footprint,” particularly when fired from a distance or from higher altitudes. Cluster munitions are intended for use in wide-area targeting, and may be deployed against moving “soft” targets (enemy personnel and civilians) or to destroy runways, scatter landmines, penetrate armor, start fires, and deliver chemical

93. *Syria: New Russian-Made Cluster Munition Reported*, HUMAN RIGHTS WATCH (Oct. 10, 2015), <https://www.hrw.org/news/2015/10/10/syria-new-russian-made-cluster-munition-reported>; *Russia/Syria: Daily Cluster Munitions Attacks*, HUMAN RIGHTS WATCH (Feb. 8, 2016), <https://www.hrw.org/news/2016/02/08/russia/syria-daily-cluster-munition-attacks>. A Russian watchdog group is in accord, notwithstanding Russian denials. Ruslan Leviev, *Sputnik, RT and Russian MoD Expose Cluster Bombs at Hmeimim Airbase*, CONFLICT INTELLIGENCE TEAM (Jan. 7, 2016), <https://citeam.org/sputnik-rt-and-russian-mod-expose-cluster-bombs-at-hmeimim-airbase/>.

94. See Office of the Prosecutor, International Criminal Tribunal for the Former Yugoslavia, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, ¶ 27, 39 INTERNATIONAL LEGAL MATERIALS 1257 (June 13, 2000), <http://www.icty.org/x/file/Press/nato061300.pdf> [hereinafter Final Report] (concluding that the use of unguided cluster bombs by NATO forces did not merit further investigation, despite some civilian deaths); *NATO's Use of Cluster Munitions in Yugoslavia*, HUMAN RIGHTS WATCH (May 11, 1999), <https://www.hrw.org/report/1999/05/11/natos-use-cluster-munitions-yugoslavia>.

95. *Cluster Munitions in Afghanistan*, HUMAN RIGHTS WATCH (Oct. 2001), <https://www.hrw.org/legacy/backgrounders/arms/cluster-bck1031.pdf>.

96. *U.S. Using Cluster Munitions in Iraq*, HUMAN RIGHTS WATCH (Apr. 1, 2003), <https://www.hrw.org/news/2003/04/01/us-using-cluster-munitions-iraq>.

weapons.⁹⁷ A major critique of cluster bomb use concerns the fact that up to 30 percent of the payload may not detonate, generating so-called unexploded ordinance (UXO) that can cause harm many years after initial use.⁹⁸ In Syria, hundreds of civilians have been killed by cluster munitions,⁹⁹ although precise data collection is inherently difficult and casualty numbers are probably higher than reported, especially once injuries from UXO are taken into account.

No complete international consensus has yet emerged that the use of cluster munitions is per se unlawful under IHL, although some States, academics, and activists have argued otherwise, and the law is certainly moving in this direction.¹⁰⁰ Almost one hundred States, including many members of the coalition conducting operations in Syria and Iraq, have joined the 2008 Convention on Cluster Munitions (CCM), which bans the use of cluster munitions, requires the destruction of stockpiles, calls for the clearance of areas contaminated with unexploded sub-munitions and obliges parties to discourage the use of such munitions and provide assistance to victims.¹⁰¹ The main producers and users of cluster munitions (the United States, Russia, India, Israel, Pakistan, China, and South Korea), however, have not

97. ANDREW FEICKERT & PAUL K. KERR, CONG. RESEARCH SERV., RS22907, CLUSTER MUNITIONS: BACKGROUND AND ISSUES FOR CONGRESS 2 (Apr. 29, 2014), <https://www.fas.org/sgp/crs/weapons/RS22907.pdf>.

98. Starting in 2018, the United States will only procure and use cluster munitions with a less than 1 percent failure rate in the field. Memorandum from Robert Gates, Secretary of Defense to Secretaries of the Military Departments et al., DoD Policy on Cluster Munitions and Unintended Harm to Civilians (June 19, 2008), <http://www.globalsecurity.org/military/library/policy/dod/d20080709cmpolicy.htm>. Protocol V to the Conventional Weapons Convention sought to address the problem of UXO post-conflict, but it is silent on use, targeting and reliability issues. See Protocol on Explosive Remnants of War to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects, Nov. 28, 2003, 2399 U.N.T.S. 100. These gaps, in part, inspired the Oslo process to negotiate the Cluster Munitions Convention outside of the United Nations and among like-minded States. See *infra* note 99. Detractors have argued that disarmament issues should be addressed within the First Committee of the U.N. General Assembly and the Conventional Weapons Convention. See *infra* note 147.

99. See *Cluster Munition Use in Syria*, LANDMINE & CLUSTER MUNITION MONITOR (Feb. 25, 2014), <http://www.the-monitor.org/en-gb/stay-informed/press-releases/2014/cluster-munition-use-in-syria.aspx>.

100. See Thomas J. Herthel, *On the Chopping Block: Cluster Munitions and the Law of War*, 51 AIR FORCE LAW REVIEW 229 (2001).

101. Convention on Cluster Munitions, Dec. 3, 2008, 2688 U.N.T.S. 39 [hereinafter CCM].

joined the treaty;¹⁰² as such, it ultimately only governs about 10 percent of the world's stockpile.¹⁰³ The treaty does not prohibit joint military action with nations that use cluster munitions, although States parties are to promote ratification of the treaty by non-party States and cannot "assist, encourage or induce anyone to engage in any activity prohibited to a State Party" under the treaty.¹⁰⁴ The United States, which possesses a large cluster munition stockpile,¹⁰⁵ stands as a persistent objector to any per se prohibition on the use of cluster munitions.¹⁰⁶ A recent declaration at the First Review Conference on the CCM condemning "any use of cluster munitions by any actor" garnered strong, but not universal, support.¹⁰⁷ Perhaps the strongest argument for the view that cluster munitions are inherently unlawful in light of the principle of distinction stems from their high "dud rate,"¹⁰⁸ a defect that manufacturers are addressing in more advanced mod-

102. *See Convention Status*, THE CONVENTION ON CLUSTER MUNITIONS <http://www.clusterconvention.org/the-convention/convention-status/> (last visited Apr. 16, 2016).

103. *France and the Elimination of Cluster Munitions*, FRANCE DIPLOMATIE, <http://www.diplomatie.gouv.fr/en/french-foreign-policy/disarmament-and-non-proliferation/france-and-the-elimination-of-cluster-munitions/> (last visited Apr. 16, 2016).

104. CCM, *supra* note 101, arts. 1(1)(c), 21(3)–(4).

105. The United States is one of the biggest producers and exporters of cluster munitions. It has stockpiled between 700 million and one billion sub-munitions. *Cluster Munitions at a Glance*, ARMS CONTROL ASSOCIATION (Nov. 2012), <https://www.armscontrol.org/factsheets/clusterataglance>.

106. *See* OFFICE OF THE GENERAL COUNSEL, U.S. DEPARTMENT OF DEFENSE, LAW OF WAR MANUAL § 6.13 (2015) [hereinafter DOD LAW OF WAR MANUAL].

107. Review Conference of States Parties to the Convention on Cluster Munitions, *Final Report*, ¶ 6, U.N. Doc. CCM/Conf./2015/7 (Oct. 13, 2015), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/234/81/PDF/G1523481.pdf?OpenElement>. *See Nations Condemn Cluster Munition Attacks*, HUMAN RIGHTS WATCH (Sept. 11, 2015), <https://www.hrw.org/news/2015/09/11/nations-condemn-cluster-munition-attacks>. The U.N. General Assembly recently issued its first resolution in support of the CCM, which was adopted 130 to 2 (with forty abstentions, including the United States). *See* Meetings Coverage, General Assembly, Speakers in First Committee Decry Destructive Force of Indiscriminate Weapons While Some Defend Need for National Protection, Approving 11 More Drafts, U.N. Meetings Coverage GA/DIS/3540 (Nov. 4, 2015), <http://www.un.org/press/en/2015/gadis3540.doc.htm>.

108. In light of this propensity, some commentators have likened cluster munitions to landmines in an effort to extend the prohibition on the use of landmines to these weapons. *See* Herthel, *supra* note 100, at 232–33. The Oslo Process and many of the provisions within the CCM drew inspiration from the anti-personnel mine ban convention. Stuart Casey-Maslen, *Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-*

els through self-destruct features.¹⁰⁹ One hundred fifty-five States—CCM parties and non-parties alike—have denounced the use of cluster munitions in Syria.¹¹⁰ The CIL study at Rule 71 indicates there is insufficient consensus to support their total prohibition, instead listing them as among the weapons that many States consider to be indiscriminate in certain or all contexts. Despite evidence of regime use of these munitions, Syria issued written assurances in November 2015 that it is not using, and will not use, “indiscriminate weapons.”¹¹¹

Even absent a universal treaty or CIL ban, the deliberate, indiscriminate or disproportionate use of cluster bombs against civilians, or without appropriate precautions,¹¹² implicates many generalized prohibitions under IHL. For example, prior to conclusion of the CCM negotiations, the ICTY in *Martić* held that the defendant’s use of cluster munitions in a “densely populated” area of Zagreb was presumptively unlawful under general IHL principles, notwithstanding that there were military targets in the general vicinity of the attacks.¹¹³ The attack was also deemed a crime against humanity.¹¹⁴ There may be certain scenarios, however, in which the use of cluster munitions against purely military objectives far from any civilian population remains lawful. The Ethiopia-Eritrea Claims Commission, for instance, found that Eritrea had taken insufficient precautions within the requirements of Article 57 of API¹¹⁵ before and after using cluster muni-

Personnel Mines and on their Destruction, UNITED NATIONS AUDIOVISUAL LIBRARY OF INTERNATIONAL LAW (2010), http://legal.un.org/avl/pdf/ha/cpusptam/cpusptam_e.pdf;

109. FEICKERT & KERR, *supra* note 97, at 2.

110. *See* G.A. Res. 67/L.63 (May 15, 2013 G.A. Res. 67/262, The Situation in Syria, (June 4, 2013); G.A. Res. 68/182, Situation of Human Rights in the Syrian Arab Republic, (Jan. 30, 2014) (condemning cluster munition use in Syria). *See generally Cluster Munitions Use in Syria*, CLUSTER MUNITION COALITION, <http://www.stopclustermunitions.org/en-gb/cluster-bombs/use-of-cluster-bombs/cluster-munition-use-in-syria.aspx> (last visited Apr. 16, 2016) (compiling condemnations).

111. Secretary-General Report, *supra* note 86, ¶ 3.

112. *See* ICRC CIL Study, *supra* note 17, r. 15 (Precautions in Attack), r. 22 (Principle of Precautions against the Effects of Attacks).

113. Prosecutor v. Martić, Case No. IT-95-11-T, Judgment, ¶ 461 (Int’l. Crim. Trib. for the former Yugoslavia June 12, 2007).

114. *Id.* ¶ 469.

115. Article 57 of API obliges parties to a conflict to “take all reasonable precautions to avoid losses of civilian lives and damage to civilian objects” in accordance with their rights and duties under IHL. API, in turn, drew inspiration from Article 19 of the Lieber Code, which governed the conduct of Union forces during the U.S. Civil War. With similar caveats on practicability, the Code required military commanders to “inform the enemy of their intention to bombard a place, so that the noncombatants, and especially the wom-

tions in its conflict with Ethiopia.¹¹⁶ The ostensible target was an airport used for military purposes, but the pilots dropping the munitions accidentally hit a nearby school and the surrounding neighborhood.¹¹⁷ The arbitral opinion, which was focused on State rather than individual criminal responsibility, and which required a clear and convincing evidentiary standard, did not condemn the use of these munitions and actually validated Eritrea's argument that it was not "feasible" for it to rely on better-trained personnel during the operation.¹¹⁸ Absent a *per se* prohibition, the use of cluster munitions in Syria would have to be prosecuted under more general rules governing direct, indiscriminate, or disproportionate attacks.

3. Incendiary Weapons

The COI and human rights groups have also recorded the use of air-dropped incendiary weapons,¹¹⁹ including so-called vacuum bombs or fuel-air explosives (FAE).¹²⁰ Incendiary weapons are munitions that produce fire through a chemical reaction involving flammable substances that burn at very high temperatures. They cause harm through thermal and respiratory

en and children, may be removed before the bombardment commences." U.S. Department of War, Instructions for the Government of Armies of the United States in the Field art. 19, General Orders No. 100, Apr. 24, 1863 [hereinafter Lieber Code]. There is no analog on precautions in APII, but the ICRC considers the rule on precautions to be inherent to the principle of distinction, which applies regardless of conflict classification. See ICRC CIL Study, *supra* note 17, r. 24. So does the U.N. General Assembly. See G.A. Res. 2675, Basic Principles for the Protection of Civilian Populations in Armed Conflicts (Dec. 9, 1970).

116. Partial Award: Central Front—Ethiopia's Claim 2 (Eri. v. Eth.), 26 R.I.A.A. 155, ¶ 110 (Eri.–Eth. Claims Comm'n 2004), <http://www.pcacases.com/web/sendAttach/754>.

117. *Id.* ¶¶ 109–10.

118. *Id.* ¶¶ 109–12. For criticism, see ALEXANDER BREITTEGGER, CLUSTER MUNITIONS IN INTERNATIONAL LAW: DISARMAMENT WITH A HUMAN FACE? § 4.1 (2012).

119. *Syria's Use of Incendiary Weapons: Memorandum to Convention on Conventional Weapons Delegates*, HUMAN RIGHTS WATCH (Nov. 2013), <http://www.refworld.org/docid/52820f686.html>.

120. Note that vacuum bombs may not fully qualify as incendiary weapons as defined by Protocol III to the CCW because they have combined effects munition qualities. Protocol III excludes from its scope "[m]unitions designed to combine penetration, blast or fragmentation effects with an additional incendiary effects . . . [when] the incendiary effect is not specifically designed to cause burn injury to persons, but to be used against military objectives, such as armoured vehicles." Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons art. 1(b)(ii), Oct. 10, 1980, 1342 U.N.T.S. 171 [hereinafter CCW Protocol III]. See DOD LAW OF WAR MANUAL, *supra* note 106, § 6.14.1.4.

burns as well as secondary fires. FAE are thermobaric weapons that disperse an aerosolized explosive cloud—often toxic in and of itself—that is ignited by a charge, producing an enormous shockwave.¹²¹ When these weapons are deployed sequentially, the resulting blast waves reinforce each other. They are more powerful in terms of energy output, and thus more destructive, than conventional explosives. Like other weapons that can be dispersed in gas form, incendiary weapons were developed primarily to deal with concealed targets (e.g., combatants hiding in bunkers or other fortifications who would be protected from shrapnel, debris, and other fragmentary media).¹²² They also rely on multiple kill mechanisms: those persons in the immediate vicinity are ignited or crushed by collapsing structures, whereas those who are more remote from the blast site die when their lungs or other internal organs rupture. Given their dispersed effects, it is extremely difficult to discriminate use such weapons in an urban or populated area since it is virtually impossible to target their harmful effects or for civilians to take shelter.

The use of such weapons in Syria has been universally condemned.¹²³ Although Protocol III¹²⁴ of the 1980 Conventional Weapons Convention (CCW) regulates the use of incendiary weapons, Syria is not a party and, in any case, the treaty contains some unfortunate definitional loopholes that make for piecemeal application. For one, it defines incendiary weapons by virtue of their primary purpose (to cause burn injuries) rather than their impact or incidental effects.¹²⁵ It bans the use of all incendiary weapons

121. *Thermobaric Explosive*, GLOBALSECURITY.ORG, <http://www.globalsecurity.org/military/systems/munitions/thermobaric.htm> (last visited Apr. 18, 2016); *Backgrounder on Russian Fuel Air Explosives (“Vacuum Bombs”)*, HUMAN RIGHTS WATCH (Feb. 1, 2000), <https://www.hrw.org/report/2000/02/01/backgrounder-russian-fuel-air-explosives-vacuum-bombs>.

122. *Marines Quiet about Brutal New Weapon*, DEFENSETECH (Nov. 14, 2005), <http://www.defensetech.org/2005/11/14/marines-quiet-about-brutal-new-weapon/>.

123. See G.A. Res. A/RES/69/189, ¶ 2, *The Situation of Human Rights in the Syrian Arab Republic* (Dec. 18, 2014) (demanding “that the Syrian authorities immediately put an end to all indiscriminate attacks on civilian areas and public spaces, including those involving the use of terror tactics, airstrikes, barrel and vacuum bombs, chemical weapons and heavy artillery”); Human Rights Council Res. 28/20, U.N. Doc. A/HRC/RES/28/20 (Mar. 27, 2015).

124. CCW Protocol III, *supra* note 120.

125. HUMAN RIGHTS WATCH & INTERNATIONAL HUMAN RIGHTS CLINIC, FROM CONDEMNATION TO CONCRETE ACTION: A FIVE-YEAR REVIEW OF INCENDIARY WEAPONS 6 (Nov. 2015), <http://hrp.law.harvard.edu/wp-content/uploads/2015/11/Incendiaries-5-year-review-final.pdf> [hereinafter HRW & IHRC].

against civilians and air-delivered incendiary weapons in areas with “concentrations of civilians,” even if a military objective is co-located therein.¹²⁶ However, it tolerates the use of land-delivered incendiary munitions against military objectives within concentrations of civilians so long as such objectives are clearly separated and other precautions are taken.¹²⁷ This distinction—largely artificial—between air-dropped and land-launched delivery systems reflects the Vietnam-era origins of the prohibition and the fervent condemnation of napalm use in that conflict.¹²⁸

The CIL study contains only a qualified ban on such weapons in all conflicts: “If incendiary weapons are used, particular care must be taken to avoid, and in any event to minimise, incidental loss of civilian life, injury to civilians and damage to civilian objects.”¹²⁹ Under this rule, such weapons may be used against an opponent as a last resort: “The anti-personnel use of incendiary weapons is prohibited, unless it is not feasible to use a less harmful weapon to render a person *hors de combat*.”¹³⁰ In its listing of serious violations of IHL constituting war crimes, Rule 156 is silent as to the use of incendiary weapons. The absence of a complete ban stems in part from the fact that incendiary weapons are one of the few weapons that are effective against caches of biological weapons and biotoxins.¹³¹ In any case, while their direct use against civilians, as seen in Syria, is conclusively banned by CIL, a court would have to determine whether their use there would constitute a war crime, either *per se* or as an indiscriminate attack.

126. CCW Protocol III, *supra* note 120, art. 2(2) (“It is prohibited in all circumstances to make any military objective located within a concentration of civilians the object of attack by air-delivered incendiary weapons.”).

127. *Id.*, art. 2(3).

128. HRW & IHRC, *supra* note 125, at 8. *See generally* ROBERT M. NEER, NAPALM, AN AMERICAN BIOGRAPHY (2013) (tracing history of use and prohibition of napalm).

129. ICRC CIL Study, *supra* note 17, r. 85.

130. *Id.*

131. Although the United States has ratified Protocol III, many State parties rejected a U.S. reservation seeking to uphold the right to use such weapons against military objectives located in concentration of civilians “where it is judged that such use would cause fewer casualties and/or less collateral damage than alternative weapons.” *See* Jeff Abramson, *U.S. Incendiary-Weapons Policy Rebuffed*, ARMS CONTROL ASSOCIATION (Mar. 31, 2010), https://www.armscontrol.org/act/2010_04/Incendiary.

4. Poison and Poisoned Weapons

As originally enacted, Article 8 of the ICC Statute specifically penalized the use of certain forms of poison and poisonous weapons in IACs (although an earlier draft of this provision did not distinguish between IACs and NIACs).¹³² It is thus criminal to employ poison or poisoned weapons (Article 8(2)(b)(xvii)) and asphyxiating, poisonous or other gases, and all analogous liquids, materials and devices (Article 8(2)(b)(xviii)) in an IAC.¹³³ The use of these weapons is also prohibited by various historical instruments, such as the 1925 Gas Protocol.¹³⁴ Rule 72 of the CIL study prohibits the use of poison or poisoned weapons in all circumstances, and Rule 70 includes poison in the list of weapons considered indiscriminate in certain or all contexts, but they are not listed specifically as crimes in Rule 156.

During the Kampala Review Conference in 2010, which also resulted in the codification of the crime of aggression, States parties adopted by consensus an amendment proposed by Belgium to extend the prohibitions on poison, poisoned weapons, and asphyxiating, poisonous or other gases to NIACs.¹³⁵ The new provisions appear as sub-paragraphs (xii) and (xiv) in Article 8(2)(e) governing NIACs. Other Belgian proposals—which would have penalized the use of biological and chemical weapons, anti-personnel mines, non-detectable fragments, and blinding laser weapons—did not garner sufficient support.¹³⁶ A 2009 proposal by Mexico to make the use of

132. See Roger S. Clark, *Building on Article 8(2)(b)(xx) of the Rome Statute of the International Criminal Court: Weapons and Methods of Warfare*, 12 NEW CRIMINAL LAW REVIEW 366 (2009).

133. A third provision (Article 8(2)(b)(xix)) penalizes the use of bullets that expand or flatten easily in the human body (so-called dum-dum bullets), reflecting the 1899 Hague Declaration on Prohibited Bullets. See Declaration (IV, 3) Concerning Expanding Bullets, July 29, 1899, 187 Consol. T.S. 459, 26 Martens Nouveau Recueil (ser. 2) 1002.

134. Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, 94 L.N.T.S. 65 [hereinafter Gas Protocol]. The Gas Protocol was a response to the failure of prior instruments to prevent the use of chemical weapons in World War I. The Protocol only bans the international use of such weapons, not their production or stockpiling. Syria has been a party since 1968.

135. See *Prohibited Weapons and the Belgian Amendment: Symbolic, But of What?*, THE ICC REVIEW CONFERENCE: KAMPALA 2010 BLOG (May 22, 2010), <http://iccreviewconference.blogspot.de/2010/05/prohibited-weapons-and-belgian.html>. The Belgian proposal also extended the crime of using dum-dum bullets to NIACs.

136. International Criminal Court, Assembly of States Parties to the Rome Statute of the International Criminal Court, 8th Sess., Official Records, ICC-ASP/8/20, Annex II

nuclear weapons an international crime met the same fate.¹³⁷ All these proposals remain in play within the Assembly of States Parties, however, and may be taken up if a subsequent review conference is calendared.¹³⁸

These changes to Article 8(2)(e) were billed as a logical extension of a set of prohibitions that already existed in IACs.¹³⁹ That said, this seemingly innocuous harmonization of the law met some resistance in light of the fact that certain chemical agents (and flattening bullets)¹⁴⁰—which might meet the technical definition of prohibited weapons under IHL—remain lawful when used in certain law enforcement situations (such as for riot control and in hostage-rescue operations) as a less lethal alternative to deadly force.¹⁴¹ There was concern that the disparate legal treatment of this technology in IHL as compared to the law governing non-IHL scenarios may give rise to unfairness or confusion in so-called “three-block wars.”¹⁴² This concept reflects the fact that in contemporary armed conflicts a State’s armed forces may be involved in full-scale combat on one block, a stabilization operation on the next block and a humanitarian relief/reconstruction operation on a third block. States also argued that the penal prohibition in the ICC Statute should not apply to substances with only temporary effects. This “safe haven” is reflected in the ICC’s Elements of Crimes, which contain a harm threshold requiring a showing that

(“Report of the Working Group on the Review Conference”), App. I (“Belgium”), Amend. 2, at 59–60 (Nov. 2009), https://www.icc-cpi.int/iccdocs/asp_docs/ASP8/OR/OR-ASP8-Vol.I-ENG.Annexes.pdf.

137. *Id.* at 64.

138. *Informal Compilation of Proposals to Amend the Rome Statute*, SECRETARIAT OF THE ASSEMBLY OF STATES PARTIES (Jan. 23, 2015), https://asp.icc-cpi.int/iccdocs/asp_docs/Publications/WGA-Inf-Comp-RS-amendments-ENG.pdf.

139. See Amal Alamuddin & Philippa Webb, *Expanding Jurisdiction over War Crimes under Article 8 of the ICC Statute*, 8 JOURNAL OF INTERNATIONAL CRIMINAL LAW 1219 (2010) (tracing drafting history).

140. See *Practice Relating to Rule 77: Expanding Bullets*, ICRC, https://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule77.

141. Kenneth Watkins, *Chemical Agents and “Expanding” Bullets: Limited Law Enforcement Exceptions or Unwarranted Handcuffs?*, in *THE LAW OF WAR IN THE 21ST CENTURY: WEAPONRY AND THE USE OF FORCE* 193 (Anthony M. Helm ed., 2006) (Vol. 82, U.S. Naval War College International Law Studies); Robin Coupland & Dominique Loye, *The 1899 Hague Declaration Concerning Expanding Bullets: A Treaty Effective for More than 100 Years Faces Complex Contemporary Issues*, 85 INTERNATIONAL REVIEW OF THE RED CROSS 135 (2003), https://www.icrc.org/eng/assets/files/other/irrc_849_coupland_et_loye.pdf.

142. A. Walter Dorn & Michael Varey, *The Rise and Demise of the “Three Block War,”* 10 CANADIAN MILITARY JOURNAL 38 (2009), <http://www.journal.forces.gc.ca/vol10/no1/doc/07-dornvarey-eng.pdf>.

the poison or prohibited gas substance “causes death or serious damage to health in the ordinary course of events, through its asphyxiating or toxic properties.”¹⁴³ These amendments to Article 8 are now in force, having garnered the necessary thirty ratifications.¹⁴⁴

5. Chemical Weapons

This brings us to the proven use by the Assad regime (and likely ISIL) of chemical weapons and agents—including sarin, sulfur mustard, and chlorine¹⁴⁵—starting with the sarin nerve agent attack in Ghouta in August 2013.¹⁴⁶ There are a number of international instruments prohibiting the use of chemical weapons, including the 1899 Hague Declaration on the

143. See, e.g., International Criminal Court, Elements of Crimes art. 8(2)(b)(xvii), U.N. Doc. ICC-ASP/1/3 (Sept. 9, 2002), <https://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf> [hereinafter ICC Elements of Crimes] (War crime of employing poison or poisoned weapons). When it comes to flattening bullets, the ICC’s Elements of Crimes introduce a *mens rea* element, requiring proof that “[t]he perpetrator was aware that the nature of the bullets was such that their employment would uselessly aggravate suffering or the wounding effect.” *Id.*, art. 8(2)(b)(xx) (War crime of employing prohibited bullets).

144. *Treaties, States Parties and Commentaries*, ICRC, <https://www.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?action=openDocument&documentId=21F94893DF9ADA56C1257E2F0038D6C5> (last visited Apr. 18, 2016). Attesting to lingering concerns with the scope of the amendments, the Czech Republic ratified the amendment with a reservation that “[t]he prohibition . . . does not apply to the use of such bullets during activities of police nature in the context of law enforcement and maintenance of public order, which do not constitute direct participation in an armed conflict, such as rescuing hostages and neutralizing civil aircraft hijackers.” *Id.*

145. Chemical weapon use over the course of the conflict has been confirmed by the U.N. Mission to Investigate Allegations of the Use of Chemical Weapons in the Syrian Arab Republic; the OPCW, which launched its own fact finding mission in Syria; the World Health Organization; and the COI, plus investigative reporting and citizen journalism. The U.N. Mission was not tasked in Resolution 2118 with allocating responsibility for chemical weapon use. S.C. Res. 2118 (Sept. 27, 2013). As a result, the Security Council ordered a new joint investigative body—the U.N.-OPCW Joint Investigative Mechanism (JIM)—to review the evidence amassed to date and to assign responsibility for reported chemical weapon use. S.C. Res. 2235 (Aug. 7, 2015). It now seems that such weapons, with varying degrees of sophistication and impact, have been employed by the Assad regime and various armed groups alike. The JIM submitted its first report on February 12. U.N. Secretary-General, Letter dated Feb 12, 2016 from the Secretary-General to the President of the Security Council, U.N. Doc. S/2016/142 (Feb. 12, 2016).

146. *Syria Chemical Attack: What We Know*, BBC (Sept. 24, 2013), <http://www.bbc.com/news/world-middle-east-23927399>.

Use of Asphyxiating Gases,¹⁴⁷ the 1907 Hague Regulations,¹⁴⁸ the 1925 Gas Protocol, and the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (CWC).¹⁴⁹ Syria ratified the latter treaty in 2013¹⁵⁰ as part of the U.S.-Russian Joint Framework Agreement on Chemical Weapons¹⁵¹ blessed by Security Council Resolution 2118, which required Syria to dismantle its chemical weapons arsenal under international supervision.¹⁵² None of these treaties, except the CWC, envisions an international penal regime or applies in all circumstances, including in NIACs.¹⁵³ The Hague Declaration and the Gas Protocol, for example, bind parties *inter se*, but do not necessarily apply when parties are engaged in internal armed conflicts or in IACs involving non-party States.¹⁵⁴ All that said, the CIL study states that any chemical

147. Declaration (IV, 2) on the Use of Projectiles the Object of Which is the Diffusion of Asphyxiating or Deleterious Gases, July 29, 1899, 187 Consol. T.S. 453, 26 Martens Nouveau Recueil (ser. 2) 998.

148. The 1907 Hague Regulations forbid poison or poisoned weapons. Hague Regulations, *supra* note 31, art. 23.

149. CWC, *supra* note 74. The Convention, which entered into force in 1997, enjoys almost universal ratification. *See also* G.A. Res. 2603 (XXIV) (Dec. 16, 1969) (declaring any use of chemical or biological weapons in an IAC to be contrary to international law).

150. The continued use of chemical weapons by Syria following its ratification of the CWC marks the first documented use of chemical weapons by a CWC State party, although Syria continues to deny any chemical weapons use on its part. *See* U.N. SCOR, 70th Sess., 7501st mtg. at 9, U.N. Doc. S/PV.7501 (Aug. 7, 2015) (“I [the Syrian Ambassador to the UN] reiterate once again that the Syrian Government and the Syrian army have never used chemical weapons, and never will.”). The use of chlorine in barrel bombs would also violate the CWC, as well as prior Security Council resolutions, such as Resolution 2118, *supra* note 145, barring the use of chemical weapons. *See* S.C. Res. 2209 (Mar. 6, 2015).

151. Letter dated Sept 19, 2013 from the Permanent Representatives of the Russian Federation and the United States of America to the United Nations addressed to the Secretary-General, Annex, U.N. Doc. A/68/398-S/2013/565 (Sept. 14, 2013).

152. S.C. Res. 2118, *supra* note 145. The Resolution also declared “the use of chemical weapons anywhere constituted a threat to international peace and security” (¶ 1) and expressed the Council’s “strong conviction that those individuals responsible for the use of chemical weapons in the Syrian Arab Republic should be held accountable” (¶ 15), although no precise mechanism was proposed.

153. The CWC obliges States parties to prohibit activities banned by the CWC and “[e]xtend its penal legislation . . . to any activity prohibited to a State Party under this Convention undertaken anywhere by national persons, possessing its nationality.” CWC, *supra* note 74, art. VII(1)(c)(c). *See* S.C. Res. 2209, *supra* note 150.

154. Jillian Blake & Aqsa Mahmud, *A Legal “Red Line”? Syria and the Use of Chemical Weapons in Civil Conflict*, 61 UCLA LAW REVIEW DISCOURSE 244, 251 (2013),

weapon use is prohibited in NIACs and IACs,¹⁵⁵ a conclusion that is not uniformly shared.¹⁵⁶ Nevertheless, in its resolutions addressing chemical weapon use in Syria, the Security Council consistently calls for accountability, implying that the use of chemical weapons in a NIAC is a war crime.¹⁵⁷

Considering only the text of the ICC Statute, one would assume the genus crimes of employing asphyxiating and poisonous weapons would encompass the use of chemical and biological weapons.¹⁵⁸ The treaty's drafting history, however, reveals that a provision specifically penalizing the use of chemical weapons was deliberately rejected by delegates as part of a compromise around the inclusion of nuclear weapons.¹⁵⁹ States from the developing world wanted a provision criminalizing resort to nuclear weapons; States from the developed world wanted a similar provision on chemical and biological weapons. This gulf between the poor man's and the rich man's weapons of mass destruction has long bedeviled disarmament efforts.¹⁶⁰ The stalemate was resolved by excluding explicit reference to both categories of weapons and adding a placeholder that might one day allow for their piecemeal inclusion. The ICC Statute at Article 8(2)(b)(xx) governing IACs thus would allow for the prosecution of individuals shown to have employed "weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law

<http://www.uclalawreview.org/a-legal-%E2%80%9Cred-line%E2%80%9D-syria-and-the-use-of-chemical-weapons-in-civil-conflict/>. The Gas Protocol, *supra* note 134, states, "the High Contracting Parties, so far as they are not already Parties to Treaties prohibiting such use, accept this prohibition, agree to extend this prohibition to the use of bacteriological methods of warfare and agree to be bound as between themselves according to the terms of this declaration."

155. ICRC CIL Study, *supra* note 17, r. 74 ("The use of chemical weapons is prohibited."); *id.* r. 156 ("Recent treaties prohibiting the use of certain weapons in any type of conflict require that such use be subject to criminal sanctions.").

156. See Blake & Mahmud, *supra* note 154, at 255 ("There is no strict customary practice regarding the use of chemical weapons in civil conflicts.").

157. See S.C. Res. 2209, *supra* note 150.

158. See Ralf Trapp, *The Investigation into the Islamic State and Chemical Weapons*, JUST SECURITY (Oct. 27, 2015), <https://www.justsecurity.org/27116/investigation-islamic-state-chemical-weapons/>.

159. See Dapo Akande, *Can the ICC Prosecute for Use of Chemical Weapons in Syria?*, EJIL TALK! (Aug. 23, 2013), <http://www.ejiltalk.org/can-the-icc-prosecute-for-use-of-chemical-weapons-in-syria/>.

160. See Nicholas A. Sims, *The Biological Weapons Convention and Prevention of Bioterrorism*, in *TERRORISM AND WEAPONS OF MASS DESTRUCTION: RESPONDING TO THE CHALLENGE* 158, 175 (Ian Bellany ed., 2007).

of armed conflict.” However, this provision will not be activated until “such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123.” Although Belgium attempted to generate just such a list of prohibited munitions in time for the Kampala Review Conference, there was insufficient support at the time and the provision remains a dead letter.

If confronted with charges involving the use of chemical weapons, the ICC will be obliged to interpret the text of its constitutive document, now amended, in light of this legislative history to determine which charges to allow.¹⁶¹ In the absence of a specific weapon prohibition, the improper use of such inherently imprecise weapons would ordinarily be charged as an indiscriminate attack or as launching an attack with the purpose of inflicting terror among the civilian population. However, the use of such weapons within urban or densely-populated areas could also be charged as an intentional attack on civilians, even if some of the attacks managed to strike legitimate military objectives. If the harm to civilians is sufficiently acute, an indiscriminate attack could thus be regarded as the equivalent of a direct attack,¹⁶² and even a crime against humanity, which would be prosecutable before the ICC. Absent an express weapons ban, the use of chemical weapons exclusively against armed actors may not be prosecutable before the ICC.

C. Siege Warfare

Turning to war crimes involving the methods of warfare, brutal sieges have been another feature of the war in Syria. The city of Madaya, for example, has been under siege for months at the time of this writing, its inhabitants reduced to eating grass. To be fair, there are also government-controlled towns, notably Fuaa and Kefraya in Idlib province, that are besieged by the opposition. Indeed, between 400,000 (the United Nations’ figure)¹⁶³ and

161. Vienna Convention on the Law of Treaties art. 32, May 23, 1969, 1155 U.N.T.S. 331 (listing the drafting history as a supplementary tool of interpretation to resolve ambiguity in text).

162. Fenrick, *supra* note 63, at 561, 565.

163. Yacoub El Hillo & Kevin Kennedy, U.N. Office for the Coordination of Humanitarian Affairs, *Joint Statement on Hard-to-Reach and Besieged Communities in Syria*, RELIEFWEB (Jan. 7, 2016), <http://m.reliefweb.int/report/1334131>.

600,000 people (the Syrian American Medical Society's estimate)¹⁶⁴ are "under siege" or in "hard-to-reach" areas in Syria.¹⁶⁵ The Syrian government has arbitrarily and discriminatorily barred or limited the delivery of humanitarian aid to these populations, including by the ICRC.¹⁶⁶ A complicated agreement reached earlier this year is supposed to allow coordinated aid into both rebel- and State-controlled regions in need, but distribution difficulties persist. There are also allegations, based upon a leaked internal memorandum, that the United Nations could have acted sooner and more forcefully to supply humanitarian aid, but was wary of alienating the Assad regime and derailing the planned negotiations.¹⁶⁷ These barriers to the provision of food and other forms of aid exist notwithstanding the Security Council's forceful resolutions in 2014–15 calling on all parties to lift sieges on populated areas,¹⁶⁸ condemning the Syrian government's withholding of access to humanitarian actors, authorizing the delivery of aid without express permission through certain identified border crossings, calling upon all parties to implement ceasefires and humanitarian pauses to enable the provision of humanitarian assistance,¹⁶⁹ and decrying the "use of starvation of civilians as a method of combat."¹⁷⁰

Siege warfare is a tactic developed during the Middle Ages that involves surrounding a garrison or a populated area with the goal of defeating the enemy force by deteriorating their defenses, cutting them off from reinforcements and vital supplies, and preventing their escape. Although sieges are costly and time consuming, they are perhaps sometimes easier than engaging the enemy directly in open battle or going house-to-house to root out the adversary in a densely populated area. The legality of siege warfare

164. SLOW DEATH: LIFE AND DEATH IN SYRIAN COMMUNITIES UNDER SIEGE, SYRIAN AMERICAN MEDICAL SOCIETY (2015), https://www.sams-usa.net/foundation/images/PDFs/Slow%20Death_Syria%20Under%20Siege.pdf.

165. The latter term is a euphemism that some argue is employed to avoid using the "S" word (siege), given its potential war crimes implications. Roy Gutman, *The U.N. Knew for Months That Madaya Was Starving*, FOREIGN POLICY (Jan. 15, 2016), <http://foreignpolicy.com/2016/01/15/u-n-knew-for-months-madaya-was-starving-syria-assad/>.

166. Marianne Gasser, *Syria Conflict: Siege Warfare and Suffering in Madaya*, BBC (Feb. 1, 2016), <http://www.bbc.com/news/world-middle-east-35455705>.

167. *Open Letter from Besieged Syrians to UN's Stephen O'Brien*, WORLDPOST (Jan. 15, 2016), http://www.huffingtonpost.com/the-syria-campaign/open-letter-from-besieged_b_8979800.html.

168. S.C. Res. 2139, *supra* note 84.

169. S.C. Res. 2165, *supra* note 85.

170. S.C. Res. 2258, pmbl., para. 4, (Dec. 22, 2015). *See also* Human Rights Council Res. 26/23, *supra* note 52, ¶ 7 (further condemning "the besiegement of civilians").

received considerable attention following the siege of Sarajevo (April 1992–February 1996) during the war occasioned by the dissolution of the former Yugoslavia. Major General Stanislav Galić, who commanded the Bosnian Serb unit that encircled the city, was indicted for his role in a shelling and sniping campaign in the city, the capital of Bosnia-Herzegovina. The staging of the siege itself was not included among the charges for which he was on trial.¹⁷¹ Rather, the ICTY convicted Galić of, among other offenses, deliberately attacking and terrorizing civilians. These treaty prohibitions were implicitly incorporated into the ICTY Statute, which at Article 3 criminalizes “violations of the laws and customs of war.”¹⁷² Given that the crime of inflicting terror was not expressly enumerated in the Statute or in any treaty, Galić challenged the charge on *nullum crimen sine lege* grounds. The Appeals Chamber ruled that the crime of inflicting terror on the civilian population was a part of CIL at the time the defendant acted and so fell within its jurisdiction.¹⁷³ He was sentenced to twenty years’ imprisonment,¹⁷⁴ a sentence that was actually increased on appeal.¹⁷⁵

This precedent reveals that siege warfare per se is not necessarily unlawful.¹⁷⁶ Geneva Convention IV, which does not regulate the means and methods of warfare in any detail, seems to assume the legality of siege tactics by articulating rules aimed at protecting certain civilians located within besieged or encircled areas.¹⁷⁷ That said, the evolution in the location in

171. *Galić* Trial Judgment, *supra* note 56, ¶ 609 (“There is no dispute between the parties that General Galić, as the Corps commander, was in charge of continuing the planning and execution of the military encirclement of Sarajevo. . . . In itself, that encirclement is not directly relevant to the charges in the Indictment.”).

172. Statute of the International Criminal Tribunal for the former Yugoslavia, S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993), adopting The Secretary-General Report Pursuant to Paragraph 2 of Security Council Resolution 808.

173. *Prosecutor v. Galić*, Case No. IT-98-29-A, Appeals Chamber Judgment, ¶ 86 (Int’l. Crim. Trib. for the former Yugoslavia Nov. 30, 2006) [hereinafter *Galić* Appeals Judgment].

174. *Galić* Trial Judgment, *supra* note 56, ¶ 769.

175. *Galić* Appeals Judgment, *supra* note 173, ¶¶ 455–56.

176. Riordan, *supra* note 54, at 156; Tom Gjelten, *Siege*, CRIMES OF WAR, <http://www.crimesofwar.org/a-z-guide/siege/>. *But see* Fenrick, *supra* note 63, at 557 (suggesting that “the *lex specialis* of siege warfare has been effectively abolished” in light of contemporary developments in the law around the protection of civilians).

177. Geneva Convention IV encourages the parties to conclude agreements for the removal of the wounded and sick, children, etc. (but not all civilians) and allow for the free passage of medical personnel and religious clerics. Geneva Convention IV, *supra* note 14, art. 17.

which armed conflicts are now often fought—in urban areas rather than in battlegrounds remote from the civilian population—coupled with developments in IHL, make “it very difficult for a commander to conduct a siege that is both successful and lawful.”¹⁷⁸ Siege warfare thus remains lawful under contemporary law in the narrowest of circumstances: so long as it is directed only at combatants and those directly participating in hostilities, civilians are allowed to leave an encircled area, and there is adherence to other provisions of IHL—a major challenge when combatants and civilians are co-located and dependent on the same necessities. These modern restrictions have not been universally welcomed, since they go far toward defeating the purpose of a siege: to compel the target force to surrender.¹⁷⁹ In any case, the various sieges in place around Syria do not adhere to any of these strictures, so those responsible are in breach of IHL.

D. Starvation of Civilians

The deliberate starvation of civilians is not a new tactic of war; parallels to the situations in Leningrad, Biafra, and Sri Lanka come immediately to mind.¹⁸⁰ IHL makes clear that the deliberate starvation of the civilian population as a tactic of war is prohibited and a prosecutable war crime.¹⁸¹ This prohibition finds clear expression in Article 54 of API, which states that besieging forces may not starve civilians “as a method of warfare.” Similarly, it is prohibited to “attack, destroy, remove or render useless” any items necessary for civilians’ survival (e.g., food, land used to cultivate food, water, irrigation works, etc.), regardless of whether the objective is to starve the civilian population, to cause them to flee, or is premised on some other motive.¹⁸²

178. Riordan, *supra* note 54, at 150.

179. See Yoram Dinstein, *Siege Warfare and the Starvation of Civilians*, in HUMANITARIAN LAW OF ARMED CONFLICT: CHALLENGES AHEAD 145, 151 (A.M. Delissen et al. eds., 1991) (“The broad injunction against sieges affecting civilians is untenable in practice, since no other method of warfare has been devised to bring about the capture of a defended town.”).

180. See generally Charles A. Allen, *Civilian Starvation and Relief during Armed Conflict: The Modern Humanitarian Law*, 19 GEORGIA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 1 (1989) (discussing history of sieges and prohibits on measures directed at civilians).

181. See Dinstein, *supra* note 179.

182. The full text of Article 54(2) is as follows:

It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production

This latter prohibition does not apply to resources used exclusively by an adverse party to sustain its own armed forces or in direct support of military action. Such resources may be directly targeted because they constitute military objectives.¹⁸³ Moreover, in instances of imperative military necessity to counter an invader, a State party may derogate from the above prohibition and resort to “scorched earth” tactics to defend its own territory.¹⁸⁴ These rules govern IACs, but a similar set of prohibitions appears in Article 14 of APII. Additionally, the ICRC considers the prohibition on deliberate starvation of civilians to be part of CIL, regardless of conflict classification.¹⁸⁵ Nonetheless, deliberately starving civilians as a method of warfare may be prosecuted before the ICC under Article 8(b)(2)(xxv), but only when committed in an IAC.

The fact that the deliberate starvation of the civilian population as a method of war is now unequivocally condemned—and even made criminal—marks an important evolution in the law. The Lieber Code, which governed Union forces during the U.S. Civil War, stated:

War is not carried on by arms alone. It is lawful to starve the hostile belligerent, armed or unarmed, so that it leads to the speedier subjugation of the enemy. . . . When a commander of a besieged place expels the non-combatants, in order to lessen the number of those who consume his stock of provisions, it is lawful, though an extreme measure, to drive them back, so as to hasten on the surrender.¹⁸⁶

of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party, whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive.

See Partial Award: Western Front, Aerial Bombardment and Related Claims, Eritrea’s Claims 25–26 (Eri. v. Eth.), 26 R.I.A.A. 291, ¶¶ 100–5 (Eri.–Eth. Claims Comm’n 2005) (finding Ethiopia had breached customary IHL, and specifically the CIL rule contained in Article 54 of API, by targeting a water reservoir that was used by civilians).

183. Article 52(2) of API indicates that for objects to be military objectives, they must “by their nature, location, purpose or use make an effective contribution to military action” and their “total or partial destruction, capture or neutralization, in the circumstances ruling at the time, [must] offer[] a definite military advantage.”

184. DOD LAW OF WAR MANUAL, *supra* note 106, § 5.20.4. *See also* Trial of Wilhelm List and Others, 8 LAW REPORTS OF TRIALS OF WAR CRIMINALS 34, 68–69 (1948) (finding “scorched earth” tactics against pursuing troops to be compelled by military necessity and thus lawful given that civilians were evacuated in advance); Dinstein, *supra* note 179, at 150 (noting that API allows for scorched earth tactics only in territory under a party’s control).

185. ICRC CIL Study, *supra* note 17, r. 53.

186. Lieber Code, *supra* note 115, arts. 17–18.

As recently as World War II, it was still understood that a belligerent could lay siege to a place and drive fleeing civilians back to areas controlled by the enemy in order to put pressure on available food and other resources. Indeed, in the so-called High Command Case, a U.S. military commission convened pursuant to Control Council Law No. 10 acquitted Field Marshal Wilhelm von Leeb for his role in the brutal siege of Leningrad (September 1941–January 1944) on this rationale. The opinion states:

A belligerent commander may lawfully lay siege to a place controlled by the enemy and endeavor by a process of isolation to cause its surrender. The propriety of attempting to reduce it by starvation is not questioned. Hence the cutting off every source of sustenance from without is deemed legitimate.¹⁸⁷

The judges concluded, “We might wish the law were otherwise, but we must administer it as we find it.”¹⁸⁸

Other U.S. articulations of the law also mirror this evolution. The 1956 law of war Army field manual noted that there was no rule of law that required that civilians be allowed to leave a besieged locality and that it was within a commander’s discretion to drive them back in order to hasten the adversary’s surrender.¹⁸⁹ By contrast, the new Department of Defense (DoD) *Law of War Manual* affirms that the starvation of civilians as a method of conflict is prohibited, regardless of conflict classification.¹⁹⁰ The *Manual* does accept the legality of starving enemy forces—whether by way of siege warfare, embargo, blockade, or the destruction of enemy food

187. The German High Command Trial, 12 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, 1, 84 (1949), https://www.loc.gov/rr/frd/Military_Law/pdf/Law-Reports_Vol-12.pdf.

188. *Id.*

189. See Department of the Army, FM 27-10: The Law of Land Warfare ¶ 44 (1956), <http://www.aschq.army.mil/gc/files/fm27-10.pdf> (“Subject to the foregoing exceptions, there is no rule of law which compels the commander of an investing force to permit noncombatants to leave a besieged locality. It is within the discretion of the besieging commander whether he will permit noncombatants to leave and under what conditions. Thus, if a commander of a besieged place expels the noncombatants in order to lessen the logistical burden he has to bear, it is lawful, though an extreme measure, to drive them back, so as to hasten the surrender. Persons who attempt to leave or enter a besieged place without obtaining the necessary permission are liable to be fired upon, sent back, or detained.”).

190. DOD LAW OF WAR MANUAL, *supra* note 106, § 5.20.

sources—so long as adherence to the principles of distinction and proportionality is observed.¹⁹¹

Although this prohibition is now well established, there have been very few prosecutions for the crime of deliberately starving the enemy civilian population. A notable exception is an *in absentia* national prosecution in Croatia against Momčilo Perišić (a colonel in the Yugoslav National Army who was also prosecuted by the ICTY for other crimes¹⁹²) and eighteen others.¹⁹³ The court convicted a number of defendants for crimes committed during the siege of the city of Zadar under the Croatian Criminal Code, which lists starvation of civilians as a punishable war crime.¹⁹⁴

E. Barring Humanitarian Access to Civilians

The Syrian regime has been accused of engaging in overt and constructive obstruction (e.g., through burdensome administrative procedures) of humanitarian aid to civilian populations on discriminatory grounds.¹⁹⁵ Invoking Chapter VII, the Security Council has established humanitarian corridors across conflict lines at certain border crossings. It also deployed a U.N. monitoring mechanism to confirm the humanitarian nature of shipments into government-, rebel-, and even ISIL-controlled areas, and to provide advance notice to the government of Syria of shipments.¹⁹⁶ All Syrian parties to the conflict were ordered to enable the unhindered delivery

191. *Id.* § 5.20.1–5.20.2.

192. Prosecutor v. Perišić, Case No. IT-04-81-A, Appeals Chamber Judgment (Int'l. Crim. Trib. for the former Yugoslavia Feb. 28, 2013).

193. Public Prosecutor v. M.P. et al., Case No. K. 74/96, District Court in Zadar, Croatia (Hrvatska) (Apr. 24, 1997), <http://www.internationalcrimesdatabase.org/Case/1053>.

194. Criminal Code, Chap. 13, Article 158 (Narodne novine No. 110 of Oct. 21, 1997), http://www.vsrh.hr/CustomPages/Static/HRV/Files/Legislation__Criminal-Code.pdf?page=44 (unofficial translation).

195. Secretary-General Report, *supra* note 86, at 8. *See also* Human Rights Council Res. 25/23, U.N. Doc. No. A/HRC/RES/25/23, ¶ 17 (Apr. 9, 2014) (condemning the denial of humanitarian assistance to civilians “from whatever quarter, noting especially the responsibilities of the Government of the Syrian Arab Republic”).

196. *See* S.C. Res. 2165, *supra* note 85; S.C. Res. 2191 (Dec. 17, 2014) (authorizing U.N. humanitarian agencies and their implementing partners to use certain routes across conflict lines and border crossings and establishing a monitoring mechanism under the authority of the U.N. Secretary-General).

of aid and ensure the safety and security of humanitarian actors.¹⁹⁷ In subsequent resolutions, the Council expressed grave concern at the lack of compliance, but did not call for criminal accountability for any breaches.¹⁹⁸

Impeding the provision of aid to civilians violates modern IHL, which in addition to prohibiting starvation as a weapon of war requires parties to allow humanitarian access to areas in need. Geneva Convention IV, aimed at the protection of noncombatants in IACs, mandates that States allow the free passage of medical consignments, food, and other relief supplies for the exclusive benefit of the civilian population,¹⁹⁹ although this provision was designed primarily for blockades rather than sieges.²⁰⁰ Relief actions must be allowed into occupied territory or territory under the control of one side, subject to agreement between the parties on the technical arrangements.²⁰¹ The breach of these treaty rules, however, does not constitute a grave breach giving rise to individual criminal responsibility. Moreover, these obligations may be suspended if the consignments are diverted for use by the opposing military force, the control over them may not be effective, or a definite advantage may accrue to the enemy.²⁰² As the rapporteur of the Canadian War Crimes Investigation Team examining the siege of Sarajevo noted, “One is left with the unpalatable fact that . . . the only way to starve out a besieged military force, a legitimate act of war, is over the starved bodies of the civilian population.”²⁰³

The ICC Statute goes farther than the IHL treaties. It allows for the prosecution of the intentional starvation of civilians as a method of warfare as such, but also “by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the

197. *Id.* See also API, *supra* note 14, art. 71 (requiring the protection of relief personnel).

198. S.C. Res. 2258, pmb1 (Dec. 22, 2015). See also S.C. Res. 2268, ¶¶ 5–6 (Feb. 26, 2016) (calling for the provision of aid following ceasefire).

199. Geneva Convention IV, *supra* note 14, art. 23 (“Each High Contracting Party shall allow the free passage of all consignments of medical and hospital stores and objects necessary for religious worship intended only for civilians of another High Contracting Party, even if the latter is its adversary. It shall likewise permit the free passage of all consignments of essential foodstuffs, clothing and tonics intended for children under fifteen, expectant mothers and maternity cases.”).

200. Dinstein, *supra* note 179, at 148.

201. Geneva Convention IV, *supra* note 14, art. 55. See also API, *supra* note 14, art. 70; Allen, *supra* note 180, at 72–73.

202. Geneva Convention IV, *supra* note 14, art. 23.

203. Riordan, *supra* note 54, at 171 (citing Canadian War Crimes Investigation Team “On-Site Report” (Aug. 1993)).

Geneva Conventions.”²⁰⁴ But again, this crime may be prosecuted only in IACs. Notwithstanding these treaty limitations, Rule 55 of the CIL study makes it clear that in all armed conflicts, the parties must facilitate impartial humanitarian relief for civilians in need.²⁰⁵ Rule 156 treats starvation and impeding relief supplies as war crimes in all conflicts.

F. Targeting Energy Infrastructure

Turning to the actions of the international coalition against ISIL, on November 16, 2015, U.S. aircraft destroyed 116 fuel trucks in oil-rich eastern Syria, the source of a solid portion of ISIL’s oil revenue. In a statement, the U.S. Department of Defense indicated that in addition to the tankers, airstrikes also hit a number of tactical units, fighting positions, storage depots, vehicles and staging areas in Syria and Iraq as part of Operation Inherent Resolve.²⁰⁶ Although a DoD spokesman indicated that this was the coalition’s first strike against tankers,²⁰⁷ the U.S. and Gulf coalitions and Russia have destroyed a number of ISIL’s oil-producing facilities and other energy assets in the past.²⁰⁸ In keeping with the IHL rule on precautions,²⁰⁹ the

204. ICC Statute, *supra* note 15, art. 8(2)(b)(xxv).

205. ICRC CIL Study, *supra* note 17, r. 55 (“The parties to the conflict must allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need, which is impartial in character and conducted without any adverse distinction, subject to their right of control.”).

206. News Release, U.S. Department of Defense, Strikes Continue Against ISIL Targets in Syria, Iraq (Nov. 16, 2015), <http://www.defense.gov/News-Article-View/Article/629013/strikes-continue-against-isil-targets-in-syria-iraq>. In subsequent operations, the number of tankers destroyed reached 238. *US Air Strike “Hits 238 IS Oil Trucks” in Syria*, BBC (Nov. 23, 2015), <http://www.bbc.com/news/world-us-canada-34906011>. Not to be outdone, the Russian press reported that Russia destroyed a thousand tankers. *Russian Airstrikes Destroy 472 Terrorist Targets in Syria in 48 Hours, 1,000 Oil Tankers in 5 Days*, RT (Nov. 23, 2015), <https://www.rt.com/news/323065-syria-airstrikes-terrorists-russia/>. The DoD expressed skepticism toward this assertion. *Pentagon Skeptical of Claims Russia Hit 1,000 ISIS Tankers*, FOX NEWS (Nov. 23, 2015), <http://www.foxnews.com/politics/2015/11/23/us-steps-up-attacks-on-islamic-state-oil-trucks-in-syria.html>.

207. Press Briefing by the Spokesman, Operation Inherent Resolve (Nov. 18, 2015), <http://www.defense.gov/News/News-Transcripts/Transcript-View/Article/630393/department-of-defense-press-briefing-by-col-warren-via-dvids-from-baghdad-iraq> [hereinafter Press Briefing].

208. *US-Led Strikes Hit ISIS Oil Areas for Second Day*, BREITBARD (Sept. 26, 2014), <http://www.breitbart.com/national-security/2014/09/26/us-led-strikes-hit-is-group-oil-areas-for-2nd-day/>. See Kenneth Watkin, *Targeting “Islamic State” Oil Facilities*, 90 INTERNATIONAL LAW STUDIES 499 (2014).

Pentagon warned truck drivers in advance of the planned strike with leaflets²¹⁰ dropped over the site, as well as show-of-force overflights. The coalition did not attack drivers fleeing from their trucks, and it appears that no drivers were killed.²¹¹ The most recent strikes were part of a stepped-up campaign to further degrade ISIL's energy infrastructure that was dubbed Tidal Wave II after a World War II effort to destroy oil refineries in Ploiești, Romania that supplied up to a third of Nazi Germany's fuel needs.²¹² The new operation is also reminiscent of the so-called "Tanker War," the at-sea portion of the 1980–88 war between Iran and Iraq.²¹³

209. According to the ICRC, each party to the conflict must give effective advance warning of attacks which may affect the civilian population, unless circumstances do not permit. See ICRC CIL Study, *supra* note 17, r. 20.

210. The leaflet messaging was unambiguous: "Get out of your trucks now, and run away from them. Warning. Airstrikes are coming, oil trucks will be destroyed. Get away from your oil trucks immediately. Do not risk your life." Press Briefing, *supra* note 207. Given IHL's precautionary obligations, leafletting has been used in prior military operations to warn the civilian population of an impending attack on a nearby military objective. Some States use other techniques. Israel has several, including the use of phone calls and text messages, as well as the more controversial "roof knocks" (i.e., dropping a minimal-impact munition on a building before destroying it to allow the civilian population time to vacate the premises). See Janina Dill, *Israel's Use of Law and Warnings in Gaza*, OPINIO JURIS (July 30, 2014), <http://opiniojuris.org/2014/07/30/guest-post-israels-use-law-warnings-gaza/>. During the humanitarian intervention in Kosovo in 1998, there was some question as to whether NATO troops had adequately warned the civilian staff of a Serbian television station that was later destroyed, although blame was also laid on the Yugoslav authorities for not evacuating the building when it became known that it was on NATO's target list. See Final Report, *supra* note 94, ¶ 77.

211. If drivers had been killed in the strikes, it would be necessary to consider the principle of proportionality—assuming the drivers were civilians—and to take into account the doctrine of direct participation in hostilities. Civilians who are present in the vicinity of military objectives (e.g., civilian workers in a munitions plant) may be immune from being intentionally targeted, but they are not necessarily protected against attacks directed at those objectives. See Yoram Dinstein, *Distinction and Loss of Civilian Protection in International Armed Conflicts*, in INTERNATIONAL LAW AND MILITARY OPERATIONS 183, 191 (Michael D. Carsten ed., 2008) (Vol. 84, U.S. Naval War College International Law Studies).

212. Incidentally, according to the U.S. Air Force Historical Support Division, production resumed quickly in Ploiești. It remains to be seen if ISIL's oil production capability will also recover or if there will be long-term incapacitation of ISIL's war economy as is hoped. *Operation Tidalwave, The Low-Level Bombing of the Ploesti Oil Refineries, 1 August 1943*, AIR FORCE HISTORICAL SUPPORT DIVISION, (Sept. 17, 2014), http://www.afhso.af.mil/topics/fact_sheets/factsheet.asp?id=17993.

213. See generally ANTHONY H. CORDESMAN & ABRAHAM R. WAGNER, 2 THE LESSONS OF MODERN WAR: THE IRAN-IRAQ WAR (1990); GEORGE K. WALKER, THE TANK-

The Treasury Department has estimated that ISIL was earning between \$1 million and \$1.5 million a day from illegal oil sales generated by a sprawling production system that rivals many State-owned oil companies in terms of organization and scope.²¹⁴ A recent Rand Corporation study ranks oil as third on the list of ISIL's sources of revenue, behind funds extracted through the extortion/taxation of people within territories it controls and funds stolen from Iraqi banks; other sources of income include ransoms, selling antiquities, human trafficking, and wealthy donors.²¹⁵ At its peak, ISIL controlled up to 80 percent of Syria's oil production—so much that the Syrian government and other rebel groups must, at times, purchase fuel from them, which may explain why these tankers have not been targeted in the past by the regime.²¹⁶ Drivers, mostly independent traders, generally transport the crude to formal and informal refineries.²¹⁷ Some petrol is consumed internally; the rest is exported across the border into Turkey or Iraq.

The airstrikes against ISIL tankers must be evaluated against the principles of distinction, which hinges upon the definition of military objectives, and proportionality.²¹⁸ The treaty definition of military objective, as confirmed by Rule 8 of the CIL study, has two components: (1) the proposed target must make an effective contribution—through its nature, location, purpose, or use—to military action by the party under attack, and (2) its destruction must offer a definite (as opposed to speculative or indeterminate) military advantage to the attacker in the circumstances at the time.²¹⁹ Article 57 of API requires that commanders “do everything feasible

ER WAR, 1980–88: LAW AND POLICY (2000) (Vol. 74, U.S. Naval War College International Law Studies).

214. *US: ISIS Earns \$1M Per Day in Black Market Oil Sales*, BREITBART (Oct. 24, 2014), <http://www.breitbart.com/national-security/2014/10/24/us-is-earns-1m-per-day-in-black-market-oil-sales/>.

215. See Sarah Almukhtar, *ISIS Finances are Strong*, NEW YORK TIMES (May 19, 2015), http://www.nytimes.com/interactive/2015/05/19/world/middleeast/isis-finances.html?_r=1. The coalition has also damaged ISIL's financial reserves. See Daphné Richemond-Barak, *Is Money a Legitimate Target?* JUST SECURITY (Feb. 10, 2016), <https://www.justsecurity.org/29255/money-legitimate-target/>.

216. Jackie Northam, *Hitting ISIS Where It Hurts by Striking Oil Trucks*, NPR (Nov. 19, 2015), <http://www.npr.org/sections/parallels/2015/11/19/456600398/hitting-isis-where-it-hurts-by-striking-oil-trucks>.

217. *Id.*

218. See *supra* note 66.

219. The Ethiopia-Eritrea Claims Commission clarified that whether an attack offered a definitive military advantage must be “considered in the context of its relation to the

to verify that the objectives to be attacked are neither civilians nor civilian objects.”²²⁰ Rule 10 of the CIL study clarifies that civilian objects lose their protection against attack when they are used for military purposes, i.e., to make an effective contribution to military action. API contains the additional rule at Article 52(3) that “in case of doubt whether an object normally dedicated to civilian purposes . . . is being used to make an effective contribution to military action, it shall be presumed not to be so used.” Although generally well established, this presumption of civilian status is not necessarily universally accepted. For example, the drafters of the DoD *Law of War Manual* do not consider this presumption to qualify as CIL.²²¹

The definition of military objective is relatively simple to apply when it comes to obvious military assets, such as a weapon systems, munitions factory, or barracks. Applying these rules becomes more fraught with respect to fungible items or to what some have deemed to be “dual-use objects,” such as transportation systems (like the roads and bridges on which the tankers travel), energy sources (like oil fields), communications systems,

armed conflict as a whole at the time of the attack.” Partial Award: Western Front, *supra* note 182, ¶ 151. The destruction of the target at issue in that award, a power station, was deemed to offer a military advantage given that it provided power to an area with a major port and naval facility. *Id.* ¶ 121.

220. Although the United States is not a party to API owing to long-standing objections to certain provisions on the treaty’s scope and on prisoner of war eligibility, it has determined that certain treaty rules—governing fundamental protections and limitations on means and methods, for example—constitute CIL. See Michael J. Matheson, *The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Convention*, 2 AMERICAN UNIVERSITY JOURNAL OF INTERNATIONAL LAW & POLICY 419 (1987) (reproducing remarks of the then-State Department Deputy Legal Advisor at the 6th Annual American Red Cross-Washington College of Law Conference on IHL held Jan. 2, 1987); Robert Chesney, *Gabor Rona on Article 75 and Additional Protocols I and II*, LAWFARE (Mar. 11, 2011), <https://www.lawfareblog.com/gabor-rona-article-75-and-additional-protocols-i-and-ii> (discussing the Obama administration announcement that it would adhere to Article 75 of Protocol I “out of a sense of legal obligation”). That many API provisions constitute CIL finds widespread support. See Fausto Pocar, *To What Extent is Protocol I Customary International Law?*, in LEGAL AND ETHICAL LESSONS OF NATO’S KOSOVO CAMPAIGN 337 (Andru E. Wall ed., 2002) (Vol. 78, U.S. Naval War College International Law Studies). Nonetheless, because many of its coalition partners have ratified API, the United States generally adheres to the treaty as a function of interoperability in coalition warfare.

221. DOD LAW OF WAR MANUAL, *supra* note 106, § 5.5.3.2.

and manufacturing plants.²²² In 1956, the ICRC drew up Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War whose annex contained a proposed list of categories of legitimate military targets applicable in all conflicts, international and non-international.²²³ In addition to obvious targets (the opponent's armed forces, military installations, supply depots, airfields, etc.), the list included more generic objectives, with some caveats, including means of communications and industries of fundamental importance for the conduct of war. Introduced during the Cold War, these Draft Rules were never formalized, in part because delegates were reticent about concretizing a discrete list that might not accommodate future contingencies. Two decades later, the drafters of API took a different approach and codified a set of abstract principles to govern targeting. Nonetheless, the Draft Rules continue to inform subsequent analyses.²²⁴

The targeting of objects based upon their war-sustaining capability alone—without a direct nexus to any concrete military operation—remains open to debate.²²⁵ The CIL study notes that some States consider economic targets that effectively support military operations to be military objectives provided their destruction offers a definite military advantage.²²⁶ The United States' position that some economic targets constitute legitimate military objectives is derived in part from the Civil War-era cotton blockades erected to prevent the sale or barter of cotton, which were used by the Confederacy to obtain weapons, ammunition, and ships from British manufacturers.²²⁷ It now finds expression in the Military Commission Act at section

222. Note that most commentators, including the drafters of the *Law of War Manual*, consider all objects to fall into one of two buckets—military objectives or civilian objects—and reject any notion that there is an intermediate category. *Id.* 102, § 5.7.1.2.

223. *Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War*, ICRC, <https://www.icrc.org/ihl/INTRO/420?OpenDocument> (1956).

224. See, e.g., IAN HENDERSON, *THE CONTEMPORARY LAW OF TARGETING* 46 (2009).

225. See, e.g., W. Hays Parks, *Air War and the Law of War*, 32 *AIR FORCE LAW REVIEW* 1, 135–45 (1990) (arguing for the legality of targeting an opponent's war-sustaining capabilities).

226. 2 *CUSTOMARY INTERNATIONAL HUMANITARIAN LAW* 217–21 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005).

227. *United States of America, Practice Relating to Rule 8: Definition of Military Objectives, Section G: Economic Installations*, ICRC, https://www.icrc.org/customary-ihl/eng/docs/v2_cou_us_rule8_sectiong (last visited Apr. 18, 2016). U.S. NAVY, U.S. MARINE CORPS & U.S. COAST GUARD, *NWP 1-14M/MCWP 5-12/COMDT PUB P5800.7A, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS* ¶ 8.2 (2007).

950p(a).²²⁸ At the same time, commentators have suggested that even attacks on legitimate military objects may be unlawful if they cause excessive long-term damage to an enemy's economic infrastructure.²²⁹ In Syria, this concern may be reflected in a desire to disable rather than completely destroy the Syrian facilities, which will be vital to a new regime in the event of a (hoped for) political transition.²³⁰

The indispensable contribution made by ISIL's system of oil production and distribution to the group's military activities seems clear. It provides ISIL with an indigenous energy source, a vital raw material for its operations, a tool for controlling the populations in the territory it holds, and a steady source of hard currency to fund its military aims and terrorist activities. Indeed, if stationary elements of ISIL's oil producing and refining system are directly targetable, it is hard to see why tankers are not also proper military objectives, since the oil produced is of little use to military operations unless it is transported to where it is needed or is otherwise monetized. Hindering ISIL's ability to exploit these resources will offer an immediate advantage to the coalition—thwarting any ISIL operations that are dependent on oil and oil revenue—in addition to longer-term advantages emanating from a reduction in ISIL's purchasing/bartering power. That said, targeting the tankers does stretch API's definition of "military objective." This is particularly so given the fungible nature of oil and the fact that the tankers may have been dispersing to multiple locations, including ISIL military installations, civilian depots, and the Turkish border. Tankers carrying oil designated for military use is thus a much easier case than tankers carrying oil for export or for civilian consumption. And it is impossible to know which tankers are which from the air absent extremely granular intelligence. Likewise, the drivers were properly treated as civilians, which would impact the proportionality analysis.

Whether the tankers are lawful military objectives will thus hinge on the validity of targeting war-sustaining objects and whether CIL is moving, or

228. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified as amended in scattered sections of 10, 18, 28, and 42 U.S.C.).

229. *See, e.g.*, JUDITH G. GARDAM, NECESSITY, PROPORTIONALITY AND THE USE OF FORCE BY STATES 118–20 (2004) (arguing that although the U.S.-led coalition in Operation Desert Storm directed attacks against military objectives, it caused excessive long-term damage to the Iraqi economic infrastructure to the detriment of the civilian population).

230. Ryan Opsal, *Why is the U.S. Reluctant to Bomb ISIS Oil Fields*, OILPRICE.COM (Dec. 2, 2015), <http://oilprice.com/Geopolitics/Middle-East/Why-Is-The-US-Reluctant-To-Bomb-ISIS-Oil-Fields.html>.

has moved, in this direction.²³¹ There has, as yet, been no major public outcry by States (or commentators) about this expanded target set against ISIL, although protests—by U.S. coalition partners, other States, or the ICRC—may have been lodged behind-the-scenes. Whether this public silence on the part of States can be deemed acquiescence, or even a demonstration of *opinio juris*, remains a doctrinal controversy in international law.²³² The fear in stretching these abstract concepts too far, of course, is that the entire distinction framework will collapse—to the ultimate detriment of the civilian population—and targeting law will regress to the point at which “total war” is countenanced and the entire civilian infrastructure is considered a legitimate target. Moreover, any argument or rule advanced in one conflict will be fair game for other parties to that conflict and may be picked up by belligerents in future conflicts as well. That said, limiting principles can be identified that will mitigate against any slippery slopes.²³³

IV. PROSPECTS FOR ACCOUNTABILITY

The discussion above has focused on the substantive law applicable to the commission of war crimes in Syria. This law can serve a political purpose—by naming and shaming those responsible for violations and their supporters—but the law is at its most potent when it is deployed in criminal proceedings. In this regard, the international community is not without options. Theoretically, national courts could exert jurisdiction over these war crimes under expansive principles of jurisdiction,²³⁴ including universal ju-

231. See Ryan Goodman, *Targeting “War-Sustaining” Objects in Non-International Armed Conflict*, 110 AMERICAN JOURNAL OF INTERNATIONAL LAW, Agora on President Obama’s War Powers Legacy (forthcoming 2016).

232. David J. Bederman, *Acquiescence, Objection and the Death of Customary International Law*, 21 DUKE JOURNAL OF COMPARATIVE & INTERNATIONAL LAW 31, 36 (2010) (discussing when *opinio juris* can develop through silence); Michael N. Schmitt & Sean Watts, *State Opinio Juris and International Humanitarian Law Pluralism*, 91 INTERNATIONAL LAW STUDIES 171 (2015) (urging States to articulate *opinio juris* or risk the crystallization of norms in their silence). The United States has on occasion taken the position that “only positive evidence” that States consider themselves bound can satisfy true *opinio juris*. See John B. Bellinger III & William J. Haynes II, *A U.S. Government Response to the International Committee of the Red Cross Study Customary International Humanitarian Law*, 89 INTERNATIONAL REVIEW OF THE RED CROSS 443, 447 (2007).

233. Goodman, *supra* note 231, at 16.

234. Exemplifying the application of passive personality jurisdiction, the United Kingdom is investigating the death of a UK physician who went to Syria to do humanitarian work. Mark Tran, *British Doctor Abbas Khan Unlawfully Killed in Syrian Prison*, *Jury*

risdiction,²³⁵ or over nationals who have traveled to the region to join the fight and who have committed crimes.²³⁶ However, not all States can exercise jurisdiction over war crimes committed in NIACs, in part because the treaties do not mandate it.²³⁷ Nor are State prosecutorial authorities likely to act unless a perpetrator is in their midst.²³⁸ As such, national courts are not apt to take the lead on ensuring accountability for war crimes committed in Syria.

Although the COI, the U.N. High Commissioner for Human Rights, and many States favor a referral of the situation in Syria to the ICC,²³⁹ the ICC has been precluded from acting following the double veto by Russia

Says, THE GUARDIAN (Oct. 27, 2014), <http://www.theguardian.com/world/2014/oct/27/british-doctor-abbas-khan-unlawfully-killed-syria-jury-inquest>.

235. ICRC CIL Study, *supra* note 17, r. 157 (“States have the right to vest universal jurisdiction in their national courts over war crimes” committed in IACs and NIACs.).

236. For example, in the United States, Shannon Maureen Conley—a U.S. Army Explorer—is being prosecuted for providing material support to a foreign terrorist organization under 18 U.S.C. § 2339B, which penalizes the provision of material support or resources to a foreign terrorist organization. Alan Gathright, *19-Year-Old Arrada Woman, Shannon Maureen Conley, Charged with Aiding ISIS Terror Group, FBI Says*, DENVER7 (July 2, 2014), <http://www.thedenverchannel.com/news/local-news/19-year-old-colorado-woman-shannon-maureen-conley-charged-with-aiding-terrorist-group-fbi-says07022014>.

237. The United States can assert jurisdiction over certain war crimes committed in NIACs, but only if the perpetrator or victim is a U.S. national or member of the U.S. armed forces. War Crimes Act of 1996, Pub. L. No. 104-192, 110 Stat 2104, codified as amended at 18 U.S.C. § 2441. *See* Beth Van Schaack, *United States War Crimes Statute & Sri Lanka*, JUST SECURITY (May 20, 2014), <https://www.justsecurity.org/10607/united-states-war-crimes-statute-sri-lanka/> (discussing history and limitations of U.S. war crimes statute).

238. Sweden has prosecuted a member of the Free Syrian Army who had been given asylum in 2013 but who was later accused of having mistreated a Syrian soldier in his custody. Dennis Lynch, *Syrian Rebel Moubannad Droubi Sentenced to 5 Years in Swedish Prison for War Crimes*, IBT (Feb. 26, 2015), <http://www.ibtimes.com/syrian-rebel-moubannad-droubi-sentenced-5-years-swedish-prison-war-crimes-1829388>. *See also* *Dutch Find 30 Suspected War Criminals among Last Year’s Refugee Wave*, THE GUARDIAN (Feb. 29, 2016), <http://www.theguardian.com/world/2016/feb/29/refugees-europe-dutch-war-criminals-migration>.

239. *See, e.g.*, Report of the Independent International Commission for Inquiry on the Syrian Arab Republic, Annex XIV, U.N. Doc. A/HRC/22/59 (Feb. 5, 2013) (calling for an ICC referral). That said, some advocates for international justice have warned against a third Security Council referral to the Court, particularly given the lack of financial and logistical support provided following the Council’s prior referrals. *See* Mark Kersten, *The UN Security Council and the ICC: Between a Rock and a Hard Place*, JUSTICE IN CONFLICT (May 6, 2011), <http://justiceinconflict.org/2011/05/06/the-un-security-council-and-the-icc-between-a-rock-and-a-hard-place/>.

and China of a proposed referral resolution.²⁴⁰ Even if a referral is forthcoming at some point in the future, it is likely that the ICC's jurisdiction will be solely prospective²⁴¹ and only a handful of indictments would be issued against senior figures. Most importantly for this discussion, the ICC Prosecutor would by and large be limited to charging intentional attacks on civilians and custodial abuses, because the ICC Statute allows for the prosecution of a more limited and fixed set of war crimes in NIACs. These factors, coupled with the ICC Statute's robust articulation of the principle of *nullum crimen sine lege*, effectively closes any resort to CIL.²⁴² As a result of these statutory features, it would be more difficult for the ICC to adjudicate many of the war crimes that have come to define this conflict—the use of chemical and improvised weaponry, sieges and starvation of civilians as weapons of war, and indiscriminate and disproportionate attacks on areas populated by civilians. As ICC member States consider possible future amendments to the ICC Statute, they should consider filling these gaps, particularly where the CIL prohibitions are clear and uncontroversial.

Given these limitations in the ICC Statute and the unlikelihood of a Security Council referral, if these crimes are to ever be prosecuted, it will have to be elsewhere. There is one additional accountability option that has been discussed but not yet implemented: an ad hoc regional or international tribunal dedicated to the conflict in Syria.²⁴³ Such a tribunal could be estab-

240. Meetings Coverage, Security Council, Referral of Syria to International Criminal Court Fails as Negative Votes Prevent Security Council from Adopting Draft Resolution, U.N. Meetings Coverage SC/11407 (May 22, 2014), <http://www.un.org/press/en/2014/sc11407.doc.htm>.

241. The ICC could exercise jurisdiction retroactively if Syria were to submit an ad hoc declaration under Article 12(3) of the ICC Statute accepting such jurisdiction. See Prosecutor v. Gbagbo, ICC-02/11-01/11 OA 2, Judgment on the Appeal of Mr. Laurent Koudou Gbagbo against the Decision of Pre-Trial Chamber I on Jurisdiction and Stay of the Proceedings, ¶ 84 (Dec. 12, 2012), <https://www.icc-cpi.int/iccdocs/doc/doc1526463.pdf>. Article 12(3) states, “If the acceptance of a State which is not a Party to this Statute is required . . . , that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question.”

242. See *supra* note 41 and accompanying text.

243. See Toby Sterling, *Push for Syria War Crime Court As Experts Call for International Tribunal To Investigate Assad and Rebels*, YAHOO! (Sept. 27, 2013), <https://www.yahoo.com/news/push-syrian-war-crimes-court-153256619.html?ref=gs>; Aryeh Neier, *An Arab War-Crimes Court for Syria*, Op-Ed, NEW YORK TIMES (Apr. 4, 2012), <http://www.nytimes.com/2012/04/05/opinion/an-arab-war-crimes-court-for-syria.html>; Beth Van Schaack, *A Mixed Chamber for Syria: An Idea Whose Time Has Come?*, JUST SECURITY (May 28, 2014), <https://www.justsecurity.org/10928/mixed-chamber-syria-idea-time-come/>; Beth Van Schaack, *Alternative Jurisdictional Bases for a Hybrid Tribunal for Syria*, JUST SECURITY (May 29,

lished by a Security Council resolution or international agreement. It could operate retroactively to cover the entire conflict, as well as attacks on peaceful protesters that predate the application of IHL.²⁴⁴ Any constitutive instrument could overcome the limitations inherent in the IHL treaties, the ICC Statute and much domestic law by incorporating the full range of CIL war crimes alongside other violations of international criminal law. In the past, such international tribunals have proven themselves to be quite adept at adjudicating CIL, having developed a range of arguments to overcome *nullum crimen sine lege* defenses raised by defendants.²⁴⁵ Such a tribunal could also ensure that direct perpetrators and mid-level commanders with operational authority do not escape accountability if the ICC ever moves forward against those most responsible. International criminal law experts have drafted a statute for such a tribunal and the COI,²⁴⁶ and U.S. House of Representatives²⁴⁷ have expressed support; however, the international community has yet to fully back the proposal,²⁴⁸ in part out of fealty to the ICC and in part due to Russia's intransigence in the Security Council.

Such an ad hoc tribunal could be created within the judicial system of one (or more) of the frontline border States that have been adversely affected by the acute destabilization created by waves of refugees across their

2014), <https://www.JustSecurity.org/10968/alternative-jurisdictional-bases-hybrid-tribunal-syria/>.

244. In this regard, an ad hoc tribunal could also assert jurisdiction over certain historical events that have fueled grievances underlying the current conflict, such as the 1982 massacre to quell a Sunni rebellion in Hama attributed to Bashar al-Assad's father. *1982: Syria's President Hafez al-Assad Crushes Rebellion in Hama*, THE GUARDIAN (Aug. 1, 2011), <http://www.theguardian.com/theguardian/from-the-archive-blog/2011/aug/01/hama-syria-massacre-1982-archive>.

245. See Beth Van Schaack, *Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals*, 97 GEORGETOWN LAW JOURNAL 119 (2008) (collecting jurisprudence).

246. *Call for Special Tribunal to Investigate War Crimes and Mass Atrocities in Syria*, THE GUARDIAN (Mar. 17, 2015), <http://www.theguardian.com/world/2015/mar/17/call-for-special-tribunal-to-investigate-war-crimes-and-mass-atrocities-in-syria>.

247. See H.R. Con. Res. 121, 113th Cong. (2014) (urging the United States to support efforts to collect documentation of international crimes being committed in Syria and urging the president to direct the UN ambassador to promote the establishment of a Syrian war crimes tribunal).

248. Kathleen A. Doty, *Expert Panel Finalizes "Draft Statute for a Syrian Extraordinary Tribunal to Prosecute Atrocity Crimes,"* AMERICAN SOCIETY OF INTERNATIONAL LAW (Oct. 3, 2013), <https://www.asil.org/blogs/expert-panel-finalizes-%E2%80%9Cdraft-statute-syria-n-extraordinary-tribunal-prosecute-atrocity-crimes%E2%80%9D>.

borders, as well as by cross-border violence from the Syrian war.²⁴⁹ Given the degree of domestic instability in Lebanon and Iraq, and the fact that Lebanon is already engaged in an experiment in international criminal justice in the form of the Special Tribunal for Lebanon, the obvious candidates to host an ad hoc hybrid tribunal are Jordan and Turkey. Another alternative would be to establish a regional tribunal in Europe, involving the delegation of a range of jurisdictional competencies, including universal jurisdiction, where cases pending in European courts could be consolidated. Operations could be gradually shifted to the region as conditions allow.²⁵⁰ Presumably, even NATO or another regional organization such as the Organization of Islamic Cooperation or the Arab League could adopt this approach. Drawing the ire of Syria, the Arab League has issued strong and unprecedented resolutions calling for accountability in Syria and other forms of coercive action.²⁵¹ To date, however, this rhetorical support has not translated into concrete institution building in the accountability space. Any of these options could be hybridized with the inclusion of Syrian personnel, drawn from organizations such as the Free Lawyers Association and Free Judges Association.²⁵² ICC Prosecutor Fatou Bensouda has encouraged this proposal given that a Syria referral to the Court is not likely to be forthcoming.²⁵³

There are a number of obvious benefits to the ad hoc tribunal model in general and to locating any such tribunal in the region, particularly when it comes to the ease of accumulating information that may become evidence

249. Beth Van Schaack, *Options for Accountability in Syria*, JUST SECURITY (May 22, 2014), <https://www.justsecurity.org/10736/options-accountability-syria/>.

250. For example, the EU Special Investigative Task Force (SITF) is investigating potential war crimes identified by a January 2011 Council of Europe report prepared by Senator Dick Marty. The SITF is based partly in Brussels to “reinforce the independence and confidentiality of the process.” See *About SITF*, SITF, <http://sitf.eu/index.php/en/about-sitf> (last visited Apr. 18, 2016).

251. *Syria Rejects New Arab League Resolutions*, RT (Feb. 13, 2012), <https://www.rt.com/news/syria-rejects-arab-league-resolution-139/>.

252. The Free Syrian Lawyers Association and Free Judges Association are networks of legal practitioners working to reform the Syrian judicial system. Neil MacFarquhar, *A Battle for Syria, One Court at a Time*, NEW YORK TIMES (Mar. 13, 2013), <http://www.nytimes.com/2013/03/14/world/middleeast/a-battle-for-syria-one-court-at-a-time.html>.

253. *ICC's Bensouda Would Support Syria Special Tribunal if ICC Path is Blocked*, AL ARABIYA (May 18, 2014), <http://english.alarabiya.net/en/News/middle-east/2014/05/18/Interview-ICC-prosecutor-to-examine-alleged-British-crimes-in-Iraq-war.html>.

in future proceedings.²⁵⁴ Being close to Syria will also facilitate the integration of Syrian jurists, lawyers, and other staff into the work of the tribunal. This lends greater local ownership and thus legitimacy to the process and also contributes to building domestic capacity. One additional reason to focus on neighboring States as potential hosts might not be so obvious: such States may be empowered to exercise jurisdiction on multiple bases given the direct effects of the conflict on them.²⁵⁵ To be sure, the principle of universal jurisdiction—which empowers all States to prosecute individuals accused of the commission of international crimes regardless of any nexus to the prosecuting State—is available to any State that is so inclined to move forward with prosecutions of individuals responsible for the commission of war crimes and crimes against humanity.²⁵⁶ Nonetheless, not all States have domesticated universal jurisdiction, and some States remain squeamish about advancing the universal jurisdiction norm, perhaps all the more so in a new collective form.²⁵⁷ As such, there is an obvious utility to identifying States that can lawfully exercise domestic jurisdiction on other, less contentious bases.²⁵⁸

The effects and protective principles find affinity in the inherent right of States to engage in acts in self-defense. The effects principle allows for assertions of jurisdiction over criminal conduct that occurs outside its territory but causes an effect within its territory.²⁵⁹ The protective principle

254. Alberto Costi, *Viable Transitional Justice Mechanisms to Combat Impunity in Post-Conflict Situations*, 22 NEW ZEALAND UNIVERSITIES LAW REVIEW 213 (2006).

255. Van Schaack, *Alternative Jurisdictional Bases*, *supra* note 243.

256. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1988); Christiane Wilke, *A Particular Universality: Universal Jurisdiction for Crimes Against Humanity in Domestic Courts*, 12 CONSTELLATIONS 83 (2005).

257. The Extraordinary African Chambers, which just prosecuted Hissène Habré of Chad, are an example of an international tribunal exercising a form of universal jurisdiction. Agreement on the Establishment of the Extraordinary African Chambers within the Senegalese Judicial System between the Government of the Republic of Senegal and the African Union art. 1(1), Aug. 22, 2012, 52 I.L.M. 1024 (2013).

258. See RESTATEMENT (THIRD), *supra* note 256, § 402 (outlining bases of jurisdiction). An ad hoc tribunal would exercise a mix of prescriptive and adjudicative jurisdiction, with the latter being most relevant were the tribunal's constitutive instrument to incorporate international law directly rather than domestic law provisions prescribing international crimes.

259. See *United States v. Aluminum Co. of America*, 148 F.2d 416, 443 (2d Cir. 1945) (“[I]t is settled law . . . that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends; and these liabilities other states will ordinarily recognize.”). The test used to be that the conduct was clearly criminal and caused direct, substantial and

authorizes the exercise of penal jurisdiction over extraterritorial acts that threaten State security, endanger the political or territorial integrity of a nation, or undermine the operation of essential governmental functions. The theory of these bases of jurisdiction is that the prosecuting State cannot be expected to rely upon other States (e.g., the State on whose territory the perpetrator acted) to adequately protect its interests. Crimes typically subject to protective jurisdiction harm the sovereign itself or impair vital governmental functions, although the principle is not limited to so-called political crimes (espionage, treason, and subversion). Additional crimes commonly subject to effects or protective jurisdiction include counterfeiting, immigration and other forms of fraud, trafficking in or smuggling of illicit substances or persons, perjury, falsification of official documents, etc.²⁶⁰ It has been hypothesized that States should also be empowered to invoke these principles of jurisdiction for transnational environmental harm²⁶¹ and that there may be other categories of State interests upon which the exercise of effects or protective jurisdiction could be based.²⁶²

The *Restatement (Third) of Foreign Relations Law* subjects these forms of prescriptive jurisdiction to a multifactor rule-of-reason that could be easily satisfied by the situation in Syria.²⁶³ The scale of the refugee problem attests to the reasonableness of Jordan or Turkey, or even European States, exercising jurisdiction over crimes resulting in the deportation or flight of Syrian refugees, with all the attendant consequences, under either an effects or protective theory of jurisdiction. The underlying crimes in question are

foreseeable effects within the adjudicating State. See RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 18 (1965). The third *Restatement* relaxes these requirements. See *supra* note 256. See generally Kathleen Hixson, *Extraterritorial Jurisdiction Under the Third Restatement of Foreign Relations Law of the United States*, 12 FORDHAM INTERNATIONAL LAW JOURNAL 127 (1988).

260. Recent Developments, *Protective Principle of Jurisdiction Applied to Uphold Statute Intended to have Extra-Territorial Effect*, 62 COLUMBIA LAW REVIEW 371 (1962).

261. Linda M. Paul, *Using the Protective Principle to Unilaterally Enforce Transnational Marine Pollution Standards*, in 2 PROCEEDINGS OF THE SECOND INTERNATIONAL CONFERENCE ON MARINE DEBRIS 1045 (R.S. Shomura & H.L. Godfrey eds., 1990), http://swfsc.noaa.gov/publications/TM/SWFSC/NOAA-TM-NMFS-SWFSC-154_P1045.PDF.

262. JAMES CRAWFORD, BROWNIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 462 (8th ed. 2008).

263. See RESTATEMENT (THIRD), *supra* note 256, § 403. This reasonableness test is not uniformly accepted. See *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 952 (D.C. Cir. 1984) (“[N]o rule of international law [holds] that a ‘more reasonable’ assertion of jurisdiction mandatorily displaces a ‘less reasonable’ assertion.”).

well-established, and the Syrian regime (and any individual defendants) would have no basis to object to an extraterritorial prosecution. In any case, there are unlikely to be any competing exercises of jurisdiction in light of the continued impunity of potential defendants in Syria and the anticipated multilateral support for any regional tribunal; thus, principles of comity offer no reason to pause. As the international community considers the ad hoc tribunal option, the protective and effects principles offer grounds to vest jurisdiction in those States most harmed by the conflict in neighboring Syria, which would now also include States of the European Union that struggle with the refugee crisis.

There is some precedent for applying the protective principle in the war crimes context. Following World War II, occupation courts relied upon the protective principle to prosecute extraterritorial conduct against the interests of the prosecuting State. For example, in *Joyce v. Director of Public Prosecutions*,²⁶⁴ the defendant (a U.S. citizen carrying a fraudulently obtained British passport) was prosecuted for treason for providing aid and comfort to the enemy in the form of propaganda broadcast in Germany. In *Kamakita v. United States*, the defendant was prosecuted for treason for torturing Allied prisoners of war who were being forced to work in a Japanese factory.²⁶⁵ Likewise, Israel invoked the protective principle (among other jurisdictional grounds) to justify its abduction and prosecution of Adolf Eichmann, even though the State of Israel did not exist at the time Eichmann acted.²⁶⁶

A similar tribunal model is under consideration for the downing of Malaysia Air Flight 17 (MH-17) as a way of circumventing Russia's veto of a Dutch/Malaysian proposal to establish an international tribunal.²⁶⁷ If such a Lockerbie-style tribunal²⁶⁸ were to move forward, the most affected States would include Ukraine, as the territorial and potentially nationality State; Malaysia, as the State of registration as well as the State of nationality of the

264. *Joyce v. Director of Public Prosecutions* [1946] A.C. 347 (HL) (U.K.), <http://uniset.ca/other/cs3/joyce.html>.

265. 343 U.S. 717 (1952).

266. *Attorney-General of the Government of Israel v Eichmann*, 36 I.L.R. 18 (Dist. Ct. 1961). See Santiago M. Villalpando, *Eichmann Case*, OXFORD PUBLIC INTERNATIONAL LAW (last updated Feb. 2007), <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e783?rskey=rQbNdU&result=4&prd=OPIL>.

267. *MH17 Crash: Russia Vetoes UN Resolution for International Tribunal*, BBC (July 29, 2015), <http://www.bbc.com/news/world-europe-33710088>.

268. Michael Scharf, *The Lockerbie Model of Transfer of Jurisdiction*, in 2 INTERNATIONAL CRIMINAL LAW 525 (M. Cherif Bassiouni ed., 3d ed. 2008).

victims; and the Netherlands (and others), also invoking the passive personality principle (two-thirds of those killed were Dutch). It is contemplated these States could, in essence, “pool” their respective jurisdictional competencies.²⁶⁹ Such a tribunal for MH-17 could also be premised on the collective exercise of universal jurisdiction if the attack amounted to a war crime or an act of terrorism subject to universal jurisdiction.²⁷⁰ In the absence of a compliant host State in the region, a group of concerned States could conceivably revert to the Nuremberg model and create among themselves an ad hoc tribunal outside of the United Nations framework that could be empowered to exercise international jurisdiction or even a delegated form of domestic jurisdiction (e.g., universal, passive personality, effects, and/or protective). Concerns about creating a precedent that could be employed in other contexts may be hindering progress on this front.

V. CONCLUSION

Notwithstanding the extensive war crimes being committed in Syria, existing tribunals—international or domestic—may have difficulty issuing charges for many of the most defining breaches of IHL given the lack of positive law governing NIAC war crimes. Most of the IHL treaties discussed are not applicable to the conflict in Syria because it remains—at least for now—a non-international armed conflict. Even if an ICC referral is forthcoming, the Court may not be able to entertain many war crimes charges of direct relevance to the situation in Syria, such as the deliberate starvation of the civilian population or the use of chemical weapons. Rather, a strict reading of the ICC Statute would limit the prosecutor to charging intentional attacks on civilians, civilian objects, and other protected persons and things—all serious charges to be sure, but these characterizations do not fully capture the particular horror that is Syria. This conclu-

269. The nationality of the perpetrators of the downing of MH-17 is unknown, which complicates the question of whether Russia’s assent would be required as a legal or practical matter for any tribunal to be established, especially given that the acts in question may be subject to universal jurisdiction.

270. Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation art. 5, 974 U.N.T.S. 178. The so-called Montreal Convention obliges States parties to exercise universal jurisdiction over attacks on civil aircraft when the perpetrator is present in the State’s territory. *Id.*, art. 5(2) (“Each Contracting State shall likewise take such measures as may be necessary to establish its jurisdiction over [treaty] offences . . . in the case where the alleged offender is present in its territory and it does not extradite him.”).

sion demonstrates that the ICC Statute—as a treaty—has frozen IHL in time in a way that does not, and will not, reflect international law’s inexorable normative development.²⁷¹

The difficulty of charging the whole range of war crimes is not fatal to criminal accountability for Syria, of course. Many of the forms of violence discussed above may also constitute crimes against humanity. An attack involving chemical weapons could be charged as the crimes against humanity of murder, extermination or the catch-all “other inhumane acts,”²⁷² for example, without reference to IHL so long as the assault formed part of an attack against a civilian population.²⁷³ As formulated in the ICC Statute, the crime against humanity of extermination covers not only the mass killing of civilians, but also intentionally inflicting conditions of life “calculated to bring about the destruction of part of a population,” including “the deprivation of access to food and medicine” so long as death results.²⁷⁴ This definition would enable the prosecution of “famine crimes”—the deliberate use of hunger “as a tool of extermination to annihilate troublesome populations”²⁷⁵ and the deliberate withholding of humanitarian aid. Likewise, the crime against humanity of deportation has prosecutorial potential given the migrant crisis in the region and Europe. The crime of deportation includes the forcible transfer²⁷⁶ of persons to another State “by expulsion or other coercive acts.”²⁷⁷

271. ICC Statute, *supra* note 15, art. 10 (“Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.”).

272. This is defined as the infliction of “great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act” that is of a similar nature and gravity to the other crimes against humanity. ICC Elements of Crimes, *supra* note 143, art. 7(1)(k).

273. It may not be possible to charge the use of such weapons against combatants, however. *See* Prosecutor v. Martić, Case No. IT-95-11-A, Appeals Chamber Judgment, ¶ 311 (Int’l. Crim. Trib. for the former Yugoslavia Oct. 8, 2008) (concluding that combatants who are *hors de combat* can be the victims of crimes against humanity so long as they are injured as part of an attack on a civilian population); Prosecutor v. Mrkšić, Case No. IT-95-13/1-A, Judgment, ¶¶ 41–43 (Int’l. Crim. Trib. for the former Yugoslavia May 5, 2009) (finding combatants had been singled out and so their death could not be charged as a crime against humanity).

274. ICC Elements of Crimes, *supra* note 143, art. 7(1)(b).

275. David Marcus, *Famine Crimes in International Law*, 97 AMERICAN JOURNAL OF INTERNATIONAL LAW 245, 247 (2003).

276. The Elements of Crimes makes clear that the term “forcibly”

is not restricted to physical force, but may include threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power

Notwithstanding the role that the prohibition of crimes against humanity can play in ensuring accountability for international crimes committed in Syria, the law governing war crimes should be central to any accountability effort. A tribunal whose prosecutor has resort to CIL prohibitions applicable to all armed conflicts would be in a better position to redress the full assortment of harms suffered by the Syrian people, reach a broader range of perpetrators and contribute to the normative development of the law of war crimes. An ad hoc tribunal dedicated to Syria offers the most promising avenue for war crimes accountability, if only the political will existed for its creation.

against such person or persons or another person, or by taking advantage of a coercive environment.

Id. at 246 n.12.

277. ICC Elements of Crimes, *supra* note 143, art. 7(1)(d).