

Department of Political Science  
Course in International Law

The Syrian Conflict: an Analysis of the Crisis in the Light of  
International Law

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*“Out beyond ideas  
of wrongdoing and rightdoing,  
there is a field.*

*I’ll meet you there.”*

*Jalaluddin Rumi*

## INTRODUCTION

After six years, the conflict in Syria, which started on March 2011, shows no sign of abating. The violence has become systematic and widespread. The events have had devastating consequences for Syria itself and for the equilibrium of the Middle East, questioning the stability of Iraq, Lebanon, Jordan and Turkey. When on August 21<sup>st</sup> 2013, more than 1,400 Syrians were killed in a chemical attack of sarin gas bombs in Gouta near Damascus, the international community was outraged and it seemed that this hideous event could lead to a final action to end the conflict. In a matter of days, a number of States – such as the United Kingdom, France and Denmark – declared that they were ready to launch an attack. The strongest reaction came from the United States, which had already mentioned that the use of chemical weapons in the civil war in Syria was crossing a “red line” which would have “enormous consequences”.<sup>1</sup> Yet, none of the concrete measures implemented have changed the nature or the outcomes of the situation.

Investigations by the UN Human Rights Council have collected numerous testimonies of the atrocities committed both by Government forces and by non-state armed groups. International efforts have included the enforcement of bilateral sanctions and a Joint Monitoring Mission, deployed during the failed ceasefire in 2012. At the time of writing, the numbers of casualties registered by the Syrian Centre for Policy Research (SCPR)<sup>2</sup> are of 470,000 victims – a far higher total than the statistics collected by the United Nations. Of these 470,000, about 400,000 casualties were the direct consequence of the violence. The remaining 70,000 casualties were caused by the lack of adequate health services, medicine, especially for chronic diseases, lack of food, clean water, sanitation and proper housing, especially for those displaced within conflict zones. In all, the report estimates that about 11.5% of the country’s population has been killed or injured since the crisis erupted in March 2011. The number of wounded amounts 1.9 million people. Warnings from Aleppo, Syria’s largest city - which is in danger of being cut off by the Government - have multiplied with the advance aided by Russian airstrikes and Iranian militiamen. Furthermore, the Syrian opposition is demanding urgent action to relieve the suffering of tens of thousands of civilians.<sup>3</sup> Furthermore, the conflict has resulted in a dramatic political and economic fragmentation, which has brought back the human development index to where it was 37 years ago<sup>4</sup>. It will take about 30 years for Syria to recover its GDP value of 2010 with an annual growth rate of 5%.<sup>5</sup> Moreover, both sides to the conflict have been targeting civilians and medical

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<sup>1</sup> Landler, M. “Obama threatens Force Against Syria”, New York Times, 20 August 2012, available at: [www.nytimes.com/2012/08/21/world/middleeast/obama-threatens-force-against-syria.html?\\_r=0](http://www.nytimes.com/2012/08/21/world/middleeast/obama-threatens-force-against-syria.html?_r=0).

<sup>2</sup> See “Alienation and Violence Report 2014” available at: <http://scpr-syria.org/publications/policy-reports/scpr-alienation-and-violence-report-2014-2/>

<sup>2</sup> See “Alienation and Violence Report 2014” available at: <http://scpr-syria.org/publications/policy-reports/scpr-alienation-and-violence-report-2014-2/>

<sup>3</sup> <http://www.theguardian.com/world/2016/feb/11/report-on-syria-conflict-finds-115-of-population-killed-or-injured>

<sup>4</sup> Yazigi, J. “Syria’s war economy,” Policy Brief, European Council on Foreign Relations, 7 April 2014, 1, available at: [http://www.ecfr.eu/publications/summary/syrias\\_war\\_economy](http://www.ecfr.eu/publications/summary/syrias_war_economy).

<sup>5</sup> *Ibid.*

infrastructure. It was estimated that in 2014 at least 60% of the hospitals and 38% of primary health clinics had been damaged or destroyed.<sup>6</sup>

This paper is divided into three main parts and has the intent to analyse from a legal perspective the Syrian conflict. The first chapter serves as an introduction to the background events by outlining the political and social context of Syria. It explains the events that have followed the initial uprisings of March 2011 and describes the international context and the response of the international community in relation to the situation in Syria. The second chapter outlines the notion of armed conflict specifying the main elements that comprise non-international conflicts under international humanitarian law. These theoretical elements, together with supporting evidence from internationally recognized institutions – the ICRC, the UNSC and the HRC - confirm the classification of the armed violence in Syria as a non-international armed conflict (NIAC). After acknowledging that the Syrian conflict is, by all means a NIAC, the paper describes the provisions of international law under IHRL and IHL that have to be observed both in times when the violence does not amount to an armed conflict and in times when the violence is classified as an armed conflict. Furthermore, the paper analyses the alleged violations perpetrated by both Government forces and the organized armed groups by using the official evidence collected by the Commission of Inquiry for Syria of the Human Rights Council. However, due to the fluid nature of the conflict and to the difficulty in collecting evidence within Syria, the information cannot be considered fully exhaustive. Finally, the third chapter - in the light of the information gathered and with all the legal elements laid out in the previous chapters - briefly discusses the evolution of the notion of humanitarian intervention by explaining the fundamental nexus there is between humanitarian emergencies and a threat to peace and international security. It then considers the cases in which an intervention would be legitimate: as *état de nécessité* for precluding wrongfulness and the Responsibility to Protect (R2P). In conclusion, it considers the legitimacy of humanitarian intervention and the implementation of the third pillar of R2P within the Syrian conflict, with supporting arguments, to ultimately protect the Syrian population. It is important to specify that this paper does not willingly analyse the role of ISIL (or ISIS) in depth and considers mostly the problematic of the use of force by State forces against civilians.

The main goal of this analysis is to understand, in a wider context and on a legal basis, how the State security paradigm may have now become anachronistic and how human security is becoming a central issue. Today, Syria, has brought under a bright cold light the reality of the struggle of the international community - of the UN system in particular - to face today's challenges. When the Security Council first met in London during January 1946 its intended purpose was not only to safeguard the stability and peace of the post-war order, but also to protect future generations from the scourge of war. In this sense the Responsibility to Protect should signify that the members of the Security Council have a responsibility not to veto when there are situations of mass atrocity crimes, as in the Syrian case. And, taking another step forward, every member of the international community has a responsibility to promote peace and ensure international security.

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<sup>6</sup> Adams, S. "Failure to Protect: Syria and the UN Security Council", Global Center for the Responsibility to Protect, Occasional Paper Series No.5, March 2015.

## CHAPTER ONE: THE SITUATION IN SYRIA FROM 2011

### 1. The Course of the Events

#### 1.1. The decay of the State

On July 17<sup>th</sup> 2000 the newly elected President addressed his inaugural speech to the Syrian parliament. Bashar al-Assad's words underlined the need for a national dialogue, transparency and constructive criticism. He affirmed the need for the rule of law and stated that "democracy is our duty towards others before it becomes a right for us".<sup>7</sup> Yet the opening to political reforms and pluralism in this 'Damascus Spring' was soon reversed and by the summer of 2001, political public houses were closed and many activists were jailed. The aftermath of this brief experiment of controlled political liberalisation revealed that Assad, as David Lesch posits, is the son of his father: a child of the Arab-Israeli conflict and the Cold War.<sup>8</sup> Assad inherited a country with a stagnant economy with a restricted banking system, no stock market and no trade arrangements. The inadequate regulatory regime and the insufficient transparency were a major impediment to attracting foreign investments. Moreover, the judiciary bodies were politicized and corrupt. The concentration of power increased the involvement of the ruling family in business and took advantage of the particularistic economic reforms implemented. The progressive liberalisation of the economy fostered corruption, economic and social distortions, favouring opportunities only for whom had access to the State's ruling clique. The two primary objectives of the security sector were, firstly, the imperative survival of the regime and, secondly, the suffocation of any threats within the security forces.<sup>9</sup> The security sector became a coup-proof strategic patronage network where benefits and favours were granted on the loyalty shown. Also, compulsory conscription ensured that all Syrian men could be politically moulded through their military service. By 2011, the already strong military was supported and supplemented by police, interior ministry, paramilitary and Ba'ath Party forces.

#### 1.2. Phases of conflict: the escalation of violence

To better understand the sequence of events, the conflict in Syria can be organized in five phases. The first starts in March 2011, when some children between nine and fifteen years old wrote anti-regime graffiti on the walls of their school in the southern town Der'a.<sup>10</sup> According to some reports they had just written the word 'freedom'.<sup>11</sup> These children were arrested and taken to Damascus for interrogation where they were allegedly subjected to torture. Two weeks after their arrest, their families were still unable to obtain their release. On the 15<sup>th</sup> of March a protest in Der'a saw the gathering of several thousand citizens and four demonstrators were shot dead. The next day, the number grew to 20,000. In this initial stage, protestors demanded the release of political prisoners and the reform of the regime, rather than its overthrow. Importantly, revolutionary activists and their sympathisers have tried to avoid the 'civil war' label, believing it would twist negatively the

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<sup>7</sup> <http://www.al-bab.com/arab/countries/syria/bashar00a.htm>

<sup>8</sup> David Lesch (2013) "Syria. The Fall of the House of Assad". Yale University Press.

<sup>9</sup> *Ibid.*

<sup>10</sup> <http://www.bbc.com/news/world-middle-east-21787787>

<sup>11</sup> *Ibid.*



narrative. Furthermore, the Assad regime considered and described these manifestations of unrest, as localised and of criminal nature. However, despite the non-violent nature of the demonstrations, government forces – including the military, the security forces, the civilian police and the *Shabbiha* militias – easily resorted to violence to contain the protests.<sup>12</sup> Over a matter of weeks, the demonstrations had spread to other parts of the country and gathered a growing number of people. While Bashar al-Assad was absent from public view and the government proposed to review the Emergency Law of 1963, the unpopular government in Der'a was replaced and it was announced that many Kurds would receive full citizenship. It was plain that the government was trying to win favours, by proposing conciliatory measures. Nonetheless, the protests continued, marked by a systematic use of violence by the authorities. Many Syrians supported Assad's regime on behalf of the fact that it had promoted religious moderation and had ensured at least a seeming stability. Assad benefitted from the quasi-neutrality of many members of minority groups and the support of key religious and business figures as they feared that the promises put forward by the Syrian opposition would not be fulfilled once the armed groups gained power<sup>13</sup>. However, the rising intensity of violence and the growing death toll jeopardized his position.

The second phase roughly starts around August 2011, when the peaceful motive of the protests had ended. In fact, on August 3<sup>rd</sup> the UN Security Council issued a presidential statement condemning the ongoing violence against demonstrators by the Syrian forces and called for restraint on all sides.<sup>14</sup> In addition on October 4<sup>th</sup> a draft resolution, recommending possible measures against Syria under Article 41 of the UN Charter, was vetoed by China and Russia.<sup>15</sup> In early November the Syrian government agreed to end the violence against the demonstrators with a 'Plan of Action' drawn up by the League of Arab States. Nonetheless, military operations continued, targeting public assemblies and funeral processions in Homs, Der'a, Hama, Dayr Az Zaw and Rif Damascus. The Office of the High Commissioner for Human Rights (OHCHR) estimated that at least 3,500 civilians were killed between March and November 2011.<sup>16</sup> In relation to the degenerating situation, on November 12<sup>th</sup> 2011, the Arab League suspended Syria's membership for failing to implement the Arab peace plan and at the same time it imposed sanctions.<sup>17</sup> Importantly, when in December of the same year, the Syrian government allowed international observers to oversee the implementation of the 'Plan of Action', the mission was forced to suspend its work on January 2012 due to the raging violence.

The siege and assault of the city of Homs in early 2012 can represent the third phase of the conflict, in which the government operated to seize militarily opposition centres of resistance. These major offensives saw the implementation of heavy artillery and helicopter attacks. On February 16<sup>th</sup> 2012, the UN General Assembly adopted Resolution 66/253, which condemned "the continued widespread and systematic violations of human rights and fundamental freedoms by the Syrian authorities, such as the use of force against civilians, arbitrary executions, the killing and persecution of protestors, human rights defenders and journalists, arbitrary detention, enforced disappearances, interference with access to medical treatment, torture, sexual violence, and ill-treatment, including against children".<sup>18</sup> This Resolution endorsed the Plan of Action of the League of Arab States and provided the establishment of a joint special envoy to facilitate a UN-Arab League initiative to negotiate a peaceful settlement. The joint special envoy, Kofi Annan, outlined a

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<sup>12</sup> See Section E of the Report (A/HRC/18/53) of the UN High Commissioner for Human Rights on the situation of human rights in the Syrian Arab Republic of September 15th 2011.

<sup>13</sup> Hokayem (2013)

<sup>14</sup> S/PRST/2011/16, 3 August 2011.

<sup>15</sup> The 6627th meeting of the UN Security Council, 4 October 2011, (S/PV.6627).

<sup>16</sup> A/HRC/S17/2/Add.1.

<sup>17</sup> Arab League Council Resolution 7438, November 12th 2011.

<sup>18</sup> A/RES/66/253, February 21st 2012, para. 2.

six-point proposal, which required the government to cease troop movements and the use of heavy weapons in city centres.<sup>19</sup> On March 25<sup>th</sup> the Syrian government agreed to implement the plan. One month later, on April 12<sup>th</sup>, the Security Council adopted Resolution 2042 authorising the deployment of the UN Supervision Mission in the Syrian Arab Republic (UNSMIS) to monitor the plan's implementation.<sup>20</sup> On April 23<sup>rd</sup> 2012 an agreement was reached between the Syrian government and the UN on the legal basis for the deployment of UNSMIS. Despite these efforts, from mid-May 2012 onwards the violence spread to other parts of the country and the intensity of the armed clashes increased significantly in some areas.<sup>21</sup> Government forces frequently shelled towns and used heavy weapons and air assets, targeting districts of the major cities of Damascus, Aleppo, Homs and Hama, where the support for the opposition groups was concentrated.<sup>22</sup> During this period the anti-government armed groups appeared to benefit from improved access to weapons, funding and logistical support. In June 2012, UNSMIS had to suspend its activities due to the intensifying violence.

In early 2013, the conflict had entered its fourth phase in which the warring parties had reached a military stalemate. Both government forces and armed opposition groups controlled considerable territory, but neither could prevail in a definite manner. This favoured the support of external actors in support of both sides. The government had to rely consistently on the assistance of Iran, Hezbollah and Russian supplies. On the other hand, the Gulf States and private donors aided the armed opposition. However, this support also fostered an increase in the number of foreign fighters and augmented the ranks of more extremist Islamist rebel militias. The fast-changing nature of the conflictual situation mutated from what seemed to be a political conflict with sectarian undertones into a sectarian civil war, also encouraged by extremist ideologies. This change in the nature of the Syrian conflict can be identified as the fifth phase which, at the time of writing, is still ongoing. In fact, the growing Salafist presence among the armed opposition is threatening Christian and Alawites minorities, which have for the majority stood with the regime. Clearly, this civil war has fractured Syria also along confessional lines and divided the country into an unstable patchwork of different military zones, where no actor involved has full sovereignty over Syria. The government maintains control of a large contiguous strip of land – which roughly amounts to a third of the country – in the west from the Latakia coast to the border with Lebanon and south to Damascus. While the Kurds have gained an independent territory in the north-eastern part of the country. On the other hand, the Euphrates valley from north to the south-eastern part of the country is controlled by several opposition groups, which compete with one another and together fight against the Assad regime. In fact, ISIL, has declared the existence of its own state extending from the capital Raqqa to Mosul in Iraq. The advance of ISIL from mid-2014 has been rapid, finding no true opposition in its way, apart from the opposition of the Kurdish *peshmerga*. Furthermore, government forces have started to retake numerous villages along the Lebanese border and are regaining control of the areas surrounding Aleppo and Damascus previously controlled by the rebels.

### 1.3. The rise of the opposition

With the experiences of the Damascus Spring in 2000-2001 and the Beirut-Damascus Declaration in 2005 when the perceived weakness of the regime had encouraged Syrians to call for a democratic liberalisation and a normalisation of the relations with Lebanon. In 2006 the opposition abroad formed the National Salvation Front, formed by the Muslim Brotherhood and other political exiles.

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<sup>19</sup> S/PRRST/2012/6, March 21st 2012; On August 17th 2012, Brahimi was appointed by the UN as the new peace envoy due to Annan's resignation, after the failed cease fire attempt.

<sup>20</sup> S/RES72142 (2012).

<sup>21</sup> Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, A/HRC/21/50, 15 August 2012, para. 21.

<sup>22</sup> *Ibid.*, para. 23.

On the other hand, in parallel, an apolitical civil society was growing. Grassroots groups started forming to cope with the continuous decay of the state, which was causing growing poverty, unemployment and a migration of rural inhabitants to suburban areas. These organizations had no direct ties with the state and had no official organization were the main core that led the first protests. By April 2011, Local Coordination Committees (LCCs) had been set up across the country. In addition, similar groups started to form like the Syrian Revolution General Commission and the Higher Council of the Syrian Revolution. The movement cut transversally through the society gaining support from middle-class professional to urban and rural workers. When the regime's security forces realised the growing influence they started to dismantle them. Yet, their decentralised structure made a total eradication impossible.

Syria's opposition has always been very active. However it is a complex and little-organised movement that reflects the cleavages and diversity of the country. Western governments, Turkey and the Gulf states have tried to tame the Syrian opposition and help it organize a credible institution at home and abroad. The main problem resided in identifying the key players in Syria as new actors stood up and claimed to represent the opposition. The official formation of the Syrian National Council (SNC), in the autumn of 2011 in Istanbul, was the culmination of this process.<sup>23</sup> However, the demands of the SNC were the unconditional resignation or ouster of Assad. The Council was composed by a number of leftist, liberal and national affiliates together with unaffiliated Islamists and the Muslim Brotherhood. Conversely, it still lacked the representation of the Kurdish, Alawite, Druze and Christian communities. Though the internal divisions were clear by the end of 2011, the SNC became, nonetheless, the legitimate Syrian opposition for the international community.<sup>24</sup> According to its official charter, the SNC, has as main objective the task to direct Syria towards a democratic and parliamentary political system.<sup>25</sup> The main problem was that it lacked a consistent influence at home and it failed to outline an inclusive picture for Syria's diverse constituencies. In fact, by adopting a strong Arab identity, it discouraged a dialogue with the moderate Kurdish National Council (KNC). In the October of 2012, the Syrian National Initiative, was created and subsequently provided the blueprint for the National Coalition of the Syrian Revolution and Opposition Forces (NC) in November 2012.<sup>26</sup> The NC was ultimately formed thanks to the help of Qatari, Turkish and Emirati mediation between the various parts. The expectations were again high and the hope was to receive, promptly, recognition and receive greater consideration from the Western states. The NC encompassed a greater portion of the Syrian society, headed by Sheikh Moaz al-Khatib, a moderate cleric and engineer, Riad Seif and Suhair Atassi, as his deputies. They all enjoyed credibility as they belonged to the internal opposition. This closely linked them to the local activist networks and the various new Military Councils (MC) in the country. The SNC finally decided to join the NC after the pressure of Qatar and Turkey. The NC defined a three-point priority programme: it searched for greater international support; it renewed its effort to unify the rebel ranks under the SMC, established in December 2012; and it stressed publicly the will to promote and ensure a social, political and religious pluralistic order in a post-Assad scenario.<sup>27</sup> In September 2013, about a dozen rebel groups abandon the SNC and reject its calls for a civil, democratic government. Later, seven of them formed their own alliance, the Islamic Front, which intended to create eventually a state governed by Islamic law.

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<sup>23</sup> Lesch (2013)

<sup>24</sup> Hokayem (2013)

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.*

<sup>27</sup> Moaz al-Katib, "Letter to the Christians of Syria", Carnegie Middle East Center, available at: <http://carnegie-mec.org/publications/?fa=50728>.

#### 1.4. The militarisation of the opposition

From early 2012, armed action and civil disobedience were downgrading and dividing the peaceful demonstrations of the activists. The main fear was that a shift of power to armed commanders and the resort to arms would cost the revolution on the moral ground, cause the collapse of state institutions and create an opportunity for the involvement of jihadi fighters. In addition, the militarisation of the confrontation was encouraged by the growing unlikelihood of an international intervention and the inefficacy of diplomacy. Rebel units were brought together by the dynamics of local realities in an uncoordinated manner. A majority, of Sunni origin, conscripts and low-level recruits formed their ranks. The Free Syrian Army (FSA) emerged in 2011 and brought together diverse rebel groups, which varied in seize, organization and performance.<sup>28</sup> A great help in the structural organization was given by the Turkish military intelligence. Though the FSA was keen to give an image of professional military force leadership, in reality it revealed weak control over its units and within its operations.<sup>29</sup> The FSA had announced to respect the international war norms and the Geneva Conventions, however, the lack of a binding leadership hindered its enforcement. Indeed, the leadership in Turkey, asserted that defectors who took command in field positions drew the line of their own engagement rules based on the training they had received in the Syrian armed forces.<sup>30</sup>

Furthermore, the access to weaponry and to funding influenced significantly the organization and military performance of the rebel groups. Most of the small size and light weaponry was taken from regime arsenals or bought on the black market. Higher quality weaponry, such as anti-tank and anti-aircraft missiles, were provided in small quantities by foreign sources. Some rebels, in addition, managed to obtain armoured vehicles but still lacked the expertise to engage in conventional combat. To obtain adequate and sufficient funding various groups changed their identity accordingly to attract a multitude of donors.<sup>31</sup> Much of the funding received was granted by the Syrian diaspora based in Western and Gulf countries. Moreover, the Muslim Brotherhood had consolidated networks in Saudi Arabia, Qatar and Kuwait. The Syrian Support Group, an NGO in the US set-up purposely to support the Syrian rebels, dealt only with the Military Councils, which were deemed moderate, acceptable rebel groups. With the escalation of the conflict legal restrictions and the governments' desire to control the funding stream regulated the flow of money and weapons. In addition, in January 2012 the FSA and the SNC mutually agreed to improve cooperation. Subsequently, another agreement was reached in which the Council agreed to grant funds to the FSA.<sup>32</sup> This agreement still allowed operational independence to both groups.

In early 2012, the absence of hierarchic chain of command and the lack of communication hindered the implementation of a nationwide strategy.<sup>33</sup> The rebels were mostly equipped with light weaponry, they generally implemented guerrilla tactics, hit-and-run operations and actions to seize government facilities by attacking checkpoints and patrols. Some military confrontation saw the

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<sup>28</sup> The formation of the FSA was announced on July 29th in a video released on the Internet. The most effective groups have been and are: the Farouq brigade, a large unit with a discrete Islamist orientation which operated mostly along the Turkish border, Homs and Idlib; the Tawheed brigade, an Islamist group which exercised its influence in Aleppo; the Shuhada Suriya brigade, which grouped a number of non-ideological Sunni factions operatin in Jabal al-Zawiyah; Liwa al-Islam, an Islamist unit operating mainly in Damascus and in the south of Syria; Ahrar al-Sham, a corps of Syrian Salafi fighters and, finally, Jabhat al-Nusra (JN), a jihadi group which included Syrian and foreign fighters.

<sup>29</sup> Hokayem (2013)

<sup>30</sup> A/HRC/19/69, February 2012, para. 107.

<sup>31</sup> <http://www.ft.com/intl/cms/s/0/5da95558-3d16-11e2-9e13-00144feabdc0.html#axzz41mirmm3B>

<sup>32</sup> See: A/HRC/19/69 para. 18 and A/HRC/21/50 para. 18.

<sup>33</sup> See: A/HRC/19/69 para. 108.

FSA militia groups prevail over the Government forces, which had to withdraw temporarily from Rif Dimashq, Idlib and Homs. In other cases, as the defeat in Baba Amr, induced the rebels to rethink their strategy, by choosing a war of attrition in the countryside to break the regime's supply lines, disrupt the territorial continuity of influence and takeover of small and middle-sized bases. The main objective was to secure liberated areas by eroding Assad's air dominance. Indeed, the regime's air superiority prevented the rebels from training large units and civilians blamed their presence when attacks were deployed. In March 2012, the FSA addressed the need to overcome its organizational inefficiencies and establish a centralized command structure with the announcement of the creation of the Joint Military Command of the Syrian Revolution. This organizational body had the responsibility to unify all armed groups, coordinate military activities and establish a dialogue with the political partners.<sup>34</sup> The FSA created local military councils, which took responsibility for the operational decisions of the armed groups. However, some armed groups did not agree to operate within the designated areas of such councils. The provincial military councils formed in Homs, Hama, Idlib, Dar'a and Damascus detained control of the FSA's operational decisions. The leaders of these Councils were identifiable figures, which exercised a certain degree of control over the members of the armed groups within their respective areas.<sup>35</sup> Nonetheless, not all armed groups decided to become FSA affiliates and the growing number of foreign fighters caused some preoccupation.<sup>36</sup>

The intensification of the conflict fostered the rise of jihadism as Assad's regime had prophetically advanced. Though Islamist networks had been always side-lined by the regime, which feared that its legitimacy could be questioned on religious grounds, they swiftly embraced the revolution and became central actors in the violent and peaceful dimension. The Islamist groups had to confront with a regime, which pictured them as dangerous fundamentalists who would ultimately impose the sharia rule and discriminate non-Sunni communities. However, the Islamist movements, comprised a range of groups: from ones which preached social conservatism but preferred to separate religion from politics, like Farouq; to ones that proposed the establishing of an Islamist state, like Tawheed; to some others which embraced a jihadi ideology, like JN and Ahrar al-Sham.<sup>37</sup> The cohabitation between Islamist militias and the FSA has resulted tense as the religious and ideological perspective contrasted the nationalist and revolutionary prospect of the latter. The most prominent of the jihadi groups is Jhabat al-Nusra (JN), which is known for its car and suicide bombings in Damascus and Aleppo. It is mostly composed of foreign fighters from Jordan and Iraq. However, in December 2012 the US has inserted JN within the list of foreign terrorist organisations with ties to al-Qaeda in Iraq.<sup>38</sup> In addition, the discipline of the jihadi formations caused political complications and credibility issues to the mainstream opposition, represented by the SNC and NC.

By spring 2012, the armed groups started benefitting from an improved access to weapons, such as mortars, rocket-propelled grenades, anti-tank missiles and some groups also possessed heavy machine guns and anti-aircraft missiles.<sup>39</sup> Qatar, Saudi Arabia, Jordan and Turkey have allegedly provided these weapons, even though States deny such actions. As a matter of fact, throughout the conflict the Turkish and Jordanian border has resulted very porous and quasi-secure channel for weapon merchants. In addition, there is compelling evidence that both Qatar and Saudi Arabia have

<sup>34</sup> For a detailed analysis see Elizabeth O'Bagy (2013) "The Free Syrian Army". Middle East Security Report 5, Institute for the Study of War.

<sup>35</sup> For example, Colonel Quassim Suad al-Din (Homs Military Council), Colonel Abdel Hamid al-Shawi (Hama Military Council), Colonel Afeef Suleiman (Idlib Military Council), Captain Quais Qataneh and Lieutenant Sharif Kayed (Der'a Military Council).

<sup>36</sup> A/HRC/21/50 para. 10.

<sup>37</sup> *Ibid.*

<sup>38</sup> Hokayem (2013)

<sup>39</sup> See A/HRC/22/59 para. 11.

been paying salaries of the FSA fighters since 2012.<sup>40</sup> This has enabled the FSA to be more present and efficient on the territory, making the military opposition gain control of the northern area from Aleppo to the Turkish border after the withdrawal of the Government forces. However, Aleppo is still, at the time of writing, under the control of the Assad regime. The FSA has gained extensive control in the countryside around the cities of Homs, Der'a, Idlib and Hama. In addition, around mid-2012 Government forces has also withdrawn from the Kurdish areas. This issue of securing governance was ultimately a matter of credibility for the rebels, socially and politically. The models of the local administrations differed depending on the local conditions, the resources available and the real administrative capacity. Some places preserved the pre-existing institutions after the local bureaucrats had taken their sides. In other places, the local leaders and civilian activists took charge by establishing courts and humanitarian bodies. However, at the time of writing, the Government forces continue to exercise consistent influence and control of strategic coastal areas around Tartus, the Alawite mountains, Homs, Hamah, central Damascus and the territories bordering Lebanon, Der'a and the area around As-Suwayda.<sup>41</sup>

## **2. The Syrian Conflict in the International Framework**

### **2.1. The regional struggle over Syria**

On the eve of the Syrian uprising, the Assad regime had gained considerable relevance due to its strategic relations. However, even though the relations with past regional rivals had ameliorated, the evolution of the conflict changed the position of several actors.

#### *2.1.1. Turkey: from ally to enemy*

In an early phase, Turkey seemed determined to find a multilateral regionally driven solution backed by the EU and Washington. However, Ankara's shortcomings and its limitations were magnified by the events. When in the summer of 2012, the Syrian air defence shot down a Turkish jet and Syrian mortars landed on Turkish soil, Ankara turned to its Western allies, calling for a no-fly zone and argued that the US should increase their involvement in supporting the Syrian rebels. Moreover, Ankara also put forward the idea of creating a safe zone inside Syria to contain the escalating refugee crisis.

#### *2.1.2. Regional competition: the Gulf States*

The prospect of a regime change was seen positively in the eyes of the Gulf monarchies, which had no convenient relations with Assad's regime. The overthrow of Assad would reverse Iran's reach in the Levant, contribute to the weakening of Hezbollah in Lebanon and bring to power an allied, possibly acquiescent Sunni leadership. The Gulf States backed directly the opposition by arming the rebels affiliated to the FSA. By late 2012, it became clear that they had underestimated Assad's strengths and the rapid transformation of the uprising into a sectarian civil war. Moreover, private Gulf funding was granted to radical Islamist factions, which now threaten internally the Syrian society.<sup>42</sup> The three countries cultivated different visions for the country's future and the lack of a unitary strategy has hindered the capacity to manage such a situation.

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<sup>40</sup> "Qatar bankrolls Syrian revolt with cash and arms", Financial Times, 16 May 2013, available at: <http://www.ft.com/intl/cms/s/0/86e3f28e-be3a-11e2-bb35-00144feab7de.html#axzz44aHxtjFd>.

<sup>41</sup> Christopher Phillips "Syria" in "The Legal Classification of the Armed Conflicts in Syria, Yemen and Libya" by Louise Arimatsu and Mohbuba Choudhury, March 2014, Chatham House: London.

<sup>42</sup> *Ibid.*

### 2.1.3. *Vulnerable states: Iran, Iraq, Lebanon and Jordan*

Initially, Iran had welcomed the Arab uprisings as they uprooted Western-aligned autocrats and undermined the Gulf States' strategic interests. Tehran established a dialogue with the regime and feebly encouraged the adoption of a less repressive approach to dissent. Also, Iraq's central government found it difficult to calibrate its policy as the Syrian uprising could have, domestically, a potential positive outcome in increasing the marginalisation of the Sunni community. Nonetheless, a fractured Syria could become a safe haven for Sunni groups and reinvigorate the position of jihadi groups against the Shia rule. At first, Iraq settled on a policy of uneasy neutrality, but as the uprising degenerated highlighting the Sunni sectarian character, Prime Minister Maliki decided to support Assad. It is alleged that Syria has used the Iraqi financial institutions to circumvent sanctions.<sup>43</sup> The Syrian crisis also eroded the already limited capacity of the Lebanese state. The rough lines demarcating the border have witnessed ongoing violence and shelling by Syrian forces targeting smugglers and rebel fighters, causing deaths and destruction. The mounting refugee crisis is another cause of concern for Lebanon. Over 1,063,000 Syrian refugees have entered Lebanon in 2015 and have destabilized the country's delicate demographic balance.<sup>44</sup> The Jordanian position has been equally difficult its calculations have evolved as the conflict expanded. At first, the Hashemite monarchy seemed unwilling to allow the use of its territory and its border for operations aimed at the destabilisation of Assad, but the growing refugee crisis, the potential use or loss of Syrian chemical weapons and the radicalisation of the opposition, ultimately changed Jordan's position.

### 2.1.4. *The end of a predictable relationship: Israel*

What Assad and Israel had in common was the shared concern of a rise and radicalisation of Islamist groups. Nonetheless, the brute force implemented by Assad's regime, moved Israel to reconsider its position. Defence Minister Ehud Barak, stated that the fall of Assad would be a "blessing for the Middle East".<sup>45</sup> On the same line of thought, President Shimon Peres declared that the reluctance to remove president Bashar al-Assad was due to the absence of valid alternatives. He added that Assad "cannot be an alternative, neither from a human point of view nor from a political point of view".<sup>46</sup>

## 2.2. The international response

The outbreak of the violence in Syria was not perceived, initially, as a major strategic threat and this led many Western countries to underestimate the nature of the conflict.

### 2.2.1. *Russia and China*

Russia has a long-standing relationship with Syria since it was a superpower in the Cold War and shares a common political, economic and especially military dimension. Furthermore, Russia has significant commercial interests in Syria, in 2009, the total investment of Russian companies in Syria's tourism, energy and infrastructure was approximately 19.4 billion dollars.<sup>47</sup> From a military

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<sup>43</sup> *Ibid.*

<sup>44</sup> <http://data.unhcr.org/syrianrefugees/country.php?id=122>

<sup>45</sup> <http://www.haaretz.com/ehud-barak-in-vienna-assad-s-downfall-will-be-blessing-for-the-middle-east-1.400880>

<sup>46</sup> [http://www.slate.com/articles/news\\_and\\_politics/foreigners/2012/06/israeli\\_president\\_shimon\\_peres\\_on\\_iran\\_syria\\_president\\_assad\\_and\\_the\\_egyptian\\_crisis\\_.html](http://www.slate.com/articles/news_and_politics/foreigners/2012/06/israeli_president_shimon_peres_on_iran_syria_president_assad_and_the_egyptian_crisis_.html)

<sup>47</sup> Lesch (2013)

strategic point of view Syria is important to Russia bearing in mind that Tartus, a Syrian port city, is Moscow's only naval base in the Mediterranean. China, also, has consistent interest in Syria and has increased its trade with the latter in the past decade becoming, in 2010, Syria's third largest importer according to the European Commission<sup>48</sup>. In recent years, Russia has shown a desire to regain a lost diplomatic status, which has led the Kremlin to choose the opposing sides to the US, its Western allies and the United Nations. Together, Russia and China have vetoed three draft resolutions to shield Assad's regime from international action. However, Moscow demonstrated seriousness by engaging Kofi Annan - and, afterwards Brahimi - and by agreeing to the Geneva transitional plan. As President Vladimir Putin wrote in the New York Times: "We must stop using the language of force and return to the path of civilized diplomatic and political settlement"<sup>49</sup>. Nonetheless, Russia has continued to supply the Syrian military with weaponry and ammunitions, helicopters and other high-tech systems.

### 2.2.2. *EU and USA*

The United States under the Obama administration have promoted a cautious multilateral approach, seeking the support of the EU, to build up pressure on the Assad regime. On March 25<sup>th</sup> 2011, the US government condemned Syria's brutal repression of the demonstrations, but there was containment to openly criticising Assad. On April 29<sup>th</sup>, sanctions by the US and the EU were announced against Syria, as Obama signed the Executive Order 13572, imposing sanctions on Syrian officials and government-related entities responsible for human rights abuses and violence against civilians.<sup>50</sup> Secretary of State, Hillary Clinton stated: "the Syrian Government's actions are neither those of a responsible government nor a credible member of the international community"<sup>51</sup>. As the violence continued in Syria, the US government decided to take a step further and include President Assad in the list of those sanctioned for human rights violations. The EU followed the line of action of the Obama administration, sanctioning individuals, government organizations and Bashar al-Assad. Thus, no one was calling Assad to step down. The hope was that such coercive diplomatic measures would convince him to undertake a democratic opening. But as the death toll rose up to 2,000 by the end of July, the relations between Syria and the US continued to deteriorate. At last, on August 18<sup>th</sup> 2011, Obama finally stated that President Assad should step aside. So did the leaders of Canada, France, Germany, of the UK and the EU. In a joint statement David Cameron, Nicolas Sarkozy and Angela Merkel saying that: "we call on him to face the reality of the complete rejection of his regime by the Syrian people and to step aside in the best interests of Syria and the unity of its people"<sup>52</sup>.

### 2.2.3. *Western hesitancy*

As a matter of fact, in the first few months of Syria's revolution the Western states were hesitant on what to do. After years of tension they had just begun rebuilding relations with the Assad regime. The Obama administration shifted from the Bush administration approach and actively courted Bashar al-Assad, considering the engagement with Syria an essential element for Middle East strategy. Some European countries had preceded the US on the road to Damascus and had always

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<sup>48</sup> *Ibid.*

<sup>49</sup> [http://www.nytimes.com/2013/09/12/opinion/putin-plea-for-caution-from-russia-on-syria.html?\\_r=0](http://www.nytimes.com/2013/09/12/opinion/putin-plea-for-caution-from-russia-on-syria.html?_r=0)

<sup>50</sup> These targeted financial sanctions against dozens of Syrian officials and businessmen involved in the repression. Sanctions were also imposed on trade and oil exports to degrade the regime's financial cost for continued support of Assad.

<sup>51</sup> <http://www.state.gov/secretary/20092013clinton/rm/2011/05/162843.htm>

<sup>52</sup> <http://edition.cnn.com/2011/POLITICS/08/18/us.syria/>



been openly sceptical of the merits of isolating Syria. The Syrian-French rapprochement, motivated by Sarkozy's desire to break with the Chirac conduct and pursue an ambitious Mediterranean agenda, set a new bar for the other European states which then rushed to the Syrian capital. Though the Western governments denounced the actions undertaken by the regime, this never implied the necessity for Assad to resign. Secretary Clinton called on Assad to halt the violent repressions and "allow the Syrian people to express their opinions freely so that a genuine transition to democracy can take place".<sup>53</sup> He was expected, in the words of President Obama, to "lead that transition or get out of the way".<sup>54</sup> The magnitude and the growing peaceful anti-regime demonstrations clashed with the brutality and the extent of the regime's response. In this light, the Western assessments changed trajectory and there were increased diplomatic contacts with a wider section of the revolutionary activists. Declarations were made against Assad and his regime, also through measures to pressure the regime's resources. Sanctions and public discussions about a possible referral of senior Syrian officials to the International Criminal Court (ICC), with the offer of safe haven and intelligence outreach, were intended to generate additional incentives to potential defectors. Given the history of antagonism, Western governments, encouraged the initial mediation efforts of Turkey and the Arab states, judging that a regional approach would avoid the narrative of imperialist anti-Muslim motives. The Western strategy was to support the Gulf states as they set the diplomatic pace and to spent political capital in mobilising the international community against Assad.<sup>55</sup> Ironically, the Libyan precedent made it more difficult to contemplate an active intervention in Syria.<sup>56</sup>

Many Western policymakers were convinced and hoped that Syria could be eventually won over with the right mix of incentives, regional integration and institutional design.<sup>57</sup> In fact, the Syrian uprising came in a moment when the West was reducing its military expenditure and there was no desire for a large-scale military operation in Syria, which would necessarily require a consistent support by the United States. The geopolitical costs were seen to outweigh the merits of a forceful intervention. Furthermore, the Russian and Chinese opposition to any UN related intervention raised disagreements and friction between governments. Hence, the costs of circumventing the UNSC were judged to be even higher, given the number of similarities with the invasion of Iraq in 2003, and so the legal complications. What defence planners had learned from Iraq was that a country's military is needed to restore security and ensure the functioning of the institutions, especially during transitional periods. An important challenge was posed by Syria's large arsenal of chemical weapons, as it ensured a strategic strength. As the death tolls increased and the regime extensively deployed its conventional military arsenals, the debate shifted to alternative options such as the implementation of no-fly zones and the safe zones. Critics and proponents have debated the lessons of humanitarian precedents in Iraq and the Balkans during the 1990s.<sup>58</sup> Safe zones require significant ground presence and no-fly zones would entail a massive military operation to disable Syria's air-defence capabilities. Additionally, intelligence-sharing was considered as another type of assistance for selected rebel groups, but there has been no sign of sustained intelligence coordination.

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<sup>53</sup> <https://blogs.state.gov/stories/2011/07/11/secretary-clinton-meets-eu-high-representative-ashton>

<sup>54</sup> <https://www.whitehouse.gov/the-press-office/2011/05/19/remarks-president-middle-east-and-north-africa>

<sup>55</sup> Hokayem (2013)

<sup>56</sup> *Ibid.*

<sup>57</sup> *Ibid.*

<sup>58</sup> For further insight, see: Radin, A. (2014) "The Misunderstood Lessons of Bosnia for Syria", Washington Quarterly.

## CHAPTER TWO: THE SYRIAN CONFLICT AND INTERNATIONAL LAW

### 1. Armed Conflicts and International Law

#### 1.1. The notion of Armed Conflict

International Humanitarian Law (IHL)<sup>59</sup> seeks to limit the effects of armed conflicts by protecting the victims of hostilities and by restricting the means and methods of warfare. There are different criteria for determining the existence of an armed conflict and they differ according to whether the armed violence is fought between two or more States, in an international armed conflict (IAC), or between a state and one or more organized non-state armed groups or between two or more such groups, in a non-international armed conflict (NIAC). The jurisprudence developed through the International Criminal Tribunal for the former Yugoslavia departing from the *Tadić* case, has broadly defined that an armed conflict exists: “whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State”.<sup>60</sup> A conclusive and exhaustive definition of non-international conflict is much disputed, in particular in the light of Common Article 3 of the Geneva Conventions, which seems to adopt a very broad notion of NIAC. Instead, Article 1 of Additional Protocol II, states explicitly that “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature” are not to be considered armed conflicts. However, such situations of violence are only governed by the international human rights law (IHRL), which applies in all circumstances, even during armed conflicts.

#### 1.2. The notion of International Armed Conflict (IAC)

##### 1.2.1. IACs according to the IHL Treaties

The criteria, generally accepted, for the definition of an international armed conflict are derived from the Common Article 2 of the 1949 Geneva Conventions, which states that:

“In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more High Contracting Parties even if the state of war is not recognized by one of them.

The Convention shall also apply to all the cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets no armed resistance”.<sup>61</sup>

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<sup>59</sup> The terms ‘International Humanitarian Law’ (IHL) and ‘Law of Armed Conflicts’ (LOAC) are used interchangeably referring to the doctrine of the *jus in bello*.

<sup>60</sup> Prosecutor v. Dusko Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72 (2 October 1995): 70.

<sup>61</sup> See Common Article 2 of the 1949 Geneva Conventions (I-IV).

The Additional Protocol I of 1977 extends the definition of IACs by including “armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations”.<sup>62</sup>

### 1.2.2. *IACs according to the jurisprudence and doctrine*

The jurisprudence of the ICTY has also proposed a general definition of international armed conflict. In the *Tadić* case, the Tribunal, has stated that “an armed conflict exists whenever there is a resort to armed force between States”.<sup>63</sup> Moreover, scholars also proposed useful considerations for the definition of IACs. Schindler, considers “the existence of an armed conflict within the meaning of Article 2 common to the Geneva Conventions can always be assumed when parts of the armed forces of two States clash with each other. [...] Any kind of use of arms between two States brings the Conventions into effect”.<sup>64</sup> In addition, Gasser explains that: “any use of armed force by one State against the territory of another, triggers the applicability of the Geneva Conventions between the two States. [...] It is also of no concern whether or not the party attacked resists. [...] As soon as the armed forces of one State find themselves with wounded or surrendering members of the armed forces or civilians of another State on their hands, as soon as they detain prisoners or have actual control over a part of the territory of the enemy State, then they must comply with the relevant convention”.<sup>65</sup>

According to this, IACs are those conflicts in which “High Contracting Parties”, meaning States, confront. An IAC occurs when one or more States resort to armed force against another State, regardless of the reasons or the intensity of this confrontation. Significant IHL provisions may be applicable even in absence of open hostilities. Moreover, no formal declaration of war or recognition of the situation is required. In addition, the Commentary of the Geneva Conventions of 1949, confirms that: “any difference arising between two States and leading to the intervention of armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war. It makes no difference how long the conflict lasts, or how much slaughter takes place”.<sup>66</sup>

### 1.3. The notion of Non-International Armed Conflict (NIAC)

After the Cold War, a great number of conflicts worldwide were fought within the borders of States, with outside interventions and without. These ‘new wars’, represented a different dimension of warfare characterised by an asymmetric disposition. Generally, the nature of such conflicts is moved by the motives of armed opposition groups, which aim at denying State control to change the political leadership or at securing natural resources. The fluid nature of such conflicts challenges the application of IHL. Treaty law and the jurisprudence of *ad hoc* tribunals have addressed when

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<sup>62</sup> Additional Protocol I of 1977, Article 1, para. 4.

<sup>63</sup> ICTY, *The Prosecutor v. Dusko Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-A, 2 October 1995, para. 70.

<sup>64</sup> Schindler, D. (1979) “The different Types of Armed Conflicts According to the Geneva Conventions and Protocols”, RCADI, Vol. 163-II, p. 131.

<sup>65</sup> Gasser, H-P. (1993) “International Humanitarian Law: an Introduction, in: *Humanity for All: the International Red Cross and Red Crescent Movement*”, Haug, H. (ed.), Paul Haupt Publishers: Berne, p. 510-511.

<sup>66</sup> Pictet, J. (1952) “Commentary on the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field”, ICRC: Geneva, at 32.

the violence perpetrated in a non-international armed conflict (NIAC) triggers the application of international humanitarian law. The two legal instruments that apply to NIACs are: the Common Article 3 of the Geneva Conventions (CA3) and the 1977 Additional Protocol II to the Geneva Conventions (APII).

### *1.3.1. Non-International Armed Conflicts in the meaning of Common Article 3*

Common Article 3 applies to “armed conflicts not of an international character occurring in the territory of one of the High Contracting Parties”.<sup>67</sup> Hostilities may occur between governmental armed forces and non-governmental armed groups or between such groups only. Considering Common Article 3 it is generally understood that IHL does not apply to internal disturbances or tensions. During the Geneva Conference, some States negotiating the provisions of the four Conventions advanced the possibility that draft Art. 2(4) – which became CA3 – should not cover situations of “disorder”, “anarchy” or “brigandage”.<sup>68</sup> The Joint Committee did not accept the amendment proposed by the French delegate. Yet, the Report of the Joint Committee to the Plenary Assembly stated that the term non-international armed conflict referred to “civil war, and not to a mere riot or disturbances caused by bandits”.<sup>69</sup> In order to determine the existence of an armed conflict, the hostilities require a certain grade of intensity - among two or more Parties – and a certain degree of organization of the non-State armed group involved, in conducting hostilities of a ‘collective’ character.<sup>70</sup> The Pictet Commentaries to the Geneva Conventions consider a wide application of CA3, even in situations that present a low level of violence.<sup>71</sup> The *ratio* behind Pictet’s reasoning can be explained considering that in that time, before the widespread ratification of international human rights treaties, IHL could be considered the most protective regime. However, it is argued that the threshold for the application of CA3 may be lower today than what was implied during the negotiations in the diplomatic Conference of 1949, where many proposals had referred to situations with civil war characteristics.<sup>72</sup> Nonetheless, the threshold is certainly lower than for the application of Additional Protocol II.

### *1.3.2. Non-International Armed Conflicts in the meaning of Art. 1 of AP II*

A more narrow definition of NIACs was proposed with the adoption of Additional Protocol II. This instrument applies to armed conflicts “which take place in the territory of a High Contracting Party

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<sup>67</sup> Common Article 3 to the Geneva Conventions of 12 August 1949 available at: <https://www.icrc.org/ihl/WebART/375-590006>.

<sup>68</sup> See Mr Lamarle speaking for France, “Final Record of the Diplomatic Conference of Geneva 1949”, Vol. II-B, “Summary Records of the Joint Committee: First Meeting”, 26 April 1949, at 10.

<sup>69</sup> Specifying that: “States could not be obliged as soon as a rebellion arose within their frontiers, to consider the rebels as regular belligerents to whose benefit the Conventions had to be applied”. See “Final Record, Diplomatic Conference of Geneva of 1949, Vol. II-B, Report drawn up by the Joint Committee and presented to the Plenary Assembly”, at 129.

<sup>70</sup> See for example Pictet, J. et al. (ed.) “Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field: Commentary”, ICRC: Geneva, 1952, at 32.

<sup>71</sup> The Commentary list a number of “convenient criteria” to help determining the existence of an armed conflict, some of which refer to the intensity of the armed confrontations, such as the government being compelled to use military force for fighting the insurgents. The Commentary also stress the “optional” character of these criteria and that they are indicators for the existence of an armed conflict, but their combined presence is not mandatory. See Pictet, J. (ed.), Convention IV Relative to the Protection of Civilian Persons in Time of War: Commentary, *supra* note 19, at 35.

<sup>72</sup> See Cullen, A. (2010) “The Concept of Non-International Armed Conflict in International Humanitarian Law”. CUP, at 158.

between its armed forces and dissident armed forces or other organized armed groups”.<sup>73</sup> Article 1 of AP II introduces a requirement of territorial control of non-governmental Parties, which must exercise such control “as to enable them to carry out sustained and concerted military operations and to implement this Protocol”. Moreover, it applies to armed conflicts between State armed forces and dissident armed forces or other organised armed groups. However, AP II does not only apply to armed conflicts occurring between non-State armed groups. Furthermore, Additional Protocol II “develops and supplements” Common Article 3 “without modifying its existing conditions of application”.<sup>74</sup> This intends that the restrictive definition is relevant solely for the application of Protocol II, but it does not extend to the law of NIAC in general and it does not modify the level of NIAC according to CA3. Additionally, the Statute of the ICC, within Article 8, confirms the existence of a definition of a non-international armed conflict not fulfilling the criteria of Protocol II.<sup>75</sup>

Article 1(1) of AP II considers armed conflicts where “sustained and concerted military operations” are carried out by OAGs.<sup>76</sup> Supposedly, the sustained character of the military operations may be connected with the intensity of the hostilities and the duration of the conflict.<sup>77</sup> The Protocol’s higher demands have resulted from the concerns raised by states during the drafting of the latter; as they believed that the Treaty would legitimize insurgents. Such a threshold, requires a “responsible command, [and] exercise [of] such control over a part of its territory”.<sup>78</sup> The ICRC has pointed out that the AP II threshold would exclude many existing armed conflicts involving dissident armed groups fighting against each other and also armed groups without a proper chain of command or without proper control of a defined territory, fighting against the established government.<sup>79</sup> However, today, most of the provisions contained within AP II are applicable in any armed conflict - also of a non-international character – as rules of customary international humanitarian law.<sup>80</sup>

### 1.3.3. NIACs according to the jurisprudence of the ICTY

Indicative criteria by the ICTY has been suggested to determine whether a situation meets the intensity threshold to be a NIAC or instead classifies as internal disturbances, for which IHL is not

<sup>73</sup> Additional Protocol II, Article 1, para. 1.

<sup>74</sup> *Ibid.*

<sup>75</sup> Statute of the ICC, Article 8 para. 2 (f): “It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups”.

<sup>76</sup> Protocol II Additional of the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, signed at Geneva on 8 June 1977.

<sup>77</sup> As an example, the *Akayesu* judgment when determining the applicability of Additional Protocol II to the armed conflict in Rwanda: “The armed forces opposing the government must be under responsible command, which entails a degree of organisation within the armed group or dissident armed forces. This degree of organisation should be such so as to enable the armed group or dissident forces to plan and carry out concerted military operations, and to impose discipline in the name of a de facto authority. [...] In essence, the operations must be continuous and planned”. See *Prosecutor v. Akayesu*, Judgement, Trial Chamber, paras. 625-626.

<sup>78</sup> Additional Protocol I of 1977, Article 1, para. 1.

<sup>79</sup> See ICRC memorandum conveyed by New Zealand, UN Doc. A/CONF/.183/INF/9 (13 July 1998).

<sup>80</sup> Accordingly, torture and cruel treatment, taking of hostages, slavery and slave trade, collective punishments or pillage are also prohibited under customary law. The same is valid for fair trial guarantees, the right of the sick and wounded to receive medical care and protection, or the protection of civilians not taking direct part in hostilities from direct attacks. For a list of rules contained in the ICRC Customary Law Study see ICRC, “Customary IHL/ Rules sorted by name”, available at [http://www.icrc.org/customary-ihl/eng/docs/v1\\_rul](http://www.icrc.org/customary-ihl/eng/docs/v1_rul).

applicable. Whether the intensity or the organization thresholds are met, for the situations to be considered as a NIAC, has to be evaluated case by case.<sup>81</sup> The factors considered by the ICTY are: the gravity and recurrence of the attacks, the temporal and territorial expansion of violence and the collective character of the hostilities; if the parties were able to operate within a territory under their control, if there was an increase in the number of government forces, the distribution and the types of weapons used by both parties in the conflict, and if the hostilities have provoked the displacement of a large number of people.<sup>82</sup> The ICTY also takes into account the legal regime used by government forces, “the way organs of the State, such as the police and military, use force against armed groups”.<sup>83</sup> Another element, when determining the existence of an armed conflict is the qualification of the situation by the UN Security Council as a threat to peace or a breach to peace. It has been emphasized how such qualification by the UNSC should be based on a factual analysis rather than on statements of political bodies.<sup>84</sup> However, according to the *Tadić* case the temporal scope of a NIAC can be considered from the beginning of the armed conflict to the achievement of a peaceful settlement.<sup>85</sup>

In regard of the organizational criterion, this is met when non-State actors are armed to the extent to which they have the capacity to mount attacks. Still, this organizational requirement does not mean that a Party in conflict has to reach the level of a conventional military unit or hold the capacity to undertake advanced military operations. To determine the compliance of this threshold, Tribunals have weighed: the internal organizational structure of the armed group, the establishment of a headquarters, the capacity to carry out coordinated actions between the armed units, the ability to recruit new members and the capacity to provide military training, the use of uniforms and military equipment, and finally the participation of members of the armed group to political negotiations.<sup>86</sup> While, the existence of an organized structure in States<sup>87</sup> is assumed, it needs to be evaluated when dealing with non-State armed groups. It is generally accepted that the level of organization of OAGs does not have to be as developed as the one of State armed forces.<sup>88</sup> The *ratio* of the organizational requirement considers that the OAGs are capable of conducting hostilities of a collective nature and of intensity above the level of internal disturbances or tensions. Finally, the level of organization is necessary for the OAG to comply with the provisions and the obligations

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<sup>81</sup> Prosecutor v. Fatmir Limaj et. al, Judgement, Case No. IT-03-66-T (30 November 2005), p. 90.

<sup>82</sup> Examples can be found in Prosecutor v. Haradinaj (IT-04-84-T), 3 April 2008, paras. 40-49 and Prosecutor v. Limaj (IT-03-66-T), 30 November 2005, paras. 135-167.

<sup>83</sup> See Prosecutor v. Boškoski et. al., Case No. IT-04-82-T, Judgment, Trial Chamber, 10 July 2008, para. 178.

<sup>84</sup> Prosecutor v. Tadić, Judgement, Trial Chamber, paras. 565-568.

<sup>85</sup> Tadić, para. 70.

<sup>86</sup> Prosecutor v. Limaj, 30 Novembre 2005, paras. 94-129.

<sup>87</sup> According to Article 1 of the 1933 “Montevideo Convention on the Rights and Duties of States”, organization is one of the elements of statehood necessary for a State to operate an effective government. Any existing State is believed to possess a degree of organization that would enable it to conduct collective military operations. See Montevideo Convention on the Rights and Duties of States, 26 December 1933, available at: [http://avalon.law.yale.edu/20th\\_century/intam03.asp](http://avalon.law.yale.edu/20th_century/intam03.asp).

<sup>88</sup> See Pictet, J. (ed.), Convention IV Relative to the Protection of Civilian Persons in Time of War: Commentary (ICRC, Geneva, 1958), at 35; and Sandoz, Y., Swinarski, C., Zimmerman, B. (ed.), Commentary on the Additional Protocols to the Geneva Conventions (Martinus Nijhoff, Dordrecht/ICRC, Geneva 1987), at 1348; also see “Agreement on the organisation of the international activities of the components of the International Red Cross and Red Crescent Movement”, 322 International Review of the Red Cross (1998), Art. 5(2)(a), available at: <http://www.icrc.org/eng/resources/documents/misc/57jp4y.htm>. While states possess both an organized ‘civilian’ and military structure, when it comes to the organization of non-state armed groups, IHL is only concerned with the military structure of the insurgents. Thus, the existence of a civilian organization is indicative of the existence of a well-organized entity, but it is not an indispensable requirement under humanitarian law.

under IHL. Importantly, as stressed by the ICTY in its *Limaj* Trial Judgement: “the purpose of the armed forces to engage in acts of violence or also achieve some further objectives is, therefore, irrelevant”.<sup>89</sup> This means, that the actual or perceived purposes of the hostilities are irrelevant and the motivations of the insurgents are not a valid condition for the existence of a NIAC under IHL.

## **2. The Legal Qualification of the Armed Violence in Syria**

### **2.1. Evidence in support of the existence of an armed conflict and its classification**

On request of the United States in April 2011, a special session of the Human Rights Council (HRC) was demanded to address the human rights situation in Syria.<sup>90</sup> Subsequently the Council adopted Resolution S-16/1 in which it condemned the use of violence against the peaceful protest movements by the Syrian government authorities and called the Syrian Arab Republic “to immediately put an end to all human rights violations, protect its population and respect fully all human rights and fundamental freedoms, including freedom of expression and freedom of assembly”.<sup>91</sup> The authorities were also demanded to ensure access to Internet and to the telecommunications networks, to allow access to foreign journalists and, to consequently, lift censorship on reporting. With this resolution the High Commissioner’s Office was authorized to dispatch a mission in Syria to investigate the alleged violations of international human rights law. The preliminary report, released on August 18<sup>th</sup> 2011 comprised the time period between March and July 2011.<sup>92</sup> In relation to the violence, it referred to three bodies of law: international human rights law, international criminal law and domestic law. It concluded that the broad use of force by military and security forces was to be considered “a violation of the State’s international human rights obligations”.<sup>93</sup> The report also mentioned an excessive use of force against demonstrators, the killing of protestors, episodes of torture, the ill-treatment of detainees and enforced disappearances. On August 22<sup>nd</sup> 2011 the HRC adopted Resolution S-17/1, which established the Independent International Commission of Inquiry on the Syrian Arab Republic (CoI) to investigate the alleged human rights violations since March 2011. In consideration of the existence of an armed conflict and the application of IHL, the Commission stated:

“According to the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia, an armed conflict exists when there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups, or between such groups within a State. The Trial Chamber in *Tadić* and subsequent cases interpreted the test for internal armed conflict as consisting of two criteria: the intensity of the conflict, and the organization of the parties to the conflict, as a way to distinguish armed conflict from banditry, unorganized and short-lived insurrections or terrorist activities, which do not fall within the scope of international humanitarian law.

The commission was unable to verify the level of the intensity of combat between Syrian armed forces and other armed groups. Similarly, it has been unable to confirm the level of

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<sup>89</sup> See Prosecutor v. Limaj, Bala, and Musliu, Case No. IT-03-66-T, Judgment, Trial Chamber, 30 November 2005, para. 170.

<sup>90</sup> A/HRC/S-16/2, report of the Human Rights Council on its 16th special session, 29 April 2011.

<sup>91</sup> A/HRC/RES/S-16/1, report on “The current human rights situation in the Syrian Arab Republic in the context of recent events”, adopted by the Human Rights Council at its 16th special session.

<sup>92</sup> A/HRC/18/53, report of the UN High Commissioner for Human Rights.

<sup>93</sup> *Ibid.*, para. 72.

organization of such armed groups as the Free Syrian Army. For the purposes of the present report, therefore, the commission will not apply international humanitarian law to the events in the Syrian Arab Republic since March 2011”.<sup>94</sup>

Also the second CoI report (A/HRC/19/69), which covered the period until February 15<sup>th</sup> 2012, informed that the events did not apply under international humanitarian law as the Commission was unable to validate if the FSA, the local groups and other anti-government armed groups had reach the necessary level of organization.

On June 26<sup>th</sup> 2012, Bashar al-Assad, in a television speech addressing his new cabinet, acknowledged that Syria was in a “state of war”.<sup>95</sup> Furthermore, the head of the International Committee of the Red Cross (ICRC) delegation in Syria, in a press release on May 27<sup>th</sup> 2012, commented that “the parties to the fighting to distinguish at all times between civilians and those participating in the hostilities”.<sup>96</sup> The ICRC delegation statement continued with the call for methods and means of warfare that would spare the involvement of civilians in the hostilities. This declaration suggests that the ICRC already considered the situation in Syria to be governed under the IHL. In an operational update of the 27<sup>th</sup> of July 2012, the ICRC clearly described the violent situation in Syria as a “non-international armed conflict”.<sup>97</sup> On August 15<sup>th</sup> 2012 the CoI released its third report (A/HRC/21/50), in which the Commission recognized the elements that justified the application of IHL:

“In its previous reports, the commission did not apply international humanitarian law. During the present reporting period, the commission determined that the intensity and duration of the conflict, combined with the increased organizational capabilities of anti-Government armed groups, had met the legal threshold for a non-international armed conflict. With this determination, the commission applied international humanitarian law in its assessment of the actions of the parties during hostilities”.<sup>98</sup>

The Commission, specifically stated that a:

“[...] non-international armed conflict developed in the Syrian Arab Republic during February 2012 which triggered the applicability of Common Article 3 of the Geneva Conventions as well as customary law relevant to non-international armed conflict”.<sup>99</sup>

The UN Security Council draft resolution (S/2012/77), of February 5<sup>th</sup> 2012, that attempted to authorize measures under Article 42 of the Charter was vetoed by China and Russia. Moreover, the UN High Commissioner for Refugees was invited on August 30<sup>th</sup> 2012 to brief the Security Council and the participants conveyed a general consensus for the application of IHL to the hostilities.<sup>100</sup> Human Rights Watch considered that the violence in Syria constituted a NIAC to which IHL was applicable, since April 2012. The report posited that “the prolonged nature of the conflict, the nature of the weapons used, and the number of casualties, the situations in some parts of Syria appears to meet the intensity of requirement”.<sup>101</sup> The report affirmed that the organizational requirement was

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<sup>94</sup> A/HRC/S-17/2/Add. 1, paras. 98-99.

<sup>95</sup> <http://www.bbc.com/news/world-middle-east-18598533>

<sup>96</sup> <https://www.icrc.org/eng/resources/documents/news-release/2012/syria-news-2012-05-27.htm>

<sup>97</sup> <https://www.icrc.org/eng/resources/documents/update/2012/syria-update-2012-07-17.htm>

<sup>98</sup> A/HRC/21/50, para. 12

<sup>99</sup> *Ibid.*, Annex II, para. 12

<sup>100</sup> S/PV.6826

<sup>101</sup> “They Burned My Heart – War Crimes in Northern Idlib during Peace Plan Negotiations”, Human Rights Watch report, May 2012, p.32



met considering the method of the FSA fighters, their attacks against the Syrian forces and the administration of areas under their control.<sup>102</sup>

## 2.2. Legal Conclusions: the existence of an armed conflict and its classification

### 2.2.1. *The existence of a NIAC*

It is clear that already by the summer of 2011, the violence in Syria had reached a level of intensity, which opened a discussion on whether the threshold for the existence of an armed conflict had been met. The evidence in support included the type of weaponry used against the demonstrators, the deployment of armed forces by the government, the use of quasi-military operation methods against the activists. The growing number of government forces deployed to respond to the rising number of armed protestors indicated that the government no longer considered possible the containment of the violence within the framework of law enforcement of the police forces. In addition, the number of individuals seeking safety across international borders evidenced that the recurrence of armed hostilities had spread geographically and had intensified. At the time of writing about 2.1 million refugees have been registered by the UNHCR in Egypt, Iraq, Jordan and Lebanon, while the Turkish Government has registered 1.9 million refugees.<sup>103</sup> Nonetheless, the existence of a NIAC is not based solely on the intensity threshold only, but there must be identifiable opposing parties to the conflict.<sup>104</sup>

In March 2011, the FSA had nominated a spokesperson, it had released political statements, *communiqués* and had established its headquarters in Turkey. However, there was little credibility to the fact that the military orders imparted by the leadership and acted upon the armed groups on the ground. The emergence of provincial military councils by March 2012 proved that the FSA fighters operating in Syria were setting up organized command structures. In addition, coordinated actions between various groups were becoming more frequent and this increased the military capacity to sustain operations against the State's armed and security forces. Moreover, the FSA was also able to recruit new members, provide basic military training and gain access to a regular supply stream of weapons from outside the country. Moreover, the growing intensity of the violence combined with the factors above mentioned meant that, at least by March 2012, the Syrian conflict can be considered a NIAC between government forces and OAGs fighting on behalf of the opposition under the banner of the FSA. Thus, the conflict triggers the application of IHL. Another step forward was made on November 13<sup>th</sup> 2012, when France recognized Syria's opposition coalition (the Syrian National Council or SOC) as the only legitimate representative of the Syrian people. This ensured a certain credibility of the SOC to other countries like Turkey, Italy, the United Kingdom, Spain, Denmark and Norway. The European Council also shared this view by stating that it will support "its relations with the international community".<sup>105</sup> Finally, in December 2012, the United States recognized the SOC as the lawful representative of the Syrian people.

### 2.2.2. *The 'internationalization' of the Syrian conflict*

An important question is the whether only NIAC rules may apply to the armed conflict in Syria or if the nature and the involvement of other states within the conflict has 'internationalized' the conflict

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<sup>102</sup> *Ibid.*

<sup>103</sup> <http://data.unhcr.org/syrianrefugees/regional.php>

<sup>104</sup> Fleck (2013)

<sup>105</sup> Council of the EU, Doc 16392/12, 19 November 2012.

with the consequence of the need to respect all IHL rules, also those applicable in IACs.<sup>106</sup> Generally, in the case of an armed intervention in support of the Government forces, the conflict, maintains its non-international qualification as the hostilities are still between a State and a non-State actor. However, if a third party State decides to intervene alongside non-state armed groups, the conflict earns international character, presenting an inter-state confrontation.<sup>107</sup> Nonetheless, not all interferences by third party States imply that those States are Parties to the armed conflict. This is only considered when a State makes a direct contribution to the hostilities to the expense of the opposing Party or, in the case of OAGs, when it exercises control over their actions and the latter are attributable to such State.<sup>108</sup>

It is difficult to quantify the precise degree of external involvement, nonetheless, there is considerable evidence, which shows that some States have actively supported the FSA, while others have continued to back and aid the Assad regime. Importantly, the operational support granted to the FSA by Syria's neighbouring States – in terms of weaponry supply, military equipment and training – violates the principle of non-intervention and the prohibition of the use of force.<sup>109</sup> External support for the government has been granted by Russia, which continues to sell weapons to Syria in accord to the military hardware contracts it has with the country.<sup>110</sup> In accordance, Iran also provides military equipment, personnel and advisory support to the government. General Qassem Suleimani, commander of the elite Quds Force of Iran's Revolutionary Guard Corps, has been reportedly aiding Assad as "chief regime adviser and strategist".<sup>111</sup> Iran also supports a number of pro-government militia groups. Moreover, there are many foreign militia actively engaged in the hostilities against the FSA, such as the Abu al-Fadl al-Abbas Brigade, which counts Hezbollah fighters from Lebanon and Iraqi Shi'a fighter.<sup>112</sup> On the other hand, external support for the FSA has been granted by Turkey, which has continued to support the opposition when the violence

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<sup>106</sup> Human Rights Law is applicable both during international and non-international armed conflicts.

<sup>107</sup> Krisztina Huszti Orban and Natia Kalandarishvili-Mueller (2012)

<sup>108</sup> Any intervention in the internal matters of a state qualifies as a violation of the principle of non-intervention in domestic matters, as recognized in the UN Charter Art. 2(7). Yet, not all such interventions amount to a violation of the prohibition to use armed force or result in the intervening State becoming a Party to an eventual armed conflict. The level of control over the acts of the armed group supported by a State is controversial. For this purpose the ICTY Appeals Chamber considers the 'overall control' test, in which the "coordinating or helping in the general planning of its [the armed group's] military activity". See *Prosecutor v. Tadić*, Judgement, Trial Chamber, para. 99-145. The ICJ, on the other hand, considers that there has to be proof of effective control of the conduct of actions - directed or controlled by a State - over each relevant military operation. See *Nicaragua v. United States of America*, International Court of Justice, 27 June 1986, ICJ Reports of judgments, advisory opinions and orders, at 114 and International Court of Justice, Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), Judgement of 26 February 2007, paras. 403-406.

<sup>109</sup> See ICJ, *Nicaragua v. United States of America*, 1986, 14, paras. 209 and 246.

<sup>110</sup> Reuters, 'Russia delivers anti-ship missiles to Syria: report', 1 December 2011, available at <http://www.reuters.com/article/2011/12/01/us-syria-russia-missiles-idUSTRE7B02LL20111201>; Richard Galpin, 'Russian arms shipments bolster Syria's embattled Assad', BBC, 30 January 2012, available at <http://www.bbc.co.uk/news/world-middle-east-16797818>; Thomas Grove, 'Russia in deal to deliver Syria fighter jets: report', Reuters, 23 January 2012, available at <http://www.reuters.com/article/2012/01/23/us-syria-russia-jets-idUSTRE80M1AP20120123>.

<sup>111</sup> Joshi, S. "Can Assad's army withstand growing pressure?", BBC, 9 February 2012, available at <http://www.bbc.co.uk/news/world-middle-east-16969501> (last accessed 24 February 2012); Zvi Bar'el, 'Report: Top Iran military official aiding Assad's crackdown on Syria opposition', Haaretz, 6 February 2012, available at <http://www.haaretz.com/news/middle-east/report-top-iran-military-official-aiding-assad-s-crackdown-on-syria-opposition-1.411402>.

<sup>112</sup> Arimatsu, L. and Choudhury M. (2014) "The Legal Classification of the Armed Conflicts in Syria, Yemen and Libya". Chatman House, London.

escalated. In July 2011, this provided the leadership of the FSA a safe-haven and their fighters were able to move freely between the Turkish and the Syrian border. Many suspect that Turkey is also providing the FSA with training.<sup>113</sup> This support might under certain circumstances amount to a violation of the prohibition of the use or threat of force under Article 2(4) of the UN Charter.<sup>114</sup> Nonetheless, Turkey considers the possibility of intervention only with the Security Council's approval.<sup>115</sup> Furthermore, Jordan has consented limited free movement through its border with Syria and it has allegedly provided training for the FSA. Gulf States, like Qatar and Saudi Arabia, are funding the FSA and it is likely that they are providing also weapons. The EU and the United States have been supplying the FSA with "non-lethal military aid" and "technical assistance for the protection of civilians".<sup>116</sup>

In conclusion, Syria is not a signatory of the AP II and this means that the possibly 'internationalized' NIAC is governed by CA3 and customary international law. Nevertheless, the significance of distinguishing between conflicts falling under the regulations and provisions of AP II and those falling under CA3 is slowly declining. In addition, there is an increasing harmonization between IACs and NIACs customary rules.<sup>117</sup> Scholars have called for a single categorization and regulation for the two types of armed conflict.<sup>118</sup>

### 3. Applicable Law

#### 3.1. General considerations on IHRL and IHL

There are specific conventional rules, firstly developed with CA3 to the Geneva Conventions, which protect victims in NIACs. They provide for the protection of combatants, civilians and individuals *hors de combat*. Furthermore, they grant a right of initiative for impartial humanitarian bodies, like the ICRC and encourage the warring Parties to enforce and comply, also by means of special agreements, with the other provisions of the Geneva Conventions.<sup>119</sup> The rules and regulations contained in CA3 ensure general protection and promote the principles of humanity in all armed conflicts. These rules have been recognized by the ICJ in the *Nicaragua* case as an emanation of "elementary considerations of humanity" which constitute a basic stepping-stone

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<sup>113</sup> *Ibid.*

<sup>114</sup> Art. 2(4) UN Charter provides for the following: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations".

<sup>115</sup> Aljazeera, 'Inside Syria: Who really calls the shots in Damascus', 12 February 2012, available at: <http://www.aljazeera.com/programmes/insidesyria/2012/02/201221271036112686.html>

<sup>116</sup> <http://www.spiegel.de/international/europe/the-eu-is-set-to-support-syrian-rebels-with-military-training-a-886794.html>

<sup>117</sup> Dinstein, Y. (2014) "Non-International Armed Conflicts in International Law", Cambridge University: Cambridge.

<sup>118</sup> See Cassese in Tadić and E. Crawford (2002) "Unequal before the Law: The Case for the Elimination of the Distinction between International and Non-International Armed Conflicts", 20 LJIL 441: 449-52. In 1999, within the Berlin session of the Institut de Droit International has expressed the support for the drafting and adoption of a new "convention designed to regulate all armed conflicts and protect all victims, regardless of whether such conflicts are international, non-international or of a mixed character". See: Berlin Session (1999) Institut de Droit International, Resolution on "The Application of International Humanitarian Law and Fundamental Human Rights, in Armed Conflicts in which Non-State Entities Are Parties", 68-II AIDI 287, 393.

<sup>119</sup> Fleck (2013)

applicable to all armed conflicts.<sup>120</sup> The relevance of CA3 was reconfirmed and stressed many times, within the ICTY *Tadić* case and in the ICTY *Kunarać* case. In NIACs, all Parties involved are bound to comply with its rules, State and non-State actors. It is important to mention that for international legal obligations to apply, there is no need for the State involved first hand or another third-party State to recognize the armed opposition groups. As a matter of fact, non-State actors, as nationals of a State member of the international community - that has agreed to the fundamental values of such community – are bound to respect the national laws which conform to the State's international commitments under conventional and customary law.<sup>121</sup> Indeed, within the Preamble of the newly amended Syrian Constitution of 2012, it is clearly stated: “The Syrian Arab Republic considers international peace and security a key objective and a strategic choice, and it works on achieving both of them under the International Law and the values of right and justice.”<sup>122</sup>

### 3.2. The international legal obligations of States

#### 3.2.1. *The rules applicable when the violence does not amount to an armed conflict*

Situations categorized as internal disturbances or tensions, where violence is isolated and sporadic, are not classified as armed conflicts and are not governed by IHL. On the other hand, international human rights law (IHRL) embraces all situations in which an individual needs protection against the abuse of power or when actions must be taken to guarantee its economic, social, and cultural rights. Today, some fundamental legal provisions within IHRL are considered to be *jus cogens*. Core human rights, entail essential obligations on behalf of the States that have undertaken to respect, protect and fulfil them.<sup>123</sup> Therefore, States are obliged to impose such a respect to all individuals or group members under their protection. All the principles enunciated by the Universal Declaration of Human Rights proclaimed by the UN General Assembly, on December 10th 1948, with Resolution 217 A, are considered universally protected fundamental human rights.<sup>124</sup> By which: “All human beings are born free and equal in dignity and rights”.<sup>125</sup> And where: “Everyone has the right to life, liberty and security”.<sup>126</sup> Importantly, the ‘right to life’ can be considered the “supreme right”,<sup>127</sup> which is “basic to all human rights”.<sup>128</sup> Both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant of Economic, Social and Cultural Rights are legally binding treaties which provide a guarantee to human rights standards, elaborated conjointly with the Universal Declaration of Human Rights. All human rights are based on the desire to protect human dignity, but not all human rights violations necessary violate the latter.<sup>129</sup>

<sup>120</sup> ICJ, Military and Paramilitary Activities in and against Nicaragua, Nicaragua v. US, Judgement, (27 June 1998) at p.218, <http://www.icj-cij.org/docket/files/70/6503.pdf>.

<sup>121</sup> Fleck (2013)

<sup>122</sup> Preamble of the Constitution of the Syrian Arab Republic of 2012, available at: [www.constituteproject.org/constitution/Syria\\_2012.pdf?lang=en](http://www.constituteproject.org/constitution/Syria_2012.pdf?lang=en).

<sup>123</sup> Moeckli, D. et al. (ed.) (2014) “International Human Rights Law”, Second Edition, Oxford University Press: Oxford.

<sup>124</sup> Universal Declaration of Human Rights (UDHR), available at: <http://www.un.org/en/universal-declaration-human-rights/>.

<sup>125</sup> Article 1 of UDHR, 1948.

<sup>126</sup> Article 3 of UDHR, 1948.

<sup>127</sup> General Comment 6(61), UN Doc CCPR/C/21/Add.1, also published as UN Doc A/37/40, Annex V, UN Doc CCPR/3/Add.1, 382-3. See also, de Guerrero v. Columbia (No 45/1979), UN Doc C/CCPR/OP/1, 112 at 117.

<sup>128</sup> General Comment 14(23), UN Doc A/40/40, Annex XX, UN Doc CCPR/C/SR. 536, 1.

<sup>129</sup> Progress Report of the Eminent Persons Panel by Manfred Nowak, “Protecting Dignity: An Agenda for Human Rights”, 12, available at: [http://www.geneva-academy.ch/docs/publications/Panel-humanDignity\\_rapport2011.pdf](http://www.geneva-academy.ch/docs/publications/Panel-humanDignity_rapport2011.pdf).

Nonetheless, slavery and torture are considered direct attacks to the core of human dignity and their prohibition is considered an absolute and non-derogable human right. Importantly, this is also mentioned within Article 2(2) of the UN Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment:

“No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture”.

Other human rights provisions cannot be derogated and by Article 4(2) of the ICCPR they are the rights within Article 6, 7<sup>130</sup>, 8(1), 8(2)<sup>131</sup>, 11, 15, 16 and 18<sup>132</sup>. According to Article 6 of the ICCPR: “Every human being has the inherent right to life. [...] No one shall be arbitrarily deprived of his life”.<sup>133</sup> The right to a fair trial is also a fundamental human right and it guarantees that no one will be deprived of its liberty without a due process of law.<sup>134</sup> Article 9(1) of the ICCPR, states that every individual has the right to the liberty and security of its own persona. “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 procedures are established by law”.<sup>135</sup>

IHL contains more advanced provisions for the protection of individuals, than IHL, at all times and under all circumstances. Thus, this protection can waver during times of public emergency when certain provisions can be suspended legitimately.<sup>136</sup> The State can derogate from its duties and responsibility only when the international community has been timely alerted of such state of emergency, which has to fulfil the internationally recognised criteria.<sup>137</sup> The recognition of the existence of a threat to the life of the State, considers that extraordinary measures departing from the normal legal and constitutional order can be undertaken to cope with such threat.<sup>138</sup> These measures should be temporary and last only until the threat has passed. Many domestic constitutions contain provisions allowing for extraordinary measures in times of emergency. This was also the case for Syria with the 1948 Emergency Law, which was lifted in mid-April in 2011.

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<sup>130</sup> Art. 7, provides that no individual will be object of “torture, or to cruel, inhuman or degrading treatment or punishment.

<sup>131</sup> Article 8(1) and (2) state that no person will be held in slavery or servitude.

<sup>132</sup> Article 16 established the equality of all individuals before the law and Article 18 ensures that all persons enjoy “the right to freedom of thought, conscience and religion”.

<sup>133</sup> The Article addresses the acceptable limits this right has in the light of capital punishment and includes a cross-reference of the guarantees under the Genocide Convention. International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976, in accordance with Article 49, available at: <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

<sup>134</sup> See UDHR, Art. 10: “Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charges against him”.

<sup>135</sup> Article 9(2) of ICCPR.

<sup>136</sup> Article 4 of ICCPR and see: Droege, C. (2007) “The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict, Israel Law Review 40, no. 2:33.

<sup>137</sup> *Ibidem*; A state of emergency can be only declared when the situation threatens the “life of the nation” and is a temporary exemption from the responsibility to ensure certain rights is deemed necessary. The European Court of Human Rights has qualified a time of public emergency as “an exceptional situation of crisis or emergency, which afflicts the whole population and constitutes a threat to the organised life of the community of which the community is composed” (Lawless v. Ireland, App. No. 332/57 of July 1st 1961).

<sup>138</sup> Kretzmer, D. (2008) in “State of Emergency”, Max Planck “Encyclopaedia of Public International Law”, Oxford Press, available at: <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e786?rskey=jLPDI9&result=1&prd=EPIL>.

However, derogations from IHRL cannot be made if these consist of a State's obligation under the aforementioned Article 4(2)<sup>139</sup> of the ICCPR and under IHL.<sup>140</sup>

### 3.2.2. *The rules applicable when the situation is classified as a NIAC*

The ICJ, in its *Israeli Wall Advisory Opinion* has stated that international humanitarian law and international human rights law are two complementary legal systems, which means that IHRL is applicable in parallel to IHL during armed conflicts.<sup>141</sup> Conventional IHL binds only States under the *pacta sunt servanda* formula. As the Syrian conflict has been labelled legally as an 'internationalized' NIAC, there are several legal obligations that all Parties have to observe.<sup>142</sup> Common Article 1 to the Geneva Conventions states that: "The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances". States are the main actors who have to ensure the respect of their commitments. The provisions for NIACs are essentially contained in CA3. The Common Article applies for all individuals not engaged in hostilities, both civilians and individuals *hors de combat*. Specifically referring to NIACs, under CA3 to the 1949 Geneva Conventions, all Parties are obliged to apply these provisions in treating persons humanely, which are considered a "compulsory minimum".<sup>143</sup> This was also confirmed by the jurisprudence of the International Court of Justice by which the provisions of CA3 constitute a "minimum yardstick".<sup>144</sup> Importantly, both the International Criminal Tribunal for Rwanda<sup>145</sup> and, subsequently the ICRC, in its Customary Law Study has sustained that all the provisions contained in CA3 have the character customary of international law. This means that the provisions outlined are binding beyond the nature of the conflict and its geographical scope.

Under CA3 a number of acts are absolutely prohibited, such as "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture" and also "outrages upon personal dignity, in particular humiliating and degrading treatment".<sup>146</sup> Furthermore, the four

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<sup>139</sup> Article 4: "(1) In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may 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 discrimination solely on the ground of race, colour, sex, language, religion or social origin. (2) No derogation from articles 6, 7, 8 (paragraphs I and II), 11, 15, 16 and 18 may be made under this provision. (3) Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation."

<sup>140</sup> For further insight see: Matthews (2013) and Droege (2007), 319.

<sup>141</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory opinion, ICJ GL No 131, [2004] ICJ Rep 136, ICGJ 203 (ICJ 2004), (2004) 43 ILM 1009, 9th July 2004, International Court of Justice [ICJ], para. 106.

<sup>142</sup> Even though Syria is not part of AP II, many of its provisions are considered customary law by the ICTY jurisprudence.

<sup>143</sup> See Pictet, J. (ed.) (1958) "The Geneva Conventions of 12 August 1949: Commentary", Vol. IV, ICRC: Geneva, at 32.

<sup>144</sup> ICJ Report, Case Concerning Military and Paramilitary Activities in and Against Nicaragua, Nicaragua v United States of America, 1986, 14.

<sup>145</sup> See International Criminal Tribunal for Rwanda (ICTR), Prosecutor v. Akayesu, Case No. ICTR-96-4-T (Trial Chamber), September 2, 1998, paras. 608–609.

<sup>146</sup> Common Article 3; Outrages to personal dignity are also prohibited under Article 4(2)(e) of AP II.

Conventions contain various references to torture.<sup>147</sup> Torture is considered a war crime, as a grave breach of the four Geneva Conventions according to Article 8(2)(a)(ii) of the Rome Statute and a serious violation of CA3 of the four Geneva Conventions. Also, according to the ICTY jurisprudence the prohibition of torture constitutes *jus cogens*.<sup>148</sup> Moreover, “the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees” is also prohibited.<sup>149</sup> Article 6 of AP II extends the protections laid out by CA3 and considers there are no possible fair trial derogations during armed conflicts. In addition, the United States Supreme Court has underlined that Article 75 of AP I which addresses judicial guarantees in a more detailed manner than CA3 binds all States as customary international law.<sup>150</sup> The wounded and sick must be collected and cared for. Consequently, medical personnel and medical establishments, transports and equipment are protected objects.<sup>151</sup> Furthermore, captured combatants and civilians who find themselves under the authority of the adverse party are entitled to respect for their lives, their dignity, their personal rights and their political, religious, and other convictions. They must be protected against all acts of violence or reprisal. They are entitled to exchange news with their families and receive aid. They must be guaranteed the basic judicial guarantees. And finally, the taking of hostages is strictly prohibited under CA3. In sum, any violation of the provisions, contained within Common Article 3, as a breach of IHL, is considered a war crime.

Grave breaches to the Geneva Conventions are also held accountable as war crimes. According to Article 50 of GC I: “Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.” And seemingly the same is stated in Article 51 of GC II and in Article 130 of GC III: “Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention [...] compelling a prisoner of war to serve in the forces of the hostile Power, or wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention.” And, restated finally, within Article 147 of GC IV: “Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.” Ultimately, IHL also considers general rules providing the protection of enemy property from destruction, prohibiting

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<sup>147</sup> Articles 12 of GC I and II prohibit torture and biological experiments; Article 17(4) of GC III states that: “No physical or mental torture, nor any other form of coercion, may be inflicted to prisoners of war to secure from them information of any kind whatever”; Article 31 of GC IV prohibits physical or moral coercion to obtain information and Article 32 prohibits torture among other brutal measures such as corporal punishment, mutilation and medical and scientific experiments.

<sup>148</sup> See *Furundizija* case, which concerned only one single act of torture (and therefore could not be considered a crime against humanity lacking the systematic element). ICTY, Judgment of December 10th 1998, in *Prosecutor v Furundzija*, Case No IT-95-17/1 (Trial Chamber), paras. 144, 153-156.

<sup>149</sup> Geneva Conventions, CA3 (d).

<sup>150</sup> See: *Hamdan v Rumsfeld*, 548 US 557 (2006) at 633-4.

<sup>151</sup> The Red Cross, Red Crescent, or Red Crystal on a white background is the distinctive sign indicating that such persons and objects must be respected.

pillage, protecting civilian objects during hostilities, protecting objects indispensable to the survival of the civilian population and regulating the use of weapons during armed conflict.<sup>152</sup>

### 3.2.3. *The principle of distinction*

The range to which CA3 regulates directly the hostilities is disputed, however, the customary international law principles of distinction is applicable in NIACs. The principle of distinction was first set forth with the St. Petersburg Declaration, by which: “the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy”.<sup>153</sup> Within the Geneva Conventions a first reference to this principle was made with Article 28 of GC IV, which describes how the immunity granted to the civilian population may not be used for military purpose in order to gain advantage and render “certain areas immune to military operations”. Furthermore, the protection of the civilian population in IACs was stated within Article 48 of AP I:

“In order to ensure respect for and protection of the civilian population and civilian objects, the parties to an armed conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives. Accordingly, they shall direct their operations only against military objectives.”

Within IHL, regarding the rules on the conduct of hostilities, a civilian is a person who is not a member of the armed forces or of a *levée en masse*.<sup>154</sup> In traditional warfare it has been usually clearer to identify who are the fighters and non-fighters, but in the present forms of asymmetrical conflicts this difference is hardly certain. However, the principle of distinction is an essential principle and such obligation comprises the Rule 1 in the ICRC’s Customary Law Study.<sup>155</sup> Civilians do not have to identify themselves, it is duty of the combatants to distinguish themselves from the civilian population and, if doubt is the case, an individual shall be treated as a civilian.<sup>156</sup> In the legal framework regulating NIACs, the non-participation of civilians in the hostilities is a prerequisite for their protection. In this regard, Article 13 of AP II states that:

“The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited. Civilians shall enjoy the protection afforded by this Part, unless and for such time as they take a direct part in hostilities.”<sup>157</sup>

Importantly, none of the warring Parties should use civilians as shields to make “certain points or areas immune from military operations”.<sup>158</sup> The first Additional Protocol distinguishes between two situations. In the first case, objects, which may be considered military objectives, may not be

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<sup>152</sup> See Henckaerts, J.-M. and Doswald-Beck, L. (ed.) (2005) “Customary International Humanitarian Law, Volume I: Rules”. ICRC, Cambridge University Press: Cambridge, Rule 43.

<sup>153</sup> St. Petersburg Declaration, Preamble.

<sup>154</sup> See Article 50, para. 1, Additional Protocol I of 1997.

<sup>155</sup> ICRC, Customary Law Study, Rule 1: “The Parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians.”

<sup>156</sup> See Article 50, para. 1, Additional Protocol I.

<sup>157</sup> For IACs this principle is stated within Article 48 of AP I by which: “[...] the Parties to the conflict shall at all times distinguish between civilian objects and military objectives and accordingly shall direct their operations only against military objectives”.

<sup>158</sup> Article 28 GCIV and see also Article 57 API.



installed in a civilian or densely populated area.<sup>159</sup> In second place, civilians may not be used as ‘safeguards’ to cover a potential military objective or to protect a military operation.<sup>160</sup> Under the ICC Statute, “intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities” constitutes a war crime in NIACs.<sup>161</sup> Furthermore, using civilians “to render certain points or areas immune from military operations” is also a war crime.<sup>162</sup> States have, generally condemned alleged violations of this rule, irrespective of whether the conflict was international or non-international. Similarly, the UN Security Council has condemned or called for an end to alleged attacks against civilians in the context of numerous conflicts, both international and non-international, including in Afghanistan, Angola, Burundi, Georgia, Lebanon, Liberia, Rwanda, Sierra Leone, Somalia, the former Yugoslavia and the territories occupied by Israel.<sup>163</sup>

As aforementioned, attacks on the civilian population or on individual civilians are prohibited and this is true also for non-military objects. Nonetheless, not all casualties and all destructions during conflicts must be considered violations of IHL. The conditions of what is generally called ‘collateral damage’ have to follow the principle of proportionality. By law, feasible incidental loss, must be measured up to the concrete advantage of the military action. However, civilians must be warned beforehand if a military actions affects them directly, unless “circumstances do not permit” such warning.<sup>164</sup> Imperatively, “when launching an attack on a military objective, all feasible precautions shall be taken to avoid, and in any event to minimize, incidental loss of civilian life, injury to civilians, and damage to civilian objects”.<sup>165</sup>

### 3.3. The international legal obligations of organized armed groups (OAGs)

#### 3.3.1. *The rules applicable under IHRL*

Traditionally, human rights have been conceived as the “historical response to the rise of the modern nation state”.<sup>166</sup> The State is primary responsible for the protection of individuals, also according to the dominant security paradigm, regarding the potential violations committed by non-state entities. In accordance to this State-centric view, the major IHRL treaties literally contain solely obligations for States and it is not certain whether non-State groups have international legal personality.<sup>167</sup> This view considers that non-State groups have no international human rights obligations, but are subject to national law and bound to respect national criminal law. However at present, this narrow State-centric view has widened to include non-State armed groups that are one of the warring parties within a conflict and that exercise control over a territory.<sup>168</sup> It has been

<sup>159</sup> Hans-Peter Gasser and Knut Dormann (2013), in Fleck (ed.)

<sup>160</sup> *Ibi.*

<sup>161</sup> ICC Statute, Article 8(2)(e)(i).

<sup>162</sup> Gasser and Dormann (2013) and ICC Statute, Article 8, para.2, lit. b(xxiii).

<sup>163</sup> See, for examples: UN Security Council, Res. 564 (1985), Res. 771 (1991), Res. 794 (1992), Res. 819 (1993), Res. 904 (1994), Res. 912 (1994), Res. 913 (1994), Res. 918, 925, 929 and 935 (1994), Res. 950 (1994), Res. 978 (1995), Res. 993 (1995), Res. 1001 (1995), Res. 1019 (1995), Res. 1041 (1996), Res. 1049 and 1072 (1996), Res. 1052 (1996), Res. 1073 (1996), Res. 1076 (1996), Res. 1161, Res. 1173 and 1180 (1998) and Res. 1181 (1998).

<sup>164</sup> Article 57, para. 2, lit. c, AP I.

<sup>165</sup> Article 57, para. 2 lit. a(ii), AP I.

<sup>166</sup> Nigel S. Rodley (1993) “Can the Armed Opposition Groups Violate Human Rights? Human Rights in the Twenty-First Century: A Global Challenge”, Kathleen E. Mahoney & Paul Mahoney (ed.), p.299

<sup>167</sup> *Ibid.* pp. 305-310.

<sup>168</sup> Rodenhause, T. “International Legal Obligations of Armed Opposition Groups in Syria”. *International Review of Law*, 2015:2

argued that non-State actors have human rights obligations in cases where such non-State entity exercises “effective power” similarly to the authority normally exercised by a States. This view, also finds further support in the ICCPR presented by the Human Rights Committee, where it was stated that human rights belong to people within a specific territory and are binding to the authorities even if there is a change in the government’s territory.<sup>169</sup> In relation to the Syrian crisis in August 2012, the UN Commission of Inquiry had considered that the groups involved were obliged to “respect the fundamental human rights of persons forming customary law”.<sup>170</sup> It can be so argued that IHRL binds armed groups in the Syrian conflict and these are held accountable for grave human rights violations such as ill-treatment and summary executions. Importantly, during armed conflicts many of the alleged human rights violations also constitute violations within IHL.<sup>171</sup> Interestingly, in the initial phases of the conflict the violence had not yet mounted to be considered an armed conflict the situation was governed solely by IHRL. However, the UN Commission acknowledged that:

“[A]t a minimum, human rights obligations constituting peremptory international law (*ius cogens*) bind States, individuals and non-State collective entities, including armed groups. Acts violating *ius cogens* – for instance, torture or enforced disappearances – can never be justified.”<sup>172</sup>

This statement finds support in various UN reports, which indicate that non-State armed groups have human rights obligations without being engaged in an armed conflict or exercising control over a territory.<sup>173</sup>

### 3.3.2. *The rules applicable under IHL*

It is certain that within the situation of an armed conflict all Parties have obligations under IHL and this includes also non-State armed groups.<sup>174</sup> As an international body of law, IHL binds both States and non-State armed groups in a ‘horizontal relationship’, recognizing *de facto* responsibilities of non-State groups if they have control over a territory.<sup>175</sup> In addition, CA3 applies to all Parties having the character of customary international law and its provisions – those aforementioned - are binding also for non-State armed groups.<sup>176</sup> Once the threshold for the existence of an armed conflict is met, IHL considers clear obligations for all the warring parties and serious violations of

<sup>169</sup> UN Human Rights Committee (HRC), CCPR General Comment No. 26: Continuity of Obligations, 8 December 1997, CCPR/C/21/Rev.1/Add.8/Rev.1, available at: <http://www.refworld.org/docid/453883fde.html>.

<sup>170</sup> UN HRC Report of the CoI on the Syrian Arab Republic, 15 Feb. 2012 – 15 Aug. 2012.

<sup>171</sup> Rodenhause (2015)

<sup>172</sup> Report of IoC for the Syrian Arab Republic, A/HRC/19/69 available at: [http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session19/A-HRC-19-69\\_en.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session19/A-HRC-19-69_en.pdf).

<sup>173</sup> For further information see: UN Doc. E/CN.4/2006/53/Add.5 (2006).

<sup>174</sup> Pictet (1952) “The Geneva Conventions of 12 August 1949: Commentary”. For a recognition that also customary international law binds non-state parties, see Prosecutor v. Norman, Special Court for Sierra Leone, Appeals Chamber p. 22, 31 May 2004.

<sup>175</sup> For further information see: ICRC Report, “31st International Conference of the Red Cross and the Red Crescent, International Humanitarian Law and the Challenges of Contemporary Armed Conflict”, November 28th – December 1st 2011 (October 2011), Geneva.

<sup>176</sup> See ICJ, Nicaragua v United States of America, June 27th 1986, paras. 218-20.

this legal regime can be prosecuted as war crimes. Nonetheless, IHL contains more permissive rules on the use of force and on the deprivation of liberty.<sup>177</sup>

### 3.4. The responsibility for violations during a non-international armed conflict

Serious violations of IHL are defined as war crimes. Traditionally, war crimes were considered only of violations of international rules regulating IACs. However, after the ICTY Appeals Chamber decision in *Tadić* it is now broadly accepted that serious violations of IHL in NIACs amount to proper war crimes, if the relevant conduct is criminalized by international law.<sup>178</sup> Additionally, Article 5 of the ICTY Statute considers crimes against humanity “when committed in armed conflict, whether international or internal in character”.<sup>179</sup> This was further supported by the *Tadić* Decision on appeal.<sup>180</sup> The 1998 Rome Statute of the ICC was the final step for individual criminal responsibility for serious violations of the law of armed conflicts. Even though Syria is not part of the ICC Statute<sup>181</sup>, universal jurisdiction applies over certain war crimes laid out by treaty. In 2005, the Krakow session of the *Institut de Droit International* declared that universal jurisdiction may be exercised by a State over – *inter alia* – “serious violations of international humanitarian law committed in international or non-international armed conflict”.<sup>182</sup> Indeed, the only relevant treaty provision lies in the Rome Statute under the ICC jurisdiction.<sup>183</sup> Torture and inhumane treatment are considered grave breaches. Moreover, State Parties to the Convention Against Torture are required to criminalize torture and bring its perpetrators to justice under the principle *aut iudicare aut dedere*.<sup>184</sup> The violation of the fair trial guarantees is also prosecuted as war crime. However, there is no obligation to criminalize cruel or degrading treatment. IHL does not contain obligations to prevent such acts or provide victims with adequate reparation.

Under IHRL the mechanisms for monitoring, implementing, enforcing the applicable Geneva standards are not so strong.<sup>185</sup> IHRL provides public scrutiny of a State’s behaviour at regular intervals with several UN treaty bodies for member states and with Charter-based procedures under the Human Rights Council. Furthermore, the ICJ can be involved on request of States in contentious proceedings or at the request of the UN in Advisory Opinion procedures. The UN Security Council

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<sup>177</sup> For a better understanding see Marco Sassòli and Laura M. Olson (2008) “The Relationship Between International Humanitarian and Human Rights Law Where It Matters: Admissible Killing and Internment of Fighters in Non-International Armed Conflicts”, 90 International Review of the Red Cross.

<sup>178</sup> ICTY, Appeals Chamber, *Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, October 2nd 1995, paras. 94-137.

<sup>179</sup> Statute of the ICTY, 1993, Laws of Armed Conflicts, 1288-1289.

<sup>180</sup> “Customary international law may not require a connection between crimes against humanity and any conflict at all”. Prosecutor v. *Tadić*, para. 59.

<sup>181</sup> As Syria has not ratified the Rome Statute, the ICC can only exercise its jurisdiction if the UN Security Council refers the situation to the Court.

<sup>182</sup> The Institut set out three conditions: (i) The competence to exercise universal jurisdiction is contingent on the State concerned having custody over the accused; (ii) Priority has to be given to the exercise of jurisdiction by a State having a significant link to the crime, the offender or the victim, and the State is willing and able to prosecute the offender; (iii) Account has to be taken of the jurisdiction of international criminal courts. See Institut de Droit International, Resolution on “Universal Jurisdiction with Respect to the Crime of Genocide, Crimes against Humanity and War Crimes”, 71 (II), AIDI 297, 299 (Krakow, 2005), Articles 3(a)(b)(c)(d).

<sup>183</sup> Dinstein (2014)

<sup>184</sup> Syria is a part to the Convention Against Torture of 1984; see Articles 5-9 of CAT.

<sup>185</sup> C. Droege (2007) “The Interplay Between International Humanitarian Law and Human Rights Law in Situations of Armed Conflict”, Israel Law Review, 40(2): 348.

enforcing actions under Chapter VII of the UN Charter can also address breaches of IHL.<sup>186</sup> If the Security Council fails to take action, the UN General Assembly can also legitimate the enforcement of actions through member states under the ‘Uniting for Peace’ procedure.<sup>187</sup> The International Criminal Court may also be involved, but such judicial organ only deals with certain IHL violations. According to Article 8 of the Rome Statute the ICC has solely jurisdiction on grave breaches of the Conventions that amount to war crimes. In addition there are other options can be undertaken: the ICRC role for *assistance humanitaire*, the naming of a protecting power, diplomatic demarches and finally, self-help within narrow confines.

Furthermore, the Geneva Conventions contain provisions governing the prosecution of ‘grave breaches’ of these Conventions: Articles 49-50 of GC I, Articles 50-51 of GC II, Articles 129-130 of GC III and Articles 146-147 of GC IV. Grave breaches of the provisions to all four Geneva Conventions encourage the endorsement of a special legislation to criminalize grave violations, to search individuals allegedly responsible of such breaches and to bring these, regardless their nationality, before their own courts or hand them over to other State Parties for the prosecution.<sup>188</sup> Though, these rules provide the necessary elements of a criminal offence, there are no explicit statements regarding the range of punishment.<sup>189</sup> Obligations to investigate and prosecute can be found in: Article 49 para. 2, GC I; Article 50, para. 2, GC II; Article 129 para. 2, GC III and Article 146, para.2, GC IV.<sup>190</sup> These obligations are not exclusive of the home State. The ability to investigate and prosecute is also open to other States. Yet, the home State has the primary duty to prosecute IHL violations.

### 3.4.1. General considerations on individual criminal responsibility

Individuals are not subjects of international law possessing full rights and obligations. When the Law of Armed Conflicts first appeared in Common Article 3, with in the *travaux préparatoires* of the Geneva Conventions it was not considered that its violation should imply individual criminal responsibility. However, this notion has evolved with the emergence of international courts and tribunals. It is now broadly recognized, that the individual is an entity with limited rights and obligations. Individual criminal responsibility considers that individuals can be held directly responsible for international crimes (*actus rea*), but that this should only occur when there is a certain degree of personal culpability (*mens rea*).<sup>191</sup> In the Nuremberg judgment affirmed that: “crimes are committed by men and not by abstract entities. It is only by punishing individuals who commit such crimes that international law can be effectively enforced”.<sup>192</sup> Individual responsibility under international law must be based upon legal norms recognized under national or international provisions, bearing in mind that *nulla poena nullum crimen sine lege*. Furthermore, the obligations individuals have under international criminal law are defined by customary international law, which can find confirmation in treaties between States as in the case of the Rome Statute of the ICC. In

<sup>186</sup> See for examples UN Security Council Resolution 1472 (2003), UN Doc S/RES/1472 (2003); Resolution 1483 (2003), UN Doc S/RES/1483 (2003); Resolution 1637 (2005), UN Doc S/RES/1637 (2005).

<sup>187</sup> Procedure based on UN General Assembly Resolution 377(V), UN Doc A/RES/377(V).

<sup>188</sup> A. Clapham and P. Gaeta (ed.) “The Oxford Handbook of International Law in Armed Conflict”. Oxford University Press: Oxford.

<sup>189</sup> Silja Vöneky (2013) in Fleck (ed.)

<sup>190</sup> *Ibi.* in Fleck (ed.)

<sup>191</sup> O’Shea, A. (2009), “Individual Criminal Responsibility” in Max Planck Encyclopedia of International Public Law, Oxford Press, available at: <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1852?rskey=OQk5EZ&result=1&prd=EPIL>.

<sup>192</sup> United States of America et al. v Goring et al., Judgment and Sentences of the International Military Tribunal, para. 221.

principle, treaties are only capable of creating obligations for States, while the national law of States can make such principles contained in a treaty directly applicable to individuals. Whether national law has such an effect, without the introduction of a specific law, depends on how national law relates to the application of international law, within its jurisdiction.

States have an obligation to ensure the prosecution of individuals responsible for grave breaches of these treaties. This means that individuals have criminal responsibility for the grave breaches of the Geneva Conventions aforementioned. Individual criminal responsibility has also developed under customary law for crimes against peace, crimes against humanity and has been extended to other crimes in various treaties regarding the protection of human rights. Some of these treaty crimes have subsequently entered into the corpus of customary international law. Thus, the criminal responsibility of individuals and the consequent obligation upon States to give effect to that responsibility through prosecution has been endorsed in a number of treaties. Traditionally, prosecution of individuals for crimes, whether committed in a domestic or international context, has remained a prerogative of States. Still today, the prosecution before national courts remains the principle method of enforcing international criminal law pursuant to the duty of States to prosecute international crimes before their own courts or extradite the offenders to another State jurisdiction or an international tribunal.

Furthermore, the evolution of international law has justified individual criminal responsibility for CA3 even though the Article does not contain explicitly reference any responsibility. Within *Tadic*, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction:

“The International Military Tribunal at Nuremberg concluded that a finding of individual criminal responsibility is not barred by the absence of treaty provisions on punishment of breaches. The Nuremberg Tribunal considered a number of factors relevant to its conclusion that the authors of particular prohibitions incur individual responsibility: the clear and unequivocal recognition of the rules of warfare in international law and State practice indicating an intention to criminalize the prohibition, including statements by government officials and international organizations, as well as punishment of violations by national courts and military tribunals. Where these conditions are met, individuals must be held criminally responsible, because, as the Nuremberg Tribunal concluded: ‘[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.’ Applying the foregoing criteria to the violations at issue here, we have no doubt that they entail individual criminal responsibility, regardless of whether they are committed in internal or international armed conflicts. Principles and rules of humanitarian law reflect ‘elementary considerations of humanity’ widely recognized as the mandatory minimum for conduct in armed conflicts of any kind. No one can doubt the gravity of the acts at issue, nor the interest of the international community in their prohibition.”<sup>193</sup>

Furthermore, this was restated in Trial Chamber of the *Naletilic and Martinovic* case: “It appears from the jurisprudence that Common Article 3 of the Statute entails individual criminal responsibility.”<sup>194</sup> And in the *Blaskic* Trial Chamber: “Violations of Article 3 of the Statute which include violations of the Regulations of The Hague and those of Common Article 3 are by definition serious violations of international humanitarian law within the meaning of the Statute.”<sup>195</sup>

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<sup>193</sup> *Tadić*, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, October 2 1995, para. 128-129.

<sup>194</sup> *Naletilic and Martinovic*, Trial Chamber, March 31, 2003, para. 228.

<sup>195</sup> *Blaskic*, Trial Chamber, March 3 2000, para. 176.

Importantly, Article 8(2)(c) of the Rome Statue retains exact wording of CA3 where “serious” violations are penalized and paragraph (d) specifically states that: “Paragraph 2(c) applies to armed conflicts not of an international character”.

### 3.4.2. General considerations on state responsibility

State responsibility is a cardinal institution of international law, resulting from the general legal personality that every State has under international law and from the fact that States are the principal bearers of international obligations.<sup>196</sup> What amounts to a breach of international law by a State depends on the State’s actual international obligations. These may differ under treaties and other commitments. In the case of the Syrian conflict, the Syrian Arab Republic is responsible for every breach of the provisions contained in the Geneva Conventions and Common Article 3. The Chapter I of the 2001 ILC Articles set out certain general principles by which: a) “every internationally wrongful act of a State entails its international responsibility”<sup>197</sup>; b) an internationally wrongful act exists when the conduct consists in an act or an omission is attributable to a State and or it constitutes a breach of an international obligation of by that State<sup>198</sup>; and c) a characterization of an internationally wrongful act is governed by international law and its characterization as lawful by internal law is irrelevant.<sup>199</sup> The act of any State organ - including “all the individual or collective entities which make up the organization of the State and act on its behalf” – are responsible.<sup>200</sup> As stated in the *Immunity from Legal Process* Advisory Opinion of 1999, the ICJ affirmed that: “according to a well-established rule of international law, the conduct of any organ of a State must be regarded as an act of that State”.<sup>201</sup> Furthermore, in the *Yeager* case of 1987, the Iran-US Claims Tribunal stated, that: “It is generally accepted in international law that a State is also responsible for acts of persons, if it is established that those persons were in fact acting on behalf of the State”.<sup>202</sup> Even though the ILC affirms that “the conduct of private persons is not as such attributable to the State”, it further affirms in Article 11 of the Draft Articles that “to the extent that the State acknowledges and adopts the conduct in question as its own” the conduct of private persons is then considered an act of the State.<sup>203</sup> Considering Article 7 of the Draft Articles the State will still be responsible for the conduct of State organs “even if it exceeds its authority or contravenes instructions”.<sup>204</sup> Importantly, due diligence for the prevention of a wrongful act is an obligation of conduct and not an obligation of result.<sup>205</sup> Which means that there is no need to achieve a specific end, but rather to demonstrate best efforts: “Obligations of prevention are usually constructed as best efforts obligations, requiring States to take all reasonable or necessary measures to prevent a given event from occurring, but without warranting that the event will not occur”.<sup>206</sup>

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<sup>196</sup> Crawford, J. (2006) in “State Responsibility”, “Max Planck Encyclopaedia of Public International Law”, Oxford Public International Law, Oxford Press.

<sup>197</sup> Article 1 of ILC Articles (2000).

<sup>198</sup> Article 2 of ILC Articles (2000).

<sup>199</sup> Article 3 of ILC Articles (2000).

<sup>200</sup> Article 4 of ILC Articles (2000).

<sup>201</sup> Advisory Opinion on “Difference Relating to Immunity from the Legal Process of a Special Rapporteur of the Commission of Human Rights”, 1999, ICJ Report 62, para. 87.

<sup>202</sup> *Yeager (US) v. Iran*, Iran-US Claims Tribunal 1987, 82 ILR 179, 193.

<sup>203</sup> See Draft Articles; In the 1980, Diplomatic and Consular Staff in Tehran case, the ICJ held that the Iranian governmental approval of the situation ‘translated’ the undertaking into an act of the State. See Case Concerning United States Diplomatic and Consular Staff in Tehran (US v. Iran), 1980, ICJ Report 3, 35.

<sup>204</sup> ILC Draft Articles, Article 7, 2001. As in State responsibility for *ultra vires* acts.

<sup>205</sup> Dinstein (2014)

<sup>206</sup> ILC, Draft Articles at 62.

## 4. Alleged Violations of International Law during the Syrian Conflict

### 4.1. The international legal Syrian framework

Within an international legal framework Syria is a party to many instruments of international human rights law, humanitarian law and criminal law. Concerning IHL, it is part of the Four Geneva Conventions of 1949 (in 1953) and to the Additional Protocol I of 1977 (1983). It is also a part to the Hague Convention of 1954 (in 1958) and the Hague Protocol of 1954 (1958). However, it has not part of Additional Protocol II of 1977 and Additional Protocol III of 2005. In addition, it not part of the Hague Protocol of 1999 and the ENMOD Convention of 1967. Furthermore, considering the IHRL framework, Syria has adhered to the ICERD of 1965 (in 1969), to the ICCPR of 1966 (in 1969), but not to the First Optional Protocol of the Covenant of Civil and Political Rights which establishes an individual complaint mechanism and neither the Second Optional Protocol for the ICCPR which commits its members to the abolition of the death penalty within their borders. Syria is a part to the International Covenant on Economic, Cultural and Social Rights (ICESCR) of 1966 and the Convention on the Elimination on All Forms of Discrimination against Women (CEDAW) of 1979 in 2003, with some reservations. It is part of the 1984 Convention Against Torture, but it has not ratified its Optional Protocol of 2002, which establishes an international inspection system for places of detention. It is part of the Convention on the Rights of the Child in 1993 and also both its Optional Protocols on Armed Conflict and on the Sale of Children. Regarding the international regulations of weapons, Syria, has only adhered to the Geneva Gas Protocol of 1925 in 1968 and has solely signed the Biological Weapons Convention of 1972. It not part of the Chemical Weapons Convention of 1993, the Convention on Certain Conventional Weapons of 1980 and all the CCW Protocols, the Ottawa Treaty of 1997 and the Convention on Cluster Munitions in 2008. Regarding the status and treatment of refugees, it has not ratified any of the international treaties such as the Refugee Convention of 1951 and the Refugee Protocol of 1967. In regard to international criminal law, Syria, is part of the 1926 Slavery Convention (in 1931) and to the Genocide Convention of 1948 in 1955, but has only signed in 2000 the International Criminal Court Rome Statute of 1998. Finally, concerning terrorism, Syria has not part of any of the international treaties, at the time of writing.

### 4.2. The alleged violations of the Government forces

The following paragraphs will describe some of the violations perpetrated by the Government forces within the Syrian conflict.

#### 4.2.1. *Excessive use of force, extrajudicial executions and unlawful attacks*

The first report of the UN Commission of Inquiry for Syria (CoI), published on November 23<sup>rd</sup> 2011, gathered first-hand information through a confidential interview process, which began in September 2011 and in which 223 victims were interviewed. As aforementioned, limited protests around issues such as poverty, corruption, freedom of expression, democratic rights and release of political prisoners, broke out in February 2011. Following these events, on April 25<sup>th</sup> the Syrian government forces deployed their first wide-scale military operations in Der'a and afterwards other similar operations were carried out in the country. On November 8<sup>th</sup>, the OHCHR estimated that State forces had killed at least 3,500 civilians since March 2011.<sup>207</sup> The CoI has gathered individual

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<sup>207</sup> A/HRC/S-17/2/Add.1, para. 28.

testimonies, which affirm that State forces have shot indiscriminately at unarmed protestors in the upper body, including the head. To sustain this accusation the Commission has received several testimonies indicating that military forces, security forces and *Shabbiha* militias had planned and conducted joint military operations with orders to shoot and kill, in order to crush demonstrations in the centre of Al Ladhiquiyah around Sheikh Daher Square in early April and also in the Ramel suburb around mid-April.<sup>208</sup> Within the report a defector described the orders his army battalion was given on May 1<sup>st</sup>:

“Our commanding officer told us that there were armed conspirators and terrorists attacking civilians and burning Government buildings. We went into Telbisa on that day. We did not see any armed group. The protestors called for freedom. They carried olive branches and marched with their children. We were ordered to either disperse the crowd or eliminate everybody, including children. The orders were to fire in the air and immediately after to shoot at people. No time was allowed between one action and the other. We opened fire; I was there. We used machine guns and other weapons. There were many people on the ground, injured or killed.”<sup>209</sup>

Since November 2011, the level of violence between the regime force and anti-Government armed groups had increased greatly. According to the Violations Documenting Centre, about 787 civilians, including 53 adult women, 26 girls and 49 boys, were killed only in the first two weeks of February in 2012.<sup>210</sup> In its second report the CoI acknowledged that: “gross human rights violations were conducted pursuant to a policy of the State, and that orders to commit such violations originated from policies and directives issued at the highest levels of the armed forces and the Government”.<sup>211</sup> State forces, especially in areas where the FSA group was present, undertook the shelling of villages, residential buildings and alleged summary executions. Cases of unlawful killings were also reported to the Commission, with extensive use of snipers, house-to-house searches where wounded or captured anti-Government fighters were executed. These testimonies have lead the CoI to believe that the Government forces and the *Shabbiha* militias have violated provisions of international human rights law and many of these killings met the elements of the war crimes of murder under the international criminal law.<sup>212</sup> Furthermore, in its 7<sup>th</sup> report, the Commission gathered evidence and testimonies of medical personnel being killed while performing it duties in opposition-controlled areas. The CoI reported that: “Hospitals in Aleppo city and Al Bab came under sustained shelling and aerial bombardments. In July 2013, Jaban hospital in Aleppo city was destroyed. On 11 September, a jet fired a missile at Al Bab field hospital, killing 15 people, including a doctor, four paramedics and eight patients, and injuring many others. The hospital had moved its location three times owing to shelling attacks.”<sup>213</sup> Furthermore, testimonies recalled that Government forces have arrested people seeking medical care and have blocked medical supplies and equipment from besieged areas.<sup>214</sup>

#### 4.2.2. *Arbitrary detentions, enforced disappearances, torture and other forms of ill-treatment*

The Commission has reported cases of arbitrary detentions, enforced disappearances and episodes of torture, in some cases also on children. For instance, Thamir Al Sharee and Hamza Al Katheeb,

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<sup>208</sup> *Ibidem*, para. 42.

<sup>209</sup> *Ibi.*, para. 43.

<sup>210</sup> A/HRC/19/69, para. 41

<sup>211</sup> *Ibidem*, para. 89 and see A/HRC/S-17/2/Add.1 paras. 102 and 103.

<sup>212</sup> Rome Statute, Art. 8(2)(c)(i).

<sup>213</sup> A/HRC/25/65, para. 109.

<sup>214</sup> A/HRC/ 25/65, para. 112-113.



of 14 and 13 years old, were seized and allegedly taken to an Air Force Intelligence facility in Damascus from the town of Sayda in the Der'a governorate. They have not returned alive home and the post-mortem report of Thamiir Al Sharee shows that the injuries presented are consistent with torture<sup>215</sup>. Likewise, defectors of State forces have been tortured after having attempted to spare civilians or by refusing to obey orders. In a testimony collected by the CoI, a defector affirmed:

“On Friday 12 August [2011], we received orders to go to the Omar al Khattab Mosque, in Duma (Damascus governorate), where about 150 people had gathered. We opened fire. A number of people were killed. I tried to aim high. Later, I realized that security forces had been taking pictures of us. I was pictured firing in the air. I was interrogated. I was accused of being a secret agent. Members of the Republican Guard beat me every hour for two days, and they tortured me with electroshocks.”<sup>216</sup>

In addition, in its 3<sup>rd</sup> report, starting from February 15<sup>th</sup> 2012, the CoI interviewed 81 individuals regarding allegations of torture and other forms of inhumane treatments, but was not able to visit the detentions centres or to observe the conditions of the detainees.<sup>217</sup> The witnesses reported suffering physical violence during detention, seeing other detainees being tortured or ill-treated and the Commission observed the wounds of the alleged victims. Several reports informed on degrading practices where detainees were subjected to rape, other forms of sexual violence or were kept forcibly in prolonged stress positions. Torture was inflicted to punish, humiliate and extract information in official and unofficial detention centres.<sup>218</sup> “Much of the physical violence described by interviewees has been found to constitute torture by various international tribunals”, which is a crime against humanity and a war crime committed by Government forces and *Shabbiha* members.<sup>219</sup> Moreover, in order to comply with IHL, those who order and carry out the attacks must distinguish between civilian and military targets, but several accounts indicate that Government forces have not.<sup>220</sup> Interviewees have frequently identified Air Force Intelligence members among the worst perpetrators.<sup>221</sup> Cases of torture and ill-treatment also have been reported in military hospitals, where patients were reportedly beaten and in some cases resulted with the death of the patient.<sup>222</sup> Moreover, attacks on hospitals and health-care facilities were documented in Hamah, Homs, Idlib, Der'a, Ar Raqqa and Damascus.<sup>223</sup>

#### 4.2.3. *Massacres, unlawful killing and hostage-taking*

In its 6<sup>th</sup> report the Commission of Inquiry on request of the Human Rights Council investigated episodes of massacres, in a time period between July 15<sup>th</sup> 2012 and February 15<sup>th</sup> 2013, defining these as: “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”.<sup>224</sup> The investigations considered the events in Jedaydet Artouz where the bodies of 60 male residents were found and appeared to have been

<sup>215</sup> A/HRC/S-17/2/Add.1, para. 62.

<sup>216</sup> A/HRC/S-17/2/Add.1, para. 64.

<sup>217</sup> A/HRC/21/50 para. 74.

<sup>218</sup> *Ibidem*, para. 84.

<sup>219</sup> *Ibi.*, paras. 84-85.

<sup>220</sup> *Ibi.*, para. 90.

<sup>221</sup> A/HRC/24/46 paras. 76-8.

<sup>222</sup> *Ibidem*, paras. 82-5.

<sup>223</sup> On May 16th 2013, Government forces destroyed a children's hospital in Dar Al-Kabirah and in later that month shelled a field hospital in Al-Houlah. See A/HRC/24/46 paras. 138-40.

<sup>224</sup> A/HRC/22/59 para. 42.

summarily executed, in Harak, Homs and in Daraya where video footage and photographs of the aftermath of the events showed bodies of women and children. The Commission believes “there are reasonable grounds to believe that government forces perpetrated the war crime of murder against hors de combat fighters and civilians taking no active part in the hostilities, including women and children”.<sup>225</sup> In a time period between January 15<sup>th</sup> 2013 and May 15<sup>th</sup> 2013, the Commission in its 5<sup>th</sup> report has reviewed 17 incidents that can be potentially considered massacres.<sup>226</sup> In addition, throughout this period, there has been a rise in hostage-taking of sectarian nature, fuelled by reprisals and inter-communal tensions. Also foreigners, journalists, businessmen, peacekeepers and where families were not able to meet the ransom, the consequences were lethal.<sup>227</sup>

#### 4.2.4. *The use of illegal weapons*

With the escalation of the conflict, the potential use of chemical weapons became a concern. The use of such weapons is prohibited, by customary international humanitarian law, in all circumstances and prosecuted as a war crime under the Rome Statute. As already mentioned, Syria has ratified the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare. During its investigations the CoI received allegations regarding the use of chemical weapons and especially by Government forces. In addition, within its 8<sup>th</sup> report published August 13<sup>th</sup> 2014, the Commission stated that Government forces were responsible for several attacks - throughout April 2014 - on civilian-inhabited areas in the governorates of Idlib and Hama<sup>228</sup>. The accounts of the victims and the medical personnel proved that there has been exposure to chemical agents and there were “reasonable grounds” to believe that chlorine was used in these incidents, dropped in barrel bombs from government helicopters.<sup>229</sup> In the light of the events, of the investigation and the facts gathered, the Commission has declared that: “government forces have committed crimes against humanity, war crimes and violations of international human rights law”.<sup>230</sup> It then added that “the Government has yet to demonstrate the willingness or ability to reign in its security and intelligence apparatus” and that these pro-Government forces have perpetrated crimes.<sup>231</sup> Furthermore, the United Nations Mission to Investigate Allegations of the Use of Chemical Weapons in the Syrian Arab Republic confirmed the use of chemical weapons, especially of sarin, in other incidents during the conflict.<sup>232</sup> In addition, the CoI gathered independent evidence, confirming the findings of the UN Mission in the cases of Al-Ghouta, Khan Al-Assal and Saraquib.<sup>233</sup> Other evidence collected regarding the use of illegal weapons confirmed the use of incendiary bombs in an attack on the town of Urem Al-Koubra near Aleppo. The CoI stated that: “By using incendiary bombs in the Urem Al-Koubra school incident, the Government violated rules of international humanitarian law prohibiting the use of weapons that cause superfluous injury, unnecessary suffering or that are indiscriminate by nature.”<sup>234</sup>

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<sup>225</sup> *Ibidem*, para. 47.

<sup>226</sup> A/HRC/23/58.

<sup>227</sup> *Ibidem*, para. 70.

<sup>228</sup> A/HRC/27/60 para. 115.

<sup>229</sup> *Ibidem*, para. 116-118; Chlorine gas is defined as a chemical weapon by the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction of 1992.

<sup>230</sup> A/HRC/24/46 para. 192.

<sup>231</sup> *Ibidem*, para. 193.

<sup>232</sup> See: A/67/997-S/2013/553, Report of the United Nations Mission to Investigate Allegations of the Use of Chemical Weapons in the Syrian Arab Republic on the alleged use of chemical weapons in the Ghouta area of Damascus on 21 August 2013.

<sup>233</sup> A/HRC/25/65, para. 127-128.

<sup>234</sup> A/HRC/25/65, para. 131.

#### 4.3. The alleged violations of the armed opposition groups

The following paragraphs will describe some of the violations perpetrated by the armed opposition groups, within the Syrian conflict.

##### 4.3.1. *Excessive use of force, extrajudicial executions and unlawful attacks*

Considering all accounts, anti-Government armed groups and especially the FSA groups have become consistently more active from November 2011. Organized armed groups must abide by the IHL general rules. In NIACs, members of such groups may be persecuted for war crimes by committing serious IHL violations and be responsible for gross human rights abuses, in particular for those that amount to international crimes.<sup>235</sup> The CoI has investigated and gathered information on such violations such as murder, extrajudicial executions and torture, by members of anti-Government groups. The Commission has considered verified evidence of killing hors de combat of soldiers and *Shabbiha* by anti-Government armed groups.<sup>236</sup> In addition, within its 4<sup>th</sup> report the CoI has collected the testimony of a credible eyewitness who provided an account of a mass killing of the Al-Barri clan in Aleppo in July 2012. The witness stated that a quasi-judicial body, a *sharia* court in Aleppo sentenced all five people to death and the footage of these was released on the Internet. Furthermore, the Commission, stated that an “anti-Government armed group, probably Liwa al-Tawhid, perpetrated the war crime of sentencing and execution without due process”<sup>237</sup>. In addition, the CoI has collected the testimony of a former resident of Damascus, which declared that: “the FSA do the same [as the army]. They also arrest and detain people. The FSA would only arrest ‘informants’. We don’t know what happened to them. They’d take them away and we’d never see them again”.<sup>238</sup> In addition, in its 8<sup>th</sup> Report, the Commission has broadly stated that anti-government armed groups have used weapons and attacked government positions in residential areas indiscriminately, causing civilian casualties.<sup>239</sup>

##### 4.3.2. *Arbitrary detentions, enforced disappearances, torture and other forms of ill-treatment*

In its 5<sup>th</sup> report, the Commission has investigated cases in which members of the United Nations Disengagement Observer Force (UNDOF) and the UN Truce Supervision Organization (UNTSO) were kidnapped and then, subsequently released unharmed.<sup>240</sup> Torture and episodes of ill-treatment, have been widely documented in several reports.<sup>241</sup> Moreover, there have been episodes of arbitrary arrest and detention, as in August 2012 when 48 Iranian citizens were taken by the Al-Bara brigades in Damascus<sup>242</sup>. The men were held hostages, allegedly threatened with execution and such is a war crime. It has been reported that individuals perceived as Government supporters at FSA checkpoints have been beaten or harassed. In one of the interviews, an FSA commander in Damascus admitted that he ordered the beating of detainee in order to obtain a confession, the detainee was later executed. Anti-Government armed groups have committed forms of cruel, inhumane and degrading

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<sup>235</sup> A/HRC/21/50 para. 134.

<sup>236</sup> *Ibidem* para. 59.

<sup>237</sup> A/HRC/22/59 para. 53.

<sup>238</sup> *Ibidem* para. 75.

<sup>239</sup> A/HRC/27/60 paras. 105-108.

<sup>240</sup> A/HRC/23/58 para. 72.

<sup>241</sup> See *ibidem* paras. 88-90 and A/HRC/22/59 paras. 100-103

<sup>242</sup> *Ibid*, para. 74.

treatment or punishment during interrogations of Government forces members and supposed members of the *Shabbiha*. Specific accounts have been collected on the actions of the Jhabat al-Nusra group<sup>243</sup>. In addition, the CoI reported that: “The rise in torture and the inhumane treatment of the civilian population in areas controlled by ISIS and affiliated groups provide reasonable grounds to believe that such groups promote the widespread and systematic attack on the civilian population.”<sup>244</sup> Furthermore, the anti-Government armed group often operate in civilian-inhabited areas. This violates the international legal obligation to distinguish between military and civilian objectives and avoid positioning military objectives within or near populated areas<sup>245</sup>. Although some groups attempt safeguarding the civilian population by warning residents to evacuate areas before the attacks, other episodes have seen OAGs like Jabhat al-Nusra, Liwa al-Tawhid and Ghuraba Al-Sham firing mortars, home-made rockets and scores in civilian neighbourhoods<sup>246</sup>. Since the beginning of the conflict, the number of people detained unlawfully has been rising. The CoI has documented an episode in April 2013 when a doctor was detained, together with other 150 people, for refusing to consent Jabhat al-Nusra to hoist its flag over a field hospital.<sup>247</sup> None of the individuals detained in this location were allowed counselling or family visits and there is no indication that detainees are being granted their fundamental rights. At the time of writing, the situation is worsening due to the involvement of extremist jihadi armed groups and of foreign fighters within the conflict. There has also been an exponential increase in attacks causing the destruction of cities and of cultural heritage sites.

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<sup>243</sup> A/HRC/23/58 paras. 89-90.

<sup>244</sup> A/HRC/25/64, para. 60.

<sup>245</sup> See Doswald-Beck, L. and Henckaerts, J-M. (2005) “Customary International Humanitarian Law Volume 1: Rules”, Cambridge University Press, pp. 25-36.

<sup>246</sup> A/HRC/23/58 paras. 109-111.

<sup>247</sup> A/HRC/24/46 para. 61.

## CHAPTER THREE: HUMANITARIAN INTERVENTION IN SYRIA AND THE RESPONSIBILITY TO PROTECT THE CIVILIAN POPULATION

### 1. Humanitarian Intervention

#### 1.1. The UN collective system for the maintenance of international peace and security

In the aftermath of WWII after the dust had settled down, the United Nations was established with the primary purpose to maintain international peace, security and to prevent the recurrence of another devastating conflict.<sup>248</sup> In order to ensure these provisions the UN Charter established a collective security system, where force was to be used only in the common interest of the international community. The prohibition concerning the use of force is openly stated in Article 2(4) of the Charter, which prescribes that all Member States “shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations”. This prohibition has opened a great debate among scholars. It has been argued that the wording of Article 2(4) implies that the only the prohibition of the use of force is directed to the territorial integrity and political independence. This argument justifies the possible use of force for humanitarian purposes. As an example, in the “Legality of Use of Force” Belgium argued that NATO’s intervention of 1999 in Kosovo “never questioned the political independence and the territorial integrity of the Federal Republic of Yugoslavia” and was “an armed humanitarian intervention, compatible with Article 2, paragraph 4, of the Charter, which covers only intervention against the territorial integrity or political independence of a State”.<sup>249</sup> However, such interpretation is widely disputed and the prevailing interpretation considers that this prohibition covers all uses of force, including the use of force for humanitarian purposes. In addition, this understanding is similarly supported in the *travaux préparatoires* of the Charter.<sup>250</sup>

The Charter also introduced a new collective organ, the Security Council (UNSC), with the “primary responsibility for the maintenance of international peace and security”.<sup>251</sup> The Charter granted the Security Council a wide range of competencies, such as the authority to allow “action by air, sea, or land forces as may be necessary to maintain or restore international peace and

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<sup>248</sup> See Preamble to the Charter of the United Nations (1945): “We the people of the United Nations determined: to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind”. See also, Article 1: “The Purposes of the United Nations are: 1. To maintain international peace and security.

<sup>249</sup> Legality of the Use of Force, Serbia and Montenegro v. Belgium, Oral Proceedings, Public Sitting, May 10th 1999, para. 12.

<sup>250</sup> See the overview in Albrecht Randelzhofer, “Article 2(4)” in Simma, B. (ed.), “The Charter of the United Nations: A Commentary”, Oxford University Press, 2nd ed. 2002, at 123: “The terms ‘territorial integrity’ and ‘political independence’ are not intended to restrict the scope of the prohibition of the use of force [...] In other words, ‘integrity’ has to be read as ‘inviolability’, proscribing any kind of forcible trespassing”.

<sup>251</sup> UN Charter, Article 24.

security”.<sup>252</sup> Yet, according to Article 51 there is nothing in “the present Charter [that] shall impair the inherent right of individual or collective self-defence if an armed attack occurs until the Security Council has taken measures necessary to maintain international peace and security”. Moreover, under Article 39 of Chapter VII, the Security Council has the exclusive authority to determine whether a situation constitutes a threat or breach to peace and can take action under Articles 41 and 42.<sup>253</sup> Also the UN General Assembly, in its “Uniting for Peace Resolution” of 1950, stated the willingness to make “appropriate recommendations [...] for collective measures including [...] the use of armed force [if the] Security Council, because lack of unanimity of the permanent member, fails to exercise its primary responsibility for the maintenance of international peace and security”.<sup>254</sup> Nonetheless, the General Assembly cannot prevail on an issue under the consideration of the Security Council. But, technically, two-thirds of the votes of the Assembly could authorize an intervention.

## 1.2. The nexus between humanitarian emergency and threat to international peace

In the light of the UN Charter, the only legitimate mean by which coercive measures – with the possibility of the use of force as an extreme *ratio* - can be implemented is under Chapter VII. In this sense, cases of humanitarian emergency cannot use automatically the instruments, explicitly stated in Articles 41 through 51, in the context of a threat to peace or breach to peace. An intervention in such situations can be possible without a pre-emptive consent of the territorial authorities only if the UNSC considers there is a nexus between the emergency and a threat or breach to peace and international security. It is plain that such nexus is clearer in the case where an emergency is the consequence of an armed conflict, as in the case of the Syrian conflict.<sup>255</sup> Nonetheless, within the UN Charter even if the protection of the individual persona is a fundamental value, the latter is subordinated to the eventual possibility that a coercive intervention might lead to a breach or threat to peace.<sup>256</sup> The principle of non-intervention and the protection of state sovereignty are put ahead of the protection of individuals. Still, the historical background and the geopolitical order of 1945 explain the wording and the intents of the Charter.

Initially, the UNSC did not establish a connection between the violation of human rights and self-determination rights as a violation of peace. This can also be partially understood referring to the scarce role the UNSC had in the years of the Cold War, which rarely enabled the Council to adopt measures under Chapter VII. In fact, the first measures under Chapter VII were taken during the decolonisation process, with the case of apartheid in Africa and seldom in cases with humanitarian scopes. However, subsequent resolutions adopted by the UNSC in cases concerning the Kurdish population in Iraq, the population of the ex-Yugoslavia, of Somalia, of Mozambique, of Liberia, of Ruanda, of Burundi and of Zaire, have recognized this nexus by adopting such resolutions under Chapter VII, with implicit or explicit declaration of humanitarian purposes.<sup>257</sup> On the basis of this reasoning, during the 1990's, the international community and legal scholars posited the legality of the use of force for humanitarian assistance, viewing such action legal from an ethno-political point of view and a juridical one.

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<sup>252</sup> *Ibidem*, Article 42.

<sup>253</sup> Article 41 assures the UNSC the power to determine non-military responses to a perceived threat, while Article 42 comes into effect if measures taken under Article 41 have been proven inadequate and enables the UNSC to use more robust measures.

<sup>254</sup> General Assembly Resolution 377 (V), November 3rd 1950.

<sup>255</sup> Lattanzi, F. (1999) “Assistenza Umanitaria e Intervento di Umanità”. Giappichelli Editore: Torino.

<sup>256</sup> Lattanzi (1999)

<sup>257</sup> *Ibidem*

### 1.3. General features of humanitarian intervention

Clearly one of the most disputed interrogatives of our time is: what is to be done when a state is unwilling or unable to halt a humanitarian crisis within its own territory and does not consent to humanitarian assistance and intervention? The controversy is deeply rooted in the definition itself on the term 'humanitarian intervention'. As Anthony Lang suggests, "[...] in trying to define this particular term, two issues arise. First, there is no clearly defined understanding of the term. Second, any definition contains within it certain normative assumptions".<sup>258</sup> A main point consists in separating humanitarian intervention from a military one. In support of this view Kofi Annan, at a symposium organized by the International Peace Academy in 2000, calls for the distinction between these two terms: [We must] get right away from using the term 'humanitarian' to describe military operations...military operations should not...in my view, be confused with humanitarian action. Otherwise, we will find ourselves using phrases like 'humanitarian bombing' and people will soon get very cynical about the whole idea".<sup>259</sup>

The question of humanitarian interventions needs to take into account considerations on the status of the parties involved, the consent of the State, the means, the motives and the question of legality. The status of the parties involved and their composition is ambiguous. Few definitions propose a list of potential interveners, such as "a state, a group within a state, a group of states or an international organization".<sup>260</sup> Yet, the identity and composition of the intervening party is of legal importance. Also the motives behind such interventions are highly disputed, though it is generally accepted that these have as primary intent to relieve the sufferings of the civil population. According to Nicholas Wheeler a humanitarian intervention has to meet certain requirements: there must be a just cause, "a supreme humanitarian emergency", where the use of force is a last resort and there must be a certain probability that such use of force will have a positive humanitarian outcome.<sup>261</sup> The issue of the legality is today, like in past years, the centre of the international debate. The majority of legal scholars consider at present these interventions to be illegal. This point, though, does not have necessary implications on the legitimacy of the intervention. The United Kingdom, referring to its actions in Kosovo before the Security Council, argued that an exception to the UN Charter's prohibition of force had emerged only with the purpose to prevent human rights abuses where convincing evidence of extreme humanitarian distress is present and there are no practical alternatives to procure relief.<sup>262</sup> Obviously, in any action the use of force has to be necessary and proportionate to the humanitarian scopes. The opposing doctrine claimed that there was little state practice and a weak *opinio juris* supporting the legality of humanitarian interventions.<sup>263</sup> Moreover, humanitarian intervention without the explicit Security Council

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<sup>258</sup> Lang, A. (2003) "Humanitarian Intervention: Definition and Debates", in A. Lang (ed.), "Just Intervention", Georgetown University Press: Washington DC, p. 2.

<sup>259</sup> Annan, K. (2000) "Annex 1: Opening Remarks" in J. Sherman (rapporteur), "Humanitarian Action: A Symposium Summary, International Peace Academy, International Policy Conference of November 20th 2000.

<sup>260</sup> Vincent, J. (1974) "Non Intervention and International Order", Princeton University Press: Princeton, New Jersey, p. 13.

<sup>261</sup> Wheeler, N. (2000) "Saving Strangers: Humanitarian Intervention in International Society", Oxford University Press: Oxford, pp. 33-34.

<sup>262</sup> See: Greenwood, C. (2002) "Humanitarian Intervention: The Case of Kosovo", 10 Finnish Year Book International Law 141, 157; For a detailed discussion of the United Kingdom's legal argument, see *id.* at 157-60.

<sup>263</sup> See: Focarelli, C. (2008) "The Responsibility to Protect Doctrine and Humanitarian Intervention: Too Many Ambiguities for a Working Doctrine", Journal of Conflict and Security Law, Oxford University Press: Oxford; Orford, A. (2003) "Reading Humanitarian Intervention: Human Rights and the Use of Force in

mandate is to be considered illegal and an infringement of state sovereignty that violated the UN Charter. Despite these contrasting views, the right of humanitarian intervention gained support within the international community. A strong argument in favour of humanitarian interventions was that even in cases where the use of force was justified as self-defence – in its narrow sense - the actions were oriented to humanitarian scopes. For instance, in the intervention of Tanzania to overthrow Idi Amin in Uganda and Vietnam's use of force to end the rule of Pol Pot in Cambodia. Importantly, Antonio Cassese has suggested that humanitarian interventions or 'humanitarian missions', legally acceptable under modern international law must fulfil several conditions – which will be taken into consideration by the ICSS report on the Responsibility to Protect - if they are to legitimize State action.<sup>264</sup> These consider that: the situation must present gross and massive violations of human rights, amounting to crimes against humanity; there must have been wilful disregard of appeals, recommendations and decisions of UN organs by the Government; the Security Council must be blocked by veto, after the conditions under Article 39 of the UN Charter have been reached; all the measures of peaceful settlement of disputes under Chapter VI must be exhausted; and, finally, a group of States must be willing to act collectively.<sup>265</sup> Furthermore, the use of force must be proportionate and implemented with the sole purpose to combat crimes against humanity and the vast human rights violations. In recent years, the concept and practice of humanitarian intervention evolved from a widely disregarded policy into a persuasive defence of the use of force to prevent mass human rights violations. Of course, the endorsement by the UN Security Council explicitly confirms the existence of a situation where the grave violations of IHL and IHRL perpetrated to the expenses of the civilian population, constitute a breach or threat to peace and international security.

#### 1.4. The legality of humanitarian intervention

According to the Vienna Convention on the Law of Treaties and to customary international law, a "treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".<sup>266</sup> The interpretation will take into consideration any "subsequent agreement between the parties regarding the interpretation of the treaty of the application of its provisions", "subsequent state practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" and "relevant rules of international law applicable in the relations between the parties".<sup>267</sup> The interpretation of a treaty and, therefore also the UN Charter, is never definitive but takes in consideration subsequent developments. Moreover, according to the International Law Commission's commentary on its Draft Articles on the law of treaties, "an agreement as to the interpretation of a provision reached after the conclusion of the treaty represents an authentic interpretation by the parties which must be read into the treaty for purposes of its interpretation".<sup>268</sup> Starting from this consideration, the subsequent paragraphs will justify the notion of humanitarian intervention.

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International Law", Cambridge: Cambridge University Press and Brownlie, I. (1963) "International Law and the Use of Force by States", Oxford University Press: Oxford, pp. 265-268.

<sup>264</sup> Cassese, A. (1999) "Ex Iniuria Ius Oritur: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?", *European Journal of International Law*, 10(1):27; see for further insight: Simma, B. (1999) "NATO, the UN and the Use of Force: Legal Aspects", *European Journal of International Law*, 10:1-22.

<sup>265</sup> *Ibidem* and Clapham, A. and Gaeta, P. (2014)

<sup>266</sup> Vienna Convention of the Law of Treaties (VCLT), Article 31 (1).

<sup>267</sup> *Ibidem*, Article 31 (3)(a)-(c).

<sup>268</sup> ILC, Yearbook of the International Law Commission (1966), Vol. II, 221, para. 14.



#### 1.4.1. *As état de nécessité for precluding legal wrongfulness*

In international law the concept of necessity relates to those cases in which the only way for a State to safeguard an “essential interest threatened by a grave and imminent peril is, for the time being, not to perform some other international obligation of lesser weight or urgency”.<sup>269</sup> In the *Gabcikovo-Nagymaros Project* the ICJ recognised that the state of “necessity is a ground recognized by customary international law for precluding the wrongfulness of an act not in conformity with an international obligation”.<sup>270</sup> According to Article 25 of the ILC’s 2001 Draft Articles on state responsibility – considered an expression of existing customary international law<sup>271</sup> – a State can break an obligation under international law, if the breach “is the only way for the state to safeguard an essential interest against grave and imminent peril” and if the action will not “seriously impair an essential interest of the state or states towards which the obligation exists, or of the international community as a whole”.<sup>272</sup> Logically, the case of necessity cannot be invoked if “the international obligation in question excludes the possibility of invoking necessity; or the State has contributed to the situation of necessity”.<sup>273</sup> Importantly Article 26 of the Draft Articles considers that necessity cannot preclude “the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law”. As Special Rapporteur on state responsibility, James Crawford, has affirmed that necessity is to be considered as an exceptional circumstance, “at the outer edge of the tolerance of international law for otherwise wrongful acts”.<sup>274</sup> The case law from the ICJ and the ICL Commentary confirms this view.<sup>275</sup> And additionally, the “state is not the sole judge of whether those conditions have been met”.<sup>276</sup>

Moreover, the claim of the state of necessity for humanitarian purposes finds support. In this sense, Professor Ole Spiermann argued that necessity “is the one way that humanitarian intervention is not sanctioned pursuant to the Charter may find space in international law, however limited”.<sup>277</sup> Supporting this view, Harold Koh, the US State Department legal adviser has stated:

“A group of nations could seek to fill the vacuum of protection [...] without invoking either a ‘legal right of humanitarian intervention’ or even a legal claim of R2P, in the sense of an international legal duty to intervene. What these states would claim instead is an *ex post* exemption from legal wrongfulness [...] the International Law Commission’s Articles on State Responsibility [...] recognized that extreme circumstances such as distress and necessity would preclude claims of international wrongfulness against an acting state, and permit certain forms of countermeasures to stop illegal acts by others”.<sup>278</sup>

<sup>269</sup> International Law Commission, “Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries”, Yearbook of International Law Commission (2001) Vol. II, Part 2: 80.

<sup>270</sup> *Gabcikovo-Nagymaros Project*, ICJ Reports, (1997) 7, para 51.

<sup>271</sup> UN Document A/Res/56/83, January 2002 and see Application of the Convention on the Prevention and Punishment of the Crime of Genocide, ICJ Reports (2007) 43, para. 401.

<sup>272</sup> A/Res/56/83, Article 25(1).

<sup>273</sup> A/Res/56/83, Article 25(29).

<sup>274</sup> Report of the International Law Commission on its work of its 51st Session (1999), A/54/10, para. 378.

<sup>275</sup> *Gabcikovo-Nagymaros Project* (n.139) paras. 51–52. See also the general scepticism displayed in *Rainbow Warrior* (New Zealand v. France), (1990) XX RIAA 217, 252, para. 78, and the International Law Commission (n.138) paras. 80–83.

<sup>276</sup> Koh, H. “Syria and the Law of Humanitarian Intervention (Part II: International Law and the Way Forward)”, 2 October 2013, available at: [justsecurity.org/2013/10/02/koh-syria-part2/](http://justsecurity.org/2013/10/02/koh-syria-part2/).

<sup>277</sup> Spiermann, O. (2002) “Humanitarian Intervention as a Necessity and the Treat or Use of Jus Cogens”, 71 Nordic Journal of International Law 543.

<sup>278</sup> Koh, H., *supra* note 273.

Clearly, the invocation of necessity is the strongest argument in support of collective humanitarian interventions and possibly for unilateral interventions without UN mandate. Nonetheless, the state of necessity must be considered in the light of the rights protected under Chapter VII, which are to maintain and promote peace and international security. In conclusion, the state of necessity should not be considered as a measure *uti singuli* of States, but as a measure for the collective security of the international community in maintaining peace and security.

#### 1.4.2. *The Responsibility to Protect*

The Responsibility to Protect (R2P) doctrine was created in the 2000s, and is today an important argument within the international debate. Many countries, such as the US, the UK, France, Germany, Norway and Denmark have referred to such doctrine in national security strategies, agreements or white papers.<sup>279</sup> The debate was initiated by the then UN Secretary-General, Kofi Annan, whom asked: “If humanitarian intervention is, indeed, an unacceptable assault to sovereignty, how should we respond to a Rwanda, to a Srebrenica – to gross and systematic violations of human rights that affect every precept of our common humanity?”<sup>280</sup>

##### 1.4.2.1. *The ICISS Report*

After the Kosovo War, the Canadian government established the International Commission on Intervention and State Sovereignty (ICISS) in 2001, which started to operationalize the concept of R2P.<sup>281</sup> The outcome of the Commission was, in fact, the formulation of a new norm by which each state had the duty to protect its own population from atrocity crimes and if the state was unwilling or unable the international community was responsible to offer the protection. Intervention for humanitarian purposes was no longer a ‘right’, but was a ‘responsibility’. States had three separated but interconnected duties. Firstly, they were responsible for the protection of their population, a “responsibility to prevent” the root causes of mass atrocities.<sup>282</sup> Secondly, the international community had a “responsibility to react” in cases where a state failed to protect its population.<sup>283</sup> Specifying, that all peaceful measures must be exhausted and that the use of force was to be a last resort in extreme circumstances.<sup>284</sup> In third place, states had a “responsibility to rebuild” by

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<sup>279</sup> See The White House, ‘National Security Strategy’ (May 2010); Cabinet Office, ‘The National Security Strategy of the United Kingdom—Security in an Interdependent World’ (March 2008); Présidence de la République, ‘Défence et Sécurité—Le Livre Blanc’ (June 2008); Federal Ministry of Defense, ‘White Paper on German Security Policy and the Future of the Bundeswehr’ (October 2006); Norwegian Ministry of Foreign Affairs, ‘Norway’s Humanitarian Policy’ (Report No 40, 2008–2009 to the Storting); and Regeringen, ‘Et Danmark, Der star sammen—Regeringsgrundlag’ (October 2011).

<sup>280</sup> Annan, K. (2000) Secretary-General of the United Nations, ‘We the Peoples’: The Role of the United Nations in the 21st Century, United Nations, at 48.

<sup>281</sup> The International Commission on Intervention and State Sovereignty (ICISS), “Responsibility to Protect” (2001) para. 2(4). See also the Dutch report on the legality and legitimacy of humanitarian intervention and its reference to the “growing significance of the international duty to protect and promote fundamental human rights”, at Advisory Council on International Affairs and Advisory Committee on Issues of Public International Law, Humanitarian Intervention (2000), at 34.

<sup>282</sup> ICISS Report, at XI,

<sup>283</sup> *Ibidem*, at 39.

<sup>284</sup> ICISS discussed the meaning of “extreme” stating that the use of force should be confined to “cases of violence which so genuinely ‘shock the conscience of mankind’ or which present clear and present danger to international security, that they require coercive military intervention.” *Ibi.*, at 31.

providing assistance to support recovery efforts, reconstruction and reconciliation processes.<sup>285</sup> Furthermore, the ICISS established specific criteria, by which the international community should decide on the legitimacy of the intervention, such as: the scale of atrocities, the rightful intentions of intervening states, the proportionality of actions, the chances of success of the intervention and the authorization of a legitimate authority.<sup>286</sup> The Commission suggested a right of humanitarian intervention without the authorisation of the Security Council:

“Based on our reading of state practice, Security Council precedent, established norms, emerging guiding principles, and evolving customary international law, the Commission believes that the Charter’s strong bias against military interventions is not to be regarded as absolute when decisive action is required on human protection grounds”.<sup>287</sup>

Even though, the UN was regarded as the legitimate authority through which the use of force could be mandated. Nonetheless, the ICISS recognized the fact that the UNSC could be deadlocked by its Permanent Members, as it had in the past. To avoid this, it considered that when the Security Council failed to act, a regional or sub-regional organization could propose collective action within their boundaries.<sup>288</sup> In addition, the ICISS supported its position arguing that the Uniting for Peace Resolution of the General Assembly could provide “a high degree of legitimacy for an intervention”.<sup>289</sup>

In the following years, the Iraq War in 2003 proved how R2P could be abused and used as an *ad hoc* justification. However, Tony Blair, the British Prime Minister at that time, openly stated that: “The essence of a community is common rights and responsibilities”.<sup>290</sup> And though scholars<sup>291</sup> rejected the relevance of R2P in Iraq, Blair’s statement re-opened the debate. In a speech given by the Canadian Prime Minister Paul Martin at the UN General Assembly in September 2004, he underlined how the “responsibility to protect is not a licence for intervention; it is an international guarantor of political accountability”.<sup>292</sup>

#### 1.4.2.2. The UN evolution of R2P

In December 2004, the UN secretary-general’s High-Level Panel on Threats, Challenges and Change reported that “the Council and the wider international community have come to accept that under Chapter VII [...] it can always authorize military action to redress catastrophic internal wrongs if it is prepared to declare that the situation is a ‘threat to international peace and security’, [which is] not especially difficult when breaches of international law are involved”.<sup>293</sup> And that R2P

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<sup>285</sup> ICISS Report, at XI.

<sup>286</sup> ICISS, “Responsibility to Protect”, XII-XIII.

<sup>287</sup> ICISS, R2P, p. 16 para. 2(27).

<sup>288</sup> See *id.* at 53–54. ICISS included regional coalitions as capable of taking collective intervention on the basis that the member states to those organizations are more familiar with the local political actors and are more likely to feel the impact of the humanitarian distress.

<sup>289</sup> See *id.* at 53.

<sup>290</sup> Blair, T. “Blair terror speech in full”.

<sup>291</sup> See as examples, the positions of Gareth Evans and Thakur Ramesh.

<sup>292</sup> “Address by Prime Minister Paul Martin at the United Nations”, 21 September 2004, available at: <http://news.gc.ca/web/article-en.do?crtr.sj1D=&mthd=advSrch&crtr.mnthndVl=&nid=98589&crtr.dpt1D=&crtr.tp1D=&crtr.lc1D=&crtr.yrStrtVl=&crtr.kw=Haiti&crtr.dyStrtVl=&crtr.aud1D=&crtr.mnthStrtVl=&crtr.yrndVl=&crtr.dyndVl>.

<sup>293</sup> “A More Secure World: Our Shared Responsibility”, 2004, Report of the High-Level Panel on Threats, Challenges and Change, Document A/59/565, United Nations: New York, p.57 para. 202, available at: [www.un.org/secureworld/report.pdf](http://www.un.org/secureworld/report.pdf).

is the “responsibility to protect every State when it comes to people suffering from avoidable catastrophe – mass murder and rape, ethnic cleansing by forcible expulsion and terror, and deliberate starvation and exposure to disease”.<sup>294</sup> The R2P doctrine was also reflected in an Outcome Document adopted in 2005 at the UN World Summit. The States declared that: “[...] The international community, through the United Nations also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means in accordance with Chapters VI and VIII of the Charter, to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity [...] prepared to take collective action, in a timely a timely and decisive manner, through the Security Council, in accordance with the Charter”.<sup>295</sup> A further acceptance came in 2006 with Resolution 1674 in which the R2P doctrine was “reaffirmed” by the UNSC.<sup>296</sup> In 2009, the UN codification of R2P took another step with Ban Ki-moon’s “Secretary General Report” in which the doctrine was operationalized in three conceptual pillars through which states could implement the provisions in a “fully faithful and consistent manner”.<sup>297</sup> In first place, every state has the responsibility to provide security for their populations and protect them from genocide, war crimes and crimes against humanity. Secondly, when a state is unable to protect its populations from these crimes, the international community has the responsibility to provide assistance and to help states comply with their obligations. Lastly, if a state “manifestly fails” to meet its responsibilities, the international community should respond in a timely and decisive manner with peaceful and forceful coercive measures.<sup>298</sup> This ‘three pillar’ approach endorsed by the Secretary-General has become widely accepted and supported by more than fifty states.<sup>299</sup>

#### *1.4.2.3. The role of Libyan situation for the R2P doctrine regarding the Syrian conflict*

On February 26<sup>th</sup> 2011, the UNSC passed Resolution 1970 in which it encouraged the Libyan authorities to protect its population and imposed an arms embargo, a travel ban and an asset freeze on specific individuals.<sup>300</sup> Nonetheless, with the events of the following weeks it became clear that those were not Qaddafi’s intentions and that the international community had to implement stronger measures. In March 2011 - parallel to the first manifestations in Syria - a NATO led intervention in Libya, endorsed by the Security Council’s Resolution 1973, was deployed to protect civilians and civilian populated areas.<sup>301</sup> The Resolution explicitly consented the use of force on the basis of R2P’s third pillar, invoking Libya’s failure to meet its responsibility to protect its population and legitimized actions under Chapter VII having terminated the peaceful means expressed in Resolution 1970. In this light, Resolution 1973 justifies R2P by underlining the duties that the Parties to an armed conflict bear, regarding the protection and security of civilians. Furthermore, it demonstrates the extension of international law in allowing the use of force in situations where there are manifest violations of human rights that amount to war crimes and crimes against humanity. Finally, it consolidates the belief that the protection of civilians and of civilian populated areas is of primary importance to the international community. From this recent practice, it appears

<sup>294</sup> *Ibidem*, pp. 56-57, para. 20.

<sup>295</sup> World Summit Outcome Document 2005, adopted by General Assembly as Resolution 60/01.

<sup>296</sup> See Security Council, Resolution 1674: “Reaffirm[ing] the provisions of paragraphs 138 and 139 of the 2005 World Summit Outcome Document regarding the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity”.

<sup>297</sup> UN Secretary-General, “Implementing the Responsibility to Protect”, paras. 2 and 11, UN Doc. A/63/677, (12 January 2009). At the subsequent General Assembly debate, over fifty states explicitly endorsed the Secretary-General’s three-pillar formulation.

<sup>298</sup> UNSG, “Implementing the Responsibility to Protect”, (2009), para. 11(a)(b)(c).

<sup>299</sup> See Global Center For The Responsibility To Protect, “Implementing The Responsibility To Protect: The General Assembly Debate: An Assessment” 5–6 (Aug. 2009).

<sup>300</sup> UNSC, Resolution 1970, Preamble, UN Doc. S/RES/1970 (26 February 2011).

<sup>301</sup> UNSC, Resolution 1973, Preamble, UN Doc. S/RES/1973 (17 March 2011).

clear that humanitarian interventions are to be considered legitimate, not as intervention of States *uti singuli*, with the authorisation of the UN Security Council or operating under a regional organization, by the measures considered within Chapter VII.

## **2. The legal Justification for Humanitarian Intervention in Syria**

### **2.1. The humanitarian situation in Syria: an overview**

In March 2016, Syria entered its sixth year of conflict, which has caused untold sufferings to the civilian population and has shredded the country to pieces. According to a report of the UNRWA, at the time of writing, there are 13.5 million people in need of protection or some sort of humanitarian assistance, of which 6.6 million are internally displaced.<sup>302</sup> An average number of 50 Syrian families have been displaced every hour since it all began in March 2011.<sup>303</sup> There are 8.7 million people who are unable to meet their basic food needs and 70% of the population lacks access to clean drinkable water. Health facilities, schools and other services are not fully operative or are closed. Furthermore, the escalation of the hostilities has caused a deep economic recession, with an increase of food and fuel prices. The civilian population, especially children and women, are the main victims of the perpetrated violations of IHRL and IHL.

In August 2011 the first UN humanitarian assessment mission was sent to Syria and up to today several resolution have condemned the violence in the country gaining little feedback.<sup>304</sup> On July 2014 the UN Security Council, with resolution 2165, has stressed alarm for the rapid deterioration of the humanitarian situation and called for an end to all violations. Moreover, it has stressed the obligation for all Parties to “respect the relevant provisions of international humanitarian law and the United Nations guiding principles of humanitarian emergency assistance”.<sup>305</sup> The Resolution, stated that the Security Council has decided that all Syrian parties to the conflict shall enable the immediate and unhindered delivery of humanitarian assistance directly to people throughout Syria, by the United Nations humanitarian agencies and their implementing partners, on the basis of United Nations assessments of need and devoid of any political prejudices and aims, including by immediately removing all impediments to the provision of humanitarian assistance”.<sup>306</sup> In the light of the situation in Syria statements from the United States, the United Kingdom and Denmark have called for a possible unilateral humanitarian intervention on behalf of extreme necessity. However, in an open statement to the New York Times, Russian President Vladimir Putin has stated that a military action without a Security Council mandate is to be considered an act of aggression.<sup>307</sup>

### **2.2. General considerations on the provision of weapons**

The lack of a UN decision for an arms embargo, due to the opposition of Russia and China, has permitted a number of governments to willingly and openly (though some covertly) provide aid, assistance and non-lethal equipment to the Syrian rebels. On the other hand, some states have suspended the provisions of weapons. In July 2012, Switzerland suspended its arms export to the

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<sup>302</sup> See: “Humanitarian Needs Overview 2016: Syrian Arab Republic”, available at: [https://www.humanitarianresponse.info/en/system/files/documents/files/2016\\_hno\\_syrian\\_arab\\_republic.pdf](https://www.humanitarianresponse.info/en/system/files/documents/files/2016_hno_syrian_arab_republic.pdf)

<sup>303</sup> *Ibidem*

<sup>304</sup> See UNGA resolution 66/253, which condemns the violence in Syria and appoints UN-LAS Joint Special Envoy; in October 2013 the UN-OPW mission starts; UNSCR 2139 of February 2014.

<sup>305</sup> S/RES/2165, Adopted by the Security Council at its 7216th meeting, on 14 July 2014.

<sup>306</sup> *Ibidem*

<sup>307</sup> Vladimir Putin, Op-ed: “A Plea for Caution from Russia”, New York Times, 11 September 2013, available at: [www.nytimes.com/2013/09/12/opinion/putin-plea-for-caution-from-russia-on-syria.html](http://www.nytimes.com/2013/09/12/opinion/putin-plea-for-caution-from-russia-on-syria.html).

United Arab Emirates, after a Swiss-made hand grenade shipped to the latter was found in Syria.<sup>308</sup> Moreover, the following month Reuters sustained that President Obama had “signed a secret order authorizing US support for rebels”, but specified that the US was “stopping short of giving the rebels lethal weapons”.<sup>309</sup> France also confirmed that it would provide “non-lethal elements” to the rebels such as “means of communication and protection”.<sup>310</sup> On the same line, William Hague, the British Foreign Secretary announced that the five million pounds of non-lethal equipment would be granted to the Syrian opposition. Hague specified that these funds would be granted to “unarmed opposition groups, human rights activists and civilians”.<sup>311</sup> However, in June 2012, the New York Times reported that CIA operatives in Turkey were providing directly weapons – paid for by Turkey, Saudi Arabia and Qatar – to the Syrian opposition fighters.<sup>312</sup> Furthermore, The Guardian, reported that: “Along with Qatar, Turkey and UAE, the Saudis are believed to be the rebels’ principal suppliers and financiers”.<sup>313</sup> Importantly, there are international provisions, which prohibit the use of force as an act of aggression and prescribe the principle of non-interference within the internal affair of states if these are not authorized by the UNSC or justified by self-defence. Hence, State practice has increasingly proved that the prohibition of the use of force no longer precludes the provision of aid, assistance, training and non-lethal equipment to rebels in cases where the objective is to prevent mass atrocities. However, limiting transfers of weapons to non-state actors has been considered as effective mean to reduce long-term risks to civilians.<sup>314</sup>

### 2.3. The Third Pillar of R2P and the Syrian crisis

The United States, the United Kingdom and Denmark have taken a step forward adopting legal pro-intervention positions sustaining that an intervention in Syria may be compatible with international law, even without the UNSC mandate. On September 8<sup>th</sup> 2013, the White House Counsel, Kathryn Ruemmler, in a brief statement affirmed that a military operation against Syria would not fit “a traditionally recognized legal basis under international law” without UN authorization would be, nonetheless, “justified and legitimate under international law”.<sup>315</sup> On October 2<sup>nd</sup> 2013, the US State Department legal adviser, Harold Koh, commented in a blog post that the evolution of international law in recent practice would contemplate that intervention in Syria would not *per se*

<sup>308</sup> “Switzerland Halts Arms Exports to U.A.E., as Report Says Swiss Arms Used by Syria Rebels”, Haaretz and Reuters, 5 July 2012, available at: <http://www.haaretz.com/middle-east-news/switzerland-halts-arms-exports-to-u-a-e-as-report-says-swiss-arms-used-by-syria-rebels-1.449022>.

<sup>309</sup> Hosenball, M. “Exclusive: Obama Authorizes Secret U.S. Support for Syrian Rebels”, Reuters, 1 August 2012, available at: <http://www.reuters.com/article/us-usa-syria-obama-order-idUSBRE8701OK20120801>.

<sup>310</sup> “France Gives Non-Lethal Military Aid to Syrian Opposition: PM”, Al-Arabiya News, 22 August 2012, available at: <https://english.alarabiya.net/articles/2012/08/22/233570.html>.

<sup>311</sup> “Syria conflict: UK gives extra £5m to opposition groups”, BBC News, 10 August 2012, available at: <http://www.bbc.com/news/uk-19205204>.

<sup>312</sup> Schmitt, E. “C.I.A. Said to Aid in Steering Arms to Syrian Opposition”, New York Times, 21 June 2012, available at: <http://www.nytimes.com/2012/06/21/world/middleeast/cia-said-to-aid-in-steering-arms-to-syrian-rebels.html?r=0>.

<sup>313</sup> The Report also précised that: “public discussion of the issue is extremely rare and the demarcation between government and private initiatives is blurred”. Ian Black, “Arm Syrian Rebels to Contain Jihadis, Says Saudi Royal”, The Guardian, 25 January 2013, available at: <http://www.theguardian.com/world/2013/jan/25/arm-syrian-rebels-jihadis-saudi>.

<sup>314</sup> Byers, M. (2015), in Ramesh, T. (ed.)

<sup>315</sup> Savage, C. “Obama Tests Limits of Power in Syrian Conflict”, New York Times, 8 September 2013, available at: [www.nytimes.com/2013/09/09/world/middleeast/obama-tests-limits-of-power-in-syrian-conflict.html](http://www.nytimes.com/2013/09/09/world/middleeast/obama-tests-limits-of-power-in-syrian-conflict.html).

illegal.<sup>316</sup> Significantly, the intervention should be considered an important “law-making moment”.<sup>317</sup> In accord, on August 29<sup>th</sup> 2013 in a legal memorandum the British government declared that: “the legal basis for military action would be humanitarian intervention”.<sup>318</sup> Yet, three conditions have to be met for the intervention to be compatible with international law. In first place, there must be “convincing evidence, generally accepted by the international community as a whole, of extreme humanitarian distress on a large scale, requiring immediate and urgent relief”. In second place, “it must be objectively clear that there is no practicable alternative to the use of force if lives are to be saved”. Lastly, “the proposed use of force must be necessary and proportionate to the aim of relief of humanitarian need and must be strictly limited in time and scope to this aim”.<sup>319</sup> The British government sustains that all three condition have been met considering the situation in Syria. The UK has also defended the intervention in Kosovo, sustain that such action was legally “justified as an exceptional measure to prevent an overwhelming humanitarian catastrophe”, even though the use of force option had been blocked by the Security Council.<sup>320</sup> Also the Danish positions, supports this view referring to the intervention in Kosovo as a relevant precedent.

As a matter of fact, the prohibitions of mass atrocity crimes, of war crimes and of crimes against humanity are now recognized as *jus cogens*. In such situations, the R2P’s third pillar allows, when the Security Council fails to act, a regional organization or a coalition of the willing to authorize and undertake the limited use of force to protect the population. The criteria<sup>321</sup> by which such measures can be implemented are: (a) establishing of a *prima facie* case<sup>322</sup>; (b) peaceful options must be exhausted; (c) the Security Council must be unable to act; (d) military force must be limited to low-intensity options designed to protect populations; (e) the use of low-intensity military force must be authorized by a legitimate authority; (f) and, finally, the intervention must be the answer of a request by credible opposition groups. These criteria will now be examined in relation to the Syrian conflict.

### 2.3.1. (a) Establishing of a *prima facie* case

The *prima facie* case is a necessary requirement in order to sustain actions of behalf of R2P and assure the international community with proof that such measures are not encouraged by the self-interest of states. Humanitarian interventions need to be reasoned by a “just cause” and have as a goal “to halt or avert human suffering”.<sup>323</sup> Both these conditions, mentioned within the ICISS report are sustained by the requirement of a *prima facie* case. Evidence and findings can be provided by courts and from independent sources of proof. The UN Human Rights Council, the ICRC, the ICC Office of the Prosecutor and also leading academics or former prosecutors can evaluate whether

<sup>316</sup> Koh, H. “Syria and the Law of Humanitarian Intervention (Part II: International Law and the Way Forward)”, 2 October 2013, available at: [justsecurity.org/2013/10/02/koh-syria-part2/](http://justsecurity.org/2013/10/02/koh-syria-part2/).

<sup>317</sup> *Ibidem*; See for further insight Scharf, M. (2013) “Customary International Law in Times of Fundamental Change—Recognizing Grotian Moments”, Cambridge University Press.

<sup>318</sup> Prime Minister’s Office, “Chemical Weapon Use by Syrian Regime—UK Government Legal Position” (29 August 2013), [www.gov.uk/government/publications/chemical-weapon-use-by-syrian-regime-uk-government-legal-position/chemical-weapon-use-by-syrian-regime-uk-government-legal-position-html-version](http://www.gov.uk/government/publications/chemical-weapon-use-by-syrian-regime-uk-government-legal-position/chemical-weapon-use-by-syrian-regime-uk-government-legal-position-html-version).

<sup>319</sup> *Ibidem*

<sup>320</sup> UN Document, S/PV.3988 (24 March 1999), 12. See Section IV.i(c).

<sup>321</sup> The naming of the criteria used is taken from an article by Williams, P. Ulbrick, J. and Worobys, J. “Preventing Mass Atrocity Crimes: The Responsibility to Protect and The Syria Crisis” (Case Western Reserve, Journal of International Law), with reference to the 2009 UN Outcome Document.

<sup>322</sup> The Security Council, in Resolution 1973 of 2011, when authorising Chapter VII powers, also supports this view.

<sup>323</sup> ICISS Report, at XII.

atrocities are being perpetrated by a state.<sup>324</sup> In the Syrian conflict, *prima facie* case evidence has been consistently supplemented – as aforementioned – by the Commission of Inquiry. Moreover, the UNHCR Report of February 2012 has also affirmed that security government forces have committed “widespread, systematic, and gross human rights violations”<sup>325</sup>, by targeting indiscriminately civilians and by implementing heavy weapons.<sup>326</sup> The Report acknowledged that Syria had “manifestly failed” to protect its own people.<sup>327</sup> In addition, international experts have also contributed to establish a *prima facie* case. Professor David Crane, former Chief Prosecutor in the Special Court of Sierra Leone has led a team in documenting the atrocities perpetrated in Syria since March 2011.<sup>328</sup> Furthermore, Human Rights Watch and Amnesty International have also collected evidence in their independent reports.<sup>329</sup>

### 2.3.2. (b) Peaceful options must be exhausted

However, the use of force for humanitarian purposes is justified and legitimate as a last resort. As the ICISS stated, “every non-military option for the prevention or peaceful resolution of the crisis [must be] explored, with reasonable grounds for believing lesser measures would not have succeeded”.<sup>330</sup> In the case of Syria it is well illustrated to which extent the international community must exhaust peaceful options before contemplating low-intensity military options. As a matter of fact, multiple regional and UN sponsored peace plans and sanctions have been implemented with little success. In December 2011, the Arab League sponsored a peace plan – signed by Assad’s government – in which it called for the formation of a national unity government, for elections and for the permission of Arab League monitors to enter the country.<sup>331</sup> However, due to the crescent intensification of violence, the Arab League suspended its mission in February 2012.<sup>332</sup> In addition, the Syrian government rejected the new Arab League’s mission proposal with the UN cooperation.<sup>333</sup> In March 2012, the Arab League and the UN, jointly appointed Kofi Annan as the UN-Arab League Special Envoy in Syria with the proposal of a Six Point Plan. Assad agreed to this peace plan, which required armed forces to withdraw from populated areas and imposed a ceasefire.<sup>334</sup> A UN Supervision Mission in Syria was established with Resolution 2043 to monitor the situation.<sup>335</sup> However, as already mentioned, the growing violence and instability of the situation led to an early suspension of the mission before the termination of the mandate. Sanctions targeting

<sup>324</sup> “Preventing Mass Atrocity Crimes”, Case Western Reserve Journal of International Law, Vol.45 (2012).

<sup>325</sup> Report on the Syrian Arab Republic, A/HRC/19/69, para. 2.

<sup>326</sup> Report on the Syrian Arab Republic, A/HRC/19/69, paras. 39-46, which describe the tactics implemented by Syrian State forces.

<sup>327</sup> Report on the Syrian Arab Republic, A/HRC/19/69, para. 126.

<sup>328</sup> For further information see: Syracuse University College of Law, Report on the Syrian Crisis: Mapping Atrocity in Syria.

<sup>329</sup> See Amnesty Report, at: <https://www.amnesty.org/en/countries/middle-east-and-north-africa/syria/report-syria/> and Human Rights Watch Report, at: <https://www.hrw.org/world-report/2015/country-chapters/Syria>.

<sup>330</sup> ICISS Report, at XII.

<sup>331</sup> See “Syrian Government Accepts Annan Peace Plan”, BBC, 27 March 2012, available at: <http://www.bbc.co.uk/news/world-middle-east-17522398> and Fahim, K. “Arab League Proposes New Peace Plan for Syria”, New York Times, 23 January 2012.

<sup>332</sup> Lynch, C. “400 Killed in Syria Since Arab League Monitors Arrived, U.N. Says”, Washington Post, 10 January 2012, available at: [http://articles.washingtonpost.com/2012-01-10/world/35438262\\_1\\_arab-league-french-ambassador-gerard-araud-latakia](http://articles.washingtonpost.com/2012-01-10/world/35438262_1_arab-league-french-ambassador-gerard-araud-latakia); “Arab League Suspends Syria Mission”, BBC, 28 January 2012, available at: <http://www.bbc.co.uk/news/world-middle-east-16774171>.

<sup>333</sup> Syria Rejects New Arab League Peace Mission Proposal, BBC, 13 February 2012, available at: <http://www.bbc.co.uk/news/world-middle-east-17008597>.

<sup>334</sup> Syria ‘Agrees’ to Peace Plan Deadline, Annan Tells UN, BBC, 2 April 2012, available at: <http://www.bbc.co.uk/news/world-middle-east-17587438>.

<sup>335</sup> UN Security Council, Resolution 2042, para. 5, UN Doc. S/RES/2043, 21 April 2012.



the assets of Syrian officials, oil purchase and information technology by the EU, the US and the Arab League have also proved to be ineffective.<sup>336</sup> Furthermore, diplomatic talks encouraged with the Geneva Conferences on Syria in 2014, failed to propose a unitary political solution. A new session of peace talks on Syria has commenced on February 1<sup>st</sup> 2016, but the conference was suspended a number of times achieving only a consensus over a very volatile cessation of the hostilities. In addition, armed groups such as ISIL (or ISIS), Jabhat al-Nusra and other terrorist organizations continue their attacks, mostly directed to the civilian population.

### *2.3.3. (c) The Security Council must be unable to act*

This criterion ensures that the Security Council, has the primary mandate for the use of force, but considers that repeated failures to achieve consensus must be acknowledged by the international community. In the case of Syria, the Security Council has failed to pass four resolutions authorizing peaceful measures in order to end the conflict, due to the open opposition of Russia and China. The first draft resolution (S/2011/612), of October 2011, threatened sanctions if the Syrian government failed to end immediately the violence against civilians. On February 2012, the second draft resolution (S/2012/77) called for the support of the Arab League's peace plan and asked Assad to leave office. The third draft resolution (S/2012/538) of July 2012, threatened sanctions unless the Syrian government withdrew heavy weapons from populated areas within ten days. Finally, a fourth draft resolution (S/2012/348) of May 2014, supported by a great number of Member States and vetoed again by Russia and China, condemned the widespread violations under IHL and IHRL both perpetrated by government forces and by anti-government armed groups. Some steps further were taken with the adoption of Resolution 2165 in July 2014, which endorsed the UN and its partners to deliver humanitarian aid in Syria without state consent and established a monitoring mechanism. In addition, two resolutions namely Resolution 2254 of December 2015 and Resolution 2268 of February 2016, called for the encouragement of a political solution and for a cessation of the hostilities with a resumption of political talks. However, at the time of writing, none of the requests have been met by any of the Parties involved.

### *2.3.4. (d) Military force must be limited to low-intensity options designed to protect populations*

The option of low-intensity military force has to comply with the "right intentions" and "proportionality" standards proposed by the ICISS report and the UN High-Level Panel.<sup>337</sup> In order to fulfil the 'right intentions' standard, the military force must not be "directed against the territorial integrity or political independence" of the state.<sup>338</sup> On the other hand, proportionality is important

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<sup>336</sup> Marsh, K. "Syria Sanctions Declared as Violent Crackdown Continues", The Guardian, May 6, 2011, available at: [www.guardian.co.uk/world/2011/may/06/syria-sanctions-crackdown-eu](http://www.guardian.co.uk/world/2011/may/06/syria-sanctions-crackdown-eu); See Report on Syrian Arab Republic, para. 34; Fact Sheet, U.S. Treasury Dep't, Off. of Public Affairs., New Executive Order Targeting Human Rights Abuses via Information Technology (Apr. 23, 2012), available at: [www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Documents/ghravity\\_eo\\_fact\\_sheet.pdf](http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Documents/ghravity_eo_fact_sheet.pdf); Stephen Castle, European Union Tightens Sanctions, NY Times, July 24, 2012

<sup>337</sup> See ICISS Report, at XII. Although these criteria were initially designed to test the legitimacy of the use of force with Security Council authorization, they can also be applied to the use of force without Security Council authorization. Importantly, the first two criteria - "just cause" and "last resort" - largely track the first two pillars of R2P. According to this, Syria presents a "just cause" for intervention because the international community has established a prima facie case of ongoing mass atrocity crimes. The use of force in Syria would be a "last resort" because a succession of peace plans, ceasefires, and economic sanctions have not stopped both Parties in committing mass atrocity crimes.

<sup>338</sup> See Joyner, C. (2007) "The Responsibility to Protect: Humanitarian Concern and the Lawfulness of Armed Intervention", Virginia Association, Journal of International Law, at 714. It is important that the intervening state or states are not perceived as acting primarily with a second hand motive, like using humanitarian interventions as a pretext for revenge, power or land grabs, or strategic interests. See for

for the humanitarian protection of at-risk populations. Importantly, during the Iraq War in 2003, the international community supported the no-fly zones implemented to protect the Kurds, while the possibility of an overthrow of Saddam met considerable resistance and hesitancy.<sup>339</sup> In Syria, the use of a no-fly zone patrolled by air forces of coalition states could be a proportional military response to the crisis, as was the case of Iraq in 1991 and Bosnia in 1992.<sup>340</sup> Humanitarian safe zones are also military low-intensity measures that can shelter and protect civilian populations facing an imminent threat.<sup>341</sup> Nonetheless, humanitarian zones are generally ineffective if there are no armed forces with the authority to protect them.

### 2.3.5. *(e) The use of low-intensity military force must be authorised by a legitimate authority*

If and when the Security Council fails to act a legitimate authority can approve the use of force to prevent or halt atrocity crimes.<sup>342</sup> State practice, as in the case of the NATO intervention in Kosovo, has shown that the legitimacy of an intervention will be greater where military action is undertaken by a regional organization, by a coalition of the willing or a form of multilateral operation.<sup>343</sup> The ICISS Report and the UN High-Level Panel supported action by regional or sub-regional organizations for collective action within their boundaries. Logically, member states of such organizations are more familiar with the geopolitical context and can better value the costs of humanitarian emergencies. This means that the European Union, the African Union or the Arab League can legitimately authorize an R2P intervention.

### 2.3.6. *(f) The intervention must come at the request of credible opposition groups*

An intervention based on the appeal of the direct victims of the situation would increase the perceived legitimacy and its possibility of success. In Syria this request could come from the National Coalition for Syrian Revolutionary and Opposition Forces, the Local Coordinating Committees, the Revolutionary Council and the Free Syrian Army. Initially, the Syrian opposition groups disagreed on the necessity of a foreign military intervention, but the views changed when the crisis escalated and there was a call for a Libya-style Arab initiative.<sup>344</sup>

Clearly, the complex nature of the Syrian situation certainly has hindered the peaceful measures adopted to find an ultimate solution to avoid a greater bloodshed. Hence, what appears clear is a divergence in the current international approaches. On one side, there is a call for a diplomatic solution, yet on the other, external actors are covertly and openly aiding the Parties in conflict with military assistance. However, even if there has been no credible pro-active international intervention scenario, certainly a humanitarian intervention in Syria can be carried out in many forms. In first place, according to Mary Kaldor, there needs to be a focus on strengthening and empowering the local and administrative councils by assisting the latter with the provision of basic

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example: International Commission On Intervention and State Sovereignty, the Responsibility to Protect: Research, Bibliography, Background 54–55 (December 2001).

<sup>339</sup> See for example, “Iraq War Legitimacy ‘Questionable,’ Says Ex-Diplomat”, BBC, Nov. 29, 2009, available at: [www.news.bbc.co.uk/2/hi/8382194.stm](http://www.news.bbc.co.uk/2/hi/8382194.stm).

<sup>340</sup> See for further insight: Benard, A. (2004) “Lessons From Iraq and Bosnia on the Theory and Practice of No-Fly Zones”, 27 Journal of Strategic Studies pp. 454- 455.

<sup>341</sup> See for further insight: Yamashita, H. (2004), “Humanitarian Space And International Politics: The Creation Of Safe Areas”, 4.

<sup>342</sup> See ICISS Report, at XII.

<sup>343</sup> Williams, P. et al. (2012)

<sup>344</sup> See for example, “Syria Rebel Leader Wants Libyan-style Arab Initiative”, Reuters, September 19, 2012, available at: [www.reuters.com/article/2012/09/19/us-syria-sieda-libya-idUSBRE88I0H020120919](http://www.reuters.com/article/2012/09/19/us-syria-sieda-libya-idUSBRE88I0H020120919).

health services, food and security.<sup>345</sup> Furthermore, she argues that a stable UN presence would certainly favour local ceasefires and ensure the provision of humanitarian aid to non-government controlled areas. Important would also be the negotiation of international buffer zones, in the sense of safe areas for civilians, protected by international peacekeepers.<sup>346</sup> Ultimately, Kaldor, stresses that the primary imperative is to shift the international discourse from the issue of whether Assad should remain in power, or the risk of jihadism and sectarianism, to a deep concern of how to save the Syrian population.

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<sup>345</sup> Kaldor, M. (2013) “A Humanitarian Strategy Focused on Syrian Civilians”, in Hashemi, N. and Postel, D. (ed.) “The Syrian Dilemma”, MIT Press.

<sup>346</sup> *Ibidem*

## CONCLUSION: FAILING TO PROTECT THE SYRIAN POPULATION

In conclusion, this paper has tried to give an accurate analysis of the elements of international law that come into consideration when referring to the Syrian conflict and to explain the reasonable grounds that would legitimize a humanitarian intervention in Syria. The Syrian conflict is a non-international armed conflict and this classification implies that the Parties involved are bound by legal obligations under IHL and IHRL. The government of Bashar al-Assad has perpetrated documented mass atrocities, with indiscriminate bombardments in populated areas and allegedly used chemical weapons for attacks. Furthermore, government-allied militias (like the *Shabbiha* militias) have repeatedly committed large-scale massacres, war crimes and gross violations of IHL as a matter of state policy.<sup>347</sup> These alleged violations, perpetrated by the Government forces and the armed opposition groups, have been considered by the Human Rights Council as war crimes and crimes against humanity in several official reports on Syria, by the Commission of Inquiry. In addition, the United Nations has reported that all Parties to the conflict have impeded humanitarian relief actions for the civilian population trapped or displaced by fighting during the Syrian conflict. Nonetheless, the events have not been deemed sufficient to trigger international action, including the use of force, under the third pillar of R2P. Yet, the UNSC has referred twice to R2P doctrine for the Syrian conflict, however, political interest and the veto by the Russian and Chinese Permanent Members have impeded an international intervention even under R2P. On October 2<sup>nd</sup> 2013 a UNSC only a presidential statement indicated, that “the Council recalls [...] that the Syrian authorities bear the primary responsibility to protect their populations”<sup>348</sup> and, on February 22<sup>nd</sup> 2014 in Resolution 2139, endorsed “all parties take all the appropriate steps to protect civilians, including members of ethnic, religious and confessional communities, and stresses that, in this regard, the primary responsibility to protect its population lies with the Syrian authorities”. Though the initial steps were ones of peaceful pro-democratic protests, the brutal repression and the militarisation of the opposition have led to this violent climax. Moreover, the failure of the peace talks in Geneva of 2012 and 2014, have proven the difficulties of the international community in finding a diplomatic solution. The sole occasion in which the Western powers actually took action by launching air strikes against the Syrian regime was after the disputed large-scale attack on August 12<sup>th</sup> 2013 in which about 1,300 people were killed with sarin gas where Assad’s forces had crossed the ‘red line’.

Undoubtedly the Syrian conflict presents several complex elements – especially with the rise of the Islamic State - which has made calling upon R2P demanding and risky for the intervening States. In “Syria and the Responsibility to Protect”, Thakur Ramesh has evidenced five factors, which have caused a dismissal of the situation and have resulted with the failure to protect the Syrian population.<sup>349</sup> In first place, Ramesh explains the conceptual difficulties there are in individuating the acceptable boundary between responsibility to protect, international humanitarian law and human rights law, in regulating the conduction of hostilities. Furthermore, the author describes the difficulties there have been, at times, to legitimately hold clearly accountable the parties for

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<sup>347</sup> “R2P Monitor, “A Bimonthly Bulletin by the Global Center for the Responsibility to Protect”. Issue 17, 15 September 2014), Responsibility to Protect: New York.

<sup>348</sup> See: S/PRST/2013/15.

<sup>349</sup> Ramesh, T. (2014) “Syria and the Responsibility to Protect” in Robert W. Murray and Alasdair McKay (ed.) “Into the Eleventh Hour: R2P, Syria and Humanitarianism in Crisis”, e-International Relations Publishing: Bristol.

atrocities committed.<sup>350</sup> Importantly, the possible consequences of an intervention, considered internally (with the possibility of a failed state situation with the collapse of the Assad regime) and externally (with the disruption of a highly volatile region and intensifying of intra-religious conflict), discouraged any actions. In addition, to this the unwillingness of Russia and China to support intervention has vetoed any actions on the basis of R2P or on the state of necessity in Syria.<sup>351</sup> Lastly, Ramesh, considers that the West's hesitancy in enforcing a rule-writing moment with new emerging powers and the reticence of most countries to go beyond the *status quo*.

Yet, the price of the international community's inaction has not simplified the situation, nor brought to a solution and the enduring hostilities have seen new actors take advantage of the sectarian nature of the conflict, as in the case of ISIS (or ISIL). The further escalation of violence, the takings of hostages and video executions have consolidated the presence of a new geostrategic threat for the West. In response an international air strikes campaign targeting ISIS started in September 2015 in Iraq and Syria and still, at the time of writing, there have been no conclusive results. Russia has carried out intense shelling raids in Syria targeting 'terrorists' with an official request from the Assad regime. The intervention consisted of air strikes primarily in northern part of Syria against militant groups opposed to the Syrian government, including the Islamic State of Iraq and the Levant (ISIL), al-Nusra Front (al-Qaeda in the Levant) and the Army of Conquest. Importantly, the lack of UNSC endorsement for the air strikes has not prevented action from being undertaken by states, though this has not been the case for R2P. It appears clear that geopolitical considerations and national interests ultimately prevail over such a humanitarian crisis, over the need for international responsibility and solidarity. It is, however, imperative to consider that the international community has a responsibility to prevent such atrocities, one to protect the population and one to rebuild a new democratic order.

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<sup>350</sup> Both issues have been addressed and explained throughout the text with the intent of rendering a clearer picture of the Syrian conflict.

<sup>351</sup> Russia and China have abstained (and not vetoed) the UNSC Resolution 1973 of March 2011 allowing action in Libya. Yet, believed that the actions undertaken exceeded the actions mandated by the Resolution, especially considering the regime change.



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## RIASSUNTO

L'obiettivo di questo elaborato è stato quello di analizzare il conflitto siriano – con specifico riguardo agli eventi più rilevanti occorsi dal 2011 al 2014 - sulla base delle norme di diritto internazionale, considerando in particolare quelle che vengono applicate a un conflitto armato, al fine di delineare le eventuali violazioni. La determinazione di tali violazioni ci ha portato a esaminare le responsabilità che ne discendono, soprattutto a carico dello stato territoriale, ma si sono prese in considerazione anche le responsabilità dei gruppi armati. Sul piano politico, hanno meritato attenzione anche le responsabilità della comunità internazionale, in particolare la sua sostanziale inattività, che è altresì valutabile sul piano giuridico. Difatti, nell'ultimo capitolo si analizza la nozione di intervento umanitario e di *Responsibility to Protect* (R2P), considerando i presupposti che legittimerebbero un intervento nella situazione siriana, che non si limiti a prese di posizione verbali o al soccorso della popolazione civile siriana soprattutto nei Paesi limitrofi piuttosto che in Siria. La necessità e l'importanza di questa analisi va valutata alla luce del fatto che il prezzo della quasi totale immobilità della comunità internazionale sia stato pagato – e lo è tutt'ora – da tale popolazione: secondo il *Syrian Center for Policy Research*, il numero complessivo delle vittime ammonterebbe, oggi, a 470,000, numero in continuo aumento.

Il primo capitolo considera la situazione istituzionale e politica siriana, per poi descrivere gli eventi a partire dal marzo del 2011. Si analizza poi il conflitto in rapporto all'assetto geopolitico, sul piano prettamente regionale e su quello internazionale. Si descrivono sinteticamente le reazioni, le posizioni e le misure adottate dai vari paesi nello scacchiere mondiale. Per semplificare l'analisi degli eventi, il conflitto viene suddiviso in cinque fasi. La prima fase inizia con le proteste pacifiche del 2011 nella città di Der'a che si sono diffuse per tutto il paese per poi essere represses, con un uso sistematico della forza di polizia e militare, ad opera delle autorità governative. La seconda fase inizia intorno all'agosto del 2011, quando cessarono di esistere i presupposti pacifici delle proteste e per la prima volta la comunità internazionale prese posizione, condannando l'uso sistematico della violenza nel paese attraverso una risoluzione del Consiglio di Sicurezza, mentre la Lega Araba proponeva un *Plan of Action*. L'assalto e l'assedio della città di Homs alla fine del 2012, rappresenta l'inizio della terza fase del conflitto in cui le forze governative cominciarono a portare avanti veri e propri attacchi militari, anche aerei, per riprendere il controllo di aree sotto l'influenza dei ribelli siriani. Alla fine del 2013, il conflitto raggiunse una situazione di stallo militare, che rappresenta la quarta fase del conflitto, in cui entrambe le parti pur controllando consistenti zone del paese non riuscivano a prevalere l'una sull'altra. Infine, il mutamento della natura del conflitto, da confronto quasi-politico con toni settari, a guerra civile alimentata anche da ideologie estremiste, rappresenta la quinta fase, tuttora in corso. A fronte di questa situazione, l'Occidente democratico si è dimostrato molto reticente a intervenire nei primi mesi della rivoluzione siriana, considerando che si era da poco ristabilito un dialogo con il governo di Assad. In linea di massima, la 'strategia occidentale' è stata quella di promuovere un intervento da parte degli Stati del Golfo o della Turchia, sempre a livello regionale, per raggiungere tramite la mediazione diplomatica un accordo pacifico. Anche sul piano regionale, le reazioni dei paesi sono state tendenzialmente passive alla ricerca di un alleato in Occidente o animate da interessi particolaristici. Ad esempio, Russia e Cina ponendo il veto a delle risoluzioni del Consiglio di Sicurezza si sono schierate apertamente dalla parte di Assad, dimostrandosi favorevoli solamente a un dialogo diplomatico. La situazione si è ulteriormente complicata con il probabile uso da parte delle forze militari governative di armi chimiche e il coinvolgimento di milizie armate jihadiste estremiste, come l'ISIS.



Nel secondo capitolo, ci si è proposto di chiarire se il conflitto in Siria possa essere considerato un conflitto armato secondo il diritto internazionale e su quali basi la situazione presente possa ritenersi, in particolare, un conflitto armato interno (NIAC, *non-international armed conflict*). A questo proposito si prendono in considerazione le quattro Convenzioni di Ginevra, i Protocolli Addizionali uniti alla giurisprudenza sviluppata dal Tribunale Penale per l'ex-Jugoslavia anzitutto nel caso *Tadić*. In questo caso si è detto che un conflitto armato esiste quando vi è un uso della forza armata tra due Stati, o tra autorità governative e gruppi armati organizzati o, in ultima istanza, tra gruppi armati all'interno dello stesso Stato. Nello specifico della Siria, dal momento che il conflitto non vede contrapporsi due Stati, ma uno Stato e dei gruppi armati organizzati, il conflitto viene definito come un NIAC. Questa classificazione presuppone due criteri fondamentali: uno riguarda la capacità organizzativa delle parti mentre l'altro riguarda l'intensità della violenza. Rispetto al primo requisito, già nel marzo del 2011 l'opposizione siriana, riconosciuta nella figura del Free Syrian Army (FSA), aveva stabilito il proprio quartier generale in Turchia e formava un anno dopo i *provincial military councils*: ciò ha di fatto reso più chiara l'esistenza di un'effettiva struttura organizzativa e di comando. Per quanto riguarda invece il secondo criterio, già dall'estate del 2011 la violenza armata in Siria aveva raggiunto il livello di intensità tale da potersi considerare un NIAC. Evidenza di ciò sono stati i metodi quasi-militari usati dalle forze governative contro i ribelli e il conseguente numero crescente di sfollati e rifugiati. Al momento sono stati registrati dall'UNHCR circa 2,1 milioni di rifugiati in Egitto, Iraq, Giordania e Libano, mentre il governo turco ha registrato la presenza di circa 1,9 milioni di rifugiati<sup>352</sup>.

Il fatto che il conflitto in Siria sia un NIAC implica che lo Stato, come anche i gruppi armati organizzati, abbiano degli obblighi da rispettare in base al diritto internazionale umanitario. Le norme che li prevedono, ormai consuetudinarie, sono state sviluppate con le Convenzioni di Ginevra del 1949 e i Protocolli Addizionali, in particolare, rispetto ai NIAC, con l'Articolo 3 Comune delle Convenzioni e il Protocollo II. Nella situazione di un NIAC possiamo sintetizzare gli obblighi delle parti in conflitto secondo quanto prescritto dall'Articolo 3 Comune: sono infatti vietati l'omicidio, la mutilazione, la tortura, i trattamenti lesivi della dignità personale, la cattura di ostaggi, la pronuncia e l'esecuzione di condanne senza il previo giudizio di un tribunale regolarmente costituito. È evidente da queste norme l'ispirazione che l'Articolo 3 Comune ha avuto dal diritto internazionale dei diritti umani, che in ogni caso resta applicabile anche in tempo di conflitto armato. Tanto gli Stati, quanto i gruppi armati organizzati hanno gli stessi diritti e gli stessi obblighi nel diritto internazionale umanitario poiché molte disposizioni fanno parte del diritto internazionale consuetudinario e alcune sono norme anche di *ius cogens*. Ovviamente, per le violazioni di tali norme viene tenuta in conto tanto la responsabilità penale individuale quanto la responsabilità statale. Infatti, le violazioni del diritto internazionale umanitario sono considerate dei crimini di guerra e dei crimini contro l'umanità. A norma delle Convenzioni di Ginevra gli Stati hanno l'obbligo di perseguire i crimini commessi dagli individui e ciò sulla base del criterio dell'universalità della giurisdizione penale per quelle violazioni considerate *grave breaches* secondo le Convenzioni di Ginevra. La violazione di tale obbligo comporta la responsabilità dello Stato. Per le restanti violazioni si lascia agli Stati la scelta delle misure ai fini della loro prevenzione e repressione, ciò che però è in ogni caso dovuto. La Siria, infatti, aderisce a gran parte dei trattati internazionali di diritto umanitario, tra cui proprio le Convenzioni di Ginevra del 1949, il primo Protocollo Addizionale del 1977. La Siria non ha invece ratificato lo Statuto della Corte Penale Internazionale né il secondo Protocollo Addizionale alle quattro Convenzioni di Ginevra, che però, per le sue norme fondamentali, è ormai ritenuto far parte del diritto consuetudinario. Considerazione hanno meritato, in questo elaborato, anche alcuni obblighi sussistenti nel caso in cui la violenza non raggiunga i livelli di un conflitto armato. In questo caso si fa riferimento solamente

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<sup>352</sup> <http://data.unhcr.org/syrianrefugees/regional.php>

al diritto internazionale dei diritti umani: è quanto si è realizzato soprattutto all'inizio degli eventi siriani, con la dura e violenta repressione ad opera delle autorità di governo delle proteste perfino pacifiche. Del resto, la Siria è parte tanto della Convenzione Internazionale sui Diritti Civili e Politici del 1966 che della Convenzione contro la Tortura del 1984. L'elaborato descrive le violazioni che sono state commesse nella situazione siriana da entrambe le parti, secondo la documentazione raccolta dalla *Commission of Inquiry* per la Siria voluta dal Consiglio per i Diritti Umani. Il primo report della Commissione è stato pubblicato il 23 novembre del 2011 e da allora ha raccolto numerose testimonianze di esecuzioni extra-giudiziali, episodi di uso eccessivo della forza bruta e attacchi illegali da parte delle forze governative e delle milizie *Shabbiba*. Sono stati inoltre registrati casi di sparizioni forzate, di tortura - anche su minori - e di uccisioni di massa nei confronti della popolazione civile o di individui *hors de combat*. Inoltre, la Commissione ha raccolto prove riguardo all'uso di armi chimiche da parte delle autorità governative nelle aree abitate dei governatorati di Idlib e Hama tra il 2013 e il 2014. Le stesse violazioni sarebbero state perpetrate anche dai gruppi armati dell'opposizione, ma su scala minore e specialmente ad opera delle milizie armate di *Jabhat al-Nusra*, *Liwa al-Tawhid* and *Ghuraba Al-Sham*.

Alla luce delle informazioni raccolte e degli elementi di diritto osservati, il terzo capitolo parte dall'analisi del nesso che sussiste tra il mantenimento della pace e della sicurezza internazionale rispetto a situazioni di emergenza umanitaria, per prendere in considerazione il problema della legittimità o meno in queste situazioni dell'intervento umanitario e descrivere i presupposti che esistono per l'implementazione nel caso siriano del terzo pilastro della R2P. Gli strumenti e le misure del Capo VII della Carta delle Nazioni Unite non si occupano specificamente delle emergenze umanitarie, poiché il valore tutelato è quello della pace e sicurezza internazionali. Ciò nonostante, la prassi si è evoluta proprio sulla base delle risoluzioni del Consiglio di Sicurezza in relazione ad alcuni eventi di gravi emergenze umanitarie, come nel caso della popolazione curda in Iraq, della popolazione dell'ex-Jugoslavia, della Somalia e del Ruanda, proprio per il nesso che può sussistere e che è stato verificato nelle suddette situazioni, fra emergenza umanitaria e pace e sicurezza internazionali. Dagli anni '90 questo nesso ha alimentato un vivace dibattito tra i promotori e i critici dell'uso della forza per fini umanitari<sup>353</sup>. Infatti, il punto centrale del dibattito è se possa considerarsi legittimo, secondo il diritto internazionale, l'intervento umanitario. In questo elaborato si giustifica tale prassi tanto in base all'*état de nécessité* come causa escludente l'illiceità dell'intervento che attraverso il concetto di R2P. Nel primo caso si prende in considerazione l'Articolo 25 del Progetto di articoli per la responsabilità dello Stato - considerati parte del diritto consuetudinario - che prevede la possibilità per uno stato di non rispettare un proprio obbligo internazionale se ciò è l'unica misura possibile per salvaguardare un interesse essenziale nel caso di un grave ed imminente pericolo<sup>354</sup>. Nel secondo caso, si considera il concetto di R2P emerso

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<sup>353</sup> Per capire l'ottica in cui questo elaborato intende quest'ultima, bisogna tenere a mente le parole pronunciate da Kofi Annan all'International Peace Academy nel 2000: "[We must] get right away from using the term 'humanitarian' to describe military operations...military operations should not...in my view, be confused with humanitarian action. Otherwise, we will find ourselves using phrases like 'humanitarian bombing' and people will soon get very cynical about the whole idea."

<sup>354</sup> ILC, Article 25: "1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act: (a) Is the only way for the State to safeguard an essential interest against a grave and imminent peril; and (b) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.

2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if: (a) The international obligation in question excludes the possibility of invoking necessity; or (b) The State has contributed to the situation of necessity."

all'inizio del XXI secolo<sup>355</sup>. L'evoluzione di questa dottrina inizia con il report dell'*International Commission on Intervention and State Sovereignty* nel quale l'intervento con fini umanitari non viene più considerato come un diritto dello stato interveniente, ma come una responsabilità di ogni Stato: responsabilità di prevenire, agire e ricostruire. Un ulteriore sviluppo si è avuto con il *High Level Panel on Threats, Challenges and Change* del Segretario Generale nel 2004 e con l'*Outcome Document* adottato nel 2005 al World Summit dell'ONU. Infine, il *Secretary General Report* del 2009 ha completato il processo di concretizzazione della R2P, con la sua suddivisione in tre pilastri. Il primo pilastro considera l'obbligo che ogni stato ha di provvedere alla sicurezza e alla protezione della propria popolazione. Il secondo considera che la comunità internazionale debba aiutare uno Stato qualora questo non riesca a proteggerla. Il terzo pilastro considera, infine, che qualora lo Stato fallisca apertamente nell'ottemperare alle proprie responsabilità, la comunità internazionale ha la responsabilità di agire in maniera tempestiva e decisa con misure pacifiche o militari. Si è quindi giunti alla conclusione che, sulla base della prassi internazionale, gli interventi umanitari che comportino l'uso della forza non siano illeciti quando vi siano manifeste violazioni dei diritti umani considerati come crimini di guerra e crimini contro l'umanità.

Nel 2016 la Siria è entrata nel sesto anno di conflitto. Molte risoluzioni adottate da organi internazionali, altrettante dichiarazioni da parte di organizzazioni non governative e di esponenti di governi degli Stati Membri dell'ONU sono state rivolte alle parti in conflitto perché si trovasse una soluzione pacifica, si rispettassero i diritti umani e le norme del diritto internazionale umanitario. Alcuni stati tra cui la Danimarca, gli Stati Uniti e il Regno Unito, alla luce del continuo deteriorarsi della situazione, hanno avanzato la proposta di un intervento umanitario unilaterale aggirando la necessità del consenso del sovrano territoriale e l'autorizzazione del Consiglio di Sicurezza. Invero, qualora il Consiglio di Sicurezza non riesca a operare, il terzo pilastro della R2P considera come lecito anche l'intervento da parte di un'organizzazione regionale o di una *coalition of the willing*, che adoperi misure coercitive e l'uso della forza al fine di proteggere la popolazione civile. L'adozione di queste misure deve però avvenire in conformità a criteri ben precisi: a) bisogna stabilire che il caso sussista *prima facie*, b) è necessario che le misure pacifiche siano terminate, c) deve essere chiaro che il Consiglio di Sicurezza non sia capace di operare, d) le misure militari devono essere autorizzate da un organo legittimo, e) con funzione di supporto, f) e, infine, l'intervento deve avvenire su richiesta di un'opposizione credibile. Di seguito, questi criteri vengono considerati in rapporto al conflitto in Siria. Le testimonianze e i fatti raccolti dalla *Commission of Inquiry* per la Siria e anche i report di Human Rights Watch e Amnesty contribuiscono, infatti, a stabilire indubbiamente la sussistenza di un caso *prima facie*. Le misure adottate dalla comunità internazionale a partire dai *peace plans* sponsorizzati dall'ONU, dalla Conferenza di Pace tenuta a Ginevra nel 2014 - ripresa adesso nel febbraio 2016 - e dalle sanzioni economiche imposte dall'UE e dagli Stati Uniti, hanno dimostrato come si siano raggiunti solamente degli effimeri cessate il fuoco e come le misure 'pacifiche' non abbiano prodotto risultati concreti alcuni. L'inefficienza del Consiglio di Sicurezza si è resa manifesta data l'aperta ostilità a qualsiasi intervento da parte dei due membri permanenti, Russia e Cina. Infine, nonostante le iniziali reticenze dell'opposizione siriana, ci sono stati appelli da parte della stessa FSA a favore di un intervento internazionale in Siria come avvenuto per la Libia.

Tuttavia, gli eventi e le atrocità perpetrate dalle autorità militari e dalle milizie dell'opposizione armata non hanno mosso la comunità internazionale a favore di un intervento. L'elaborato considera come l'intervento in Libia sia stato, da una parte controproducente per la causa siriana, ma dall'altra con la Risoluzione 1973, abbia legittimato ancor di più agli occhi della comunità

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<sup>355</sup> Per capire meglio il senso del discorso bisogna considerare, nuovamente, le parole di Kofi Annan: "*If humanitarian intervention is, indeed, an unacceptable assault to sovereignty, how should we respond to a Rwanda, to a Srebrenica – to gross and systematic violations of human rights that affect every precept of our common humanity?*"

internazionale il ruolo della R2P, che nella situazione siriana ha finito per non essere applicata. Certamente, la situazione in Siria è resa molto complessa da un elevato numero di attori coinvolti e dalla presenza di interessi geopolitici che risultano avere un peso superiore rispetto alla grave crisi umanitaria. Appare innegabile, alla luce dell'analisi svolta, che entrambe le parti di questo conflitto abbiano violato il diritto internazionale umanitario e abbiano impedito l'assistenza alla popolazione civile. Inoltre i membri del governo come dei gruppi armati si sono resi responsabili di crimini di guerra e di crimini contro l'umanità. Di fronte a tali violazioni e tali crimini, la comunità internazionale non può continuare a rimanere inattiva.