Syria: Can International Law Cope?
Workshop Report

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I. Introduction

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

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

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

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

⁴. Commission of Inquiry Report 5, supra note 3, ¶ 139.
⁵. This organization is referred to interchangeably as the Islamic State for Iraq and the Levant (ISIL), the Islamic State (IS) or by its Arabic acronym, Daesh. See Maria Vultaggio, ISIL, ISIS, Islamic State, Daesh: What’s the Difference, IBT (Nov. 16, 2015), http://www.ibtimes.com/isil ISIS-islamic-state-daesh-whats-difference-2187131.
ty interests in the Middle East. Attendees included four U.S. and allied general officers and other senior policy advisors.

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

II. BACKGROUND TO THE CONFLICTS IN SYRIA

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

9. UN Human Rights Council Calls for Investigation into Alleged Abuses in Syria, UN NEWS CENTER (Apr. 29, 2011), http://www.un.org/apps/news/story.asp?NewsID=38237& (The Deputy High Commissioner for the Human Rights indicated that by the end of April, 2011 “[t]anks have been deployed and shelled densely-populated areas. The delivery of food has been impeded. Access to electricity has been cut. And transportation systems have been shut down. There have been reports of snipers firing on persons attempting to assist the injured or remove dead bodies from public areas.”).
On September 12, the United Nations established the Commission of Inquiry with the mission “to investigate all alleged violations of international human rights law . . . in . . . Syria[,] . . . to establish the facts and circumstances that may amount to such violations and of the crimes perpetrated and, where possible, to identify those responsible . . . .” The Commission has since issued a series of reports on the conflicts detailing the conduct of hostilities.\(^{13}\)

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

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

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14. For a list of some Commission Reports, see supra note 3. For the Commission’s mandate, see Commission of Inquiry Report 1, supra note 3, ¶ 4 (“to investigate all alleged violations of international human rights law since March 2011 in the Syrian Arab Republic, to establish the facts and circumstances that may amount to such violations and of the crimes perpetrated and, where possible, to identify those responsible with a view of ensuring that perpetrators of violations, including those that may constitute crimes against humanity, are held accountable”).
17. Neil MacFarquhar, Arab League Votes to Suspend Syria over Crackdown, NEW YORK TIMES (Nov. 12, 2011), http://www.nytimes.com/2011/11/13/world/middleeast/arab-league-votes-to-suspend-syria-over-its-crackdown-on-protesters.html?_r=0. (Eighteen of the twenty-two members voted to suspend their membership. Only Yemen and Lebanon opposed the action. See also Commission of Inquiry Report 1, supra note 3, Summary & ¶ 8 (Noting that in November the Office of the United Nations High Commissioner for Human Rights had found that 3,500 civilians had been killed by State forces since March, 2011. The Commission report found “[t]he substantial body of evidence gathered by the commission indicates that . . . gross violations of human rights have been committed by Syrian military and security forces since the beginning of the protests.”).
18. Despite their affiliation with al-Qaeda the focus of this group thus far has been on Assad rather than the West. Al-Qaeda leader Ayman al-Zawahiri has specifically directed the al-Nusra Front to concentrate operations on Syria and cease operations against the West. See Charles Lister, An Internal Struggle: Al Qaeda’s Syrian Affiliate is Grappling with its
violence intensified dramatically during the spring and summer of 2012. The Commission found the existence of a non-international armed conflict (NIAC) in its third report, released on August 16. The report also documented numerous war crimes committed by pro-government militias (the Shabbiha).

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

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

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

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

III. SELECTED LEGAL ISSUES DISCUSSED AT THE WORKSHOP

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

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

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the UN Charter\textsuperscript{30} and its exceptions\textsuperscript{31}—discussion turned to the specific facts presented by the conflicts in Syria. The use of force was considered in several broad categories: support to Syrian rebel groups, military support to the Syrian government and operations against ISIS.

Participants addressed the legal ramifications which flow from third-party support to rebel groups. One issue considered was whether U.S. programs supporting rebels could trigger the armed attack threshold. This analysis centered on the International Court of Justice’s\textit{Nicaragua} decision and the gap viewed by many to exist between Article 2(4) and Article 51.\textsuperscript{32} It was noted that if one accepts the existence of a gap this could prevent the victim State from acting in self-defense because the support to rebel groups, while amounting to a use of force under 2(4), would not constitute an armed attack. A number of participants agreed that U.S. support had not triggered Syria’s right to self-defense, thus appropriate responses from Syria would be limited to non-forcible countermeasures.\textsuperscript{33}

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

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\item Article 2(4) of the UN Charter prohibits the “threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.” \textit{See also} Armed Activities on the Territory of Congo (Dem. Rep. of the Congo v. Uganda), 2005 I.C.J. 168, ¶ 35 (Dec. 19).
\item There are two Charter-based exceptions—Security Council action pursuant to Article 39 and 42 and self-defense pursuant to Article 51. Other exceptions include consent and (arguably) humanitarian intervention.
\item On the gap between these two articles, see Military and Paramilitary Activities in and against Nicaragua (Nicar v. U.S.) 1986 I.C.J. 226, ¶ 190 (June 27) [hereinafter \textit{Nicaragua}].
\item The United States has argued that it may act in self-defense in another State where that State is “unwilling or unable to prevent the use of its territory for such attacks.” Permanent Rep. of the United States of America to the U.N., Letter dated September 23, 2014 from the Permanent Rep. of the United States of America to the United Nations addressed to the Secretary-General, U.N. Doc. S/2014/695 (Sept. 23, 2014). For an excellent and comprehensive article on the “unwilling or unable” test, see Ashley S. Deeks, “Unwilling or Unable”: Toward a Normative Framework for Extraterritorial Self-Defense, 52 \textsc{Virginia Journal of International Law} 483 (2012). On State responsibility, see Draft Articles on Responsibility of States for Internationally Wrongful Acts art. 20, Report of
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and implicitly endorsed by the United Kingdom,\textsuperscript{37} France\textsuperscript{38} and Iraq.\textsuperscript{39} It was noted that some alternatives to “unwilling or

demonstrated that it is unwilling or unable to prevent those attacks. In response to
the request for assistance by the Government of Iraq, Australia is therefore undertaking
necessary and proportionate military operations against ISIL in Syria in the exercise of the
collective self-defence of Iraq.”).

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

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

from the Permanent Rep. of France to the United Nations addressed to the Secretary-
(“In accordance with Article 51 of the Charter of the United Nations, France has taken
unable” include the concepts of “harbor and support” and “ungoverned spaces.”40 Finally, discussion addressed U.S. actions against the al-Nusra Front.

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

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

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

Discussion then turned to the geographic applicability of Common Article 3 and the customary law of armed conflict (LOAC) in a NIAC. Some participants argued that LOAC applies in the territory of a State into which the conflict has “spilled over.” Others argued to the contrary, noting that there are two alternatives: conflict follows the person or conflict is limited to the territory of the State. Despite some disagreement on this topic, many considered that the question of whether or not LOAC applies in spill-over conflicts is particularly relevant for determining the law applicable to detention operations and post-conflict prosecutions.

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

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

44. GC I–IV, supra note 41, art. 3.

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

46. For the view that a conflict follows the parties to that conflict, see generally Michael N. Schmitt, Charting the Legal Geography of Non-International Armed Conflict, 90 INTERNATIONAL LAW STUDIES 1 (2014).
The second day of the workshop opened with a presentation on the issue of arming, training and employing proxies in Syria. The use of proxies implicates the principle of non-intervention,\textsuperscript{47} the prohibition on the use of force;\textsuperscript{48} State responsibility;\textsuperscript{49} Common Article 1 of the Geneva Conventions, which requires “[p]arties undertake to respect and to ensure respect for the present Convention in all circumstances;”\textsuperscript{50} and the territorial State’s right of self-defense. These issues raised the policy question of what steps could be taken by a government to ensure the proxy force complies with LOAC. Some of the suggestions included:

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

The next topic addressed was the legal implications arising from the presence of foreign fighters, as well as various States’ approaches to implementing Security Council Resolutions 2170\textsuperscript{51} and 2178.\textsuperscript{52} The discussion here focused on pragmatic issues faced by States: where is the line between incitement to violence and freedom of expression in developing national legislation, what is “terrorist intent” within the meaning of the Security Council resolutions\textsuperscript{53} and when is an act considered to be terrorism and not

\textsuperscript{47} Nicaragua, supra note 32, ¶ 202. See also Armed Activities, supra note 30, ¶ 205 (The International Court of Justice in Nicaragua found “the principle forbids all States or groups of States to intervene directly or indirectly in internal or external affairs of other States.”).
\textsuperscript{48} Nicaragua, supra note 32, ¶ 228 (“arming and training” rebels “can certainly be said to involve the threat or use of force against Nicaragua”).
\textsuperscript{49} Id., ¶¶ 109, 115 (The sponsoring State may be liable for the actions of the proxy where the proxy is acting on behalf of the sponsor or where the sponsoring State has effective control over the proxy.).
\textsuperscript{50} GC I–IV, supra note 41, art. 1.
\textsuperscript{51} S.C. Res. 2170 (Aug. 15, 2014).
\textsuperscript{52} S.C. Res. 2178 (Sept. 24, 2014).
\textsuperscript{53} In Resolution 1566 terrorist acts are defined as those
just a criminal offense. The discussion of these issues focused on specific questions, e.g., in the context of foreign fighters, the role of social media and the presence of recruiters who encourage foreign fighter participation and international criminal culpability for acts relating to foreign fighters. With regard to the latter question, at least one participant expressed a belief that the Rome Statute provides jurisdiction over foreign fighters who are nationals of States party.

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

S. C. Res. 1566 (Oct. 8, 2004).
55. An extensive catalogue of the methods and means of hostilities employed in Syria can be found in the U.N Independent International Commission of Inquiry reports, supra note 3.
And third positions argued that allowing an adversary to take advantage of human shields would encourage their use.

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

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

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

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

\textsuperscript{58} Id., arts. 5, 13(b).