

Spring 2013

Volume 43 Number 2

CALIFORNIA
WESTERN
INTERNATIONAL
LAW JOURNAL

CALIFORNIA WESTERN
SCHOOL OF LAW | San Diego

SAILING CLOSE TO THE WIND: HUMAN RIGHTS
COUNCIL FACT-FINDING IN SITUATIONS OF
ARMED CONFLICT—THE CASE OF SYRIA

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I. FROM GRAFFITI IN DARA'A TO CIVIL WAR IN SYRIA

Syria was a latecomer in the political uprisings, which had developed across Arab countries since the Tunisian revolution of late 2010 and early 2011.¹ Syrian President Bashar al-Assad's government and the Ba'ath Party, the country's dominant political power, had long been successful in curbing earlier protests,² labeling opposition members "terrorists" and arresting many political activists. Not even Hasan Ali Akleh setting himself on fire on January 26, 2011,³ and subsequent demonstrations in Al-Hasakah in early February 2011,⁴ weakened government control.⁵

1. See Fouad Ajami, *The Arab Spring at One. A Year of Living Dangerously* 91 (2) FOREIGN AFF. 56 (2012) (highlighting the early developments of the Arab spring). For a discussion of the Arab spring from a socio-political perspective see Olivier Roy, *The Transformation of the Arab World* 23 (3) J. DEMOCRACY 5, 9 (2012), who points out that this largely is an indigenous process:

"The appeal of democracy is not a consequence of the export of the concept of Western democracy ... It is the political consequence of social and cultural changes in Arab societies (though these changes, of course, are part of the globalization process). It is precisely because the Arab Spring is a succession of indigenous upheavals, centered on particular nation-states and delinked from Western encroachments, that democracy is seen as both acceptable and desirable."

On the implications for international relations and international law see generally Peter J. Schraeder, *Tunisia's Jasmine Revolution & the Arab Spring: Implications for International Intervention* 56 ORBIS 662 (2012).

2. Khaled Yacoub Oweis, *Fear Barrier Crumbles in Syrian "Kingdom of Silence"*, REUTERS, (Mar. 22, 2011), <http://www.reuters.com/article/2011/03/22/us-syria-fear-idUSTRE72L3ME20110322> (referring to "humiliation and decades of repression" and to a "'fear factor' that had made people suspicious that even close relatives might be informants").

3. DAVID W. LESCH, SYRIA—THE FALL OF THE HOUSE OF ASSAD 92 (2012). This act obviously was an allusion to the Tunisian Tarek al-Tayeb Mohamed Bouazizi who set himself on fire on December 17, 2010, thereby catalyzing the Tunisian Revolution. See LIN NOUEIHED & ALEX WARREN, THE BATTLE FOR THE ARAB SPRING: REVOLUTION, COUNTER-REVOLUTION AND THE MAKING OF A NEW ERA 73-75 (2012).

4. See Lauren Williams, *Syria Clamps Down on Dissent with Beatings and Arrests*, THE GUARDIAN (Feb. 24, 2011), <http://www.guardian.co.uk/world/2011/feb/24/syria-crackdown-protest-arrests-beatings>. See generally NOW THAT WE HAVE TASTED HOPE: VOICES FROM THE ARAB SPRING (Daniel Gumbiner

The beginning of unrest in Syria is often associated with events in March 2011, when youngsters wrote anti-government graffiti on the wall of their school in Dara'a, an agricultural town in Southern Syria.⁶ The slogan they put up, “ash-sha'b yurīd isqāṭ an-nizām” meaning “the people want to bring down the regime,” was firmly rooted in the Arab spring⁷ and perceived as a call for democracy and greater freedom in Syria. The local governor in Dara'a came down hard on the teenagers who were arrested on March 6, 2011 and reportedly tortured.⁸ In response to these arrests, locals demanded the release of the school children, and protestors clashed with local police.⁹ Within days, the situation further escalated. Nationwide demonstrations began with protestors soon demanding the resignation of President Bashar al-Assad and an end to nearly five decades of Ba'ath Party rule.¹⁰

After unsuccessful efforts to crackdown on the uprising, and after equally unsuccessful offers for political reforms and policy changes,¹¹

ed., 2012) (discussing the early Syrian demonstrations).

5. Lesch, *supra* note 3, at 92 (“[T]his action did not garner as much attention as Bouazizi’s, nor did it immediately light the fuse to an uprising.”).

6. These events are referred to in an initial U.N. report. See Human Rights Council, *Rep. of the Independent Int’l Comm’n of Inquiry on the Syrian Arab Republic*, para. 27, U.N. Doc. A/HRC/S-17/2/Add.1 (Nov. 23, 2011), at http://www.ohchr.org/Documents/Countries/SY/A.HRC.S-17.2.Add.1_en.pdf. [hereinafter First Report on Syria]; see also Kareem Fahim & Hwaida Saada, *Faceless Teenage Refugee Who Helped Ignite Syria’s War*, N.Y. Times (Feb. 8, 2013), http://www.nytimes.com/2013/02/09/world/middleeast/a-faceless-teenage-refugee-who-helped-ignite-syrias-war.html?_r=1&.

7. NOUEIHED & WARREN *supra* note 3, at 227.

8. *In Syria, Accounts of Widening Torture: Protester Tells of Cuts, Burns and Blows During Detention in a Military Hospital*, WALL ST. J. (May 28, 2011), http://online.wsj.com/article/SB10001424052702303654804576341030013131512.html?mod=googlenews_wsj (“When released, the children, who were as young as 10, bore burn marks from cigarettes and had fingernails torn out, said human-rights activists and a Deraa resident who said he saw some of them after their release.”).

9. See generally, Rania Abouzeid, *Syria’s Revolt: How Graffiti Stirred an Uprising*, TIME (Mar. 22, 2011), <http://www.time.com/time/world/article/0,8599,2060788,00.html>.

10. See *Profile: Syria’s ruling Baath Party*, BBC NEWS (July 9, 2012), <http://www.bbc.co.uk/news/world-middle-east-18582755> (discussing the Baath Party).

11. For further details, see LESCH, *supra* note 3, at 69-86.

including concessions to the majority Sunni and some minority populations, the Syrian government, in light of anti-government protests continuing into April 2011, opted for a military response to the political opposition. On April 25, 2011, the Syrian military launched a large operation at Dara'a, ostensibly to target terrorists but in fact trying to end pro-democracy protests.¹² Rather than calming down the situation in Dara'a, these military activities triggered further anti-government demonstrations all over Syria.

Initially, the protesters did not have military capabilities at their disposal.¹³ This, however, changed when soldiers began to desert from the Syrian army.¹⁴ Early defections had already occurred during the operation in Dara'a as the army (and later, also secret police and intelligence agents) summarily executed soldiers, who refused to use lethal force against unarmed protesters.¹⁵ Soon, deserters began to form fighting units, and the opposition became more well-equipped and organized with senior officers and government officials also defecting.¹⁶

Political opposition began to turn into armed insurrection in early June 2011, with rebel attacks on security forces in Jisr ash-Shugur on the Syrian-Turkish border and the government sending troops to

12. See generally Anthony Shadid, *Syrian Forces Seize Mosque That Was Uprising's Symbol*, N.Y. TIMES (Apr. 30, 2011), <http://www.nytimes.com/2011/05/01/world/middleeast/01syria.html>; Joseph Holliday, *The Struggle for Syria in 2011: An Operation and Regional Analysis*, *Middle East Security Report 2*, INST. STUD. WAR, Dec. 2011, at 13-14, available at http://www.understandingwar.org/sites/default/files/Struggle_For_Syria.pdf. The Human Rights Council Independent Commission of Inquiry also refers to military operations beginning on April 25, 2011. See First Report on Syria, *supra* note 6, para. 28.

13. STEPHEN STARR, *EYE-WITNESS TO THE SYRIAN UPRISING 10* (2012) (describing the situation as of early 2012 by stating that "the entire world saw Syria's armed opposition for what it was: a mostly disorganized group with limited capabilities").

14. Another observer pointed out that "Syria's armed resistance has been made up of only small units of deserters and local insurgents, all of whom have been lightly armed." Holliday, *supra* note 12, at 17.

15. See *id.*, at 21.

16. Jamie Crawford, *U.S. sees Syrian military defections beginning to 'accelerate'*, CNN (June 22, 2012), <http://security.blogs.cnn.com/2012/06/22/u-s-sees-syrian-military-defections-beginning-to-accelerate>.

respond.¹⁷ Reportedly, more than 100 security forces were killed and some 10,000 residents, insurgents and defectors fled to Turkey.¹⁸ In the following weeks, not only the Syrian Army expanded its operations. On July 29, 2011, parts of the military opposition announced the formation of the so-called Free Syrian Army.¹⁹ A few weeks later, on August 23, 2011, a political coalition of anti-government groups was formed, calling itself the Syrian National Council.²⁰ A major confrontation between the Free Syrian Army and government armed forces occurred at the end of September 2011, in Rastan, which involved tanks and helicopters.²¹ Since October 2011, the Free Syrian Army has received military support from Turkey, with its headquarters located in Southern Turkey close to the Syrian border.²² Fighting moved to Homs in November 2011, and also to the provinces of Hama and Dara'a, with increasing use of tanks and artillery by the Syrian Army from January 2012 onwards.²³

17. *Syria vows 'decisive' response in Jisr al-Shughour*, BBC NEWS (June 7, 2011), <http://www.bbc.co.uk/news/world-middle-east-13677200>; *Syrian unrest: Army in control of Jisr al-Shughour*, BBC NEWS (June 12, 2011), <http://www.bbc.co.uk/news/world-middle-east-13741106>.

18. *Syrian unrest: Army in control of Jisr al-Shughour*, BBC NEWS (June 12, 2011), <http://www.bbc.co.uk/news/world-middle-east-13741106>.

19. On its website, the Free Syrian Army names September 23, 2011, as the date of its establishment, referring to the merger of the so-called "Free Officers' Movement," headed by Hussein Harmoush, and another group set up on July 29, 2011, by Reyad Mous Al-As'ad. *See About Us*, FREE SYRIAN ARMY, <http://www.free-syrian-army.com/en/about-us> (last visited Mar. 11, 2013). Other sources refer to other dates as the Free Syrian Army's inception. *See Guide to the Syrian opposition*, BBC News (Nov. 12, 2012), <http://www.bbc.co.uk/news/world-middle-east-15798218>.

20. *See Guide to the Syrian opposition*, *supra* note 19.

21. *Syrian Forces Pound Western City in Battle Against Defectors*, CNN (Sept. 29, 2011), <http://edition.cnn.com/2011/09/28/world/meast/syria-unrest>.

22. Liam Stack, *In Slap at Syria Turkey Shelters Anti-Assad Fighters*, N.Y. TIMES (Oct. 27, 2011), http://www.nytimes.com/2011/10/28/world/europe/turkey-is-sheltering-antigovernment-syrian-militia.html?pagewanted=all&_r=0.

23. *See Human Rights Council, Rep. of the Independent Int'l Comm'n of Inquiry on the Syrian Arab Republic*, paras. 43-45, U.N. Doc. A/HRC/19/69 (Feb. 22, 2012), at http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session19/A-HRC-19-69_en.pdf [hereinafter *Second Report on Syria*].

As part of Kofi Annan's peace plan, the United Nations (U.N.) mediated a ceasefire period.²⁴ However, after infractions by both sides the ceasefire failed.²⁵ After the killings at Houla on May 25, 2012,²⁶ the conflict increasingly affected the coastal province of Latakia.²⁷ The most prominent international event occurred on June 22, 2012 when a Turkish fighter jet was shot down by Syrian government forces, killing both pilots.²⁸

During the first period of the uprising, the inhabitants of Damascus and Aleppo remained largely uninvolved in the anti-government protests, and these cities were not affected by the fighting. However, both cities increasingly suffered from July 2012 onwards. Damascus was seriously affected between July 15 and August 4, 2012 when large numbers of rebels sought to infiltrate the capital and the Syrian government responded to this operation.²⁹ Towards the end of the so-called Operation Damascus Volcano, the government regained

24. S.C. Res. 2042, U.N. Doc. S/RES/2042 (Apr. 14, 2012).

25. *Syrian ceasefire has 'failed', says UN chief*, THE TELEGRAPH (April 19, 2012), <http://www.telegraph.co.uk/news/worldnews/middleeast/syria/9213122/Syrian-ceasefire-has-failed-says-UN-chief.html>.

26. See Human Rights Council, *Rep. of the Independent Int'l Comm'n of Inquiry on the Syrian Arab Republic*, paras. 41-50 & Annex IV para. 1, U.N. Doc. A/HRC/21/50 (Aug. 16, 2012), at http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session21/A-HRC-21-50_en.pdf [hereinafter Third Report on Syria]; see also Human Rights Council, *Oral Update of the Independent Int'l Comm'n of Inquiry on the Syrian Arab Republic*, para. 88, U.N. Doc. A/HRC/20/CRP.1 (June 26, 2012), at <http://www.ohchr.org/Documents/HRBodies/HRCouncil/CoISyria/OralUpdateJune2012.pdf>.

27. *Heavy Fighting Erupts in Syria's Latakia Province*, REUTERS (Jun. 5, 2012), <http://www.reuters.com/article/2012/06/05/us-syria-crisis-latakia-idUSBRE8540IG20120605>.

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

29. See Andrew Osborn, *How "Damascus Volcano" Erupted in Assad's Stronghold*, CHI. TRIB., (July 20, 2012), http://articles.chicagotribune.com/2012-07-20/business/sns-rt-us-syria-crisis-damascusbre86j17e-20120720_1_midan-southern-hajar-al-aswad-district-assad.

control of the city. Fighting in Aleppo began on July 19, 2012³⁰ and is currently ongoing into 2013.³¹

After the rebels' military defeat in Damascus, they employed guerilla tactics, making use of their bases around Damascus. These guerilla tactics led to counter-attacks by the Syrian Army.³² Since mid-August 2012 clashes between rebels and the Syrian Army have been ongoing in Rif Dimashq, including fighting at the Palestinian refugee camp Yarmouk in December 2012,³³ a government offensive against the rebel stronghold of Daraya in February 2013,³⁴ and a rebel offensive against the Jobar District of Damascus in February 2013.³⁵ Additional fighting affected the province of Hama, where the Syrian armed opposition began an operation by mid-December 2012, which was countered by Syrian Army forces.³⁶ Reportedly, the Syrian Army began to fire Scud ballistic missiles at the rebels.³⁷

30. *Syria conflict: Troops 'mass before Aleppo battle'*, BBC NEWS (July 26, 2012), <http://www.bbc.co.uk/news/world-middle-east-18994124>.

31. Barbara Surk, *Syria Fighting In Aleppo Intensifies As Rebels Try To Capture Key Airport*, HUFFINGTON POST (Feb. 23, 2013), http://www.huffingtonpost.com/2013/02/23/syria-fighting-in-aleppo-_n_2748570.html?utm_hp_ref=world.

32. *Syrian military retakes airport road after fierce clashes, two Austrian peacekeepers wounded*, RT, (Nov. 29, 2012), <http://rt.com/news/syria-damascus-airport-clashes-914>.

33. Human Rights Council, *Rep. of the Indep. Int'l Comm'n of Inquiry on the Syrian Arab Republic*, para. 6, U.N. Doc. A/HRC/22/59 (Feb. 5, 2013), at http://www.ohchr.org/Documents/HRBodies/HRCouncil/CoISyria/A.HRC.22.59_en.pdf [hereinafter Fourth Report on Syria].

34. Khaled Yacoub Oweis, *Syrian Troops Bombard Rebel Posts Around Capital*, REUTERS (Feb. 13, 2013), <http://www.reuters.com/article/2013/02/13/us-syria-crisis-idUSBRE91A0MU20130213>.

35. Khaled Yacoub Oweis, *Syrian army, Rebels Clash in Damascus*, REUTERS (Feb. 11, 2013), <http://www.reuters.com/article/2013/02/11/us-syria-crisis-damascus-idUSBRE91A0DH20130211>.

36. *Syria's Top Military Policeman Switches Sides*, ABC News (Dec. 27, 2012), <http://www.abc.net.au/news/2012-12-27/head-of-syrian-military-police-defects/4444332> ("Elsewhere, the army took control of three Alawite villages in the central province of Hama.").

37. Matthew Weaver, *Syria Conflict: Assad Fires More Scuds*, THE GUARDIAN (Dec. 21, 2012), <http://www.guardian.co.uk/world/middle-east-live/2012/dec/21/syria-conflict-assad-fires-more-scuds-live>.

Apart from providing an overview on how the situation in Syria has developed since March 2011, the facts on the ground are relevant not only to discussing the legality and legitimacy of an involvement of the U.N. Security Council³⁸ and the U.N. Human Rights Council,³⁹ but also to determining whether, and if so when, the situation in Syria developed into an armed conflict.⁴⁰

II. SECURITY COUNCIL INACTION AND HUMAN RIGHTS COUNCIL ACTIVISM

The organized international community's⁴¹ response to the Syrian crisis was slow and ambiguous,⁴² especially compared to the cohesive response to Libya's revolution.⁴³ Diverse political preferences and resulting reactions of individual states prevented the international community from taking more coherent action. Identifying the different groups of actors contributes to a better understanding of what happened in the U.N. Security Council and the U.N. Human Rights Council, respectively.

38. See *infra* Part II.B.

39. See *infra* Part II.C.

40. See *infra* Part III.A.

41. The primary international organizations addressing the Syrian uprising are the Arab League, NATO, and the United Nations.

42. *The neighbours: Meddling at their peril—Syria's war is both worrying the region and infecting it*, 404 *ECONOMIST* 8802 (Sep. 15, 2012); Tony Karon, *Five Reasons Why the Assad Regime Survives*, *TIME WORLD* (Aug. 30, 2012), <http://world.time.com/2012/08/30/five-reasons-why-the-assad-regime-survives> (“Not only is the international community divided over Syria, but even those countries most supportive of the rebellion have not settled on a common strategy, while the disarray among the Syrian opposition further deepens disquiet over intervention.”).

43. The military intervention in Libya, authorized by the U.N. Security Council, and its contextualization with the Arab Spring, the responsibility to protect, and regime change, has been discussed intensely. See Simon Chesterman, *“Leading from Behind”: The Responsibility to Protect, the Obama Doctrine, and Humanitarian Intervention After Libya*, 25 *ETHICS & INT’L AFF.* 279 (2011); Stephan Hobe, *The Responsibility to Protect and Security Council Action in Libya*, 51 *INDIAN J. INT’L L.* 502 (2011); Mehrdad Payandeh, *The United Nations, Military Intervention, and Regime Change in Libya*, 52 *VA. J. INT’L L.* 355 (2012); Catherine Powell, *Libya: A Multilateral Constitutional Moment?*, 106 *AM. J. INT’L L.* 298 (2012).

A. Governments' Responses to the Situation in Syria

In light of the fact that the political and military conflict in Syria is and was linked to the Arab spring,⁴⁴ the reaction of Arab states and pertinent international organizations is of primary interest. During the early days of the uprising, most governments in the region expressed their support for the Syrian government.⁴⁵ However, governments began to side with opposition groups when fighting intensified and numbers of wounded and dead among the Syrian population increased.⁴⁶

First and foremost, Saudi Arabia and Qatar moved away from Assad eventually providing rebel forces with weapons—many of which now seem to have reached hardline Islamic jihadists.⁴⁷ Initially Saudi Arabia and Qatar covertly provided weapons to rebel forces; however, by spring 2012, the countries announced they would begin arming the opposition.⁴⁸ By the end of 2012, reports indicated that Qatar supported Sunni Islamists in Syria.⁴⁹ There is no agreement among political and military analysts on the impact of such military

44. Raymond Hinnebusch, *Syria: from 'Authoritarian Upgrading' to Revolution?*, 88 INT'L AFF. 95, 107 (2012).

45. See Richard Gowen, *The EU and Syria: everything but force?* (Jan. 26, 2012), <http://www.iss.europa.eu/fr/publications/detail-page/article/the-eu-and-syria-everything-but-force> (“Initially, Arab countries were divided over whether to support the U.N. monitoring, but they have increasingly given it their backing. The deployment of Arab League observers to Syria in December failed to deter the government from continuing attacks on civilians.”).

46. *Id.*

47. David E. Sanger, *Rebel Arms Flow Is Said to Benefit Jihadists in Syria*, N.Y. TIMES (Oct. 14, 2012), http://www.nytimes.com/2012/10/15/world/middleeast/jihadists-receiving-most-arms-sent-to-syrian-rebels.html?_r=0.

48. Karen DeYoung, *Saudi, Qatari Plans to Arm Syrian Rebels Risk Overtaking Cautious Approach Favored by U.S.*, WASH. POST, (March 2, 2012), http://www.washingtonpost.com/world/national-security/saudi-qatari-plans-to-arm-syrian-rebels-risk-overtaking-cautious-approach-favored-by-us/2012/03/01/gIQArWQfIR_story.html.

49. Tony Karon, *The Qatar Conundrum: The Emirate That Arms Syria's Rebels Also Embraces Hamas*, TIME (Oct. 24, 2012), <http://world.time.com/2012/10/24/the-qatar-conundrum-the-emirate-that-arms-syrias-rebels-also-embraces-hamas>.

support,⁵⁰ which from an international law perspective is not necessarily lawful.⁵¹

In contrast to Saudi Arabia and Qatar, Iran has remained a firm ally of the Assad government.⁵² Iran provided the regime with arms, technical support, and even combat troops.⁵³ Reportedly, technical support included unmanned aerial vehicles.⁵⁴ Iran also provided indirect support to the Syrian government by training Hezbollah militants in Lebanon, who were then deployed to Syria.⁵⁵ In January 2013, an exchange of captives between rebels and government forces included Iranians, seemingly members of the Iranian Revolutionary Guard.⁵⁶

50. See CHATHAM HOUSE, MEETING SUMMARY, SYRIA: PROSPECTS FOR INTERVENTION (Aug. 2012), available at http://www.chathamhouse.org/sites/default/files/public/Research/Middle%20East/0812syria_summary.pdf; see also Rachel Kleinfeld, *The Case for Arming Syrian Rebels*, WALL ST. J. (Feb. 24, 2013), <http://carnegieendowment.org/2013/02/24/russia-s-foreign-and-security-policy-update/fktt>.

51. Generally, foreign states are not normally allowed to provide help to armed opposition groups in a non-international armed conflict, unless the government receives foreign help (one may argue in favor of a right of counter-intervention in such a case); once the armed opposition has been recognized as belligerent, the rules of neutrality will even prevent foreign assistance provided to the government. See Thilo Marauhn & Zacharie F. Ntoubandi, *Armed Conflict, Non-International*, in MAX PLANCK ENCYCLOPEDIA OF PUB. INT'L LAW, para. 41 (Rüdiger Wolfrum ed., 2011), available at www.mpepil.com.

52. Ali Akbar Dareini, *Iran Reaffirms Syria, Assad Alliance As Key To 'Resistance Front' Against Israel*, HUFFINGTON POST (Jan. 26, 2013), http://www.huffingtonpost.com/2013/01/26/iran-reaffirms-syria-assad-allianc_e_n_2557611.html.

53. Karim Sadjadpour, *Iran Will Be Central No Matter the Outcome*, N.Y. TIMES (Aug. 9, 2012), <http://www.nytimes.com/roomfordebate/2012/08/08/how-to-end-the-war-in-syria/iran-will-be-central-no-matter-the-outcome>; Paul Salem, *A New Balance of Power if Syria Shifts Away from Iran*, THE NAT'L (Dec. 9, 2011), <http://www.thenational.ae/thenationalconversation/comment/a-new-balance-of-power-if-syria-shifts-away-from-iran>.

54. Nick Paton Walsh, *Iranian Drones Guiding Syrian Attacks, Rebels Say*, CNN (Oct. 31, 2012), <http://www.cnn.com/2012/10/31/world/meast/syria-drones/index.html>.

55. Dareini, *supra* note 52.

56. Babak Dehghanpisheh, *Syria Releases 2,130 Captives to Rebels in Exchange for 48 Iranian Prisoners*, WASH. POST (Jan. 9, 2013), http://articles.washingtonpost.com/2013-01-09/world/36232738_1_syrian-

In the Arab world, notwithstanding the diverse attitudes of governments towards the Syrian conflict, the Arab League condemned the Assad regime's violent response to the protests and suspended Syria's membership. The Organization of Islamic Cooperation also suspended Syria's membership.⁵⁷

A second noteworthy reaction to the developments in Syria is that of the Turkish government, particularly in light of the close relations between the two states before the uprising. The Turkish administration not only condemned the violent response of the Assad regime to protests but also called for President Assad's departure from office.⁵⁸ From October 2011 onwards, the Free Syrian Army was allowed into Turkey and provided with a base for operations.⁵⁹ On June 22, 2012, as previously mentioned, Syrian government forces shot down a Turkish fighter jet.⁶⁰ The facts, however, are not sufficiently clear to allow a definite assessment from the perspective of public international law. Should Turkish claims be true that the incident occurred in international airspace, then the Syrian shooting was a violation of Article 2 (4) of the U.N. Charter.⁶¹ However, if

government-iranians-free-syrian-army.

57. The Arab League decision was made at an emergency summit. See League of Arab States, Council Res. 7438 (Nov. 12, 2011), available at <http://www.lasportal.org/wps/wcm/connect/65bd7b80495235058b6fef7abaae88c3/LAS+RES+7438+ENGLISH.pdf?MOD=AJPERES>; see also David Batty & Jack Shenker, *Syria suspended from Arab League*, THE GUARDIAN (Nov. 12, 2011), <http://www.guardian.co.uk/world/2011/nov/12/syria-suspended-arab-league>. The Organization of Islamic Cooperation at its Fourth Extraordinary Islamic Conference Summit on August 14 and 15, 2012, adopted Resolution 2/4-EX (IS) on the situation in Syria. Org. Islamic Cooperation, *On the Situation in Syria*, Res. 2/4-EX (IS), 7-8, O.I.C. Doc. No. OIC/EX-SUM-4/2012/RES/FINAL, at pp. 7-8 (Aug. 15, 2012), available at http://www.oic-oci.org/english/conf/is/ex-4/is_ex4_res_en.pdf.

58. See Abigail Fielding-Smith, *Obama and Erdogan Discuss Assad Exit*, FIN. TIMES (July 31, 2012), <http://www.ft.com/intl/cms/s/0/060d231a-da60-11e1-a413-00144feab49a.html#axzz2MVYhehRW>.

59. Stack, *supra* note 22; see also Sinan Ulgen, *Turkey's Syria Conundrum*, THE NAT. INTEREST (Aug. 24, 2012), <http://nationalinterest.org/commentary/turkeys-syria-conundrum-7385>.

60. See Stack, *supra* note 28, and accompanying text. For further information, see BBC Middle East, *Turkish Warplane Downed by Syria 'May Have Crossed Border'*, BBC NEWS (June 23, 2012), <http://www.bbc.co.uk/news/world-middle-east-18562210>.

61. In international airspace, any attack on a foreign aircraft, whether civilian

Syrian claims are valid—that the fighter was shot by a range limited surface-to-air missile—the fighter likely violated Syrian airspace, and Syria’s reaction might have been justified.⁶² The North Atlantic Treaty Organization (NATO) discussed the matter under Article 4 of the North Atlantic Treaty,⁶³ rather than taking action under the Treaty’s Article 5.⁶⁴ In response to clashes on the Syrian-Turkish border in late 2012, Turkey asked for NATO support to defend its borders, and Patriot missile batteries were delivered in early 2013.⁶⁵

Turning to Europe and the United States, their respective governments were generally sympathetic towards the uprisings linked to the Arab spring. This also stimulated their support for protesters in Syria and freedom of speech. However, neither the United States nor its allies limited themselves to mere democracy promotion. They not only supported peaceful change, but explicitly called for President Assad’s departure from power.⁶⁶ In addition to political pressure, the United States and its European allies sought to make use of pertinent international organizations, primarily the U.N., in order to put an end

or military, amounts to a use of force in international relations, which is prohibited under Article 2 (4) of the U.N. Charter, except in situations of self-defense. See Antonio Cassese, *The International Community’s “Legal” Response to Terrorism*, 38 INT’L & COMP. L.Q. 589, 596 (1989).

62. Even if the Turkish jet had violated Syrian airspace, this did not automatically entitle Syria to shoot down the jet. Whereas, the shooting of a civilian airliner, even in a country’s own airspace, is prohibited according to Article 3bis (a) of the 1944 Chicago Convention. Protocol Relating to an Amendment to the Convention on International Civil Aviation art. 3bis (a), May 10, 1984, 23 I.L.M. 705. The downing a military aircraft, however, depends on the threat arising from its entry into foreign airspace. See Brian E. Foont, *Shooting Down Civilian Aircraft: Is There an International Law?*, 72 J. AIR L. & COM. 695 (2007).

63. Press Release, NAC, Statement on the shooting down of a Turkish aircraft by Syria (June 26, 2012), available at http://www.nato.int/cps/en/natolive/news_88652.htm.

64. On Article 5 of the North Atlantic Treaty, see Thilo Marauhn, *North Atlantic Treaty Organization*, in MAX PLANCK ENCYCLOPEDIA OF PUB. INT’L LAW, paras. 15-17 (Rüdiger Wolfrum ed., 2011), available at www.mpepil.com.

65. Press Release, NATO, Spokesperson’s Statement on the Deployment of Patriot Missiles to Turkey (Dec. 21, 2012), available at http://www.nato.int/cps/en/natolive/news_93430.htm.

66. Steven Lee Myers, *U.S. and Allies Say Syria Leader Must Step Down*, N.Y. TIMES (Aug. 18, 2011), http://www.nytimes.com/2011/08/19/world/middleeast/19diplo.html?pagewanted=all&_r=0.

to the ongoing fighting and legitimize regime change in Syria.⁶⁷ However, due to Russia and China blocking U.N. Security Council resolutions imposing sanctions on Syria this strategy largely failed.⁶⁸ In the course of 2012, the United States as well as the United Kingdom and France, began providing physical support to opposition forces, such as communications and medical equipment.⁶⁹ Reportedly, Cyprus-based British intelligence support for Turkey found its way to the Free Syrian Army,⁷⁰ which also seemed to benefit from CIA training and advice.⁷¹ As to strategic interests, many argue the West has been interested in cutting the political and military links between Iran, Syria, and the Lebanon-based Hezbollah.⁷²

On the other hand, Russia, as a long-time ally of Syria, continued to support the Assad administration. Siding with the Syrian government's claim to defend public order and suppress terrorist unrest, Russia stressed the principle of non-intervention and argued

67. See France, Germany, Portugal and United Kingdom of Great Britain and Northern Ireland: Draft Resolution, U.N. Doc. S/2011/612 (Oct. 4, 2011); Bahrain, Colombia, Egypt, France, Germany, Jordan, Kuwait, Libya, Morocco, Oman, Portugal, Qatar, Saudi Arabia, Togo, Tunisia, Turkey, United Arab Emirates, United Kingdom of Great Britain and Northern Ireland and the United States of America: Draft Resolution, U.N. Doc. S/2012/77 (Feb. 4, 2012).

68. See U.N. S.C. Rep. The Situation in the Middle East, U.N. Doc. S/PV.6627 (Oct. 4, 2011) (discussing Security Council's Draft Resolution U.N. Doc. S/2011/612 vetoed by China and the Russian Federation); U.N. S.C. Rep. The Situation in the Middle East, U.N. Doc. S/PV.6711 (Feb. 4, 2012) (discussing draft resolution U.N. Doc. S/2012/77 vetoed by China and the Russian Federation (13-0-2)).

69. Mark Hosenball, *Exclusive: Obama Authorizes Secret U.S. Support for Syrian Rebels*, REUTERS (Aug. 1, 2012), <http://www.reuters.com/article/2012/08/01/us-usa-syria-obama-order-idUSBRE8701OK20120801>; *Syria Conflict: UK to Give Extra £5m to Opposition Groups*, BBC NEWS (Aug. 10, 2012), <http://www.bbc.co.uk/news/uk-19205204>.

70. *Syria Rebels 'Aided By British Intelligence'*, SKY NEWS (Aug. 19, 2012), <http://news.sky.com/story/974300/syria-rebels-aided-by-british-intelligence>.

71. Jay Solomon & Nour Malas, *U.S. Bolsters Ties to Fighters in Syria*, WALL ST. J. (June 13, 2012), <http://online.wsj.com/article/SB10001424052702303410404577464763551149048.html#>.

72. Paul Saleem, *Can Hezbollah Weather the Arab Spring?*, PROJECT SYNDICATE (June 19, 2012), <http://www.project-syndicate.org/commentary/can-hezbollah-weather-the-arab-spring>.

that political change in Syria should not result from outside pressure.⁷³ Even though towards the end of 2012 Russian politicians acknowledged a process of destabilization of the Syrian government, Moscow continued to support Assad's government.⁷⁴ Russia's position is partly informed by the fact that Syria hosts a Russian naval base, electronic surveillance facility, and airbase.⁷⁵ There are also more than 30,000 Russian civilians in Syria.⁷⁶ Furthermore, Syria's military equipment largely originates in Russia. Military support for a government involved in suppressing political unrest, even if this amounts to a non-international armed conflict, is not normally contrary to international law,⁷⁷ unless the U.N. Security Council has adopted pertinent sanctions.⁷⁸ A different matter is assessing the legality of Turkey's actions. In October 2012, Turkey forced a Syrian airplane returning from Moscow to land in Ankara.⁷⁹ Indeed, there are distinct rules for the transportation of military materials onboard civilian airliners across the airspace of other countries.⁸⁰

73. Jaime A. FlorCruz, *Russia, China and Partners Call for Non-Intervention in Syria, Iran*, CNN (June 7, 2012), <http://edition.cnn.com/2012/06/07/world/asia/china-russia-syria>.

74. Ellen Barry & Steven Erlanger, *Russia Offers a Dark View of Assad's Chances for Survival*, N.Y. TIMES (Dec. 13, 2012), <http://www.nytimes.com/2012/12/14/world/middleeast/russian-envoy-says-syrian-leader-is-losing-control.html>.

75. The Russian naval base is located in Tartus, the electronic surveillance facility is located in Latakia, and the airbase facility is located at Tadmur. On Russia's naval base, see Christopher Harmer, *Backgrounder – Russian Naval Base Tartus*, INST. STUD. WAR, July 31, 2012, available at http://www.understandingwar.org/sites/default/files/Backgrounder_Russian_NavalBaseTartus.pdf. On the Russian presence in Syria, see Julian Borger, *Russian Military Presence in Syria Poses Challenge to US-led Intervention*, THE GUARDIAN (Dec. 23, 2012), <http://www.guardian.co.uk/world/2012/dec/23/syria-crisis-russian-military-presence>.

76. Michael Jansen, *Russians Not Leaving Syria, Says Embassy*, IRISH TIMES (Jan. 23, 2013), <http://www.irishtimes.com/newspaper/world/2013/0123/1224329189096.html>.

77. Marauhn & Ntoubandi, *supra* note 51, para. 41.

78. This only refers to sanctions adopted on the basis of Chapter VII of the U.N. Charter.

79. Nick Tattersall, *Turkey Says Syrian Plane Carried Russian Munitions*, REUTERS (Oct. 11, 2012), <http://www.reuters.com/article/2012/10/11/us-syria-crisis-idUSBRE88J0X720121011>.

80. This has to be assessed in light of Article 3bis (b) and (c), and Article 35 of

There have been multiple ways to analyze the involvement of external actors in the internal Syrian conflict. Some analysts have seen this as a confrontation between Western strategic interests on one hand, and Russia's (sometimes sided by China) interests on the other.⁸¹ Analysts also interpreted the conflict in religious terms between Sunni and Shiite states, with Turkey, Saudi Arabia, and Qatar on the Sunni site, and Iran, Hezbollah, and Syria supporting Shia Islam.⁸² Closely linked to the latter view, is the enormous number of fighters involved in the conflict, including jihadists and extremist groups.⁸³

B. Inaction of the U.N. Security Council

It is against the background of these reactions that the role of the U.N. can be more closely described and assessed. The U.N. Security Council ("Council") first addressed the situation in Syria on August 3, 2011, when it issued a presidential statement, expressing "its grave concern at the deteriorating situation in Syria" and "profound regret at the death of many hundreds of people."⁸⁴ Without identifying pertinent rules of international law, the Council further condemned "the widespread violations of human rights and the use of force against civilians by the Syrian authorities."⁸⁵ The Council called for "an immediate end to all violence"⁸⁶ and it also called "on the Syrian authorities to fully respect human rights and to comply with their obligations under applicable international law."⁸⁷ Notwithstanding the

the Chicago Convention. *See* Foont, *supra* note 62.

81. Daniel Treisman, *Why Russia Protects Syria's Assad*, CNN, (Feb. 3, 2012), <http://edition.cnn.com/2012/02/02/opinion/treisman-russia-syria>.

82. Charles M. Sennott, *Syria's Civil War Emphasizes Middle East's Deep Sunni-Shia Division*, GLOBALPOST (Feb. 8, 2013), <http://www.globalpost.com/dispatches/news/regions/middle-east/egypt/syria-civil-war-sunni-shia-divide-middle-east-oic>.

83. *See* Elizabeth O'Bagy, *Jihad in Syria, Middle East Security Report 6*, INST. FOR THE STUD. OF WAR, Sept. 2012, available at <http://www.understandingwar.org/sites/default/files/Jihad-In-Syria-17SEPT.pdf>.

84. S.C. Pres. Statement 2011/16, paras. 1 & 2, U.N. Doc. S/PRST/2011/16 (Aug. 3, 2011).

85. *Id.* para. 2.

86. *Id.* para. 3.

87. *Id.* para. 4.

fact that the Council in its presidential statement called for a Syrian-led political solution, it explicitly reaffirmed “its strong commitment to the sovereignty, independence, and territorial integrity of Syria.”⁸⁸

It took the Council until March 21, 2012, to issue a second presidential statement on the situation in Syria. This statement was preceded by two draft resolutions, which the Council was not able to agree upon. The first draft resolution, submitted on October 4, 2011, by France, Germany, Portugal, and the United Kingdom of Great Britain and Northern Ireland,⁸⁹ in its operative part, sought to strongly condemn “the continued grave and systematic human rights violations and the use of force against civilians by the Syrian authorities.”⁹⁰ The draft resolution included demands for the Syrian authorities, to not only end human rights violations and terminate the use of force against civilians, but also to improve the humanitarian situation in crisis areas and ensure the return of those who fled the violence to their homes.⁹¹ The draft was not adopted because it was vetoed by China and Russia.⁹²

On February 4, 2012, a second draft was presented by Bahrain, Colombia, Egypt, France, Germany, Jordan, Kuwait, Libya, Morocco, Oman, Portugal, Qatar, Saudi Arabia, Togo, Tunisia, Turkey, the United Arab Emirates, the United Kingdom of Great Britain and Northern Ireland, and the United States.⁹³ The draft condemned “the continued widespread and gross violations of human rights and

88. *Id.* para. 6.

89. France, Germany, Portugal and United Kingdom of Great Britain and Northern Ireland: draft resolution, *supra* note 67.

90. *Id.* para. 1.

91. *Id.* para. 4.

92. U.N. Doc. S/PV.6627, *supra* note 68. There were ten votes in favor, two against, and four abstentions. *Id.* at 2. In the Council debate, Russia referred to “the principle of non-intervention, including military,” while at the same time stating not to be “advocates of the Al-Assad regime,” and condemning the “repression of protests by peaceful demonstrators.” *Id.* at 3-4. China called upon the international community to “fully respect Syria’s sovereignty, independence and territorial integrity.” *Id.* at 5. Germany criticized the Council for not adopting the draft: “Today the Council failed to live up to its responsibilities under the Charter of the United Nations.” *Id.* at 10. Russia and China both referred to their own issues to table a draft resolution. *Id.* at 3-4, 5.

93. France, Germany, Portugal and United Kingdom of Great Britain and Northern Ireland: Draft Resolution, *supra* note 67.

fundamental freedoms by the Syrian authorities.”⁹⁴ In its second operative paragraph, it included the demand “that the Syrian government immediately put an end to all human rights violations.”⁹⁵ The draft condemned “all violence, irrespective of where it comes from,”⁹⁶ and it eventually demanded that the Syrian government comply “with the Plan of Action of the League of Arab States of November 2, 2011 and its decision of January 22, 2012.”⁹⁷ Again, the draft was vetoed by China and Russia, and hence, was not adopted.⁹⁸

The second presidential statement on the situation in Syria, issued by the Council on March 21, 2012, expresses the Council’s full support for the initial six-point proposal submitted to the Syrian authorities by Joint Special Envoy for the U.N. and the League of Arab States, Kofi Annan.⁹⁹ Expressly, the statement supports the efforts of the former U.N. Secretary-General “to bring an immediate end to all violence and human rights violations, secure humanitarian access, and facilitate a Syrian-led political transition to a democratic, plural political system.”¹⁰⁰ Kofi Annan had presented the proposal to the Council on March 16, 2012. It included a commitment to “an inclusive Syrian-led political process,” ending fighting and achieving a U.N.-supervised cessation of armed violence, ensuring the provision of humanitarian assistance and a release of arbitrarily detained individuals, safeguarding freedom of movement in the country for journalists and respect for basic political liberties, including freedom

94. *Id.* para. 1.

95. *Id.* para. 2.

96. *Id.* para. 3.

97. *Id.* para. 5.

98. U.N. S.C. Rep. The Situation in the Middle East, U.N. Doc. S/PV.6711 (Feb. 4, 2012). There were thirteen votes in favor of the resolution and two against it. *Id.* at 2. In the debate, Russia criticized the draft because it “did not adequately reflect the true state of affairs in Syria.” *Id.* at 9. China reiterated its call for respecting the “sovereignty, independence and territorial integrity of Syria.” *Id.* The United States made a strong statement, declaring “(t)he United States is disgusted that a couple of members of this Council continue to prevent us from fulfilling our sole purpose here.” *Id.* at 5.

99. S.C. Pres. Statement 2012/6, U.N. Doc S/PRST/2012/6 (Mar. 21, 2012).

100. *Id.*

of association.¹⁰¹ While aiming at ending the use of force in Syria, the six-point proposal also sought a political solution to the conflict, and did not expressly include but pointed towards the establishment of political democracy in Syria.¹⁰² This, in itself, might have gone too far for the Assad government and at least contributed to the failure of this process and the eventual demise of Kofi Annan.¹⁰³

At this point in time, however, the Council first and foremost aimed at putting an end to the violence in Syria. It issued another presidential statement on April 5, 2012, calling upon the Syrian authorities to comply with the agreement reached in negotiations of the Assad government with Kofi Annan to cease troop movements toward population centers and begin pullbacks away from those areas by the agreed deadline.¹⁰⁴ The Council also called “upon all parties, including the opposition, to cease armed violence in all its forms within 48 hours of the implementation in their entirety by the Syrian Government”¹⁰⁵ of the measures agreed with the Special Envoy, and it signaled its intention to authorize a mechanism to monitor the end of violence.¹⁰⁶ A few days later the Council adopted its first resolution on the situation in Syria: U.N. SC Resolution 2042 of 2012 (“Resolution 2042”).¹⁰⁷ This resolution included two major elements: an

101. *Id.*

102. On the United Nation’s approach towards democratic governance, see Thilo Marauhn, *The United Nations and Political Democracy, in DEMOKRATIE-PERSPEKTIVEN. FESTSCHRIFT FÜR BRUN-OTTO BRYDE ZUM 70. GEBURTSTAG 659* (Michael Bäuerle et al. eds., 2013), with the author arguing, among others, that “Libya and Syria are illustrations of the UN Security Council being trapped in power politics rather than being the optimum organ for supporting political democracy.” *Id.* at 671.

103. It is illustrative that Kofi Annan, in a statement to the press on the occasion of his resignation as Special Envoy, declared: “Without serious, purposeful and united international pressure, including from the powers of the region, it is impossible for me, or anyone, to compel the Syrian government in the first place, and also the opposition, to take the steps necessary to begin a political process.” *Kofi Annan resigns as UN-Arab League Joint Special Envoy for Syrian crisis*, U.N. NEWS (Aug. 2, 2012), <http://www.un.org/apps/news/story.asp?NewsID=42609#.UTTP3jnnDvY>.

104. S.C. Pres. Statement 2012/10, U.N. Doc S/PRST/2012/10 (Apr. 5, 2012).

105. *Id.*

106. *Id.*

107. Statements made in the U.N. Security Council after the adoption of

endorsement by the Council of the six-point plan and an authorization of an advance team to monitor the cease-fire in Syria.

In the first element, the Council reaffirmed “its full support for” the plan and called for its “urgent, comprehensive, and immediate implementation.”¹⁰⁸ The plan was annexed to the text of Resolution 2042. However, because the Council neither expressly determined the existence of a “threat to the peace, breach of the peace, or act of aggression” under Article 39 of the U.N. Charter, nor expressly stated that it was acting on the basis of Chapter VII of the U.N. Charter, Resolution 2042 does not attach legally binding force to the six-point plan on the basis of the U.N. Charter, in particular, on the basis of Article 25.¹⁰⁹ Thus, it would be very difficult to derive more than just political support for the plan from the Council’s adoption of Resolution 2042.

In contrast, the second element of the resolution “to authorize an advance team of up to 30 unarmed military observers to liaise with the parties and to begin to report on the implementation of a full cessation of armed violence in all its forms by all parties,”¹¹⁰ is a decision, which unambiguously binds all other U.N. organs. Although clearly binding in regards to the U.N., Resolution 2042 does not impose any specific obligations upon the parties to the conflict other than those directly related to the establishment of the advance team. It is noteworthy that the obligations imposed upon the parties to cooperate with the advance team were phrased in remarkably softer language, using the phrase “calls upon.”¹¹¹

Based upon Resolution 2042, the Secretary-General, on April 19, 2012, submitted a proposal to the Council for a U.N. supervision mission in the Syrian Arab Republic (UNSMIS) for an initial period of three months.¹¹² The Council followed this proposal in light of its

Resolution 2042 are included in U.N. Doc. S/PV.6751. U.N. S.C. Rep. The Situation in the Middle East, U.N. Doc. S/PV.6751 (Apr. 14, 2012).

108. S.C. Res. 2042, para. 1, U.N. Doc. S/RES/2042 (Apr. 14, 2012).

109. On the binding force of U.N. Security Council resolutions adopted under Chapter VII of the Charter, see Michael Wood, *United Nations, Security Council*, paras. 13, 23 in MAX PLANCK ENCYCLOPEDIA OF PUB. INT’L LAW (Rüdiger Wolfrum ed., 2007), available at www.mpepil.com.

110. S.C. Res. 2042, *supra* note 108, para. 7.

111. *Id.* paras. 7-8.

112. U.N. Secretary-General, Letter dated Apr. 19, 2012 from Secretary-

concern “over ongoing violence and reports of casualties which have escalated again . . . noting that the cessation of armed violence in all its forms is therefore clearly incomplete,”¹¹³ and adopted Resolution 2043 on April 21, 2012.¹¹⁴ Resolution 2043 confirmed the Council’s earlier activities and assessments and called upon the parties to end violence. It relied on the “Preliminary Understanding agreed between the Syrian Arab Republic and the United Nations” on April 19, 2012,¹¹⁵ which established UNSMIS and defined its mandate “to monitor a cessation of armed violence in all its forms by all parties and to monitor and support the full implementation of the Envoy’s six-point proposal.”¹¹⁶

While the establishment of similar missions had often been a meaningful first step in not only bringing an end to violence in a conflict but also paving the way for a political solution, UNSMIS nearly from the first day of its operations onwards was confronted with so many difficulties¹¹⁷ that the Council finally decided to bring the mission to an end. Formally speaking, the Council, on July 20, 2012 renewed the mandate of UNSMIS for another thirty days.¹¹⁸ However, the Council, in operating paragraph three of Resolution 2059 clearly expressed “its willingness to renew the mandate of UNSMIS thereafter only in the event that the Secretary-General reports and the Council confirms the cessation of the use of heavy weapons and a reduction in the level of violence by all sides sufficient

General Addressed to the President of the Security Council, U.N. Doc. S/2012/238 (Apr. 19, 2012).

113. S.C. Res. 2043, preamble, U.N. Doc. S/RES/2043 (Apr. 21, 2012).

114. For the statements made after the unanimous adoption of the resolution, see U.N. S.C. Rep. The Situation in the Middle East, U.N. Doc. S/PV.6756 (Apr. 21, 2012).

115. U.N. Secretary-General, Note Dated Apr. 23, 2012 from the Secretary-General, U.N. Doc. S/2012/250 (Apr. 23, 2012).

116. S.C. Res. 2043, *supra* note 113, para. 6.

117. U.N. Secretary-General, *Report of the Secretary-General on the Implementation of Security Council Resolution 2043 (2012)*, para. 49-57, U.N. Doc. S/2012/523 (July 6, 2012) (outlining options for future of UNSMIS of July 6, 2012, U.N. Doc. S/2012/523).

118. S.C. Res. 2059, para. 1, U.N. Doc. S/RES/2059 (Apr. 20, 2012) (referring, already, to a “final period”).

to allow UNSMIS to implement its mandate.”¹¹⁹ As this was not the case, UNSMIS came to an end at midnight on August 19, 2012.

It is important to take into account that the Council’s Resolution 2059 was only agreed upon after Russia and China had vetoed, on July 19, 2012, a draft resolution based upon Chapter VII of the U.N. Charter, which would not only have extended the mandate of UNSMIS, but also demanded verifiable compliance that the Syrian government cease the use of heavy weapons against civilians, or otherwise face sanctions.¹²⁰ The draft resolution, tabled by France, Germany, Portugal, the United Kingdom of Great Britain and Northern Ireland, and the United States, would have stepped up Council involvement;¹²¹ but, precisely for this reason, the resolution seemed to be unacceptable for Russia and China.¹²² As a consequence, formal Council involvement in Syria largely came to an end by August 19, 2012.

C. Actions Taken by the U.N. General Assembly and the U.N. Human Rights Council

In contrast to the Security Council’s limited action, which from the perspective of the victims might also be labeled inaction, the U.N. General Assembly (“General Assembly”) and the U.N. Human Rights Council (HRC) developed a more activist approach. The General Assembly, on December 19, 2011, adopted a non-binding resolution,¹²³ calling upon the Syrian authorities “to immediately put an end to all human rights violations;”¹²⁴ “to implement the Plan of

119. *Id.*

120. S.C. Res. 538, U.N. Doc. S/RES/538 (July 19, 2012).

121. Among others, Syria would have been faced with sanctions under Article 41 of the U.N. Charter in the case of non-compliance. *Id.*

122. As stated by Russia, “(t)he Russian delegation had very clearly and consistently explained that we simply cannot accept a document under Chapter VII of the Charter of the United Nations, that would open the way for the pressure of sanctions and later for external military involvement in Syrian domestic affairs.” S.C. Res. 6810, at 8, U.N. Doc. S/PV/6810 (July 19, 2012). Among others, the United Kingdom was “appalled by the decision of Russia and China to veto the draft resolution.” *Id.* at 2.

123. G.A. Res. 66/176, U.N. Doc. A/RES/66/176 (Dec. 19, 2011).

124. *Id.* para. 2.

Action of the League of Arab States;”¹²⁵ and “to comply with Human Rights Council resolutions S-16/1 and S-17/1, including by cooperating fully and effectively with the independent international commission of inquiry.”¹²⁶ Three months later, the General Assembly addressed not only the Syrian government, but all parties to the conflict, and, adopting its Resolution 66/253 on February 16, 2012, condemned “all violence, irrespective of where it comes from” and called upon “all parties in the Syrian Arab Republic, including armed groups, to stop all violence or reprisals immediately.”¹²⁷ The General Assembly in Resolution 66/253 reiterated its calls upon the Syrian authorities as already included in Resolution 66/176 of December 2011. In adopting Resolution 66/253B on August 3, 2012, the General Assembly supported the Council’s efforts and demanded “that all parties immediately and visibly implement Security Council resolutions 2042 (2012) and 2043 (2012) in order to achieve a cessation of armed violence in all its forms by all parties.”¹²⁸

The most activist U.N. organ in respect to Syria turned out to be the HRC.¹²⁹ Already, on April 29, 2011, the HRC addressed the situation in Syria. In its Resolution S-16/1, the HRC “unequivocally” condemned “the use of lethal violence against peaceful protestors by the Syrian authorities and the hindrance of access to medical treatment” and urged “the Syrian Government to immediately put an end to all human rights violations.”¹³⁰ Most important in this

125. *Id.* para. 3.

126. *Id.* para. 5. The Commission referred to by the General Assembly is the Commission set up by the Human Rights Council.

127. G.A. Res. 66/253, para. 4, U.N. Doc. A/RES/66/253 (Feb. 16, 2012).

128. G.A. Res. 66/253, para. 4, U.N. Doc. A/RES/66/253 B (Aug. 3, 2012).

129. This activist approach only comes to the fore in light of what commentators have criticized about the U.N. Security Council, often misperceiving the different role of these organs—with the Security Council focusing on peace and security, and the Human Rights Council focusing on human rights. *See, e.g.,* Pierre-Marie Dupuy, *Back to the Future of a Multilateral Dimension of the Law of State Responsibility for Breaches of “Obligations Owed to the International Community as a Whole”*, 23 EUR. J. INT’L L. 1059, 1069 (2012) (“[T]he organic limits still affecting the United Nations, with no real hope that any specific development in this respect may be realistically expected, as dramatically illustrated by the cruel lack of efficiency of the again paralysed Security Council in the face of the continuous trail of crimes against humanity committed in Syria.”).

130. Human Rights Council, *The Current Human Rights Situation in the*

Resolution is the request of the HRC addressed to the Office of the High Commissioner for Human Rights “to dispatch urgently a mission to the Syrian Arab Republic to investigate all alleged violations of international human rights law and to establish the facts and circumstances of such violations and of the crimes perpetrated, with a view to avoiding impunity and ensuring full accountability.”¹³¹ Based upon an initial fact-finding report,¹³² the HRC, on August 22, 2011, adopted Resolution S-17/1 and decided:

[T]o dispatch urgently an independent international commission of inquiry, to be appointed by the President of the Human Rights Council, 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.¹³³

On September 12, 2011, the President of the HRC appointed Paulo Pinheiro as the Commission of Inquiry’s (“Commission”) chairperson, and Yakin Ertürk and Karen Koning AbuZayd as members of the Commission.¹³⁴ Yakin Erturk stepped down from her position as Commissioner in March 2012,¹³⁵ and in September 2012,

Syrian Arab Republic in the Context of Recent Events, para. 1, U.N. Doc. A/HRC/RES/S-16/1 (Apr. 29, 2011), at <http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/16/docs/A%20-HRC-RES-S-16-1.pdf>.

131. *Id.* para. 7.

132. Human Rights Council, Rep. of the United Nations High Commissioner for Human Rights on the Situation of Human Rights in the Syrian Arab Republic, U.N. Doc. A/HRC/18/53 (Aug. 22, 2011), at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/159/68/PDF/G1115968.pdf?OpenElement>.

133. Human Rights Council, Commission of Inquiry on the Syrian Arab Republic, para. 12, U.N. Doc. A/HRC/RES/S-17/1 (Aug. 23, 2011), at <http://www.ohchr.org/EN/Countries/MENARegion/Pages/SyriaCallSubmission.aspx>.

134. Press Release, Human Rights Council, President of Human Rights Council Appoints International Commission of Inquiry to Investigate Human Rights Violations in Syria (Sept. 12, 2011), <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11369&LangID=E>.

135. Louis Charbonneau, *U.N. Syria investigator resigns to protest lack of*

Carla del Ponte and Vitit Muntarbhorn were appointed as new members of the Commission.¹³⁶ The Commission began its work immediately after the appointment of its members. So far, the Commission has presented four comprehensive reports, all of which will be addressed in more detail in the next section of this article. These four reports were published on November 23, 2011,¹³⁷ February 22, 2012,¹³⁸ August 15, 2012,¹³⁹ and February 5, 2013.¹⁴⁰ The HRC discussed each of these reports in detail and a number of resolutions were adopted by the HRC in response.

On December 2, 2011, the HRC adopted Resolution S-18/1, which strongly condemned, among others, the “continued widespread, systematic and gross violations of human rights and fundamental freedoms by the Syrian authorities”¹⁴¹ and the “attacks against civilians in cities and villages across the country.”¹⁴² The HRC urged “the Syrian authorities to respect the popular will, aspirations and demands of its people.”¹⁴³ The same HRC resolution also considered “establish[ing] the mandate of Special Rapporteur on the situation of human rights in the Syrian Arab Republic once the mandate of the commission of inquiry ends.”¹⁴⁴ However, the HRC extended the Commission’s mandate, among others, on the basis of Resolution 21/26 of September 28, 2012.¹⁴⁵ Also, the Commission conducted a

access, REUTERS (Mar. 26, 2012), <http://www.reuters.com/article/2012/03/26/us-syria-un-rights-idUSBRE82P14K20120326>.

136. Press Release, Human Rights Council, Council Adopts Five Texts, Appoints Members of Advisory Committee, Commission of Inquiry on Syria (Sept. 28, 2012) <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=1312712608&LangID=E>.

137. First Report on Syria, *supra* note 6.

138. Second Report on Syria, *supra* note 23.

139. Third Report on Syria, *supra* note 26.

140. Fourth Report on Syria, *supra* note 33.

141. Human Rights Council, The Human Rights Situation in the Syrian Arab Republic, U.N. Doc. A/HRC/RES/S-18/1 (Dec., 5, 2011), at <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/G11/172/09/PDF/G1117209.pdf?OpenElement>.

142. *Id.* para. 2(a).

143. *Id.* para. 2(i).

144. *Id.* para. 10.

145. Human Rights Council, Situation of Human Rights in the Syrian Arab Republic, para. 17, U.N. Doc. A/HRC/RES/21/26 (Oct. 17, 2012), at <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/G12/176/37/PDF/G1217637.pdf?Open>

special inquiry into the events in Al-Houleh, mandated by the HRC in its resolution S-19/1 of June 1, 2012.¹⁴⁶

In its Resolution 19/22 of March 23, 2012, the HRC not only decided to extend the mandate of the Commission, but it expressed “deep concern at the humanitarian situation in Syria” and reiterated its demands addressed to the Syrian government.¹⁴⁷ The HRC decided “to transmit the updated reports of the commission of inquiry to all relevant United Nations bodies and the Secretary-General for appropriate action,”¹⁴⁸ thus indicating that it perceived a need for further action, including possibly decisions to be taken by the Council. In Resolution S-19/1, the HRC condemned the atrocities that had earlier occurred in El-Houleh, indicating that fact-finding of the Commission may also serve “to hold to account those responsible.”¹⁴⁹ In subsequent resolutions, the HRC continued to call for an end of violence and for a peaceful solution, stressing the importance of the Commission’s fact-finding, and to again refer to the need of holding perpetrators accountable.

Against this background—juxtaposing the Council’s inaction and the HRC’s activism—the situation in Syria raises a number of questions. In a nutshell these questions can be addressed by analyzing the role of the HRC and its Commission. Has the situation in Syria developed into a non-international armed conflict? If so, what are the applicable rules? Does this have an impact on the fact-finding mandate of the Commission, which was set up by a human rights body and not by a body competent to address compliance with the law of war? To what extent is there an overlap between the law of armed conflict and international human rights law, which the Commission and the HRC have rightly taken into account? How does the

Element (addressing the prolongation of the Commission’s mandate); *see also id.* at para. 10, (adding “war crimes” to the substantive mandate of the Commission).

146. Human Rights Council, The Deteriorating Situation of Human Rights in the Syrian Arab Republic, and The Recent Killings in El-Houleh, U.N. Doc. A/HRC/RES/S-19/1 (June 1, 2012), at http://www.un.org/ga/search/view_doc.asp?symbol=A/HRC/RES/S-19/1.

147. Human Rights Council, Situation of human rights in the Syrian Arab Republic, para. 9, U.N. Doc. A/HRC/RES/19/22, (Apr. 10, 2012), at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G12/130/34/PDF/G1213034.pdf?OpenElement>.

148. *Id.* para. 21.

149. *See* H.R.C. Res. S-19/1, *supra* note 146, para. 7.

distinction between human rights law and the law of armed conflict impact fact-finding procedures? And eventually, have the Commission and the HRC, by attempting to be all-inclusive, run the risk of blurring the lines and thereby weakening compliance with the law applicable to the situation in Syria?

III. THE RISK OF BEING ALL-INCLUSIVE: BLURRING THE LINES

The Commission was set up with a clear mandate, namely, to investigate all alleged violations of international human rights law since March 2011.¹⁵⁰ This was to include investigations into “crimes against humanity.”¹⁵¹ It is noteworthy that the Commission mandate included, “where possible, to identify those responsible with a view of ensuring that perpetrators of violations” of applicable human rights law are held accountable.¹⁵² The Commission, in interpreting its mandate, distinguished between establishing the facts of human rights violations, only requiring “reasonable suspicion.”¹⁵³ In contrast, the second component of its mandate needs a higher burden of proof by requiring the identification of “those responsible.”¹⁵⁴

A. Does the Situation in Syria Amount to a Non-International Armed Conflict?

In its first report, the Commission voiced concern “that the armed violence in the Syrian Arab Republic risks rising to the level of an ‘internal armed conflict’ under international law.”¹⁵⁵ The Commission pointed out that international human rights law, according to the jurisprudence of the International Court of Justice, continues to apply during armed conflict, though it is modified by the law of armed conflict as *lex specialis*, in so far as the conduct of hostilities is

150. Human Rights Council, The Human Rights Situation in the Syrian Arab Republic, para. 12, U.N. Doc. A/HRC/RES/S-17/1 (Aug. 23, 2011), at <http://www.un.org/Docs/journal/asp/ws.asp?m=A/HRC/RES/S-17/1>.

151. *Id.*

152. *Id.*

153. First Report on Syria, *supra* note 6 para. 5.

154. H.R.C. Res. S-17/1, *supra* note 150, para. 12.

155. *Id.* para. 97.

concerned.¹⁵⁶ As to the definition of an armed conflict, the Commission relied upon the jurisprudence of the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY),¹⁵⁷ which, referred to protracted armed violence between governmental authorities and organized armed groups.¹⁵⁸ The Commission further specified that the Trial Chamber of the ICTY had required a certain intensity of the conflict and a minimum level of organization of the parties to the conflict.¹⁵⁹ In its first report, the Commission did not feel it was in a position to determine whether the situation in Syria amounted to a non-international armed conflict between March 2011 and the time of reporting on November 23, 2011.¹⁶⁰ Consequently, the Commission only analyzed violations of international human rights law and crimes against humanity, which may have occurred irrespective of the existence of an armed conflict.¹⁶¹

The second report, which covers information received until February 15, 2012,¹⁶² did not apply the law of armed conflict but again limited itself to an application of international human rights law and provisions on crimes against humanity.¹⁶³ The Commission expressed concern that “violence in certain areas may have reached the requisite level of intensity” of an armed conflict,¹⁶⁴ but it was doubtful that opposition “armed groups had reached the necessary level of organization.”¹⁶⁵ In its conclusions, however, the Commission

156. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, para. 25 (July 8).

157. Prosecutor v. Tadić, Case No. IT-94-1-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 70 (Int’l Crim. Trib. For the Former Yugoslavia Oct. 2, 1995).

158. First Report on Syria, *supra* note 6 para. 98.

159. See, e.g., *id.* para 99; *The Prosecutor v. Dusko Tadić*, Case No. ICTY IT-94-1-T, Judgment, paras. 561-68 (May 7, 1997).

160. First Report on Syria, *supra* note 6, para. 99.

161. *Id.* para. 100 (“[C]rimes against humanity may occur irrespective of the existence of an armed conflict and the application of international humanitarian law.”).

162. Second Report on Syria, *supra* note 23, paras. 3, 6.

163. *Id.* paras. 1-3.

164. *Id.* para. 13.

165. *Id.*

pointed out that “the Syrian Arab Republic is on the brink of an internal armed conflict.”¹⁶⁶

The Commission’s third report is based on investigations conducted up until July 20, 2012.¹⁶⁷ According to the Commission’s views the situation in Syria since the middle of February 2012 has “evolved into an armed conflict.”¹⁶⁸ The Commission’s determination was based upon its assessment of “the intensity and duration of the conflict”¹⁶⁹ and “the increased organizational capabilities of anti-Government armed groups.”¹⁷⁰ The consequences arising therefrom are not entirely clear in the report. On the one hand, the Commission applied international humanitarian law,¹⁷¹ and regarding the nine explosions addressed in its report, stated that these “acts may be linked to non-international armed conflict and thus assessed under international humanitarian law.”¹⁷² In the same context the Commission argues that these acts “are nevertheless domestic crimes prosecutable under the Syrian criminal code,” and that the “Government is obliged to ensure that an investigation is conducted impartially, promptly, effectively and independently, in accordance with its international human rights obligations.”¹⁷³ The Commission also pointed out that “organized armed groups must . . . abide by the principles of international humanitarian law,” and then went on to refer to “gross abuses of human rights” and “international crimes.”¹⁷⁴ In its conclusion, the Commission clearly states, that “hostilities . . . have evolved into a non-international armed conflict.”¹⁷⁵

166. *Id.* para. 122.

167. Third Report on Syria, *supra* note 26, para. 2. It should be noted that the third report was drafted by only two commissioners, Paulo Pinheiro and Karen Koning AbuZayd, due to the resignation of Yakin Ertürk. *See* Press Release, *supra* note 134.

168. Third Report on Syria, *supra* note 26, para. 4.

169. *Id.* paras. 3, 12.

170. *Id.* paras. 3, 12.

171. *Id.* paras. 12, 58.

172. *Id.* para. 62.

173. *Id.* para. 62.

174. *Id.* para. 134.

175. *Id.* para. 143.

It is interesting that the third report of the Commission includes an Annex of fifteen pages on the applicable law.¹⁷⁶ In the introductory paragraphs thereof, the Commission repeats that it “has determined that the intensity and duration of the conflict, combined with the increased organizational capabilities of the Free Syrian Army, do, in fact, meet the legal threshold for a non-international armed conflict.”¹⁷⁷ The Commission, on this basis, concluded to apply the law of armed conflict, “including Common Article 3, in its assessment of the actions of the parties during hostilities.”¹⁷⁸

The fourth report of the Commission covers findings until January 15, 2013.¹⁷⁹ According to the Commission, there has been “an escalation in the armed conflict between Government forces and anti-Government armed groups”¹⁸⁰ since July 15, 2012, with a variety of armed opposition groups involved. The Commission describes the conflict as “increasingly sectarian” and also as “increasingly violent and complex.”¹⁸¹ In respect to territorial control, the Commission points out that “the Government remained in control of the southern and coastal governorates,”¹⁸² and “anti-Government armed groups made substantial military gains in central and northern regions, forcing the Government to cede control of several localities and strategic junctions.”¹⁸³ Obviously, the Commission continued to qualify the situation as a non-international armed conflict, stating that among other things the “actors choosing to detain persons during armed conflict [sic] must treat them humanely.”¹⁸⁴ Later, the Commission stipulated that “[e]scalating violence in densely populated urban areas has increasingly affected persons and objects specifically protected under the laws of armed conflict.”¹⁸⁵ Also, the Commission affirmed that attacks on hospitals “are in violation of the

176. *Id.* paras. 45-59.

177. *Id.* Annex II, para. 1.

178. *Id.* para. 3.

179. Fourth Report on Syria, *supra* note 33, para. 2.

180. *Id.* para. 1-2.

181. *Id.*

182. *Id.* Annex II, para. 2.

183. *Id.* para. 20.

184. *Id.* para. 66.

185. *Id.* para. 119.

law of armed conflict and amount to the war crime of attacking protected objects.”¹⁸⁶ In its conclusion, the Commission reiterated that “[t]here is an evident escalation of the armed conflict between the Government and anti-Government armed groups.”¹⁸⁷ It is noteworthy that the Commission, thus, continued to apply its earlier assessment made in its third report—that the situation amounts to a non-international armed conflict—without, however, discussing this again in its fourth report. Annex II attached to the fourth report provided an overview of the military situation.¹⁸⁸

In assessing whether the Commission’s approach in defining the existence of an “armed conflict” has been convincing, it is necessary to consider the relevant rules of international law. Because the situation in Syria clearly does not amount to an international armed conflict, it is only necessary to consider the notion of “non-international armed conflict.” The starting point is Common Article 3 of the four Geneva Conventions (GCs), which applies to “armed conflicts not of an international character occurring in the territory of one of the High Contracting Parties.” There is no doubt this includes hostilities between governmental armed forces and non-governmental armed groups.¹⁸⁹ Not only is Syria a party to the four GCs,¹⁹⁰ but the Conventions have universally been ratified.¹⁹¹ Thus, the requirement

186. *Id.* para. 147.

187. *Id.* para. 167.

188. *Id.* paras. 45-59.

189. See Frédéric Siordet, *Conflicts Not of an International Character*, in 1 GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 37, 37-60 (Jean S. Pictet ed., 1995).

190. Syria signed the Geneva Conventions on August 12, 1949, and ratified them on November 2, 1953. See *Syrian Arab Republic*, INT’L COMM. OF THE RED CROSS, <http://www.icrc.org/ihl.nsf/Pays?ReadForm&c=SY> (last visited Apr. 7, 2013).

191. For an overview of the Conventions, see Hans-Peter Gasser & Daniel Thürer, *Geneva Conventions I-IV (1949)*, in MAX PLANCK ENCYCLOPEDIA OF PUB. INT’L LAW (Rüdiger Wolfrum ed., 2011), available at www.mpepil.com. The Conventions first became universal in 2006, with accessions by the Republic of Nauru and the Republic of Montenegro (the latter effective from February 2, 2007 onwards). See Press Release, Int’l Comm. of the Red Cross, Geneva Conventions of 1949 Achieve Universal Acceptance, ICRC Press Release 06/96 (Aug. 21, 2006), available at <http://www.icrc.org/eng/resources/documents/news-release/2009-and-earlier/geneva-conventions-news-210806.htm>. After the Republic of South Sudan

that the armed conflict must occur “in the territory of one of the High Contracting Parties” is met anyway. Beyond this, Common Article 3 of the GCs does not define “non-international armed conflict.”¹⁹² There is, however, agreement that the situation covered by Common Article 3 of the GCs must reach a certain threshold of confrontation.¹⁹³ Indicators that the threshold has been reached include collective hostilities and the need for the government to apply military force rather than mere police force.¹⁹⁴ Relying upon the phrase “parties to the conflict,” it is argued that non-governmental groups must possess organized armed forces.¹⁹⁵ This not only requires a command structure but also the capacity to sustain military operations.¹⁹⁶

The definition of a “non-international armed conflict” in Article I of the 1977 Protocol Additional to the Geneva Conventions of August 12, 1949, relating to the Protection of Victims of Non-International Armed Conflicts (AP II), sets a higher threshold for defining an “non-international armed conflict” but is less far reaching.¹⁹⁷ Even though Syria is not a party to AP II, the differences with Common Article 3 of the GCs may be briefly highlighted here. The AP II definition of non-international armed conflict requires territorial control by the non-governmental armed groups, and it only applies to armed conflicts between governmental armed forces and dissident armed forces or

became independent on July 9, 2011, the Conventions again became universal with the country’s accession to the Conventions in July 2012. *See* Press Release, ICRC, South Sudan: World’s Newest Country Signs Up to the Geneva Conventions, ICRC Press Release 12/154, (July 19, 2012), *available at* <http://www.icrc.org/eng/resources/documents/news-release/2012/south-sudan-news-2012-07-09.htm>.

192. Christine Gray, *The Meaning of Armed Conflict: Non-International Armed Conflict*, in *WHAT IS WAR? AN INVESTIGATION IN THE WAKE OF 9/11* 69, 70 (Mary Ellen O’Connell ed., 2012); EVE LA HAYE, *WAR CRIMES IN INTERNAL ARMED CONFLICTS* 20 (2008).

193. LINDSAY MOIR, *THE LAW OF INTERNAL ARMED CONFLICT* 38-40 (2002).

194. *Prosecutor v. Limaj*, Case No. IT-03-66-T, Judgment, para. 170 (Nov. 30, 2005) (noting that the two forces “were substantially engaged in their mutual military struggle”).

195. MOIR, *supra* note 193, at 36.

196. Int’l Comm. of the Red Cross, *How is the Term “Armed Conflict” Defined in International Humanitarian Law?* (Mar. 17, 2008), <http://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf>.

197. Gray, *supra* note 192, at 71; LA HAYE, *supra* note 192, at 8-9.

other organized armed groups.¹⁹⁸ Only the notion of territorial control by armed opposition groups might cause problems with regard to the situation in Syria. However, AP II does not apply without Syria being a party to it.

Recent international case law has confirmed the threshold requirement and the need for organizational capabilities of non-governmental armed groups. It has also further specified these criteria.¹⁹⁹ In the *Tadić* decision, the ICTY Appeals Chamber adopted what has been characterized as “a generally low threshold”²⁰⁰ for defining a “non-international armed conflict” under Common Article 3 of the GCs, but it introduced the notion of “protracted armed violence.”²⁰¹ A number of prominent commentators perceive this as a mere reformulation of the threshold requirement.²⁰²

In the *Kordić & Cerkez* decision, the ICTY Appeals Chamber stated that the phrase “protracted armed violence” serves to exclude mere cases of civil unrest.²⁰³ The *Tadić* Trial Chamber then explicitly referred to the intensity of the conflict and the organization of the parties to the conflict.²⁰⁴ This has subsequently developed into firm

198. MOIR, *supra* note 193, at 99-108.

199. See Prosecutor v. Limaj, *supra* note 194, para. 84.

200. Gray, *supra* note 192, at 73.

201. Prosecutor v. Tadić, *supra* note 157, para. 70. This notion is included in Article 8(2)(f) of the Rome Statute of the International Criminal Court: “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.” Rome Statute of the Int’l Criminal Ct. art. 8(2)(f), July 17, 1998, 2187 U.N.T.S. 38544. For further interpretation of this clause, see Anthony Cullen, *The Definition of Non-International Armed Conflict in the Rome Statute of the International Criminal Court*, 12 J. CONFLICT & SECURITY L. 419, 435-45 (2007) (arguing in favor of interpreting the threshold contained in Article 8(2)(f) of the Rome Statute identically to common Article 3 of the GCs).

202. Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT’L L. 239, 260 (2009); Michael Bothe, *War Crimes*, in 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 370, 423 (Antonio Cassese, Paola Gaeta & John R.W.D. Jones eds., 2002); Claus Kress, *War Crimes Committed in Non-International Armed Conflict and the Emerging System of International Criminal Justice*, 30 ISR. Y.B. HUM. RTS. 103, 118 (2001).

203. Prosecutor v. Kordić & Cerkez, Case No. IT-95-14/2-A, Judgment, para. 341 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 17, 2004).

204. Prosecutor v. Tadić, Case No. IT-94-1-T, Judgment, para. 562 (May 7, 1997).

ICTY jurisprudence.²⁰⁵ The International Tribunal on Rwanda (ICTR) explicitly relied on the *Tadić* decision in the *Akayesu* case²⁰⁶ and made it clear that intensity had to be determined in an objective way, not depending on the assessment of the parties to the conflict.²⁰⁷ Subsequent case law of the ICTR followed this approach.²⁰⁸

The definition based upon Common Article 3 of the GCs, and not the one included in Article 1 of the AP II, is also part of customary international law.²⁰⁹ Consequently, it can be argued that the Commission's definition and approach to the concept of "non-international armed conflict" based upon Common Article 3 of the GCs is firmly rooted in accepted public international law. Its application to Syria has largely met the approval of states and pertinent international organizations. In particular, in July 2012, the International Committee of the Red Cross (ICRC) considered the Syrian conflict a "non-international armed conflict."²¹⁰

205. The following ICTY cases provide further support to the already cited case law. *See generally* Prosecutor v. Blagojević & Jokić, Case No. IT-02-60-T, Judgment, para. 536 (Jan. 17, 2005); Prosecutor v. Halilović, Case No. IT-01-48-T, Judgment, para. 24 (Nov. 16, 2005); Prosecutor v. Galić, Case No. IT-98-29-T, Judgment, para. 9 (Dec. 5, 2003); Prosecutor v. Stakić, Case No. IT-97-24-T, Judgment, para. 560 (July 31, 2003).

206. Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgment, para. 619-27 (Sept. 2, 1998).

207. *Id.* para. 603.

208. Gray, *supra* note 192, at 76-77.

209. ANTHONY CULLEN, *THE CONCEPT OF NON-INTERNATIONAL ARMED CONFLICT IN INTERNATIONAL HUMANITARIAN LAW* 156 (2010).

210. The ICRC is not competent to issue a legally binding statement on whether there is a non-international armed conflict. *See generally* *The ICRC's Mandate and Mission: 29-10-2010 Overview*, INT'L COMM. OF THE RED CROSS (Oct. 29, 2010), <http://www.icrc.org/eng/who-we-are/mandate/overview-icrc-mandate-mission.htm>. However, responding to a query during a meeting with the press, ICRC spokesperson Hicham Hassan stated: "There is a non-international armed conflict in Syria. Not every place is affected, but it is not only limited to those three areas, it has spread to several other areas." Stephanie Nebehay, *Exclusive: Red Cross ruling raises questions of Syrian war crimes*, REUTERS (July 14, 2012), <http://www.reuters.com/article/2012/07/14/us-syria-crisis-icrc-idUSBRE86D09H20120714>. In its first press release published after that interview, the ICRC declared: "The ICRC concludes that there is currently a non-international (internal) armed conflict occurring in Syria opposing Government Forces and a number of organised armed opposition groups operating in several parts of the

B. The Application of Human Rights Law in a Non-International Armed Conflict

The Commission has not limited itself to an application of international human rights law. Instead, from its third report onwards, the Commission has made assessments on the basis of the law of armed conflict.²¹¹ The Commission sought to justify this approach in the Annex attached to its third report because it could not rely upon an explicit mandate of the HRC to apply the law of armed conflict. In the opening section of Annex II, attached to the third report, the Commission, referring to its determination of the situation in Syria as a “non-international armed conflict,” simply states, “With this determination, the commission applied IHL, including Common Article 3, in its assessment of the actions of the parties during hostilities.”²¹²

The first question to be addressed here is whether the Commission has the competence to apply the law of armed conflict, in particular international humanitarian law. To repeat, the mandate for the Commission, as adopted by the HRC, reads as follows:

country (including, but not limited to, Homs, Idlib and Hama).” Press Release, ICRC, Syria: ICRC and Syrian Arab Red Crescent Maintain Aid Effort Amid Increasing Fighting (July 17, 2012), *available at* <http://www.icrc.org/eng/resources/documents/update/2012/syria-update-2012-07-17.htm>.

211. The terms “law of war,” “law of armed conflict,” and “international humanitarian law” should not be used interchangeably. Being of relatively recent origin and not being included in the Geneva Conventions of 1949, the term “international humanitarian law” focuses on so-called Geneva law (in contrast to Hague law) and regulates the treatment of the individual in armed conflicts. *See* Christopher Greenwood, *Historical Development and Legal Basis*, in *THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW* 101, 104 (Dieter Fleck, ed. 2008) (discussing how the term “international humanitarian law” does not include all of what has been known as “law of war” or “law of armed conflict”, such as the law of neutrality, not pursuing humanitarian purposes). Today these terms are often used interchangeably, which puts necessary distinctions at risk. In this article, the term “international humanitarian law” will be used when the protection of the individual in armed conflicts is at issue. For the remainder, the “law of armed conflict” or the “law of war” are the terms preferred by the author.

212. Fourth Report on Syria, *supra* note 33, at 38-41.

[T]o 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.²¹³

None of the subsequent resolutions, in which the HRC extended the operation period of the Commission, explicitly extended the Commission's mandate to the laws of war or international humanitarian law. In Resolution 21/26, the HRC only sought to follow up the Commission's reporting and stressed the need "to conduct an international, transparent, independent and prompt investigation into abuses and violations of international law, with a view to hold to account those responsible for violations and abuses, including those that may amount to crimes against humanity and war crimes,"²¹⁴ thereby adding "war crimes" to the Commission's mandate of inquiry. The Commission itself did not raise the question of its own competence with regard to the application of international humanitarian law as part of the law of armed conflict.

The question, whether the Commission acted outside its powers by addressing violations of international humanitarian law in its third and fourth report, arises in this context. To be clear, according to the doctrine of *ultra vires*,²¹⁵ this would not have rendered the fact-finding activities of the Commission, the HRC, and eventually the U.N., invalid, because the overall mandate of the organization, i.e., the U.N., also includes the power to address violations of the law of armed conflict. As has been rightly stated, acts of international organizations remain valid if they are "*intra vires* the organization, though *ultra vires* the particular organ."²¹⁶ Indeed, it can be said that fact-finding

213. H.R.C. Res. S-17/1, *supra* note 133, para. 13.

214. Human Rights Council Res. 21/26, para. 10, Situation of Human Rights in the Syrian Arab Republic, U.N. Doc. A/HRC/RES/21/26 (Oct. 17, 2012), at <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/G12/176/37/PDF/G1217637.pdf?OpenElement>.

215. *Ultra vires* is defined by Black's Law Dictionary as an "act performed without any authority to act on the subject." BLACK'S LAW DICTIONARY 1522 (6th ed. 1991).

216. CHITTHARANJAN FELIX AMERASINGHE, PRINCIPLES OF THE

in respect to international peace and security falls within the competences of the U.N. as a whole. However, whether or not the HRC and the Commission are the appropriate bodies to address the law of armed conflict is a different matter.

The Commission would have acted as the competent body if the promotion of respect for international humanitarian law as part of the law of armed conflict was an explicit or implicit task of the HRC, which the Commission had integrated into its mandate. However, the HRC was not established to ensure respect for international humanitarian law. Its focus is international human rights law,²¹⁷ as stated in the U.N. General Assembly Resolution establishing the Council: “[T]he Council shall be responsible for promoting universal respect for the protection of all human rights and fundamental freedoms for all, without distinction of any kind and in a fair and equal manner.”²¹⁸ Nowhere in the primary documents that establish the HRC are any references to the law of war in general or international humanitarian law more specifically. This does not however, exclude the implied powers²¹⁹ of the HRC to address the law of armed conflict. Whether this is convincing deserves further consideration.

Because the HRC and the Commission do not have any specifically mandated power in international humanitarian law, the question of whether or not the Commission was competent to deal with possible violations of international humanitarian law in Syria depends on how the relationship between human rights law and international humanitarian law is eventually defined. If international

INSTITUTIONAL LAW OF INTERNATIONAL ORGANIZATIONS 213 (2nd ed. 2006) (containing further references, including the case law of the International Court of Justice).

217. Beate Rudolf, *United Nations Commission on Human Rights/United Nations Human Rights Council* (2008), in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INT’L LAW, paras. 20-22, (Rüdiger Wolfrum ed., 2008), available <http://www.mpepil.com>.

218. G.A. Res. 60/251, para. 2, U.N. Doc. A/RES/60/251 (Apr. 3, 2006).

219. See Niels M. Blokker, *International Organizations or Institutions and Implied Powers*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INT’L LAW, para. 1 (Rüdiger Wolfrum ed., 2009), available at <http://www.mpepil.com> (“While the notion of implied powers of international organizations has been generally accepted, there is no consensus about its precise scope.”).

humanitarian law cannot be completely separated from human rights law, there may be some plausibility for the Commission to address potential humanitarian law violations. Historically, international human rights law and international humanitarian law have been strictly separated.²²⁰ In contrast to this separation doctrine, new approaches have been developed over the last few decades, which focus on the overlap between these two bodies of law.²²¹ The starting point of these developments is the recognition that universal and regional human rights law have limited the power of state parties to derogate from human rights in times of emergency, including international and non-international armed conflict.²²² Among others, Article 4(1) of the International Covenant on Civil and Political Rights (ICCPR) allows state parties:

[I]n time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, . . . [to] take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve

220. Cordula Droege, *Elective Affinities? Human Rights and Humanitarian Law*, 90 INT'L REV. RED CROSS 501, 501 (2008) ("Traditionally, international human rights law (IHRL) and international humanitarian law (IHL) are two distinct bodies of law with different subject matters and different roots, and for a long time they evolved without much mutual influence."). Until recently, this separation has been applied, among others, by the Israeli Government. See Human Rights Committee, Second Periodic Rep., Addendum, Isr., U.N. Hum. Rts. Comm., para. 8, U.N. Doc. CCPR/C/ISR/2001/2 (Dec. 4, 2001), at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/2cc0a33c394919e0c1256be9002e1188?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/2cc0a33c394919e0c1256be9002e1188?Opendocument); see also U.N. Human Rights Committee, Response of the Human Rights Committee, Concluding Observations of the Human Rights Committee: Isr., U.N. Doc. CCPR/CO/78/ISR (Aug. 21, 2003), at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.CO.78.ISR.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.CO.78.ISR.En?OpenDocument).

221. For a discussion of these approaches, see, e.g., Christian Tomuschat, *Human Rights and International Humanitarian Law*, 21 EUR. J. INT'L L. 15 (2010); Robert Cryer, *The Interplay of Human Rights and Humanitarian Law—the Approach of the I.C.T.Y.*, 14 J. CONFLICT & SECURITY L. 511 (2009); Droege, *supra* note 220; Alexander Orakhelashvili, *The Interaction Between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism, or Convergence?*, 19 EUR. J. INT'L L. 161 (2008).

222. Droege, *supra* note 220, at 507; Orakhelashvili, *supra* note 221, at 165.

discrimination solely on the ground of race, color, sex, language, religion or social origin.²²³

On the other hand, the ICCPR clearly states that “[n]o derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.”²²⁴ Non-derogable rights include the right to life, the prohibition of torture and slavery, habeas corpus, due process rights, and freedom of thought and religion.²²⁵

With these in mind, the International Court of Justice (ICJ), in its 1996 advisory opinion on nuclear arms, observed that “the protection of the [ICCPR] does not cease in times of war,”²²⁶ and stated that “whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the ICCPR, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the [ICCPR] itself.”²²⁷ This approach, based upon the idea of *lex specialis*,²²⁸ might also be read as overlap instead of placing the final say on the legality of certain killings into the hands of international humanitarian law.

In its 2004 assessment of the lawfulness of the construction of a wall in the occupied Palestinian territory, the ICJ did not refine its approach but more generally distinguished three modes of coexistence between human rights law and international humanitarian law: “As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others

223. International Covenant on Civil and Political Rights, art. 4, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force on Mar. 23, 1976) [hereinafter ICCPR].

224. *Id.*

225. See Denise Plattner, *International Humanitarian Law and Inalienable or Non-Derogable Human Rights*, in *DROITS INTANGIBLES ET ETATS D’EXCEPTION* 349, 349-63 (Daniel Prémont ed., 1996) (discussing the relationship between non-derogable rights and international humanitarian law).

226. *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, para. 25 (July 8).

227. *Id.*

228. For more information on the application of the *lex specialis* doctrine to the relationship between international human rights law and the law of armed conflict, see Droege, *supra* note 220, at 522-24.

may be exclusively matters of human rights law; yet others may be matters of both these branches of international law.”²²⁹ This approach was confirmed by the ICJ in its 2005 judgment on the dispute between the Democratic Republic of the Congo and Uganda,²³⁰ and to a certain extent, its decisions regarding the dispute between Georgia and Russia.²³¹ Human rights courts have gone even further in this regard; however, not without problems.²³²

Even if not fully sharing the approach of the ICJ, and less so the European Court of Human Rights, it cannot be disputed that the theory of strict separation between human rights law and international humanitarian law has lost its persuasiveness.²³³ With this in mind, the Commission can draw legitimacy for addressing international humanitarian law from the interface between the two bodies of law, in particular in situations of non-international armed conflict. Thus, it may be argued that the Commission did not act *ultra vires*; rather, it made use of its implied powers and is sailing close to the wind.

Some questions arise regarding the Commission’s definition of “international humanitarian law.” Unfortunately, the opening paragraph on the applicability of international humanitarian law is far too general, by giving a general indication what this body of law might include, rather than looking at which treaties actually apply to the situation in Syria. This is particularly true for the Commission’s reference to AP II.²³⁴ Only in the second paragraph on international humanitarian law does the Commission clarify which rules apply to

229. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, para. 106 (July 9).

230. Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 116, para. 216 (Dec. 19).

231. Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Geor. v. Russ.), 2008 I.C.J. 140, para. 112 (Oct. 15).

232. Cf. Droege, *supra* note 220, at 510-18 (noting the problem of extraterritorial application of international human rights law); Orakhelashvili, *supra* note 221, at 170-74 (focusing on the right of life jurisprudence of the European Court of Human Rights).

233. Droege, *supra* note 220, at 501 (stating that international human rights law and the law of armed conflict exercise mutual influence upon each other today).

234. Third Report on Syria, *supra* note 26, Annex II, para. 11.

Syria,²³⁵ not only referring to specific treaty law, but above all to “Common Article 3 of the Geneva Conventions as well as customary law relevant to non-international armed conflict.” The Commission also adds a special reference to U.N. Security Council Resolution 1325, which addresses the protection of women and girls in situations of armed conflict.²³⁶

However, this does not answer the question of to what extent international human rights law continues to apply to a situation of armed conflict. In its third report, the Commission had to determine the extent to which international human rights law continued to apply alongside the law of armed conflict. In the Annex on the applicable law mentioned above, the Commission takes up this issue. The Commission begins by stating, “The onset of IHL [international humanitarian law] applicability does not replace existing obligations under IHRL [international human rights law]; both regimes remain in force and are generally considered as complementary and mutually reinforcing.”²³⁷ Subsequently, the Commission does not distinguish between the applicability of these distinct bodies of law, but in respect to whether they “can be applied consistently.”²³⁸ According to the Commission, whenever this is possible, “parties to a conflict are obliged to do so.”²³⁹ If not, “the principle of *lex specialis* applies.”²⁴⁰ In the subsequent paragraph, the Commission refers to international criminal accountability, which may arise in cases of violations of both bodies of law.²⁴¹

It is against this background that there is an additional argument in favor of the Commission’s approach to address violations of international humanitarian law and the interpretation of its mandate, since the mandate indeed refers to “the crimes perpetrated”; however, it should also be noted that this phrase is linked to “violations of international human rights law.”²⁴² More specifically, the

235. *Id.* para. 12.

236. *Id.* para. 13.

237. *Id.* para. 5.

238. *Id.*

239. *Id.*

240. *Id.* para. 5.

241. *Id.* para. 6.

242. H.R.C. Res. S-17/1, *supra* note 133, para. 13.

Commission, after its determination that the Syrian situation amounted to a non-international armed conflict, not only referred to non-derogable rights, but simply stated that the Syrian Government “did not declare a state of emergency nor otherwise seek to derogate from any of the aforementioned obligations which consequently remained in effect throughout the conflict.”²⁴³

It would go beyond the scope of this contribution to discuss each and every aspect thereof, but it may suffice to provide a few examples. In respect of unlawful killings, the Commission first notes that international human rights law “strictly prohibits taking life arbitrarily.”²⁴⁴ It then goes on to state that these “standards differ to a degree from those applicable to fighters/combatants during an armed conflict under IHL.”²⁴⁵ This is, to say the least, imprecise. Moreover, it is misleading to state that “[s]o long as all applicable IHL, CIL [customary international law] and IHRL requirements are met, killing an enemy fighter during an armed conflict is not illegal.”²⁴⁶

The starting point of the law of armed conflict is that killing an enemy fighter is lawful unless the law of armed conflict specifically outlaws such killing; as to other persons, only so-called protected persons, primarily civilians, are exempted from being the object of an attack.²⁴⁷ However, it is unfortunately conceded that there is no definition of a “combatant” in non-international armed conflict.²⁴⁸

243. Third Report on Syria, *supra* note 26 Annex II. para. 8. In the following parts of the Annex to its third report, the Commission specifically addressed the excessive use of force, unlawful killings, arbitrary arrest and unlawful detention, enforced disappearances, torture and other forms of ill-treatment, rape and sexual violence, children and armed conflict, pillaging, and destruction of personal property. *See id.* paras. 28-68.

244. *Id.* para. 30.

245. *Id.* para. 32.

246. *Id.*

247. This refers to the principle of distinction. On its continued importance, see Stefan Oeter, *Comment: Is the Principle of Distinction Outdated?*, in INTERNATIONAL HUMANITARIAN LAW FACING NEW CHALLENGES: SYMPOSIUM IN HONOUR OF KNUT ISPEN 53-62 (Wolff Heintschel von Heinegg & Volker Epping eds., 2007), available at http://books.google.com/books?id=WO4q7seH-SwC&printsec=frontcover&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false.

248. The explanation on Rule 3 of the ICRC’s customary international law study, dealing with combatants, explains the following on non-international armed

The Commission, only at a relatively late point, makes it clear that the law of armed conflict “prohibits the intentional targeting of civilians in both international and non-international armed conflicts.”²⁴⁹ Unfortunately, there is no clear reference to the legal sources from which these rules come.²⁵⁰

Another example can be taken from the Commission’s discussion of arrest and detention. The pertinent section made no reference to the law of armed conflict, and only the subsequent section on enforced disappearances includes a reference to international humanitarian law; albeit a very general one. The text states:

Under IHL, persons taking no active part in the hostilities are entitled to be treated humanely. Customary IHL rules also include a prohibition on arbitrary deprivation of liberty and require parties to the conflict to keep a register of persons deprived of their liberty,

conflicts: “Persons taking a direct part in hostilities in non-international armed conflicts are sometimes labeled ‘combatants’. . . this designation is only used in its generic meaning and indicates that these persons do not enjoy the protection against attack accorded to civilians” 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: RULES 12 (Jean-Marie Henckaerts et al. eds., 2005). The Additional Protocol II to the Geneva Conventions (not as such applicable to Syria) stipulates that the “civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations.” Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts art. 13, June 8, 1977, 16 I.L.M. 1442 [hereinafter AP II]. The Additional Protocols II goes on to state an exception with regard to direct participation: “Civilians shall enjoy the protection afforded by this Part, unless and for such time as they take a direct part in hostilities.” *Id.* This complicates the application of the principle of distinction in non-international armed conflicts. See Jann K. Kleffner, *From ‘Belligerents’ to ‘Fighters’ and Civilians Directly Participating in Hostilities - on the Principle of Distinction in Non-International Armed Conflicts One Hundred Years After the Second Hague Peace Conference*, 54 NETH. INT’L L. REV. 315 (2007). The application of the principle of distinction to the Gaza conflict has led to quite a few controversies in assessing the Goldstone Report. See, e.g., Jean-Philippe Kot, *Israeli Civilians Versus Palestinian Combatants? Reading the Goldstone Report in Light of the Israeli Conception of the Principle of Distinction*, 24 LEIDEN J. INT’L L. 961 (2011).

249. Third Report on Syria, *supra* note 26, Annex II para. 36.

250. For a comparative analysis of the protection from arbitrary deprivation of life guaranteed under international human rights law and international humanitarian law, including a discussion of Articles 51 and 57 of AP I, but not of Article 13 of AP II, see Orakhelashvili, *supra* note 221, at 168-74.

respect detainees' family life, to permit detainees to receive visitors, especially near relatives to the degree practicable and allow correspondence between detainees and their families.²⁵¹

Rather than carefully distinguishing between international human rights law and the law of armed conflict, the Commission blurs the lines between the two bodies of law. Additionally, the Commission is not always careful to consider that the rules must be applied on its own merits and that the object and purpose of these two bodies of law is different.

In its fourth report, the Commission no longer seems to carefully distinguish between human rights law and the law of armed conflict. Rather, it seems to apply these bodies of law alongside each other, which may be best illustrated by the following examples. The Commission was required to investigate massacres, and as such, provided a definition of a massacre that refers to both bodies of law indifferently. A massacre is defined as “[a]n intentional mass killing of civilians not directly participating in hostilities, or hors de combat fighters, by organized armed forces or groups in a single incident, in violation of international human rights or humanitarian law.”²⁵² Regarding unlawful killings, the Commission addresses the disintegration of “the State law enforcement and justice system,”²⁵³ and in this context states that “these mechanisms do not meet international judicial standards as defined under international humanitarian law.”²⁵⁴

These observations are not intended to put any individual assessment of the Commission into question. They simply serve to identify the lack of distinction between international human rights law and the law of armed conflict. In effect, the Commission has blurred the lines between international human rights law and the law of armed conflict. Apart from raising very principled questions, which will be addressed subsequently,²⁵⁵ the Commission has treated fact-finding with regard to possible human rights violations in the same way as

251. Third Report on Syria, *supra* note 26, Annex II para. 48.

252. Fourth Report on Syria, *supra* note 33, para. 42.

253. *Id.* para. 63.

254. *Id.*

255. *See infra* Part III.D.

fact-finding in respect of possible violations of the law of armed conflict. This raises serious questions, not only as to the methodology applied, but also about the reliability of the Commission's findings.

C. Fact-finding in Human Rights Law vs Fact-Finding with Respect to the Law of Armed Conflict

Generally speaking, fact-finding is a traditional means of dispute settlement in public international law.²⁵⁶ Article 33 of the U.N. Charter refers to an "enquiry," and Article 34 empowers the Council to "investigate any dispute."²⁵⁷ While its potential has been further developed, its methodology has not necessarily done the same. Simply defined in this regard, fact-finding is a "method of ascertaining facts' through the evaluation and compilation of various information sources."²⁵⁸

In recent years, fact-finding missions authorized by the U.N. Secretary-General, the Council, or the HRC have become more frequent.²⁵⁹ This is particularly true with respect to alleged violations

256. Agnieszka Jachec-Neale, *Fact-Finding*, in THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, para. 1 (Rüdiger Wolfrum ed., 2008), available at <http://www.mpopil.com> ("Fact-finding' or 'inquiry' is a recognized form of international dispute settlement through the process of elucidating facts, given that it is the varied perceptions of these facts that often give rise to the dispute in the first place.").

257. U.N. Charter arts. 33, 34.

258. Théo Boutruche, *Credible Fact-Finding and Allegations of International Humanitarian Law Violations*, 16 J. CONFLICT & SECURITY L. 105, 106 (2011).

259. Quite a few analyses have since been provided. See, e.g., Christine M. Chinkin, *U.N. Human Rights Council Fact-Finding Missions*, in LOOKING TO THE FUTURE – ESSAYS ON INTERNATIONAL LAW IN HONOR OF W. MICHAEL REISMAN 475 (Mahmoud H. Arsanjani ed., 2011); Micaela Frulli, *Fact-Finding or Paving the Road to Criminal Justice? Some Reflections on United Nations Commissions of Inquiry*, 10 J. INT'L CRIM. JUST. 1323 (2012). However, what is still lacking is a comprehensive and critical assessment of mandate and methodology. See, e.g., Laurie R. Blank, *Finding Facts but Missing the Law: The Goldstone Report, Gaza and Lawfare*, 43 CASE W. RES. J. INT'L L. 279 (2010) (giving critical assessment of the Goldstone Report). For an interesting approach in terms of methodology (looking at best practices), see GERALD STEINBERG, ANNE HERZBERG & JORDAN BERMAN, BEST PRACTICES FOR HUMAN RIGHTS AND HUMANITARIAN NGO FACT-FINDING (2012). Some professors at the University of Leiden currently supervise a research project, which looks more closely at the various methodologies applied to fact-finding. See C.E.M. Harwood: Profile, UNIVERSITEIT LEIDEN,

of human rights, and to some extent, of the law of war. Fact-finding methodology differs greatly depending on the sponsor of the mission, but also on the subject matter. Even similar missions do not necessarily follow uniform methodology.²⁶⁰

This raises the question as to what extent fact-finding in human rights law and fact-finding in the law of armed conflict differ, not only in fact, but in law. With a view to the various missions that have been initiated in recent years, it has been pointed out that “fact-finding may at times comprise elements common in both IHL and human rights law fields,” but it is equally important to note that “differences exist, particularly with regard to the techniques that vary depending on the nature of the violations.”²⁶¹

Since the facts covered by a fact-finding mission are framed by the elements of the very rule allegedly violated, it is necessary to distinguish between human rights law and international humanitarian law. For example, the status of an individual as a civilian is important in international humanitarian law in order to apply the principle of distinction.²⁶² This status does not, however, play a major role in international human rights law. With respect to Syria, it has thus rightly been pointed out that “the issue of correct identification becomes crucial if the unrest in Syria does become a non-international armed conflict.”²⁶³ Also, the principle of proportionality has a different meaning in international human rights law than in international humanitarian law. The latter involves a balancing between the damage caused and military necessity,²⁶⁴ while the former raises the general question of whether a governmental measure excessively burdens the individual compared to the benefits the

<http://law.leiden.edu/organisation/publiclaw/publicinternationallaw/staff/catherine-harwood.html> (last visited Apr. 4, 2013) (“[R]esearch explores how international fact-finding investigations in (post)conflict situations may be coordinated and harmonised to strengthen international justice and accountability.”).

260. See *supra* note 259, for different approaches reflected in the analysis.

261. Boutruche, *supra* note 258, at 107.

262. See *supra* notes 247-48 and accompanying text.

263. Annyssa Bellal & Louise Doswald-Beck, *Evaluating the Use of Force During the Arab Spring*, 14 Y.B. INT’L HUMANITARIAN L. 3, 30 (2011).

264. On proportionality in the law of armed conflict, see Michael N. Schmitt, *Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance*, 50 VA. J. INT’L L. 795 (2010).

measure aims to secure.²⁶⁵ Thus, the scope and methodology of fact-finding may depend on the applicable law; in other words, “[i]nvestigating facts with an explicit or implicit link with violations requires, to a certain extent, a minimum amount of legal evaluation, for the mere purpose of defining the scope of the facts at stake.”²⁶⁶

The challenges involved in international humanitarian law fact-finding, however, are much broader. They begin with the determination of when the law of armed conflict begins to apply and when it stops applying.²⁶⁷ As such, armed conflict further complicates fact-finding. This includes security considerations for the mission itself, not only during actual combat operations but also thereafter. One such consideration is whether the area subject to an on-site visit includes explosive remnants of war.²⁶⁸ Military classification may limit access to information and testimonies may be extremely biased in respect to armed conflict situations.²⁶⁹ More important, perhaps, is the risk that fact-finding in the context of an armed conflict may compromise peace-building efforts though not necessarily to the extent that efforts to fight impunity may hamper reconciliation.²⁷⁰ The most serious challenges arise, however, from the relationship between international humanitarian law and human rights law, and “the difficulty of establishing violations by non-state actors.”²⁷¹

First, international human rights law tends to be more general in substance than international humanitarian law; the latter is often more detailed and specific while its scope of application tends to be rather limited. This does not exclude international humanitarian law from making “reference to facts, often even plans or perceptions of facts that are difficult to establish”²⁷²

265. For a critical assessment of the proportionality principle in the human rights context, see Stavros Tsakyrakis, *Proportionality: An Assault on Human Rights?* (The Jean Monnet Program, Working Paper No. 09/08, 2008), available at <http://centers.law.nyu.edu/jeanmonnet/papers/08/080901.pdf>.

266. Boutruche, *supra* note 258, at 112.

267. *See id.* at 120-121.

268. *See id.* at 121.

269. *See id.*

270. *Id.* at 122.

271. *Id.* at 123.

272. *Id.*

Second, in a non-international armed conflict, it is a major challenge to apply international humanitarian law to non-state actors.²⁷³ Even more so, ensuring compliance of armed groups with this body of international law is problematic.²⁷⁴ This is not to say that these groups are unwilling to comply, but they find themselves confronted with similar incentives for compliance and/or non-compliance as governments do. Furthermore, in addition to well-known patterns of compliance and non-compliance, armed groups cannot prepare in the same way for the situation in which they find themselves. For purposes of fact-finding, it is difficult for a commission to properly assess their actions, or to even to get hold of the appropriate situation at all, as it may sometimes be difficult to identify the person or persons in charge.

The third challenge that the Commission on Syria faced was the lack of access to the territory and to information directly emerging from the territory.²⁷⁵ In light of the resistance of the Syrian government to admit the Commission into its territory, the Commission had no other choice but to rely upon interviews conducted outside Syria, sometimes not even face-to-face, but through technological means.²⁷⁶ The evidentiary value of such interviews is relatively limited; especially in light of the fact that the Commission can only interview limited groups of people: those who have the privilege or capacity to leave the country, or who have access to capable technology.²⁷⁷

It is not disputed that certain facts could amount to a violation of international human rights law and international humanitarian law

273. For a critical assessment of the proportionality principle in the human rights context, see Tsakyrakis, *supra* note 265.

274. For an instructive discussion of incentives, see Olivier Bangerter, *Reasons Why Armed Groups Choose to Respect International Humanitarian Law or Not*, 93 INT'L REV. RED CROSS 882 (2011).

275. Fourth Report on Syria, *supra* note 33, para. 5 ("Lack of physical access to the country undermined the commission's ability to fulfill its mandate. Its access to Government officials and to members of the armed and security forces was limited. Victims and witnesses inside the country, especially those allegedly abused by anti-Government armed groups, could not be interviewed in person.").

276. *See id.* paras. 8-11.

277. *See id.* paras. 7-11 (detailing the methodology used in the report).

alike. However, this is not necessarily the case. The conclusions drawn may differ.

*D. Does Blurring the Lines Weaken Compliance with
the Applicable Law?*

Against this background the question arises whether blurring the lines weakens compliance with the applicable law. This question is not only relevant from the perspective of the applicable law, but even more so in light of the fact that fact-finding aims at enhancing compliance with the appropriate body of law. Fact-finding does serve to ensure accountability, perhaps even criminal responsibility, which is not conducive to an environment of impunity. Further, fact-finding also has a preventive effect. Particularly in situations of armed conflict, it would be a misperception to reduce fact-finding in such a way. Criminal law in general and international criminal law in particular, deals with the repression of crimes and takes a retrospective look at what happened. Fact-finding outside the ambit of criminal law, however, steps in at an earlier stage and seeks to enhance compliance with the law in the ongoing conflict rather than only having an impact on future conflicts.²⁷⁸ Preventing violations and enhancing compliance thus is the focus of fact-finding. In this sense, it strongly matters which body of the law is applied.

Treating human rights and humanitarian law alike and ignoring their differences will indeed entail the risk of weakening compliance with both bodies of the law.

For example, the right to life is protected under international human rights law.²⁷⁹ Arbitrary deprivation is unlawful.²⁸⁰ As far as the protection of physical integrity below the threshold of killing is

278. As Michael Bothe has pointed out, “[c]ertainty about actual facts often is a first step in ensuring compliance with an obligation.” Michael Bothe, *Fact-finding as a Means of Ensuring Respect for International Humanitarian Law*, in INTERNATIONAL HUMANITARIAN LAW FACING NEW CHALLENGES 249, 249 (Wolff Heintschel von Heinegg & Volker Epping eds., 2007).

279. For an overview, see Christian Tomuschat, *The Right to Life: Legal and Political Foundations*, in THE RIGHT TO LIFE 3 (Christian Tomuschat et al. eds., 2010).

280. ICCPR, *supra* note 223 at 174. The third sentence of Article 6(1) ICCPR clearly states that “[n]o one shall be arbitrarily deprived of his life.” *Id.*

concerned, international human rights law is largely limited to a prohibition of torture and inhumane treatment (as safeguarded, among others, by Article 7 of the ICCPR).²⁸¹

International humanitarian law, however, takes a different approach, it neither focuses on the right to life nor on the protection of physical integrity, because the principle of distinction prohibits making the civilian population the object of an attack.²⁸² This broadens the protection of the civilian population (compared to international human rights law) in the sense that even if neither bodily harm nor death occurs, an attack upon them is unlawful *per se*.²⁸³

On the other hand, the protection is less stringent in that so-called collateral damage may occur even if the principle of distinction is respected.²⁸⁴

It is thus a misperception to simply argue that international human rights law and international humanitarian law are complementary with respect to the right to life. They are simply different and pursue a different purpose. It is simply not convincing to generalize and argue that international human rights law and international humanitarian law both serve to protect human life. It is even misleading to argue that “[t]here can be no doubt that the right to life has always provided the

281. *Id.* at 175. Article 7 of the ICCPR reads: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.” *Id.*

282. On pertinent customary law obligations in times of non-international armed conflict, see MOIR, *supra* note 193, at 139-44.

283. As can be taken from Article 13(2) of AP II, which as such does not apply to Syria, but which may be considered customary international law: “The civilian population as such, as well as individual civilians, shall not be the object of attack.” AP II, *supra* note 248, art. 13(2). This is read as an “absolute obligation applicable at all times.” COMMENTARY ON THE ADDITIONAL PROTOCOLS 1451 (Yves Sandoz et al. eds., 1987). The protection afforded by Article 13 of AP II and pertinent customary international law requires “that precautions are taken both by the party launching the attack during the planning, decision and action stages of the attack, and by the party that is attacked.” *Id.* at 1449.

284. Orakhelashvili, *supra* note 221, at 169 (taking a slightly different approach in arguing that “humanitarian law serves as further elaboration of the parameters of the right to life in armed conflict, and defines circumstances in which the deprivation of life is or is not arbitrary.”).

background of IHL.”²⁸⁵ Modern law of armed conflict seeks to protect the civilian population from the effects of fighting, but it does not call into question military necessity as a criterion for balancing. The balancing is indeed between military necessity and, among others, the protection of the civilian population; it is a misperception to state “that IHL comes from an epoch when military thinking still largely dominated its architecture,”²⁸⁶ to continue that this “is susceptible of making a mockery of the entire carefully constructed edifice of IHL,”²⁸⁷ and to then conclude that “one cannot place full trust in traditional IHL without raising some questions.”²⁸⁸ Distinguishing between the two areas of the law requires precision to ensure optimum protection of not only, but primarily, the civilian population in situations of armed conflict.

Another example regarding the situation in Syria is the conditions for detaining individuals, even though the specific rules on prisoner of war status only apply in international armed conflict, hence, not to Syria.²⁸⁹ There are major differences between international human rights law and international humanitarian law with respect to detaining individuals. International human rights law incorporates a full set of *habeas corpus* principles, among others in Article 9 of the ICCPR.²⁹⁰ Treatment during detention is also governed by a particular set of standards (included, among others, in Article 10 of the ICCPR), focusing upon “humanity” and “respect for the inherent dignity of the human person.”²⁹¹ The object and purpose of these provisions again is to protect the individual against arbitrary behavior of the government

285. Tomuschat, *supra* note 221, at 17.

286. *Id.*

287. *Id.*

288. *Id.*

289. There is, however, agreement that detained fighters in non-international armed conflict enjoy the minimum guarantees under Common Article 3 GCs since they are “hors de combat” through detention. *See* MOIR, *supra* note 193, at 60.

290. Article 9(1) of the ICCPR reads: “Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.” ICCPR, *supra* note 223..

291. Article 10(1) of the ICCPR stipulates: “All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.” *Id.* art. 10(1).

and to ensure his or her liberty. The law of armed conflict pursues a different rationale, because its focus is not upon protecting the individual against governmental measures, but upon treatment of combatants and civilians by the enemy party.²⁹² Detaining combatants entails two distinct elements. First, their detention reduces the war fighting capacity of the enemy party and thus serves military purposes.²⁹³ Second, combatants enjoy prisoner of war status with appropriate standards of treatment during internment and with an obligation to immediately release these prisoners when the armed conflict comes to an end.²⁹⁴ Civilians, in situations of armed conflict, may only be arrested for particular reasons, with a minimum of due process standards as well as minimum standards of protection during detention.²⁹⁵ To a certain extent, these standards are similar to those included in international human rights instruments. However, those pertaining to combatants are not only different in terms of object and purpose, but also in terms of substance. There is no defined status as combatant in the law applicable to non-international armed conflicts, which has given rise to an ongoing debate on the rules applicable to detention.²⁹⁶

292. This can, among others, be taken from the notion of “protected persons,” which typically concerns civilians in the hands of the enemy and prisoners of war. See Cátia Lopes & Noëlle Quénivet, *Individuals as Subjects of International Humanitarian Law and Human Rights Law*, in INTERNATIONAL HUMANITARIAN LAW AND HUMAN RIGHTS LAW 199, 213 (Roberta Arnold & Noëlle Quénivet eds., 2008).

293. As rightly stated by rule 701 of the German military manual, “prisoners of war shall only be considered as captives detained for reasons of security, not as criminals”, meaning that detention serves “to prevent further participation in military operations against the detaining power.” Horst Fischer, *Protection of Prisoners of War*, in THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 367, 373 (Dieter Fleck ed., 2008).

294. Orakhelashvili, *supra* note 221, at 176 (referring to the U.N. Report on Guantánamo Detainees (U.N. Doc. E/CN.4/2006/120), and stating that, even with regard to unlawful combatants, “detention under humanitarian law is merely protective custody, unlawful combatants must be tried or released at the end of hostilities.”).

295. See Ryan Goodman, *The Detention of Civilians in Armed Conflict*, 103 AM. J. INT’L L. 48 (2009).

296. See generally Ashley S. Deeks, *Administrative Detention in Armed Conflict*, 40 CASE W. RES. J. INT’L L. 403 (2009).

There are many more examples to illustrate the need for carefully distinguishing between international human rights law and international humanitarian law. They each have to be applied on their own merits, with their own methodology, and by appropriately mandated and experienced bodies. Only then do pertinent rules of international law have a chance to be adequately applied and hopefully complied with. As has been pointed out, there are at least four major distinctions between international human rights law and international humanitarian law, namely:

[H]umanitarian law only applies in times of armed conflict, whereas human rights law applies at all times. Second, human rights law and humanitarian law are traditionally binding on different parties. While it is clear that humanitarian law is binding for “parties to the conflict”—that is, both state authorities and non-state parties. . . . Third, while most international human rights are with few exceptions derogable, humanitarian law is non-derogable. . . . Lastly, there are considerable differences in procedural and secondary rights, such as the right to an individual remedy. . . .²⁹⁷

Indeed, in the case of Syria, and as far as the HRC is concerned, also in other cases, the HRC and the Commission have contributed to blurring the lines between international human rights law and international humanitarian law. Even if this has been well-intentioned—and there are some who would argue that this has been politically motivated—it has not necessarily strengthened compliance with the two distinct bodies of international law; rather, it has at least equally weakened if not primarily weakened such compliance. Sailing close to the wind may thus be assessed in rather critical terms.

IV. THE BENEFITS OF SAILING CLOSE TO THE WIND

This critical analysis would go too far if it only focused on the negative effects of sailing close to the wind.²⁹⁸ There are indeed some

297. Droege, *supra* note 220, at 521.

298. It must be taken into account that the inquiry started as an inquiry into human rights violations. Therefore, even before the situation in Syria developed into a non-international armed conflict commentators rightly pointed out that, in such a situation, “the legal situation in Syria regarding use of force would probably

benefits in the approach taken by the HRC and the Commission, which must be highlighted here.

The second section of this paper explained that the organized international community had its problems in even addressing the uprising in Syria.²⁹⁹ If the U.N. General Assembly and the HRC had not put Syria on their respective agendas, the Council might not have been in a position to follow suit. It was the pressure of other U.N. organs that made the Council at least address the issue, even though the Council's mission in Syria eventually was not successful in ending the fighting (and one must add, not even in addressing possible violations of either international human rights law or international humanitarian law). It is thus important to recognize that the U.N. General Assembly and the HRC deserve credit for putting potential violations of the law in Syria on the agenda of the international organized community.³⁰⁰

At this point, one might take the position that violations of international human rights law are a matter to be considered by the HRC anyway. Indeed, the HRC is competent to do so, and it has rightly established a fact-finding mission to consider human rights violations. No other universal organ was in a comparable position to do so, and no other universal organ is similarly experienced in the field. One must bear in mind that the HRC and the Commission were in a tremendously difficult situation when establishing the mission for at least two primary reasons. First, the debate about Syria had been extremely politicized in the sense that geostrategic aspects and considerations of regime change made any assessment of human rights violations a difficult matter *per se*. And, with the U.N. Secretary-General having more or less openly taken sides against Assad, the U.N. had lost some of its potential to mediate the conflict. Second, the Commission has not had access to Syria, thus the means of fact-finding were very limited from the outset.

When the situation in Syria developed into a non-international armed conflict, the situation became even more difficult, and one may actually make a good case here for the HRC and the Commission to address international humanitarian law in addition to international

become more complex." Bellal & Doswald-Beck, *supra* note 263, at 7.

299. See *supra* Part II.

300. See *supra* Part II.

human rights law. First, it would have been difficult to convey to the international community had the HRC stopped its fact-finding activities upon the uprising being qualified as a non-international armed conflict. Second, unfortunately, the law of war does not have a supervisory body at hand with the exception of the International (Humanitarian) Fact-Finding Commission (IHFFC) based upon Article 90 of the Additional Protocols I (AP I).³⁰¹

The IHFFC can also address non-international armed conflicts on the basis of common Article 3 of the GCs, and has expressed its willingness to do so.³⁰² Further, the IHFFC has a number of advantages compared to HRC fact-finding, in particular, its confidentiality.³⁰³ Despite these two facts, the Commission so far has not been mandated; even if Syria could have done so on an *ad hoc* basis, Syria has not generally recognized the competence of the IHFFC. This left the organized international community—and in particular the Commission established by the HRC—in a difficult position. Interpreting its mandate in a restrictive way, and limiting its

301. See, e.g., Elzbieta Mikos-Skuza, *The International Humanitarian Fact-Finding Commission*, in FRIEDEN IN FREIHEIT – FESTSCHRIFT FÜR MICHAEL BOTHE ZUM 70. GEBURTSTAG 481 (Andreas Fischer-Lescano, H.P. Gasser, T. Marauhn & N. Ronzitti eds., 2008); Heike Spieker, *International (Humanitarian) Fact-Finding Commission*, in MAX PLANCK ENCYCLOPEDIA OF PUB. INT’L LAW, (Rüdiger Wolfrum ed., 2011), available at www.mpepil.com; Charles H.B. Garraway, *The International Humanitarian Fact-Finding Commission*, 34 COMMONWEALTH L. BULL. 813 (2008).

301. Cf. *About Us—In a Few Words*, INT’L HUMANITARIAN FACT-FINDING COMMISSION, http://www.ihffc.org/index.asp?Language=en&page=aboutus_general (last visited Mar. 28, 2013).

302. *Id.*

303. According to Art. 90(5) of Protocol I to the Geneva Conventions of 12 August 1949, the Commission only reports to the parties, which have called upon it, and the “Commission shall not report its findings publicly, unless all the Parties to the conflict have requested the Commission to do so.” Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol 1) art. 90(5), *opened for signature* Dec. 12, 1977, 1125 U.N.T.S. 3 [hereinafter AP I]. Furthermore, there are explicit provisions on confidentiality in Rules 18, 28 and 29 of the Rules of the International Humanitarian Fact-Finding Commission. Int’l Humanitarian Fact-Finding Comm’n, *Rules of the International Humanitarian Fact-Finding Commission* (last amended 2011), available at http://www.ihffc.org/index.asp?Language=EN&page=rules_of_commission.

review to possible violations of international human rights law would have left possible violations of international humanitarian law unaddressed. There were no signs of *ad hoc* fact-finding efforts nor would the ICRC have been in a similar position to investigate, since this is not the ICRC's primary responsibility (and it might have put its unique capabilities at risk).

Thus, the Commission and the HRC deserve credit for taking up the issues, and sailing close to the wind. However, they also deserve criticism for not being sufficiently clear on the differences between international human rights law and international humanitarian law. They not only put compliance with both bodies of law at risk by blurring the lines, but they also put their own credibility at risk. A lot depends on the credibility of the international body that is in charge of such fact-finding. This notion of credibility extends across mandate, methodology, expertise, and more.

There is a resulting sense of uneasiness that one is left with towards the end of this critical analysis of fact-finding in Syria. In terms of providing a forum, the HRC deserves credit; in terms of substance, the HRC deserves criticism.

V. IMPROVING COMPLIANCE WITH THE LAW OF ARMED CONFLICT

This problem is, to a large extent, due to the lack of comprehensive supervisory mechanisms in the law of armed conflict. The three compliance mechanisms provided for in the GCs and AP I have yet to be used, or are not currently being used for the purpose of enhancing compliance with international humanitarian law. The Protecting Powers mechanism as provided for in the GCs and in AP I applies in international armed conflicts only,³⁰⁴ and it was last used

304. See AP I, *supra* note 303, art. 5(1) ("It is the duty of the Parties to a conflict from the beginning of that conflict to secure the supervision and implementation of the Conventions and of this Protocol by the application of the system of Protecting Powers, including, inter alia, the designation and acceptance of those Powers, in accordance with the following paragraphs. Protecting Powers shall have the duty of safeguarding the interests of the Parties to the conflict."); see also, Geneva Convention Relative to the Treatment of Prisoners of War art. 126, Aug. 12, 1949, 6 U.S.T. 3316, 3516 U.N.T.S. 287 [hereinafter GC III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 143, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV].

several decades ago.³⁰⁵ Individual states have sought to use the formal Enquiry Procedure that was already established in 1929, and subsequently included in the GCs.³⁰⁶ Yet, none of the efforts have resulted in its actual launching.³⁰⁷ Finally, the already-mentioned IHFFC, based upon Article 90 of AP I, and established in 1991, has not been triggered to date.

It is against this background that the 31st International Conference of the Red Cross and the Red Crescent (“Conference”) adopted Resolution 31IC/11/R1 on “Strengthening Legal Protection for Victims of Armed Conflicts.”³⁰⁸ In this Resolution, the Conference stressed “that greater compliance with international humanitarian law is an indispensable prerequisite for improving the situation of victims of armed conflict,” and reaffirmed “the obligation of all States and all parties to armed conflict to respect and ensure respect for international humanitarian law in all circumstances.”³⁰⁹ The Conference invited:

[T]he ICRC to pursue further research, consultation and discussion in cooperation with States and, if appropriate, other relevant actors, including international and regional organisations, to identify and propose a range of options and its recommendations to: i) ensure that international humanitarian law remains practical and relevant

305. Hans-Joachim Heintze, *Protecting Power*, in THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Rüdiger Wolfrum ed., 2009), available at www.mpepil.com.

306. The Enquiry procedure is included in articles 52 of Geneva Convention I, 53 of Geneva Convention II, 132 of Geneva Convention III, and 149 of Geneva Convention IV. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 52, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 53, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; GC III, *supra* note 304, art. 132; GC IV, *supra* note 304, art. 149. See Jean Pictet, HUMANITARIAN LAW AND THE PROTECTION OF WAR VICTIMS 73 (Leiden 1975), for examples of attempts to make use of the enquiry procedure.

307. See generally Knut Dörmann, *Dissemination and Monitoring Compliance of International Humanitarian Law*, in INT’L HUMANITARIAN LAW: FACING NEW CHALLENGES 227, 237 (Wolff Heintschel von Heinegg & Volker Epping eds., 2007).

308. ICRC, *Strengthening Legal Protection for Victims of Armed Conflicts*, 31IC/11/R1 (Nov. 28 – Dec. 1, 2011), available at http://www.icrcconference.org/docs_upl/en/R1_Strengthening_IHL_EN.pdf.

309. *Id.* pmbl.

in providing legal protection to all persons deprived of their liberty in relation to armed conflict; and ii) enhance and ensure the effectiveness of mechanisms of compliance with international humanitarian law³¹⁰

The Conference expressed its appreciation “to the government of Switzerland for its commitment to explore and identify concrete ways and means to strengthen the application of international humanitarian law and reinforce dialogue on international humanitarian law issues among States and other interested actors, in cooperation with the ICRC.”³¹¹ This latter part of the resolution is the basis for the “Swiss-ICRC Initiative to strengthen compliance with International Humanitarian Law.”³¹²

This initiative was launched in early 2012 with the first objective to enable states to engage in a regular and systematic dialogue on international humanitarian law issues, especially on strengthening and compliance. As an initial step, the Swiss government and the ICRC jointly developed a framework to invite states to an informal “Meeting of States” in Geneva on July 13, 2012.³¹³ On this occasion, participants exchanged views on ways of strengthening compliance with international humanitarian law and on possible ways forward.³¹⁴ This state-driven process may put the responsibility of ensuring compliance with the law of armed conflict back into the hands of states. In its concluding remarks, the chair not only raised questions about the ability of existing mechanism to meet today’s challenges with respect to compliance with international humanitarian law, but the chair also identified institutional lacunae with regard to international humanitarian law institutions and noted that states are

310. *Id.* para. 6.

311. *Id.* para. 7.

312. See Fed. Dep’t of Foreign Affairs, *Swiss-ICRC Initiative to Strengthen Compliance with International Humanitarian Law (IHL)*, SCHWEIZERISCHE EIDGENOSSENSCHAFT, <http://www.eda.admin.ch/eda/en/home/topics/intla/humlaw/swieng/icrc.html> (last visited Mar. 28, 2013).

313. ICRC, *Informal Meeting on Strengthening Compliance with International Humanitarian Law, Concluding Remarks* (July 13, 2012), available at http://www.eda.admin.ch/etc/medialib/downloads/ihl.Par.0004.File.tmp/31.08.12_%20ConcludingRemarks13Julylogo.pdf.

314. See *id.* at 1.

beginning to make use of other forums, such as the HRC and the Security Council.³¹⁵ With respect to these organs, the chair explicitly stated:

[t]he attention these organs pay to IHL is positive. It shows an increasing awareness of the international community for IHL matters. However, as many delegations have noted, there are specificities of armed conflict, and consequently of IHL application, which bodies established under other branches of law are not able to fully address. Due to these inherent limitations it will be necessary to examine possible avenues for ensuring respect for IHL by means of IHL compliance mechanisms.³¹⁶

Delegations concurred that states lack a forum to regularly exchange views on current international humanitarian law issues and there was agreement to continue discussions and to enhance the ability of the international community to ensure compliance with international humanitarian law in a far better way than before.

CONCLUSION

The Commission and the pertinent resolutions of the HRC on Syria underline the necessity to continue with the state-driven process initiated by Switzerland and the ICRC in order not to just sail close to the wind, but to have a distinct, competent, and credible fact-finding mechanism for matters arising with respect to the law of armed conflict.³¹⁷ Whether the IHFFC will come to play a major role within this process is an open question. It is, however, currently the only organ that is specialized in the law of armed conflict, and thus competent to specifically address compliance with international humanitarian law. To make the IHFFC operational beyond its narrowly defined original mandate will, however, depend on the political support coming from states, who in this particularly sensitive area of international law are not only the most important actors, but also those who must live up to their responsibility. They may

315. *Id.* at 2.

316. *Id.*

317. See Boutruche, *supra* note 258, at 106-08 (stressing credibility as a crucial component to any meaningful fact-finding).

eventually feel more prepared to do so in a state-driven process (possibly with a sense of confidentiality), than in a process fully conducted in the open and more designed to name and shame than to assist and promote compliance.

Regarding the dramatic situation in Syria, the difficult question is whether, and to what extent, the Commission could contribute to improving the situation. While the Commission had to cope with the worsening of the situation anyway, it sought not to ignore possible violations of international humanitarian law. However, on the ground, it seems pretty clear that the Commission could not contribute to improve compliance with international humanitarian law. It may be that, after the end of the conflict, it will be in a position to provide information so as to avoid impunity. But in light of the limited evidentiary value of the information collected, and in light of its blurring the lines between human rights law and international humanitarian law, even this seems doubtful. In addition, the conflict in Syria is so politicized for many reasons that fact-finding with reports to be published and, thus, fact-finding with an inherent tendency to name and shame, might not contribute to improving the situation on the ground. Confidential fact-finding might enhance trust between the parties to the conflict and perhaps open a door for mitigating the conflict. But this was not what the Commission could nor what it wanted to do.

The HRC and the Commission on Syria have, by sailing close to the wind, contributed to enhancing the debate on compliance with international humanitarian law perhaps to a greater extent than originally envisaged. One takeaway from the experience with the Commission on Syria is that it is important to have a forum for not only addressing possible violations of international human rights law, but for dealing with possible violations of international humanitarian law. The two bodies should, however, be more clearly separated from each other—not just in theory, but in practice. This can also be taken from the Commission's work. Otherwise, it must be feared that both bodies of law and compliance therewith, will be weakened.

