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Classifying the Conflict in Syria

Terry D. Gill*

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I. INTRODUCTION

The armed conflicts currently underway in Syria have grown from a popular uprising which started in February–March 2011 to become a complex set of conflicts involving myriad contending parties that include both State and non-State actors.¹ This article will attempt to provide a classification of the various conflicts currently underway within the borders of the Syrian Arab Republic from the perspective of international humanitarian law (IHL) and assess how they relate to each other and to related but separate conflicts taking place in neighboring countries. It will also consider the two main contending views concerning the role consent of the government to foreign military intervention plays in classification of conflict and determine how this affects the manner in which the conflicts in Syria are characterized. Finally, it will comment on the extent to which the classification of the conflict matters in terms of the applicable law.

The article is structured as follows. First, a short factual overview of the various parties and their alignments within the conflicts will be provided in Part II. This will serve as a basis for further assessment and evaluation of the applicable law. Following that, the applicable law relating to the classification of conflict under IHL will be set out in Part III. In that context, the two main contending views relating to the effect of consent (or lack thereof) by a government to foreign military intervention will be discussed. In Part IV, the law relating to the classification of conflicts will be applied to the factual situation set out in Part II. In Part V attention will be devoted to the question whether and to what extent the classification of a conflict matters in terms of the applicable law. Finally, in Part VI, a number of conclusions will be drawn.

II. THE MAIN CONTENDERS

There are reportedly hundreds (by some accounts approximately 1,500) of armed groups and militias active in the Syrian conflict.² Many, indeed most of them, follow their own agendas and are primarily active on a local level.

1. For an overview of the conflict in Syria, see *Involvement in Armed Conflicts: Syria*, RULAC, <http://www.rulac.org/countries/syria> (last visited May 30, 2016).

2. CHRISTOPHER M. BLANCHARD ET AL., CONG. RESEARCH SERV., RL33487, ARMED CONFLICT IN SYRIA: OVERVIEW AND U.S. RESPONSE 9 (Oct. 9, 2015), <https://www.fas.org/sgp/crs/mideast/RL33487.pdf>.

The situation is fluid and characterized by a shifting pattern of alliances, cooperation and clashes between the various groups. It would be well-nigh impossible to draw a coherent picture of the entire mosaic of armed groups and their aims, actions and alignments. Nevertheless, it is possible to identify the main parties and give an overall picture of where they stand in the conflicts. In addition, a number of States have directly intervened in Syria, some with, others without, Syrian government consent. As will next be discussed, the multitude of actors has resulted in a number of interrelated overlapping armed conflicts, but ones which have certain aspects of particularity in terms of the protagonists and their respective aims.

A. Syrian Government and its Allies

The Syrian government of President Bashar al Assad is still in control of the capital; the machinery of government; the armed forces; much of the western part of the country, which provides the government at least partial control of nearly all the major urban centers such as Homs, Hama and Aleppo; and almost all the coastal region, including the port of Latakia. The armed forces, although much diminished in size since the outbreak of the conflict due to losses and desertion, are still estimated to have 100,000–125,000 personnel and are the only Syrian party in the conflicts with air and naval forces.³ Notwithstanding the withdrawal of recognition by a significant number of important States within the region and further afield, the Syrian government still maintains diplomatic relations with a large number of countries and continues to represent the country in the United Nations. It is consequently still the “Government of Syria” from an international legal perspective.⁴

The Syrian government is supported within the country by a large pro-government militia known as the National Defense Forces (NDF), which

3. *Id.* at 12

4. There is a strong presumption in favor of an established government as constituting the government of a State. Non-recognition of governments has little legal significance and is primarily a political signal of disapproval of a particular government’s policies. As long as the government has control over essential parts of a State and State apparatus such as the armed forces, treasury, etc. and continues to enjoy wide representation and conduct international relations on behalf of the State, it is presumed to be the government of that State from a legal perspective. For commentary on recognition of governments and its primarily political function, see e.g., IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 88–93 (4th ed. 1990); MALCOLM N. SHAW, *INTERNATIONAL LAW* 328–32 (7th ed. 2014).

has been organized by the government with Iranian assistance. It participates in both defensive and offensive operations against opposition forces under the overall coordination of the armed forces. The NDF and associated pro-government militias reportedly number between 60,000 and 80,000 fighters. In addition to these indigenous forces, there are also a large number of foreigners fighting on behalf of the government. These include the Lebanese Shi'ite militia Hezbollah, with an estimated 5,000–8,000 fighters active in Syria, and between 5,000 and 10,000 Iraqi and Afghan Shi'ite fighters organized in separate units and fighting alongside other pro-government forces.⁵

Two States are known to have military forces active in the conflict in support of the Syrian government. These are Iran, which has close ties with the Assad government and has reportedly deployed several thousand members of the Revolutionary Guard in direct support of Syrian military operations, in addition to providing training, military advice and substantial financial support,⁶ and the Russian Federation, which had approximately 4,000 personnel deployed in Syria as of November 2015.⁷ The Russian forces have included ground forces, naval units and, in particular, combat aircraft and helicopters that have been used in airstrikes against ISIS and other opposition groups since their arrival in the country in late August–early September 2015.

Both Russia and Iran have, alongside other aims, the shared objective of shoring up their common ally the Syrian government, aiding it in regaining some of the strategic areas it has lost, and ensuring the inclusion of the government and its supporters in any overall peace agreement that may emerge. For its part, the Syrian government is intent on retaining as much

5. THE CARTER CENTER, SYRIA: PRO-GOVERNMENT PARAMILITARY FORCES 4 (2013), https://www.cartercenter.org/resources/pdfs/peace/conflict_resolution/syria-conflict/Pro-GovernmentParamilitaryForces.pdf; see also BLANCHARD ET AL., *supra* note 5, at 12.

6. Sam Dagher & Asa Fitch, *Iran Expands Role in Syria in Conjunction with Russia's Airstrikes*, WALL STREET JOURNAL (Oct. 2, 2015), <http://www.wsj.com/articles/iran-expands-role-in-syria-in-conjunction-with-russias-airstrikes-1443811030>. See also *Iran's Evolving Policy in Iraq and Syria*, THE ECONOMIST (Jan. 8, 2015), <http://country.eiu.com/article.aspx?articleid=1032642887&Country=Syria&topic=Politicst>.

7. Maria Tsvetkova, *Russian Soldiers Geolocated by Photos in Multiple Syria Locations*, *Bloggers Say*, REUTERS, Nov. 8, 2015, <http://www.reuters.com/article/us-mideast-crisis-syria-russia-idUSKCN0SX0H820151108>. In March 2016, Russia announced a partial withdrawal of its forces; however, significant forces will remain. See *Putin the Peacemaker*, THE ECONOMIST, Mar. 19, 2016, at 31, <http://www.economist.com/news/middle-east-and-africa/21694996-putin-appears-turn-hard-power-diplomacy-russians-show-their-hand>.

power as possible and not being excluded from any settlement that may be reached.

B. The Mainstream Syrian Opposition and the Al Nusra Front

The Syrian opposition consists of a large number of disparate armed groups and local militias, which can be roughly divided into two main coalitions (not including either the Islamic State of Iraq and Syria (ISIS), or the Kurdish opposition, both of which will be treated separately). One of these is the loose coalition (or rather two sub-coalitions) composed of a mixture of secular and Islamist armed groups that together form the mainstream opposition. The secular opposition includes a number of armed groups collectively known as the Free Syrian Army (FSA), which emerged in the early stages of the anti-government insurgency in 2011 and is partly made up of former members of the armed forces. However, despite the name, the FSA is possibly as much a label as a coherent military organization and has lost much terrain to other opposition groups, in particular to the Islamist opposition.⁸ The mainstream Islamist opposition is loosely organized into what is known as the Islamic Front.⁹ These two mainstream opposition armed groups cooperate to a certain extent and each has received a significant degree of foreign support in the form of arms, training and finances. However, neither has a central command structure that exercises effective operational control over the various groups under its umbrella. Moreover, some of the groups have clashed with one another. Some of these opposition groups are represented in the Syrian National Coalition, the political arm of part of the opposition,¹⁰ which has been recognized by some eighty States and the European Union as the “legitimate representatives of the Syrian people” and is represented in the Arab League.¹¹

8. See, e.g., JOSEPH HALLIDAY, INSTITUTE FOR THE STUDY OF WAR MIDDLE EAST SECURITY REPORT 3: SYRIA’S ARMED OPPOSITION 6, 14–17 (2012), http://www.understandingwar.org/sites/default/files/Syrias_Armed_Opposition.pdf.

9. *Leading Syrian Rebel Groups Form New “Islamic Front,”* BBC (Nov. 22, 2013), <http://www.bbc.com/news/world-middle-east-25053525>.

10. Abdullah Rebhy, *Syrian Opposition Groups Reach Unity Deal*, SEATTLE TIMES (Nov. 22, 2012), <http://www.seattletimes.com/nation-world/syrian-opposition-groups-reach-unity-deal/>.

11. The Free Syrian Army is represented in the Syrian National Council (SNC); however, the Islamic Front rejects the SNC. See, e.g., *“Their Own Men”: Islamist Rebels Sever Ties with the Political Opposition*, THE ECONOMIST (Sept. 28, 2013), <http://www.economist.com/news/middle-east-and-africa/21586879-islamist-rebels-sever-ties-political-opposition-the>

The other main coalition is made up of a variety of jihadist armed groups associated with the Al Qaida movement; the most important of which is the Al Nusra Front and its allies. This coalition, while vehemently opposed to the government, has clashed with the more secular non-jihadist opposition on occasion, and has taken control of areas formerly in the hands of the mainstream opposition in the northern part of Syria. Al Nusra does, however, cooperate with some of the groups within the more mainstream Islamic Front, but, after it rejected a merger with ISIS in February 2014, the two groups have gone separate ways.¹² The various groups which make up the Islamic Front are divided in their attitude toward the Al Qaida-affiliated Al Nusra and ISIS; some have terminated cooperation with the secular opposition and, in fact, are more aligned with the jihadist groups than with the mainstream opposition.¹³ However, the patterns of alignment and infighting between opposition groups is fluid and subject to change, making it extremely difficult to draw a coherent picture of how groups stand at any particular time and their objectives beyond stating that they are as much rivals for power as opponents to the government. It is estimated that the various opposition groups, including the Al Nusra Front, but excluding ISIS and the Kurdish opposition, controlled approximately 20 percent of Syrian territory as of late 2015.¹⁴ The primary aim of the main-

ir-own-men. For an overview of the international recognition of the SNC and its membership in the Arab League, see *National Coalition for Syrian Revolutionary and Opposition Forces*, WIKIPEDIA, https://en.wikipedia.org/wiki/National_Coalition_for_Syrian_Revolutionary_and_Opposition_Forces (last visited May 30, 2016).

12. For an extensive treatment of Al Nusra's strategy and objectives, see JENNIFER CAFARELLA, INSTITUTE FOR THE STUDY OF WAR, MIDDLE EAST SECURITY REPORT 25: JABHAT AL-NUSRA IN SYRIA—AN ISLAMIC CALIPHATE FOR AL-QAEDA (2014), <http://www.understandingwar.org/sites/default/files/JN%20Final.pdf>. The Khorasan Group coordinates with and is affiliated to some extent with Al Nusra, sharing common roots with the Al Qaida umbrella organization, but has a separate agenda, which according to U.S. intelligence includes conducting strikes against Western targets inside and outside the region. See, e.g., *Syria Airstrikes Fail to Cripple Khorasan Threat*, TIMES OF AP (Oct. 10, 2014), <http://timesofap.com/politics/syria-airstrikes-failed-to-cripple-khorasan-threat.html>. For an overview of Syrian rebel groups and the split between Al Nusra and ISIS, see, e.g., Erika Solomon & Oliver Holmes, *Factbox: Syria's Rebel Groups*, REUTERS (Jan. 3, 2014), <http://www.reuters.com/article/us-syria-crisis-rebels-factbox-idUSBREA120O220140203>.

13. For information regarding the attitude of various Syrian opposition armed groups to ISIS, see Aron Lund, *Pushing Back against the Islamic State of Iraq and the Levant: The Islamic Front*, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE (Jan. 8, 2014), <http://carnegieendowment.org/syriaincrisis/?fa=54121>.

14. For an overview of the relative area under control of various parties to the conflict, see Joshua Landis, *Why Syria is the Gordian Knot of Obama's Anti-ISIL Campaign*,

stream opposition is overthrow of the present government, but the secularists and Islamists do not necessarily share the same longer term objective regarding the type of government they want to establish if that aim were achieved. The jihadist Al Nusra Front and some of the other more mainstream Islamist groups' objective is to establish a Salafist theocratic government, but beyond that their agendas may also differ radically.

C. ISIS

ISIS (also known as IS, ISIL and Daesh) originated in Iraq as an affiliate of the Al Qaida movement. It grew out of the organization known as Al Qaida in Iraq which was active in the anti-United States/anti-Iraqi government insurgency from 2003 to 2013. In the early years of the Syrian conflict, ISIS was reportedly instrumental in helping to establish Al Nusra in Syria and has been active in the Syrian conflict since 2013. Following Al Nusra's refusal to merge with ISIS in February 2014, the two movements are no longer directly connected and, as stated previously, are opposed to each other, at least to some extent.¹⁵

ISIS controls a large swath of territory in Syria and Iraq and has its operational headquarters in the Syrian provincial city of Rakka. It is a self-proclaimed caliphate dedicated to establishing an ultra-radical Salafist Islamic State. Known for its radical version of Islam and its extremely brutal tactics, ISIS is involved in armed conflict with the Syrian government, the mainstream opposition and Kurdish forces in northern Syria; with the Iraqi government and Kurdish forces in the Kurdish autonomous region of northern Iraq; and with a significant number of States which support either the Syrian or Iraqi governments, or both. It has a highly coherent and effective military organization and a civil administration in the areas in which it exercises control. Estimates of its fighting strength vary, but according to the CIA it has some 20,000–31,500 fighters in Syria and Iraq. Other estimates place this total considerably higher.¹⁶

ALJAZEERA AMERICA (Sept. 15, 2014), <http://america.aljazeera.com/articles/2014/9/15/why-syria-is-the Gordian knot of Obama's anti-ISIS campaign.html>.

15. See, e.g., *What is "Islamic State,"* BBC (Dec. 2, 2015), <http://www.bbc.com/news/world-middle-east-29052144>.

16. *Id.* See also Jim Sciutto, Jamie Crawford & Chelsea J. Carter, *ISIS Can "Muster" between 20,000 and 31,500 Fighters, CIA Says*, CNN (Sept. 12, 2014), <http://edition.cnn.com/2014/09/11/world/meast/isis-syria-iraq/> (CNN quoting a CIA source on the strength of ISIS in September 2014). Other sources quote figures ranging from 80,000 to 200,000 fighters. See, e.g., *Islamic State "Has 50,000 Fighters in Syria,"* ALJAZEERA (Aug. 19,

D. *Kurdish Militias*

The de facto autonomous region of Syrian Kurdistan (also known as Rojava) is located in the northern area of Syria adjoining the border with Turkey. After the Syrian government withdrew its forces from most of the region in 2012, it came under the control of the Kurdish National Council and its subsidiary, the Kurdish Supreme Committee (hereinafter collectively referred to as the Kurdish Administration), which exercises political control over the areas it controls and over the armed Kurdish militias, principally the People's Protection Units (YPG). The YPG and associated Kurdish militias have clashed in the past with Islamist opposition armed groups over control of border crossings with Turkey, in particular with ISIS, which controls areas of territory directly adjacent to the Kurdish region. In these clashes, ISIS has lost significant amounts of territory to the YPG. Turkey has condemned the YPG and Kurdish Administration as a terrorist organization affiliated with the Kurdish Workers Party (PKK) with which Turkey has been in a longstanding armed conflict. There have been a number of armed clashes between Turkish forces and the YPG as a result of this mutual hostility.¹⁷

The Turkish claim that the YPG is a terrorist organization is not shared by Western governments and the United States has carried out numerous airstrikes in direct support of YPG forces in action against ISIS. The YPG receives a measure of foreign support from other, mostly Western, governments, including arms and non-lethal military equipment, and has had limited military assistance from the Iraqi Kurdish Peshmerga militia.¹⁸ It controls approximately 11.5 percent of Syria's territory and reportedly has around 40,000 fighters.¹⁹ The primary aim of the Kurdish political organi-

2014), <http://www.aljazeera.com/news/middleeast/2014/08/islamic-state-50000-fighters-syria-2014819184258421392.html> (citing 50,000 ISIS fighters in Syria and another 30,000 in Iraq).

17. See Jonathan Steele, *The Syrian Kurds are Winning!*, NEW YORK REVIEW OF BOOKS (Nov. 4, 2015), <http://www.nybooks.com/articles/2015/12/03/syrian-kurds-are-winning/> (reviewing MICHAEL M. GUNTER, *OUT OF NOWHERE: THE KURDS OF SYRIA IN PEACE AND WAR* (2015)).

18. *Id.*

19. Tom Perry, *Syrian Kurds Now Say They Now Control Territory the Size of Qatar and Kuwait Combined*, UK BUSINESS INSIDER (Aug. 14, 2015), <http://uk.businessinsider.com/syrian-kurds-now-say-they-now-control-territory-the-size-of-qatar-and-kuwait-combined-2015-8?r=US&IR=T>.

zations and the Kurdish militias is to achieve recognized far-reaching autonomy, resist its mortal enemy ISIS, and maintain and consolidate control over the Kurdish populated regions in Syria.

E. Anti-ISIS Coalition and Turkey

The United States led anti-ISIS coalition, which is actively engaged in conducting airstrikes against ISIS within Syria, consists of a group of some ten Western and regional States. Most of these are also engaged in conducting operations against ISIS in Iraq, but several of the coalition members have confined their operations to Syria (Turkey, Saudi Arabia and United Arab Emirates), while some States (Denmark and Belgium) engaged against ISIS in Iraq have to date not conducted operations in Syria.²⁰ Based on information from the U.S. Department of Defense, as of April 26, 2016, the coalition had carried out a total of 3,809 airstrikes within Syria, 3,577 conducted by the United States and 232 by other coalition members.²¹

The coalition commenced operations in August 2014 at the request of the Iraqi government following the advance of ISIS forces deep into Iraqi territory during that summer.²² The members of the coalition have based their use of force inside Syria on the right of (collective) self-defense in response to the advance of ISIS into Iraq and in response to terrorist acts attributed to ISIS in a number of States, including Turkey and France.²³

20. The States participating in airstrikes against ISIS in Syria are Australia, Bahrain, France, Jordan, the Netherlands, Saudi Arabia, Turkey, United Arab Emirates, United Kingdom and United States. For official figures, see *Operation Inherent Resolve: Targeted Operations against ISIL Terrorists*, U.S. DEPARTMENT OF DEFENSE (Apr. 26, 2016), http://www.defense.gov/News/Special-Reports/0814_Inherent-Resolve. Canada withdrew from active participation in airstrikes in February 2016, but at the same time tripled its involvement in the ground conflict. Emily Chan, "It is More Risky": Canada Enters New Role in Anti-ISIS Fight, CTV NEWS (Feb. 14, 2016), <http://www.ctvnews.ca/politics/it-is-more-risky-canada-enters-new-role-in-anti-isis-fight-1.2777342>.

21. *Operation Inherent Resolve*, *supra* note 20.

22. *Id.*

23. The United States informed the UN Security Council in September 2014 that it relied on Article 51 of the UN Charter as the legal basis for conducting airstrikes against ISIS in Syria in support of Iraq. See, e.g., Somini Sengupta, *U.S. Invokes Iraq's Defense in Legal Justification of Syria Strikes*, NEW YORK TIMES (Sept. 23, 2014), http://www.nytimes.com/2014/09/24/us/politics/us-invokes-defense-of-iraq-in-saying-strikes-on-syria-are-legal.html?_r=0. Canada, Australia and the United Kingdom have similarly invoked collective self-defense as the legal basis for their airstrikes. See Raphael Van Steenberghe, *From Passive Consent to Self-Defence after the Syrian Protest against the US-led Coalition*, EJIL: TALK! (Oct. 23,

The Syrian government has not consented to the coalition's operations within its territory and has characterized them as a violation of its sovereignty and as unlawful.²⁴ At the same time, the Syrian government has not actively opposed the coalition airstrikes and has refrained from taking action against coalition aircraft in its airspace. None of the coalition airstrikes have targeted Syrian government forces, installations or territory held by government forces. They have been almost exclusively directed against ISIS forces, oil installations operated by ISIS within territory it controls or targets in areas where its forces are active. The United States has conducted at least several airstrikes against the Khorasan Group within the Al Nusra Front.²⁵ Turkey has conducted a number of airstrikes and artillery bombardments against Syrian Kurdish forces and territory held by them, as it sees the YPG as an ally or extension of the PKK inside Turkey.²⁶ By contrast, the United States has coordinated a large number of airstrikes within Syria with the YPG and provided it with close air support in helping it retake control of certain key towns from ISIS.

III. CLASSIFICATION OF CONFLICT UNDER INTERNATIONAL HUMANITARIAN LAW AND THE ROLE OF CONSENT IN DETERMINING CONFLICT CLASSIFICATION

A. *Recognized Types of Armed Conflict under International Humanitarian Law*

Under IHL (also known as the law of armed conflict), there are two recognized types of armed conflict, each governed by its own legal regime. An international armed conflict (IAC) is one between two or more States and

2015), <http://www.ejiltalk.org/13758-2/>. For an analysis of the UK position, see, e.g., Arabella Lang, *Legal Basis for UK Military Action in Syria*, VOLTAIRENET.ORG (Nov. 26, 2015), <http://www.voltairenet.org/article189449.html>. France had initially cited collective self-defense as the legal justification for its actions, but following the November 13, 2015 attacks in Paris and Saint-Denis indicated it was now also acting in individual self-defense. See, e.g., U.N. SCOR, 70th Sess., 7565th mtg. at 2, U.N. Doc. S/PV.7565 (Nov. 20, 2015).

24. Permanent Rep. of the Syrian Arab Republic to the U.N., Identical Letters dated September 16, 2015 from the Permanent Rep. of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council, U.N. Doc. S/2015/718 (Sept. 17, 2015).

25. See Jordain Carney, *US Targets the Khorasan Group with a New Round of Airstrikes*, DEFENSEONE (Nov. 6, 2014), <http://www.defenseone.com/threats/2014/11/us-targets-khorasan-group-new-round-airstrikes/98417/>.

26. See *Turkey v Syrian Kurds v Islamic State*, BBC (Feb. 19, 2016), <http://www.bbc.com/news/world-middle-east-33690060>.

is subject to the rules of all applicable treaties to which the belligerent States are party and to customary IHL rules pertaining to such conflicts. The threshold for such a conflict according to the generally held position (to which this author subscribes) is low and is often referred to as “the first shot theory.”²⁷ Under this approach, any use of force by one State against another State’s armed forces, or any total or partial occupation of another State’s territory irrespective of whether it is opposed, will trigger the existence of an armed conflict between those States.²⁸ According to this view, a border skirmish or isolated incident would not require the application of the whole body of IHL (e.g., the rules relating to the treatment of prisoners of war do not apply until prisoners have in fact been taken and the rules of belligerent occupation only apply if territory is placed under occupation, etc.). This is not to say that IHL would not apply, it is simply the consequence of the factual situation.

The other theory relating to the IAC threshold presumes that relatively small-scale incidents between State armed forces do not trigger an armed conflict; that only a reasonably sustained use of force by one State against another State, or sustained conflict between their armed forces are required for the existence of an international armed conflict.²⁹ This approach risks creating a legal vacuum, which is why the low threshold is generally held as the better view.³⁰

The second type of armed conflict is a non-international armed conflict (NIAC) in which at least one of the parties is a non-State actor (ordinarily an organized armed group (OAG)). The threshold for this type of armed

27. INTERNATIONAL INSTITUTE OF HUMANITARIAN LAW, XXXVIII ROUND TABLE ON CURRENT ISSUES OF INTERNATIONAL HUMANITARIAN LAW, THE DISTINCTION BETWEEN INTERNATIONAL AND NON-INTERNATIONAL ARMED CONFLICTS: CHALLENGES FOR IHL? Sanremo, Sept. 3–5, at 3 (2015), <http://www.iihl.org/wp-content/uploads/2015/12/Pedrazzi.pdf> [hereinafter IIHL XXXVIII ROUND TABLE].

28. *See, e.g.*, Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 1, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; COMMENTARY TO GENEVA CONVENTION I FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 32–33 (Jean Pictet ed. 1952) [hereinafter ICRC COMMENTARY (1952)].

29. Use of Force Committee, *Final Report on the Meaning of Armed Conflict*, in INTERNATIONAL LAW INTERNATIONAL LAW ASSOCIATION: REPORT OF THE SEVENTY-FOURTH CONFERENCE 677, 692–708 (Christine Chinkin, Sarah Nouwen & Christopher Ward eds., 2010).

30. Dapo Akande, *Classification of Armed Conflicts: Relevant Legal Concepts*, in INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS 32, 41–42 (Elizabeth Wilmshurst ed., 2012).

conflict is somewhat higher, requiring the parties to have a minimum degree of organization sufficient to conduct and coordinate operations and a degree of intensity that rises above internal unrest, sporadic violence or terrorist incidents.³¹ Such a conflict can be between a government and one or more OAGs, or between two or more OAGs.³² Some writers have put forward arguments in favor of accepting a third category of armed conflict, sometimes referred to as a “transnational armed conflict.”³³ Such a classification could apply to conflicts between a State and an OAG which operates across international frontiers; however, this theory has not gained general acceptance and will not be considered further.³⁴ Thus, in situations where an OAG engages in operations that cross international borders, the conflict will either be international or non-international in character. It is argued below that such conflicts remain non-international unless certain conditions are met.

If an OAG is acting under the control of an outside State, or an outside State militarily intervenes on the side of an insurgent or rebel armed group against the armed forces of the State where the conflict is ongoing, the possibility arises that the conflict, which was hitherto non-international in character can become internationalized, triggering the applicability of the IAC IHL regime. The level of control necessary for the conflict to become internationalized is somewhat contested, but the prevailing view is that once a State exercises “overall control” over the OAG, the conflict becomes internationalized.³⁵ While the overall control standard is not sharply defined and has met with a degree of criticism by some commentators,³⁶ at

31. IHL XXXVIII ROUND TABLE, *supra* note 27, at 7 paraphrasing Article 1(2) of AP II.

32. Prosecutor v. Tadić, Case No. IT-94-1-AR72, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. for the former Yugoslavia Oct. 2, 1995) [hereinafter Tadić Interlocutory Appeal decision].

33. See, e.g., Geoffrey Corn, *Hamdan, Lebanon and the Regulation of Armed Hostilities: The Need to Recognize a Hybrid Category of Armed Conflict*, 40 VANDERBILT JOURNAL OF TRANSNATIONAL LAW 295 (2006).

34. See, e.g., Noam Lubell, *The War (?) against Al Qaeda*, in INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS, *supra* note 30, at 421, 439–40.

35. Jann Kleffner, *Human Rights and International Humanitarian Law: General Issues*, in THE HANDBOOK OF THE INTERNATIONAL LAW OF MILITARY OPERATIONS 35, 41–42 (Terry Gill & Dieter Fleck eds., 2d ed. 2015) (citing Tadić Interlocutory Appeal decision, *supra* note 32, ¶ 122).

36. Akande, *supra* note 30, at 60–61 (referring to the International Court of Justice judgment in Application of the Convention on the Prevention and Punishment of the

the very least the intervening State must have a significant role in the planning and coordinating of the military operations of the OAG.

The more stringent “effective control” standard requires a higher degree of involvement and control by the intervening State over the operations of the OAG,³⁷ although this standard may be more relevant in terms of attributing the acts of the OAG to the intervening State in the realm of international responsibility than in classification of the conflict. The question, however, is not completely settled as a matter of law.³⁸ In any case, for the purposes of further discussion, the overall control standard will be taken as the requisite standard for classification of a conflict. If an outside State directly intervenes militarily, the conflict can either become completely international in character if the OAG is in fact incorporated into the armed forces of the intervening State, but more often there will be two parallel conflicts; one of an international character between the intervening State and the territorial State if there are armed clashes between their respective armed forces or the intervening State occupies part of the territory of the territorial State and one of a non-international character between the OAG and the armed forces of the territorial State.

In NIACs the applicable treaty law is much more limited than in IACs. The only universally applicable treaty provision is Common Article 3 of the Geneva Conventions.³⁹ In some cases, Additional Protocol II⁴⁰ to the Geneva Conventions may be applicable if the State where the conflict is underway is a party thereto and the requisite conditions for its applicability have been met. In addition, there are several other conventional instruments which may be applicable provided the State where the conflict is occurring is a party to them.⁴¹ More importantly, many of the customary

Crime of Genocide (Bosn. & Herz. v. Serb. and Montenegro), 2007 I.C.J. 43, ¶¶ 385–95 (Feb. 26)).

37. Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, at 65 (June 27).

38. Kleffner, *supra* note 35, at 41–42.

39. *See, e.g.*, Geneva Convention I, *supra* note 28, art. 3.

40. Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609].

41. *See, e.g.*, Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, Mar. 26, 1999, 2253 U.N.T.S. 172 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Apr. 10, 1981, 1342 U.N.T.S. 137, Amended Dec. 21, 2001.

rules of IHL are applicable to NIAC. According to the International Committee of the Red Cross's (ICRC) customary IHL study, there are 148 such customary rules applicable to NIACs.⁴² Assuming that determination is an accurate rendition of the law, this has greatly narrowed the normative gap between the two types of conflict. Nevertheless, differences remain and their significance will be examined in Part V.

B. Consent of the Territorial State as an Element in Conflict Classification

A question of relevance in both legal theory and in the context of the classification of the conflicts in Syria is the effect of a lack of consent by a territorial State to a military intervention by a foreign State directed against an OAG operating on or from its territory. In recent practice there are many instances in which an outside State has conducted military action against an OAG on the territory of another State. This is distinct from either a military intervention by a State against the territorial State itself or a military intervention with the consent of the territorial State. An attack on a State's armed forces or national resources (population centers, State organs, industrial, and transportation and communications infrastructure) would obviously constitute an IAC.⁴³ The lack of consent here is simply an obvious by-product of the fact that one State is engaged in an armed conflict with another through its attacks on that State. Likewise, as already indicated, an occupation by a State of all, or a portion of, another State's territory will trigger the IAC IHL regime, irrespective of whether the occupation is forcibly opposed. In the case of a military intervention on the side of a State in an internal conflict, the conflict will remain non-international and the element of consent is usually clear.⁴⁴

The matter is less clear, however, when a State intervenes in another State's territory without the latter's consent and directs its military action solely against an OAG located in the territorial State. This usually occurs because the group is conducting armed acts against the intervening State from the territorial State. One view, which is reflected in judicial decisions and the writings of some authorities, is that any State intervention on another State's territory in the absence of that State's consent will constitute an IAC. Under this view, the intervention is seen as necessarily constituting

42. 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005); Kleffner, *supra* note 35, at 42.

43. *See supra* note 28 and accompanying text; *supra* note 32 and accompanying text.

44. *See, e.g.*, Kleffner, *supra* note 35, at 42.

an intervention against that State as a consequence of its non-consensual character.⁴⁵ The other school of thought (to which this author adheres) is that an intervention directed exclusively against an OAG, which does not target the territorial State's organs or "national assets" (State property, critical infrastructure, industrial base, population, etc., in so far as these are under the control of the State), is not directed against the State, but rather is against the armed group and therefore remains, in principle, a NIAC (assuming the requisite intensity and organizational criteria are satisfied), notwithstanding the lack of consent by the territorial State.⁴⁶

There are cogent arguments to be made in support of both views and it is fair to say that the matter is not definitively settled under international law. However, the more persuasive view based on a number of considerations, most of them pointing firmly in the same direction, is that such situations should be treated as NIACs unless there are specific reasons for determining the conflict is international in character. Several of these considerations will be examined, but a full treatment would require more analysis and discussion than is either possible or warranted here.

First, while there is a possible *prima facie* violation of sovereignty in the event of a non-consensual military intervention in a State's territory, this is not always the case. It is quite possible the intervention may have a credible legal basis (e.g., a U.N. Security Council mandate, self-defense or possibly in some cases a plea of "state of necessity.")⁴⁷ In such instances,

45. Akande, *supra* note 30, at 73. For other authors taking this view, see Marco Sassòli, *Transnational Armed Groups and International Humanitarian Law*, HPCR OCCASIONAL PAPER SERIES 4–5 (2006); Dieter Fleck, *Non-International Armed Conflicts*, in *THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW* 584–85 (Dieter Fleck ed., 3d ed. 2013).

46. See e.g., Lubell, *supra* note 34, at 432. Other authors taking the view that lack of consent does not automatically render an intervention by a State against an organized armed group international are listed below *infra* note 57.

47. "State of necessity" is one of the grounds precluding wrongfulness identified by the International Law Commission in its Articles on State Responsibility (ARSIWA) of 2001. The conditions for invoking it are stringent and its applicability to the use of force on another State's territory is dubious. See Articles 25 and 26 of the ARSIWA with commentary. Articles on Responsibility of States for Internationally Wrongful Acts, arts. 25–26, Report of the International Law Commission, 53d Sess., Apr. 23–June 1, July 2–Aug. 10, 2001, U.N. Doc. A/56/10, GAOR 56th Sess., Supp. No. 10 (2001), *reprinted in* [2001] 2 YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 32, U.N. Doc. A/CN.4/SER.A/2001/Add.1, 80–85 (Part 2). In situations where there is no wrongful conduct on the part of the State where an act based on necessity takes place, such as evacuation of citizens in situations where there is a complete breakdown of State authority, it is sometimes argued

there is no violation of either the *ius ad bellum* or the territorial State's sovereignty and right of territorial inviolability. In the case of a Security Council mandate, the authority for, and legality of, the intervention would be clear and so need not be addressed here. When self-defense is invoked, the issue is less straightforward. Nevertheless, there is considerable support, albeit not wholly without controversy, for the premise that self-defense is not limited to countering armed attacks which are conducted by or under the control of a State. Assuming there is a credible basis for acting in self-defense against an armed attack by an OAG acting autonomously from another State's territory, and assuming again that the defending State directed its defensive action exclusively against the OAG and remained within the confines of necessity and proportionality *ad bellum*, the territorial State's sovereignty would not necessarily be violated, even if it verbally protested the action. This is not the place to enter into a lengthy discussion of self-defense against non-State actors, but if one accepts that this is at least a possible legal basis, then the argument that non-consensual military intervention automatically constitutes a violation of sovereignty and is therefore directed against the territorial State loses in persuasiveness.⁴⁸

Second, even if such an intervention did constitute a violation of sovereignty (either because it did not fulfil the requirements for the exercise of lawful self-defense or because one rejects that there is a right of self-defense against an armed attack by an independent OAG), it does not inevitably follow that a non-consensual military intervention would qualify as an international (i.e., inter-State) armed conflict under the humanitarian law of armed conflict.

that necessity would be applicable, see Terry Gill & Paul Ducheine, *Rescue of Nationals*, in Gill & Fleck, *supra* note 45, at 242–43.

48. There is abundant literature relating to the applicability of self-defense to armed attacks by OAGs acting independently of State control. The literature reflects divided views, as do the opinions of judges of the International Court of Justice (ICJ). See, e.g., INTERNATIONAL LAW AND ARMED CONFLICT: EXPLORING THE FAULTLINES (Michael Schmitt & Jelena Pejic eds., 2007) (with contributions by various authors, including the present author, on the topic). The ICJ inferred that self-defense was restricted to attacks by States in its *Wall* advisory opinion and in its *Armed Activities* decision. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶¶ 139, 194 (July 9); *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, 2005 I.C.J. 168, ¶¶ 146–47, 222–23 (Dec. 19). Both of these positions occasioned vigorous criticism by a number of the judges on the Court in their individual opinions.

The two bodies of law—*ius ad bellum* and *ius in bello*—are separate and have their own criteria for determining the lawfulness of any particular action. While they do act in parallel and any action must conform with both, in so far as both are applicable, for it to be lawful under international law as a whole, a violation of the *ius ad bellum* does not automatically qualify as a violation of the *ius in bello*, and vice versa. Likewise, there is no reason to assume that the classification of an armed conflict is dependent upon—or even influenced by—the question of whether a violation of the *ius ad bellum* has occurred.⁴⁹ If it were, this would undermine one of the cardinal principles of the humanitarian law of armed conflict, namely, the principle of equal application of the law to the belligerent parties. Moreover, if neither the intervening State nor the territorial State are engaged in hostilities or are supporting a party to an armed conflict, there is no presumption that they are belligerent parties vis-à-vis each other.

It is true that an intervention may impact portions of a State's population or its national resources, but to the extent these are located where the OAG is active, it is likely that in most cases they will not be under the control of the territorial State. Nor would attacks directed against the OAG result in civilians or civilian objects being divested of protection, since any attack on the OAG which might affect civilians or civilian objects would be subject to virtually the same degree of protection from the effects of hostilities under the legal regime applicable to NIACs as they enjoy under the regime pertaining to IACs. In any case, when a population and public property are under the control of an OAG and not under the effective control of the territorial State, they can no longer be identified with that State for purposes of determining the legal constraints on the conduct of hostilities. In the event the intervening State's action resulted in occupation of territory, this would change the situation and trigger the regime pertaining to IACs. Absent a clear basis such as occupation, there is no compelling reason to assume that attacks directed against an OAG operating from a State's territory are tantamount to attacks on the State and that the regime pertaining to IACs is the most plausible option or is required from a humanitarian standpoint.

If the intervening and territorial States are engaged in hostilities with each other or if members of the armed forces of either are taken prisoner by the other State, those actions would trigger the applicability of the regime pertaining to IACs for as long as such hostilities or detention took

49. Lubell, *supra* note 34, at 432–33.

place. It is thus the factual situation that triggers such applicability, not simply the (possible) violation of sovereignty. As a result of the exchange of hostilities and/or detention of individuals, the requirements of Common Article 2⁵⁰ would be met under the first shot approach. Whether the conflict between the States in question continues would depend completely on the conduct of the respective parties (whether or not the fighting and/or detention continue) and on the humanitarian requirement to provide the most favorable degree of protection to the affected individuals, not on the question of consent (or lack thereof) to the intervention. Similarly, if civilians come under the power of the intervening State and are detained for security reasons, either on the territory of the intervening State or elsewhere, this would trigger the applicability of the IAC regime for protection of civilians. In each of these cases, this would be a consequence of the factual circumstances and humanitarian considerations and would not hinge on the lack of consent to the intervention.⁵¹

Third, neither the text of the relevant provisions in the Geneva Conventions (Common Articles 2 and 3) nor the original ICRC commentaries thereto contain any reference to violation of sovereignty as a criterion for determining the character of the armed conflict. Common Article 3 relating to non-international armed conflicts provides for applicability of that provision “[i]n the case of an armed conflict not of an international character occurring in the territory of one of the High Contracting Parties.” An armed conflict between a State and an OAG on the territory of another State falls within this definition as has been pointed out by a number of commentators.⁵² The terms of Common Article 2 relating to international armed conflicts refer to three basic situations that will trigger the existence of an international armed conflict: a declaration of war, an armed conflict *between* States, and occupation (total or partial, resisted or unresisted) of one State’s territory by another. The *Commentary* to the First Geneva Convention makes it clear that, absent a declaration of war (which only rarely occurs today), the facts on the ground will determine the applicability of

50. See, e.g., Geneva Convention I, *supra* note 28, art. 2 (“[T]he present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.”).

51. Kleffner, *supra* note 35, at 43–44.

52. See, e.g., Lubell, *supra* note 34, at 435; Claus Kress, *Some Reflections on the International Legal Framework Governing Transnational Armed Conflicts*, 15 JOURNAL OF CONFLICT & SECURITY LAW 245 (2010).

Common Article 2, referring specifically to hostilities *between States*.⁵³ Likewise, the International Criminal Tribunal for the former Yugoslavia's *Tadić* judgment, the leading judicial decision on the classification of armed conflicts, specifically mentions "the resort to armed force between States,"⁵⁴ which clearly implicates hostilities *between* them. Neither the 1952 ICRC *Commentary* nor the *Tadić* judgment cites violation of territory or sovereignty as a criterion for determining the classification of the conflict.⁵⁵

Fourth, and perhaps most importantly, there are many indications from actual State practice (both verbal and non-verbal) that action by an intervening State which is directed solely against an armed group conducting operations from another State does not automatically trigger an international armed conflict simply because it is non-consensual, or because the existence of consent is unclear or disputed. Examples include drone strikes by the United States against various jihadist armed groups in Pakistan and Yemen, the intervention of Turkey against PKK positions in northern Iraq, cross-border action by the armed forces of Kenya into Somalia in pursuit of Al Shabaab fighters, and Colombian incursions into Ecuador against FARC rebels. In none of these did any of the States concerned ever consider themselves in a situation of armed conflict with each other. Nor did the interventions result in hostilities between the armed forces of the States concerned, force directed against the national resources of the territorial State or occupation of territory, any one of which would have triggered an international armed conflict between them, even though in some of these cases no consent was forthcoming or was, at the least, unclear or disputed. This is also true of the intervention of the anti-ISIS coalition in Syria as will be discussed presently.

While one may object that the lack of hostilities between the intervening and territorial States in these examples may be in whole or in part due to other factors, it is undeniable that in none of them did the States concerned either verbally or factually conduct themselves as if they were involved in an armed conflict, even though they may not have consented to the interventions and may have considered them a violation of their sovereignty (irrespective of whether they did constitute such violations). The

53. ICRC COMMENTARY (1952), *supra* note 28, at 32.

54. *Tadić* Interlocutory Appeal decision, *supra* note 32, ¶ 70.

55. The *Tadić* judgment made no reference to consent or violation of sovereignty as determining whether force between States had been used. *Id.* Neither does the 1952 Commentary to Article 2 of the Geneva Conventions. ICRC COMMENTARY (1952), *supra* note 28, at 32.

principal exceptions to these examples, the intervention of various States in the Democratic Republic of the Congo in the 1990s and the 2006 conflict between Israel and Hezbollah which was fought in Lebanon, are indeed generally considered to have been IACs for a number of reasons, but not simply because they lacked the consent of the territorial State. In fact, those interventions can easily be used in support of the contention that consent is not the determining factor. In each case, the parties' conduct (occupation of territory, attacks on the State's infrastructure, plundering of natural resources, blockade of the coast of the territorial State, etc.) was certainly more important in the classification of the situation as an IAC than the simple lack of governmental consent to the intervention.

Fifth, and finally, it would seem that most authorities take the position that the classification of armed conflicts primarily (but not exclusively) turns on the nature of the parties (i.e., that at least one of them is a non-State actor) and not on the existence or lack of consent by the territorial State. While academic publications are not a primary source of international law, they are indicative of a leading interpretation when it points preponderantly in a particular direction and is, moreover, supported by other considerations, as is the case here.⁵⁶ However, it is also true that the most recent version of the ICRC *Commentary* on Common Article 2 states that

it is useful to recall that the population and public property of the territorial State may also be present in areas where the armed group is present and some group members may also be residents or citizens of the territorial State, such that attacks against the armed group will concomitantly affect the local population and the State's infrastructure. For these reasons and others, it better corresponds to the factual reality to conclude that an international armed conflict arises between the territorial State and the intervening State when force is used on the former's territory without its consent.⁵⁷

56. While headcounts do not make the law, it is probably true to say that most authors take the position that the nature of the parties is more important than the factor of consent. See Akande, *supra* note 30, at 75 (who despite taking the opposite position admits that his is probably a minority view). For authors sharing Akande's view, see Sassòli, *supra* note 45, at 4–5; Fleck, *supra* note 45, at 584–85. The contrary view is held, *inter alia*, by most of the other contributors to INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS, *supra* note 30. See Elizabeth Wilmshurst, *Conclusions, in id.* at 478, 484.

57. INTERNATIONAL COMMITTEE FOR THE RED CROSS, COMMENTARY TO GENEVA CONVENTION I FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN THE ARMED FORCES IN THE FIELD ¶ 262 (2d ed. 2016), <https://www.icrc.org/a>

While there are good arguments opposing the points raised in this statement (e.g., if the population and public property affected are not under the control of the territorial State) and the conclusion reached, the position taken by the ICRC cannot be ignored. It is primarily because of the ICRC's position that it is not possible to conclusively state, despite the reasons put forward here, that consent is not a relevant (and for some a determining) factor. But, on balance, the arguments in favor of assuming that non-consensual intervention automatically renders an armed conflict international seem considerably less persuasive, at least to this author, than those which make the classification of the conflict dependent on the factual situation, including such factors as

- the nature of the parties involved in hostilities (are both parties States or is one of them an OAG),
- the manner in which the intervention is conducted (is it directed solely against the non-State armed group),
- whether there is an occupation of territory by the intervening State,
- whether the intervening State detains persons,
- the existence or lack of any effective control over territory, population and State infrastructure in the area effected by the territorial State,
- the relationship between the targeted armed group and the territorial State (are they allied or opposed to each other), and
- other possibly relevant factors.

Hence, while the matter is still not settled law, the question of lack of consent in itself is not the most persuasive factor in determining the classification of an armed conflict.

IV. DETERMINATION AND CLASSIFICATION OF THE ONGOING ARMED CONFLICTS IN SYRIA

When determining whether there are one or multiple armed conflicts currently underway in Syria and in classifying the nature of these conflicts,

pplic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=BE2D518CF5DE54EAC1257F7D0036B518 (last visited June 15, 2016).

there are a number of factors to be taken into account. First, there are a number of main contenders⁵⁸ which are active, each with a clear degree of organization and specific aims, notwithstanding a certain degree of fluidity in alignments, and a large number of armed groups which are active in the overall conflict. However, there can be no doubt that at least since early 2012, given the degree of organization of the main opposition groups and the intensity of the fighting, the threshold of a non-international armed conflict, to which there were multiple parties, was crossed. The main parties are set out in Part II and include the Syrian government and its associated militias, and the main opposition groups gathered into two loose coalitions, one more secular and the other Islamist in nature. These two coalitions form the mainstream opposition. While they have reportedly clashed on occasion at a local level, they share the common objective of overthrowing the current Syrian government and cooperate more often than not in pursuing that goal. Together or separately they constitute a party (or two parties) to the conflict with the Syrian government and its associated forces which constitute another party.

A separate party to this NIAC is made up of a variety of aligned extreme jihadist groups reportedly associated with Al Qaida, the most important of which to date is the Al Nusra Front. It shares the mainstream opposition's goal of overthrowing the Syrian government, but has its own agenda and is not allied with the mainstream opposition, even though they share a common main adversary. It is sufficiently organized and in control of a significant enough portion of Syrian territory to be seen as a party in its own right.

The same is undoubtedly true of ISIS, which split from the Al Nusra Front and has been active in the conflict since 2013. It has pursued its own objective of establishing a self-styled Islamist caliphate and opposes the Syrian government, the mainstream opposition coalitions and the Kurdish armed groups. It has also clashed with its ideological "cousin," the Al Nusra Front, since an abortive merger attempt in 2014. It controls a significant amount of territory and population within Syria and, as such, is a separate party to the conflict.

Finally, there are the Kurdish militias and political organizations, principally the Kurdish National Council, the Kurdish Supreme Committee and

58. For information concerning the identity of the parties to the conflicts and their respective objectives and alignments, see *supra* Part II.

the main Kurdish armed group, the YPG. They too have a separate agenda and control sufficient territory to be ranked as a party to the conflict.

The fact that these parties have different objectives and have clashed with one another on occasion (or in the case of ISIS and the Kurdish YPG on an ongoing basis) does not change the fact that there is one overall conflict of a non-international character within Syria with a number of different parties. The alternative of looking at each conflict as a separate conflict makes no factual or legal sense. To compare a historical example, the Thirty Years War in Europe⁵⁹ had a large number of parties, each with separate goals and shifting patterns of alignment, but is seen as one overall conflict. There is no reason to assess the Syrian conflict differently and, in any case, whether there is one overall NIAC or multiple NIACs, the applicable law is the same.

The intervention of Russian and Iranian forces on the side of the Syrian government does not affect the classification of the conflict or amount to a separate conflict as they are in direct support of the government. Nor is there any evidence that either of those States exercise control (as opposed to mere influence) over the Syrian government.

Alongside this non-international conflict, there has been a separate conflict between ISIS and the anti-ISIS coalition States since the coalition commenced aerial operations against ISIS-held positions and forces in Syria in August 2014. For the reasons set forth in Part III concerning consent as an element in conflict classification, this author takes the position that this separate conflict is also non-international, notwithstanding the lack of consent by the Syrian government. Coalition actions are directed almost exclusively against ISIS, which is in firm control of a significant portion of Syrian territory, population and infrastructure, rather than Syrian government-held territory, population or infrastructure. (The United States is conducting operations against the Al-Nusra aligned Khorasan Group, which is also engaged in a NIAC with the Syrian government and, like ISIS, controls a portion of Syrian territory, population and infrastructure). The operations have not resulted in overall or effective control of an armed group active in the conflict by a State within the coalition or occupation of Syrian territory, either of which would have internationalized the conflict. Nor does U.S. air support to Kurdish militias on the ground engaged with ISIS result in internationalization of the conflict. Moreover, neither Syria,

59. For a brief history, see *Thirty Years War*, HISTORY (2009), <http://www.history.com/topics/thirty-years-war>.

nor the States in the coalition consider themselves to be in an armed conflict with each other and no action has occurred between them that would trigger an inter-State conflict and the applicability of the IAC IHL regime. Consequently, it can be seen as a separate armed conflict of a non-international character.

There is arguably a third armed conflict underway between Turkish forces and the Kurdish militias and administration in northern Syria. Previously, there had been a number of sporadic clashes between Turkish forces and Kurdish militias along the border, but these have increased in intensity since February 2016. The advances of the Syrian army into northern Syria in February around Aleppo with Russian air support opened the way for Kurdish forces to consolidate control over the Kurdish areas along the Syrian/Turkish border. In response, Turkey stepped up shelling and airstrikes against YPG positions since it views the YPG as an extension of the PKK, with which it is in conflict inside Turkey, and is opposed to the YPG's goal of establishing a viable autonomous Kurdish region across the border.⁶⁰ The number and intensity of Turkish strikes against the Syrian Kurds strongly suggest that the NIAC threshold has been crossed. If so, this would be a separate NIAC within Syria as the parties in the other conflicts are different and the aims of the contenders here are distinct from the participants in the other conflicts. The same arguments supporting the determination that the anti-ISIS coalition airstrikes constitute a NIAC are equally applicable to this conflict. There has been no clash to date between Turkish forces and the Syrian government (aside from an aerial incident in the early stages of the conflict); hence the conflict between Turkey and the Syrian Kurdish militias (if it does qualify as such) is, for the reasons set out above, non-international in character.

At the time of writing, a ceasefire is in place between the Syrian government and the mainstream opposition, which has, despite local violations, largely been observed since it came into force on February 26, although it is still too early to say the parties will continue to observe it.⁶¹ However, ISIS and Al Nusra and its associates are not included in the

60. See Daren Butler, *Kurds' Advance in Syria Divides U.S. and Turkey as Russia Bombs*, REUTERS (Feb. 17, 2016), <http://www.reuters.com/article/us-mideast-crisis-syria-kurds-idUSKCN0VQ1FR>. See also *Putin the Peacemaker*, *supra* note 7, at 31.

61. See *Syrian Ceasefire is "Largely Holding" but with Violations*, AL ARABIYA ENGLISH (Mar. 12, 2016), <http://english.alarabiya.net/en/News/middle-east/2016/03/12/Syria-ceasefire-is-largely-holding-.html>.

ceasefire and fighting between the Syrian government (with Russian air support) and ISIS, fighting between ISIS and the Kurdish YPG, and coalition airstrikes against ISIS-held positions have continued. Hence, as of early April there are still two, and probably three, separate NIACs still ongoing. Moreover, a temporary ceasefire does not signal an end to the main conflict between the Syrian government and the broad array of opposition groups. Only a diplomatic settlement and peace agreement between some of the main parties or a long-term cessation of hostilities could end the principal conflict. However, it is unlikely any agreement would include either ISIS or Al Nusra, in which case operations against them by various parties would in all probability continue.

V. CONSEQUENCES OF CLASSIFICATION: (WHY) DOES IT MATTER?

We can now turn to the question of the consequences of the classification of the conflicts in Syria in practical and legal terms and whether the classification given to them matters. It must be pointed out that this raises questions that go considerably beyond the scope of this article; therefore, there will be no in-depth discussion of those issues as it would require several more contributions to treat each of them in a comprehensive fashion. Nevertheless, the most important consequences will be addressed with the degree of discussion required to round off this subject.

The first consequence is obvious; namely, that classification of a conflict as either international or non-international will determine the applicable regime of IHL pertaining to it. While the gap between the two types of armed conflict has narrowed in the last two decades or so, considerable differences remain. While differences in terms of the law relating to the targeting of persons and objects and the conduct of hostilities are less important than they once were, some do remain. These include such questions as the position and status of armed groups and their individual members, certain rules relating to the targeting of specific types of objects and the weapons which may be employed. However, on balance, the law relating to targeting is quite similar under the two regimes, hence for the purpose of determining whether an attack is indiscriminate or disproportionate classification will make little difference, if any, as to whether a conflict is governed by the rules pertaining to IAC or NIAC.

When it comes to important other areas of IHL, the situation is quite different. The regimes pertaining to prisoners of war and occupation are completely inapplicable as a matter of law (as opposed to possible policy-

driven application) in a NIAC. The detention of persons captured or held for security reasons is also governed by different rules, although precisely what these are in the context of a NIAC is not wholly settled, in contrast to the relative clarity of the rules applicable in these situations in an IAC. The law of naval warfare is another area of the law of armed conflict which is only applicable in IAC. Although it has not been relevant to date in the Syrian conflicts, it could potentially become so if and when, for example, a blockade of the Syrian coast was undertaken. Likewise, the rules relating to criminal responsibility for violations of IHL differ in some important respects, depending on the classification of the conflict. These differences in the IAC and NIAC regimes, while not exhaustive, serve to illustrate that classification continues to matter in terms of the applicable law.

Second, the classification can affect the relationship of the various parties to each other in a broader sense. For example, the fact that Russia and Iran are acting in support of the Syrian government and fighting alongside its forces and that the anti-ISIS coalition is acting without Syrian consent would mean that if the conflict between the coalition and ISIS is classified as an IAC in which the coalition States are acting *against* Syria and are consequently “at war” with it, then they logically would also be “at war” with Russia and Iran as co-belligerents with Syria. Needless to say, this would have consequences, both legal and non-legal, which go far beyond the scope of the conflicts within Syria.

A related question is the thorny issue of the geography of armed conflict. This is partly regulated by IHL, but also, and probably at least as importantly, by other areas of international law.⁶² In an IAC, there is little disagreement that IHL applies within the territories of all States party to the conflict and, in principle, to international sea and airspace outside the territory of neutral or non-belligerent States. Whether this signifies that persons and objects may always be targeted anywhere within these confines is another matter, but the fact that IHL is applicable is not widely disputed and signifies that even if an attack in the sense of Article 49 of Additional Protocol I⁶³ resulted in a violation of the *ius ad bellum* or the law of neutrali-

62. For a somewhat more extensive treatment of how other bodies of law may affect targeting see, e.g., Terry Gill, *Some Considerations Concerning the Role of the Ius ad Bellum in Targeting*, in *TARGETING: THE CHALLENGES OF MODERN WARFARE* 101, 102–18 (Paul Ducheine, Michael Schmitt & Frans Osinga eds., 2016).

63. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 49(1), June 8, 1977,

ty, it would not necessarily be a violation of IHL. By contrast, the NIAC regime is, in principle, only applicable *within* the State where the conflict is underway. While this may be extended to the territory of another State in the event the conflict “spills over” or if a series of related but separate NIACs are underway in one or more other States, the geographical confines of such conflicts are both more limited, at least in the opinion of this author, and much less settled than is the case in a classic inter-State conflict. In principle, NIAC is a regime which, originally at least, pertained to a conflict within a single State and the question to what extent it can extend elsewhere is not presently conclusively settled and would require much more thorough treatment to be adequately dealt with than is possible here. This is so, because the matter is not simply a question of whether a NIAC can extend across State borders under IHL, but how IHL relates to wholly other areas of international law. That is an important question, but one which is not capable of being addressed in the context of a single article on the conflicts in Syria and one that will have to await further treatment.

These are a number of the most important consequences of classification and, while there may well be others, they suffice to illustrate that it does matter whether a conflict is deemed international or non-international; it certainly matters in the case of the Syrian conflicts. Anyone who thinks that the coalition States presently engaged in an armed conflict with ISIS are also at war with Syria, Iran and Russia, should think again and do a serious reality check. This is not simply a question of academic purity in applying IHL, but one which has potentially far-reaching consequences. The adage of “be careful what you wish for” is apropos in this context.

VI. SOME CONCLUSIONS

This article has attempted to make some sense of the current conflicts raging inside Syria, which have had such devastating consequences on that State and its population in particular, as well as upon the region and the wider surroundings. It has been shown that there are at least two, and arguably three, separate armed conflicts in progress, all of which, it was concluded, are non-international in character. In reaching this conclusion, the wider question of the effect of consent (or lack thereof) by a State to foreign military intervention on its territory was examined and shown that

1125 U.N.T.S. 3 (“Attacks” means acts of violence against the adversary, whether in offence or defence.”).

consent should not be seen as determinative of whether a conflict becomes international in character in the absence of objective reasons for so doing.

Areas of contention remain and likely will remain for the foreseeable future as to the role that consent should play and how other factors may influence the determination of the nature of armed conflict in general and this set of conflicts in particular. Likewise, other questions relating to the consequences of classification remain subject to debate. These include, in particular, the question of the geography of armed conflict and how IHL relates to other bodies of international law which may affect where operations may be lawfully conducted, both in IACs and NIACs. These questions were not answered conclusively—and are not capable of being answered conclusively in a single piece—hence the title of this Part, “*Some Conclusions.*” Those which have been reached hopefully provide some clarity and the arguments put forward on the open questions may serve to further the discussion. But in any case, the underlying purpose of this article is to provide some clarity on the classification of the conflicts underway in Syria. Whatever one thinks on this and the questions raised but not conclusively answered, this should not affect the fact that classification matters and that one should be wary of drawing conclusions which open the door to a widening of the conflict, or which result in losing sight of the main tragedy which the situation in Syria has caused—and continues to cause—regardless of the classification.