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International legal obligations of armed opposition groups in Syria

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ABSTRACT

Starting with peaceful protests of people demanding democratic reforms and fundamental rights from the regime in Damascus, the Syria crisis developed into a full-fledged civil war causing large-scale death, injury, and displacement. During the first year of the crisis, violence in Syria was marked by the brutal crackdown of regime forces on protesters. Confronted with a high degree of violence from state forces, opposition groups gradually organized politically and militarily. This article focuses on international legal obligations of armed opposition groups in the course of this crisis. Such obligations are clearly contained in international humanitarian law, and arguably also in international human rights law. In order to determine the applicable law, the classification of the situation as either an armed conflict or one of internal tensions and disturbances is fundamental but controversial. This article examines at what stage of the crisis international human rights obligations and international humanitarian law obligations of non-state armed groups became pertinent, and provides reasons why this is the case. It shall be argued that even before the Syria crisis turned into a non-international armed conflict, opposition groups were bound by fundamental rules of international human rights law. In addition to these rules, all parties to the armed conflict became bound by international humanitarian law once the situation reached a sufficient degree of violence, and the non-state groups a sufficient degree of organization. By examining the Syria crisis, this article shall show what these abstract criteria mean in practice.

Keywords: non-state actors, non-state armed groups, human rights obligations, international humanitarian law, Syria conflict

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I. INTRODUCTION

Starting with peaceful protests of people demanding democratic reforms and fundamental rights from the regime in Damascus, the Syria crisis developed into a full-fledged civil war causing large-scale death, injury, and displacement. During its first year, the brutal crackdown of regime forces on protesters marked the Syria conflict.¹ Confronted with a high degree of violence from state forces, opposition groups gradually organized politically and militarily. Syrian army defectors as well as civilians formed armed groups, which strived to defend protesters, villages, and neighbourhoods. Early on, some of these groups organized under a structure known as the Free Syrian Army.² However, instead of creating one united opposition front, over the last three years a great variety of independent non-state armed groups emerged. Armed groups fighting the Assad regime have failed to unite under one command structure, which not only weakened their military capabilities but also lead to substantial in-fighting.³

It has been continuously emphasized that “violations and abuses committed by anti-government armed groups did not . . . reach the intensity and scale of those committed by government forces and affiliated militia.”⁴ Still, different non-state armed groups operating in Syria have been accused of grave human rights violations,⁵ war crimes,⁶ and crimes against humanity.⁷ From an international legal perspective, these accusations pose interesting questions: first, can non-state armed groups violate international human rights law, and if yes, under what circumstance? Second, the commission of war crimes by any conflicting party requires the existence of an armed conflict, in the Syria case, a non-international armed conflict. But at what stage did armed violence in Syria amount to a non-international armed conflict? And third, under what conditions can armed groups commit crimes against humanity?

The present article focuses on the first two questions: namely whether and under what conditions non-state groups such as Syrian opposition groups have human rights obligations, and at what stage internal violence in Syria amounted to an armed conflict. Inquiring into international legal obligations of non-state armed groups under international human rights and international humanitarian law is warranted for two main reasons. First, while it has become uncontroversial that international humanitarian law binds all parties to an armed conflict, as seen in the Syria crisis, it is often unclear from what threshold this field of law applies. This question is not only essential to clarify which laws apply to all conflicting parties; it also determines from which stage alleged crimes could be prosecuted as war crimes. Second, the applicability of international human rights law to non-state actors is a highly debated issue with important practical consequences. During situations of internal disturbances or tensions as prevailing during the first year of the Syria crisis, due to the inapplicability of international humanitarian law, the field of international law that could protect fundamental human entitlements was international human rights law.⁸ In addition, even when international

¹For an adequate summary of violent incidents occurring in Syria in 2011, see U.N. H.R.C. Rep. of the independent international commission of inquiry on the Syrian Arab Republic, Sept. 30, 2011-Nov. 15, 2011, UN Doc. A/17/2/Add.1; GAOR, 17th Sess., Supp. No. 2 (2011), http://www.ohchr.org/Documents/Countries/SY/A.HRC.S-17.2.Add.1_en.pdf.

²*Id.* ¶ 29.

³On the negative effects of this lack of a centralized command structure before in-fighting broke out, see U.N. H. R.C., Rep. of the independent international commission of inquiry on the Syrian Arab Republic, Jan. 15, 2013-May 15, 2013, ¶¶ 24–25, U.N. Doc. A/23/58; GAOR, 23d Sess., Supp. No. 58 (2013), http://www.ohchr.org/Documents/HRBodies/HRCouncil/ColSyria/A-HRC-23-58_en.pdf.

⁴*Id.*, summary. However, in the latest report the Commission of Inquiry no longer made this qualification but stated “[t]he scale and geographic distribution of violations perpetrated by government forces and pro-government militia, and non-State armed groups, differ among violations.” U.N. H.R.C. Rep. of the independent international commission of inquiry on the Syrian Arab Republic, July 15, 2013-Jan. 20, 2014, U.N. Doc. A/25/65; GAOR, 25th Sess., Supp. No. 65 (2014).

⁵*Id.*, at summary and ¶ 152; see also U.N. H.R.C. Rep. of the independent international commission of inquiry on the Syrian Arab Republic, Nov. 2011-Feb. 2012, ¶¶ 112–120, U.N. Doc. A/19/69; GAOR, 19th Sess., Supp. 69 (2012), http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session19/A-HRC-19-69_en.pdf.

⁶See, for example, Human Rights Council, *supra* note 3, at ¶ 156.

⁷See Human Rights Watch, “You can still see their blood”: Executions, Indiscriminate Shootings, and Hostage Taking by Opposition Forces in Latakia Countryside Oct. 2013.

⁸As emphasized by different commentators, situations that fall short of armed conflicts under IHL are of particular relevance when discussing human rights obligations of non-state armed groups. See, for example, Nigel Rodley, *Non-State Actors and Human Rights*, in ROUTLEDGE HANDBOOK OF INTERNATIONAL HUMAN RIGHTS LAW 523, 530 (Scott Sheeran & Nigel Rodley eds., 2013).

humanitarian law applies, the protection offered is limited and does not, for example, include political rights or certain economic and social rights.⁹

The examination of these two questions consists of an analysis of the most important legal sources and applies theoretical findings to facts established by the United Nations Independent International Commission of Inquiry on the Syrian Arab Republic.¹⁰ Thus, the present article provides an assessment of the pertinent legal concepts in light of one of the gravest humanitarian crises of the past years.

II. INTERNATIONAL HUMAN RIGHTS OBLIGATIONS OF NON-STATE ARMED GROUPS

International human rights law (IHRL) is an international legal regime applicable at all times, meaning both in times of peace and during armed conflicts.¹¹ IHRL has been binding the Syrian Government at all times throughout the Syria crisis, particularly between March 2011 and the beginning of 2012 when the crisis did not amount to an armed conflict.¹² The case is possibly different for non-state entities. Traditionally, human rights are conceived as the “historical response to the rise of the modern nation state.”¹³ Accordingly, it is argued that due to their philosophical origin, human rights only apply to the vertical relation between the state and its subjects.¹⁴ Under international law, the state is primarily responsible for protecting its citizens with due diligence from human rights violations committed by non-state entities.¹⁵ Underpinning this state-centric view, it can be stressed that all major IHRL treaties are phrased as exclusively containing obligations for states and that it is doubtful whether non-state groups have international legal personality.¹⁶ Under such a view, non-state groups have no international human rights obligations. Instead, group members are subject to national law and must respect national criminal law, the law of the state they are struggling against.

a. Human rights obligations of non-state conflict parties

The traditional state-centric view, however, has broadened to include non-state armed groups that are party to an armed conflict and exercise control over territory. As Rodley argued in his seminal piece on the issue of non-state actors’ human rights obligations, this could be the case if the non-state entity exercised ‘effective power’ and thereby authority over people akin to that normally exercised by states.¹⁷ For Tomuschat, insurgent movements have human rights obligations under international law because respect for certain fundamental norms is required as part of the “general framework of rights and duties which every actor seeking to legitimize himself as a suitable player at the inter-State level must respect.”¹⁸ The conclusion that non-state parties to an armed conflict that exercise control over territory have customary human rights obligations finds further support

⁹For a more in-depth analysis of this issue, see Annyssa Bellal, Gilles Giacca, and Stuart Casey-Maslen, *International Law and Armed Non-State Actors in Afghanistan*, 93 INTERNATIONAL REVIEW OF THE RED CROSS 47, 63–64 (2011).

¹⁰The author believes that the U.N. Commission of Inquiry reports present facts objectively and report on alleged human rights and international humanitarian law violations of all conflicting parties. These reports have therefore been chosen as the principle source of information among the publicly available information on the Syria crisis.

¹¹See Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories, Advisory Opinion, 2004 I.C.J. 136 ¶ 106 (July 9).

¹²For a more detailed analysis of human rights obligations in times of emergency, see Tilman Rodenhäuser, *Fundamental Standards of Humanity: How International Law Regulates Internal Strife*, 26 JOURNAL FOR INTERNATIONAL LAW OF PEACE AND ARMED CONFLICT 121 (2013).

¹³Nigel S. Rodley, *Can Armed Opposition Groups Violate Human Rights?*, HUMAN RIGHTS IN THE TWENTY-FIRST CENTURY: A GLOBAL CHALLENGE 299 (Kathleen E. Mahoney & Paul Mahoney eds., 1993).

¹⁴See C. Ryngaert & M. Noortmann, *New Actors in Global Governance and International Human Rights Law*, 4 HUMAN RIGHTS AND INTERNATIONAL LEGAL DISCOURSE 4, 12 (2010).

¹⁵See Daniel Moeckli, et al., INTERNATIONAL HUMAN RIGHTS LAW 31 (2010).

¹⁶Rodley, *supra* note 13, at 305–310; Jan Hessbruegge, *Human Rights Violations Arising from Conduct of Non-State Actors*, 11 BUFF. HUM. RTS. L. REV. 1, 38, (2005). Indeed, art. 2 (1) of the International Covenant on Civil and Political Rights provides that it is the duty of the State to “respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights” enshrined in the instrument. International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Treaty Doc. No. 95–20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171. Similar provision can be found *inter alia* in EUR. CONV. ON H. R. art. 1 and AM. CONV. OF H. R. art. 1(1).

¹⁷*Ibid.*, at 313.

¹⁸Christian Tomuschat, *The Applicability of Human Rights Law to Insurgent Movements*, in KRISENSICHERUNG UND HUMANITÄRE SCHUTZ: FESTSCHRIFT FÜR DIETER FLECK = CRISIS MANAGEMENT AND HUMANITARIAN PROTECTION 587 (Horst Fischer & Dieter Fleck eds., 2004).

in an argument presented by the Human Rights Committee with regard to the International Covenant of Civil and Political Rights: human rights belong to people in a specific territory and must continue binding the authorities even if the government of a territory changes.¹⁹

Accordingly, when in August 2012 the UN Commission of Inquiry concluded that the crisis in Syria amounted to a non-international armed conflict and that armed opposition groups controlled parts of Syrian territory, it also found that these groups must “respect the fundamental human rights of persons forming customary international law.”²⁰ This finding follows an established practise by UN Commissions, including the UN Commission of Inquiry on Libya, arguing “where non-state groups exercise *de facto* control over territory, they must respect fundamental human rights of persons in that territory.”²¹ Similarly, the UN Security Council and General Assembly established a practise of holding non-state armed groups (NSAGs) responsible for human rights violations during armed conflicts.²² The Security Council frequently “condemns the grave and systematic violations and human rights abuses” committed by NSAGs²³ or demands armed groups to “cease all abuses of human rights.”²⁴

This brief analysis shows that although major human rights treaties do not contain human rights obligations for non-state groups, it seems that at the international level a practice and conviction emerged to hold such groups accountable to customary human rights law when exercising control over territory. As mentioned above, during armed conflict, IHRL can complement international humanitarian law, especially with regard to certain rights of political participation and social and economic rights. In a way, the more such armed groups resemble states they become bound by IHRL. A further indication for states’ conviction that armed groups can have human rights obligations is reference to human rights obligations for armed groups in international human rights treaty law.²⁵ Thus, it can be argued that international human rights law binds armed groups in the Syria conflict that exercise control over territory, and that the Commission of Inquiry is right in demanding accountability for grave human rights violations such as summary executions or ill-treatment. Yet, during armed conflicts a significant number of alleged human rights violations also constitute violations of international humanitarian law, which often prevails as *lex specialis*, holding armed groups accountable to human rights law does not have the same impact as it has outside armed conflict.²⁶

b. Human rights obligations of armed non-state groups in other situations of violence

During the initial period of the Syria crisis, armed opposition groups emerged both from Syrian defectors and from civilians striving to defend their villages or neighbourhoods against regime violence. No centralized leadership existed for these groups and according to the UN Commission of Inquiry, violence between them and government forces did not amount to an armed conflict.²⁷ Consequently, only IHRL governed the situation in addition to Syrian national law. At that time, non-state groups did not exercise control over territory in a state-like manner.²⁸ However, the UN Commission still found that:

¹⁹Human Rights Committee, General Comment 26, ¶ 4, CCPR/C/21/Rev.1/Add.8/Rev.1, (Dec. 8, 1997).

²⁰U.N. H.R.C. Rep. of the independent international commission of inquiry on the Syrian Arab Republic, Feb. 15, 2012-Aug. 15, 2012, ¶ 11, U.N. Doc. A/21/50; GAOR, 21st Sess., Supp. No. 50 (2012), http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session21/A-HRC-21-50_en.pdf. Unfortunately, however, the report did not specify which human rights provisions it considers customary international law.

²¹U.N. H.R.C. Rep. of the International Commission of Inquiry to investigate all alleged violations of international human rights law in the Libyan Arab Jamahiriya, Feb. 25, 2011-June 1, 2011, ¶ 72, U.N. Doc. A/17/44; GAOR, 17th Sess., Supp. No. 44 (2011); see also U.N. H.R.C. Human Rights Situation in Palestine and other Occupied Arab Territories, ¶ 22, U.N. Doc. A/HRC/10/22, (May 29, 2009).

²²Tomuschat examined a great number of resolutions both by the General Assembly and the Security Council and points examples where these organs addressed NSAGs to respect human rights in armed conflicts, see Tomuschat, *supra* note 18. For a more recent analysis of U.N. Security Council practice; see Aristoteles Constantinides, *Human Rights Obligations and Accountability of Armed Opposition Groups: the Practice of the UN Security Council*, 4 Human Rights and International Legal Discourse 89, (2010).

²³S.C. Res 2067, ¶ 18, U.N. Doc. S/RES/2067 (Sept. 18, 2012) (Somalia).

²⁴S.C. Res 2071, ¶ 5, U.N. Doc. S/RES/2071 (Dec. 20, 2012) (Mali).

²⁵See art. 4 (1) of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts and art. 7(5) of the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa.

²⁶One exception, for example, would be the human right of “freedom of expression” which is not found in IHL.

²⁷Human Rights Council, *supra* note 5, at ¶ 122.

²⁸According to the Commission of Inquiry, the Syrian army only withdrew temporarily from certain areas. *Id.* at ¶ 20.

[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.²⁹

Thus, it argued that peremptory human rights law binds non-state armed groups even if they are not party to an armed conflict or acting as *de facto* authority in a determined territory. In this respect, the UN Commission went further than any other UN Commission or organ before.

This progressive finding is not unsupported in international law. Different UN reports indicate that non-state armed groups may have human rights obligations without being engaged in an armed conflict or exercising *de facto* control over territory. For example, in his function as the United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions, Alston regarded human rights as operating “on three levels - as the rights of individuals, as obligations assumed by States, and as legitimate expectations of the international community.”³⁰ He found that although a non-state actor “does not have legal obligations under ICCPR, . . . it remains subject to the demand of the international community, first expressed in the Universal Declaration of Human Rights (UDHR), that every organ of society respect and promote human rights.”³¹ Alston explains that calling a non-state armed group to respect IHL is “*especially* appropriate” if the group “exercises significant control over territory and population and has an identifiable political structure.”³² This statement does not exclude that the international community can subject armed groups to its legitimate expectations in situations in which the entity does not fulfil these conditions. Although such “legitimate expectations” cannot *per se* be equalled to obligations under international law,³³ one may wonder whether they are only non-legal expectations. Following Alston’s finding that these expectations have first been expressed in the Universal Declaration of Human Rights, the customary character of a number of provisions contained in the UDHR could suggest that these “legitimate expectations” are legally binding on all international legal actors – including armed groups.

Scholars have further discussed this idea, especially Clapham. Convincingly, he argues that human rights as formulated in the UDHR are primarily individual entitlements protecting the dignity of all individual human beings.³⁴ As internationally protected human rights exist, the question follows which entities are bound to respect them? Different branches of international law, especially IHL and international criminal law, recognize legal obligations not only of states but also of individual human beings and of non-state groups, and in principle there is nothing in international law that precludes the existence of human rights obligations of non-state actors. As recently suggested by a group of scholars, one source of such obligations could be *ius cogens*.³⁵

Following increasing academic debate on this question and the practice of different UN human rights mandate holders, states in the Human Rights Council condemned in a resolution on Mali in July 2012 “the human rights violations and acts of violence committed in northern Mali, in particular by the rebels, terrorist groups and other organized transnational crime networks”³⁶

²⁹*Id.* at ¶ 106.

³⁰Extrajudicial, summary or arbitrary executions, Report of the Special Rapporteur Philip Alston, Addendum, Mission to Sri Lanka, ¶ 25, U.N. Doc. E/CN.4/2006/53/Add.5, (2006).

³¹*Id.*

³²*Id.* at ¶ 26.

³³Ryngaert & Noortmann, *supra* note 14, at 70. Ryngaert argues that this statement: “stopped short of stating that armed groups incur direct human rights obligations”.

³⁴Andrew Clapham, *The Rights and Responsibilities of Armed Non-State Actors: The Legal Landscape & Issues Surrounding Engagement*, Geneva Academy of International Humanitarian Law and Human Rights, 4, 24 (2010).

³⁵International Law Association, The Hague Conference, Non-state actors, para. 3.2 (2010). The ILA stated: “consensus appears . . . that currently NSAs do not incur direct human rights obligations enforceable under international law. Exceptions include violations of *jus cogens* norms, the duty of insurgents to comply with international humanitarian law, and perhaps, ‘legitimate expectations’ of the international community that NSAs comply with certain norms”

³⁶U.N. H.R.C. *Human rights situation in Mali*, July 17, 2012, ¶ 2 U.N. Doc. A/20/17; GAOR, 20th Sess., Supp. No. 17 (2012). On a discussion of the Human Rights Council’s practice in the following resolutions as well as the seemingly political distinction between human rights violations and abuses, see Andrew Clapham, *HUMAN RIGHTS AND NON-STATE ACTORS*, xxviii, fn.39 (2013).

Neither states nor other UN mandate holders or the scholars discussed here make their findings dependent on control over territory or the exercise of government authority. Instead, practice of UN organs suggests that a norm emerges under general international law requiring respect of fundamental human rights norms by non-state actors at all times, simply because violations of the most basic individual rights can never be justified.

The finding that peremptory human rights norms bind states as well as non-state entities and individuals provides a seemingly unlimited scope of application: any individual or group of individuals would have international human rights obligations. The Human Rights Council explicitly included terrorist groups and other organized transnational crime networks among the alleged authors of human rights violations. This raises the question whether that would not turn any crime into a human rights violation and thereby dilute the concept of human rights violations under international law? Asked differently, are criminals under national law in many cases also human rights violators under international law? This author believes that this scope would be too broad. Under international law, states have an obligation not only to respect human rights but also to protect their citizens with due diligence against human rights violations. This rule applies “in relation to the acts of individual third parties, even irregular armed groups of any kind.”³⁷ However, this rule has limitations. In practice, “the measures that a State might take to meet this [due diligence] obligation will be constrained by democratic principles and practical considerations of resources.”³⁸ It is also limited if states are unable to control non-state entities despite a genuine effort to subject them to state power. In such cases, while grave violations of human rights may occur, the state’s obligation to protect individuals under its jurisdiction with due diligence is not necessarily infringed. Thus, if international law aims to protect core values including the most fundamental rights of the individual, it must reach beyond the state. In situations where non-state groups act outside the control of states, and states’ national criminal laws do not apply effectively, non-state actors should be considered bound by IHRL.³⁹ Otherwise, human rights were violated without engaging any actor’s international responsibility.

c. The practical importance of holding non-state actors accountable for human rights violations

In a situation such as the Syria crisis, the question arises whether emphasizing armed group’s human rights obligations and pointing towards alleged violations has any practical relevance. After all, no international court exists to hold armed groups accountable for human rights violations.⁴⁰ Yet, applying fundamental human rights to armed groups is important for several reasons. First, philosophically human rights are not primarily state obligations but entitlements of the individual, protecting every human being’s dignity. In this respect, human rights protect the individual against any infringements; especially if armed groups operate beyond state control, as armed opposition groups did in Syria. By holding armed groups accountable to fundamental, arguably peremptory, human rights norms, the international community also defines basic values that every member of this community must respect.⁴¹

Second, impartial reporting on a situation of internal disturbances where two opposing parties commit human rights violations requires reference to both parties’ misconduct. Otherwise, the report may appear one-sided. Reporting on armed groups’ human rights violations can also entail very practical consequences. Reliable proof that armed groups commit human rights violations

³⁷The Case of the Communities of the Jiguamiandó and the Curbaradó, Order of the Court, Inter-Am. Ct. H.R. (ser. E), ¶11 (Mar. 6, 2003). This obligation is well established under the main human rights treaties, see *Velasquez Rodriguez v. Honduras*, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 4. (July 20, 1988). *Osman v. The United Kingdom*, 23452/94 ECHR 101 (Oct. 28, 1998). Human Rights Committee, General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant, ¶ 8, U.N. Doc. CCPR/C/21/ Rev.1/Add.13 (May 26, 2004).

³⁸Barbara Frey, Human Rights Council, Prevention of human rights violations committed with small arms and light weapons, U.N. Doc. E/CN.4/Sub.2/2003/29 (June 25, 2003).

³⁹Tilman Rodenhäuser, *Human Rights Obligations of Non-State Armed Groups in Other Situations of Violence: The Syria Example*, 3 J. INT’L LEGAL STUD. 263–290 (2013) (discussing further elaborations of this approach).

⁴⁰See Julia Kozma, Manfred Nowak & Martin Scheinin, *A World Court of Human Rights – Consolidated Draft Statute and Commentary* (2010) (discussing the idea of a World Court of Human Rights as well as a draft statute that would include human rights violations by non-state actors) available at <http://www.eui.eu/Documents/Departments/Centres/Law/Professors/Scheinin/ConsolidatedWorldCourtStatute.pdf>.

⁴¹*Prosecutor v. Furundzija*, Case No. IT-95–17/1-T, Judgment, ¶154 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998).

damages their international reputation and possibly diminishes the likelihood of external support – materially, politically, and morally. As many opposition groups strive to become the legitimate and internationally recognized government of their country, their human rights record is important. For an opposition group fighting a state army, external support in equipment, including arms, is vital.

Third, states' political hesitation to support armed groups with weapons may in future turn into a legal obligation once the Arms Trade Treaty is in force. Under its article 7(3), states shall not export weapons if they assess that there is an overriding risk that the arms could be used to "commit or facilitate a serious violation of international human rights law."⁴² International actors continuous and transparent reporting on possible human rights violations by such groups could clarify whether such overriding risk exists.

As a result, the decision by the UN Commission of Inquiry to hold Syrian opposition groups accountable to fundamental human rights serves the purpose of protecting the "inherent dignity and of the equal and inalienable rights of all members of the human family"⁴³, is required for impartial international reporting, and can have important practical consequences for armed groups. Scrutinizing armed groups' respect for human rights also responds adequately to patterns of human rights abuses in today's situations of instability, disturbances, and tensions. In the words of the UN Special Rapporteur on Terrorism:

[I]t is a central tenet of international human rights law that it must keep pace with a changing world. Some of the gravest violations of human rights are nowadays committed by, or on behalf of, non-State actors operating in conflict situations of one kind or another ... If international human rights law is to keep pace with these changes, the victims ... must now be recognised as victims of grave violations of international human rights law.⁴⁴

III. INTERNATIONAL HUMANITARIAN LAW OBLIGATIONS OF NON-STATE GROUPS IN NON-INTERNATIONAL ARMED CONFLICTS

While debate persists to what extent non-state armed groups have obligations under international human rights law, all parties to an armed conflict have obligations under international humanitarian law (IHL).⁴⁵ As Syria is not party to Additional Protocol II of the Geneva Conventions, the laws applicable to the present non-international armed conflict are Common Article 3 and customary IHL. Common Article 3 outlines some fundamental humanitarian standards that were explicitly developed for internal conflict, and a number of serious violations of IHL also constitute war crimes. To render IHL and the war crimes regime applicable, a situation must amount to an armed conflict. Yet, no international authority exists to make binding conflict classifications during situations of armed violence, and classifications by the conflicting parties are often politically motivated. Thus, international law expert opinions are often the only reliable source. In Syria, conflict classification was particularly difficult because violence did not break out between two pre-existing armies but evolved between state armed forces and an opposition movement that formed and developed during the crisis and without centralized leadership. Despite several thousand people killed by armed violence during the first year of the crisis,⁴⁶ in February 2012 the UN Commission of Inquiry found itself unable to confirm that Syria was in a state of non-international armed conflict.⁴⁷ It was only in May 2012 that the ICRC declared publicly that during the preceding months, violence in some parts of Syria had amounted to an armed conflict.⁴⁸ Since this time,

⁴²Article 7(3) Arms Trade Treaty.

⁴³Universal Declaration of Human Rights, Preamble, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

⁴⁴U.N. H.C.R. Rep. of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Aug. 1, 2011-Apr. 2, 2012, ¶ 12, U.N. Doc. A/20/14; GAOR, Sess. 20, Supp. No. 14 (2012), <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G12/137/80/PDF/G1213780.pdf?OpenElement>.

⁴⁵This is clear from the wording of Common Article 3 which refers to obligations of "each Party to the conflict", which in a non-international armed conflict is at least one non-state group. Jean Simon Pictet, *THE GENEVA CONVENTIONS OF 12 AUGUST 1949: COMMENTARY: I* 37, (1952). For a recognition that not only Common Article 3 but also customary international binds non-state parties, see *Prosecutor v. Norman*, (Special Court for Sierra Leone, Appeals Chamber, ¶ 22, May 31, 2004).

⁴⁶See Human Rights Council, *supra* note 5, at ¶ 24–25.

⁴⁷*Ibid.*, ¶ 13.

⁴⁸Stephanie Nebehay, *Some Syria violence amounts to civil war: Red Cross*, Reuters, May 8, 2012, available at <http://www.reuters.com/article/2012/05/08/us-syria-redcross-idUSBRE8470D920120508>.

violence has continuously escalated and today multiple armed conflicts exist in Syria, both between non-state groups and the Assad regime, as well as between armed groups.

a. Classification of non-international armed conflicts

During the decades following the adoption of the Geneva Conventions and their Common Article 3, the meaning of an ‘armed conflict not of an international character’ remained unclear.⁴⁹ This was only partly alleviated by the adoption of Additional Protocol II, which arguably contains a much higher threshold than Common Article 3.⁵⁰ Thus, when the International Criminal Tribunal for the Former Yugoslavia (ICTY) was tasked to adjudicate on alleged war crimes committed in a non-international armed conflict, it established the following formula, which adequately reflects the notion of armed conflict as existing under IHL:

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.⁵¹

The ICTY and other tribunals applied this formula in their judgments, international commissions of inquiry referred to it, and states included it almost *verbatim* in the Rome Statute of the International Criminal Court.⁵² This interpretation of the armed conflict threshold forms part of customary international law.⁵³ Although this formula today is undisputed and constitutes a milestone in international humanitarian and criminal law, this success is also due to the fact that it is sufficiently broad to encapsulate different interpretations.⁵⁴

Early on, the ICTY clarified that the *Tadic* formula requires examination of the intensity of violence and the organization of the parties to the conflict.⁵⁵ In the context of non-international armed conflicts, these criteria serve the purpose “of distinguishing an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law.”⁵⁶ Similarly, the ICC examines the degree of organization of the groups involved and the intensity of violence to establish whether an armed conflict exists.⁵⁷ These two criteria have been established as the sole requirements for conflict classification. In contrast, examining whether the non-state party controls territory is not a requirement *sine qua non* to establish the existence of a non-international armed conflict, although it can be a strong indicator for the group’s degree of organization and its relative strength as compared to state forces.⁵⁸ Similarly, “the purpose of the armed forces to engage in acts of violence or also achieve some further objective is . . . irrelevant.”⁵⁹ The requirements of sufficient intensity of violence and

⁴⁹Common Article 3 does not contain a definition of an ‘armed conflict not of an international character’. The criteria contained in the ICRC commentary on the article are ‘convenient’ but not binding. See *infra* note 64.

⁵⁰This view was taken, for example, by the ICTY. *Prosecutor v. Boskoski and Tarkulovski*, Judgment, ¶ 197, Case No. IT-04–82-T (Int’l Crim. Trib. for the Former Yugoslavia July 10, 2008). For an alternative view, see Sandesh Sivakumaran, *THE LAW OF NON-INTERNATIONAL ARMED CONFLICT*, 197 (2012).

⁵¹*Prosecutor v. Tadic*, Case No. IT-94-I-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

⁵²Art. 8(2)(f) ICC Statute. For a accurate summary on the extent to which the *Tadic* formula got accepted in international practice, see Anthony Cullen, *THE CONCEPT OF NON-INTERNATIONAL ARMED CONFLICT IN INTERNATIONAL HUMANITARIAN LAW*, 120–122, (2010).

⁵³The *Tadic* formula is today included in numerous national military manuals as the definition of non-international armed conflicts. See, for example, military handbooks of Australia, Canada, Germany, the Netherlands, Peru or the United Kingdom (translations on file with the author). The view that this formula presents customary international law is also shared by commentators, see Michael Bothe, *War Crimes*, in *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* 423 (Antonio Cassese, et al., eds., 2002); Sivakumaran, *supra* note 50, at 155.

⁵⁴An important and concise interpretation of the notion of armed conflict is provided by the ICRC: International Committee of the Red Cross, *How is the Term “Armed Conflict” Defined in International Humanitarian Law?*, available at <http://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict>.

⁵⁵*Tadic*, *supra* note 51, at ¶ 562. This two-pronged test has been applied by many ICTY chamber since then. See also *Prosecutor v. Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj*, Case No. IT-04-84-T, Judgment, ¶ 49 (Int’l Crim. Trib. for the Former Yugoslavia Apr. 3, 2008).

⁵⁶*Tadic*, *supra* note 51, ¶ 562 This formulation also reflects the definition of armed conflicts as included in art. 1 (2) Additional Protocol II.

⁵⁷See *Prosecutor v. Lubanga Dyilo*, Case No. 01/04-01/06, ¶ 537–538 (ICC Mar. 14, 2012).

⁵⁸Haradinaj et al., *supra* note 55, ¶ 73; Lubanga Dyilo, *supra* note 57, ¶ 536.

⁵⁹See *Prosecutor v. Fatmir Limaj, Haradin Bala, Isak Musliu*, Case No. IT-03-66-T, Judgment, ¶ 170 (Int’l Crim. Trib. for the Former Yugoslavia (Nov. 30, 2005)).

the degree of organization of the non-state party shall be briefly analysed in the following two sections, before conflict classification in Syria is analysed more closely.

i. Intensity

The intensity of violence is a rather obvious requirement for establishing the existence of a non-international armed conflict. The notions of ‘armed conflict’ or the ‘laws of war’ inherently require a certain degree of violence going beyond what states are normally able to contain by means of law enforcement. In their jurisprudence, the ICTY and the ICC referred to a number of indicative factors that signify a sufficient degree of violence – none of which, however, is decisive by itself.⁶⁰ These factors include the seriousness of confrontations and whether violence increases, the type and number of armed forces involved in confrontations, the types of weapons used, the amount of destruction caused by the fighting, and the number of persons displaced by it. Another indicator has been whether the situation attracted the attention of the UN Security Council.⁶¹ While findings on these factors do not normally pose major challenges because they are public, the degree of organization of an armed group is more difficult to analyse.

ii. Organization

At first sight, a sufficient degree of organization of the parties involved is a less straightforward criterion for qualifying a situation of internal violence as a non-international armed conflict. Commentators suggested that in situations where violence of a significant level occurs and the armed group is capable to engage in armed action, being organized is “of minor importance”⁶² or “loses some of its significance.”⁶³ In contrast, international tribunals have insisted on both the intensity and the organization criterion, and so does the International Committee of the Red Cross (ICRC). Referring to fundamental considerations underlying IHL, the ICRC explained:

The very logic underlying IHL requires identifiable parties in the above sense [i.e. having a certain level of organization, command structure and, therefore, the ability to implement international humanitarian law] because this body of law, while not affecting the parties’ legal status, establishes equality of rights and obligations among them under IHL (not domestic law) when they are at war. The parties’ IHL rights and obligations are provided for so that both sides know the rules within which they are allowed to operate and so that they are able to rely on similar conduct by the other side.⁶⁴

Thus, although in practice it is more difficult to assess and arguably of secondary importance if a situation shows a high degree of violence, it seems that the very notion of an armed conflict requires two organized conflicting parties. Parties must be more than loosely connected individuals or protesting masses. As with regard to the intensity of violence, international tribunals established indicative factors that testify of a sufficient degree of organization.⁶⁵ These factors can be distinguished as those indicating the ability to engage in military operations, and factors indicating the ability to respect fundamental rules of IHL and other engagements. The first category includes the group’s command structure, its ability to plan and implement military operations over a sustained period, and the logistics, including weapons and ammunition, available to the group. The second category includes again the groups command structure or hierarchy, its level of discipline as well as the ability to disseminate and implement rules, and the group’s ability to speak with one voice.⁶⁶ Importantly, a certain level of discipline and the ability to implement rules

⁶⁰The ‘convenient criteria’ as included in the Pictet commentary on CA3 are too demanding, and as an examination of the *travaux préparatoires* shows reflect criteria invoked by states for the application of all norms of the Geneva Convention in non-international armed conflict and not to the application of the ‘elementary considerations of humanity’ as contained in the final article.

⁶¹Boskoski and Tarkulovski, *supra* note 50, ¶ 177; Haradinaj, *supra* note 55, ¶ 394; Dyllo, *supra* note 57, ¶ 538.

⁶²Arne W. Dahl & Magnus Sandu, *The Threshold of Armed Conflict*, 45 *MILITARY AND LAW OF WAR REVIEW* 376, (2006).

⁶³Andrea Bianchi and Yasmin Naqvi, *INTERNATIONAL HUMANITARIAN LAW AND TERRORISM*, 17 *JOURNAL OF CONFLICT & SECURITY LAW* 129 (2011).

⁶⁴International Committee of the Red Cross, *INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY ARMED CONFLICTS*, ¶ 232 (Dec. 2003).

⁶⁵See, for example, Haradinaj, *supra* note 55, ¶ 395; Boskoski and Tarkulovski, *supra* note 50, at 199–206; and Dyllo, *supra* note 57, ¶ 537.

⁶⁶These factors are drawn from the judgements in the preceding footnote.

does not require actual respect for IHL: a party to an armed conflict can be well-disciplined and organized but decide consciously to disregard fundamental humanitarian provisions.⁶⁷

b. Implications from conflict classification in Syria

Examining the evolution of the Syria crisis as recorded in the UN Commission of Inquiry reports, adds to clarifying at what point a situation of internal tensions and disturbances develops into a non-international armed conflict.⁶⁸ Right from the start of the Syria crisis, state forces employed a significant level of violence. Reportedly, throughout summer and autumn 2011 the Damascus regime called upon its armed forces to quell protests and to mount checkpoints. Allegedly, the regime's strategy included the use of snipers and heavy weapons in populated neighbourhoods.⁶⁹ As a response to state violence, defectors and civilians formed armed groups including the Free Syrian Army (FSA), and members of these groups started armed operations against security forces.⁷⁰ Yet, at that stage, the crisis was better categorized as internal disturbances or tensions and not yet as an armed conflict in the legal sense.

Due to increasing resistance from armed opposition groups and the regime's fierce response, fighting in certain areas of Syria intensified during late 2011 and early 2012.⁷¹ Armed opposition groups intensified military operations against softer state targets such as checkpoints or security forces buildings.⁷² Still, by mid-February 2012, international actors such as the UN Commission of Inquiry hesitated to qualify the situation as one of armed conflict because "it was unable to verify that the Free Syrian Army (FSA), local groups identifying themselves as such or other anti-Government armed groups had reached the necessary level of organization."⁷³ Arguably, the wording suggests that it was not categorically excluded but simply unclear whether, and in which areas of Syria, violence amounted to an armed conflict. In contrast, the ICRC found that in February 2012 fighting in some specific areas of Syria reached the threshold of a non-international armed conflict, stressing that opposition forces had become more organized and increasingly employed guerrilla tactics.⁷⁴

Analysing the conflict classification by the different actors underlines a number of important points, which contribute to the clarification of the meaning of the term non-international armed conflict under IHL. First, a high degree of violence is not alone decisive for qualifying a situation of internal violence as a non-international armed conflict. As long as violence is primarily one-sided, even the employment of armed forces or heavy weapons against civilians does not turn the situation into an armed conflict. Rather, in cases where violence by state forces is committed as part of a widespread or systematic attack directed against any civilian population, even outside armed conflict it can amount to crimes against humanity.⁷⁵

Second, an internal armed conflict requires at least two organized parties engaging in military operations against each other. Presupposing that a state is disposing of an organized armed force with military capabilities, IHL becomes applicable and binds all parties to an armed conflict once the non-state groups develop sufficient capabilities to become party to an armed conflict. In this respect, the ability to plan and implement military operations against the opponent is crucial – be they described as offensive or defensive. Such actions must not be merely isolated conduct by small groups of individuals. Hostilities between the conflicting parties are required.⁷⁶ In addition, a party to an armed conflict cannot consist of small individual armed bands operating independently from each other, which the state would be able to suppress by law enforcement measures.⁷⁷ Rather,

⁶⁷See Boskoski and Tarkulovski, *supra* note 50, ¶ 204.

⁶⁸Again, this author does not claim that the UN Commission of Inquiry reports contain complete information on all facts. Yet, he decided to base his analysis primarily on these reports because among the publicly available information he finds that these reports contain objectively and verified information.

⁶⁹See Human Rights Council, *supra* note 1, ¶ 41–51.

⁷⁰*Id.* ¶ 28–29 and 39.

⁷¹See Human Rights Council, *supra* note 5, ¶ 39.

⁷²*Id.* ¶ 19.

⁷³*Id.* ¶ 13.

⁷⁴See Nebehay, *supra* note 48.

⁷⁵This was rightly pointed out by the Syria Commission of Inquiry, see Human Rights Council, *supra* note 1, ¶ 101.

⁷⁶See Boskoski and Tarkulovski, *supra* note 50, ¶ 185.

⁷⁷See Human Rights Council, *supra* note 5, ¶ 13. This idea is also found in ICTY jurisprudence with regard to early stage of the KLA insurgency in Kosovo, see Haradinaj, *supra* note 55, ¶ 407–410.

small bands must unite under one structure or at least coordinate their actions. A basic command structure enables an armed group to conduct military operations as well as to disseminate rules, impose discipline, and thereby to respect basic provisions of IHL. This does not mean that all armed groups operating in Syria were required to unite under one centralized structure. As the ICRC emphasized, violence in certain parts of the country between state armed forces and the local armed opposition forces can amount to an armed conflict.

Recognizing the existence of different non-state parties to the conflict also suggests that different non-international armed conflicts exist in Syria.⁷⁸ This means first that the Syrian government is arguably involved in different conflicts with different armed groups, including at least one conflict with groups affiliated with the Supreme Military Council, one with Syrian Islamic armed groups, and one with the Islamic State.⁷⁹ Ending one of these conflicts would not necessarily affect the other conflicts. In addition, fighting between armed opposition groups suggests that there may also exist an armed conflict between different armed groups – which again is independent from the conflicts between the groups and the Assad regime.

Third, in order to qualify as party to a non-international armed conflict, IHL does not require non-state parties to have state-like capabilities. Military operations by non-state parties can take the form of guerrilla attacks consisting of hit-and-run assaults against softer state military targets.⁸⁰ Another tactic frequently used by non-state armed groups is the employment of improvised explosive devices (IEDs).⁸¹ In times of peace, from a state's perspective, such attacks would qualify as "terrorist attacks." Accordingly, the Assad regime blamed a number of bombings against state targets to what it called "terrorist saboteurs."⁸² While even during armed conflict bombings against certain targets can qualify as unlawful acts of terrorism;⁸³ governments' claim that their opponents are merely terrorists or bandits is irrelevant for the qualification of conflicts. What is essential is that violence, possibly including alleged acts of terrorism, is not isolated but reaches the level of military confrontations between two organized armed parties.⁸⁴

Once the armed conflict threshold is met, IHL spells out clear obligations for all conflicting parties, including non-state groups, and serious violations of this legal regime can be prosecuted as war crimes. While the advantages of increased clarity on the applicable law and the prospective of criminal accountability argue in favour of concluding earlier rather than later that an armed conflict exists, this conclusion should not be drawn easily. Before IHL applies, violence does not occur in a legal vacuum, but is governed by national law and international human rights law, the latter arguably including obligations both for states and for non-state actors. Comparing these two international regimes, it appears that IHL contains more permissive rules on the use of force as well as with regard to the deprivation of liberty.⁸⁵ Thus, in order to achieve the highest degree of protection for all individuals, prudence in qualifying a situation of internal violence as a non-international armed conflict is advisable.

⁷⁸Almost since the beginning, non-state armed forces consist of different and distinct armed groups. See Human Rights Council, *supra* note 20, at Annex III, ¶ 8–17.

⁷⁹For a rough mapping of armed groups involved in the conflict, see Human Rights Council, *supra* note 4, ¶ 16.

⁸⁰See Haradinaj, *supra* note 55, ¶ 87; Boskoski and Tarkulovski, *supra* note 50, ¶ 276.

⁸¹See Human Rights Council, *supra* note 20, at Annex III, ¶ 10.

⁸²Human Rights Council, *supra* note 5, ¶ 22.

⁸³Under customary international humanitarian law, "[a]cts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited." Louise Doswald-Beck & Jean-Marie Henckaerts, *CUSTOMARY INTERNATIONAL HUMANITARIAN LAW VOLUME 1: RULES*, rule 2 (2005).

⁸⁴See Boskoski and Tarkulovski, *supra* note 50, ¶ 185–190.

⁸⁵For a good discussion of the rules on the use of force and detention under IHL and IHRL, see Marco Sassòli & Laura M. Olson, *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*, (2008). See also International Committee of the Red Cross, *INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY ARMED CONFLICTS*, ¶ 17–20 (Oct. 31, 2011); David Kretzmer, *Rethinking the Application of IHL in Non-International Armed Conflicts*, 42 *ISRAEL LAW REVIEW* 8, 24–25 (2009); Yves Sadoz, *Discours d'Ouverture: La Pertinence del la Catégorisation des Conflits Armés: Une Réelle Différence dans la Protection des Personnes Touchées?*, *ARMED CONFLICTS AND PARTIES TO ARMED CONFLICTS UNDER IHL: CONFRONTING LEGAL CATEGORIES TO CONTEMPORARY REALITIES - PROCEEDINGS OF THE BRUGES COLLOQUIUM*, 17 (2009).

c. The possible internationalization of the conflict

The armed conflict in Syria is affecting stability of the broader region and involves actors from different neighbouring states. For example, Hezbollah admitted its active military involvement on the side of the Assad regime in Syria,⁸⁶ and reports suggest that Iran is supporting the Assad regime at least with advice, training and supplies,⁸⁷ and allegedly also with troops.⁸⁸ On the other hand, the Syrian opposition is receiving external support, and the group “Islamic State,” for example, operates not only in Syria but also in neighbouring Iraq.⁸⁹ In addition, following the use of chemical weapons in Syria, there was a real threat of the use of force by third states against the Assad regime. The involvement of third states in the conflict in Syria could possibly change the classification of the conflict, and if the armed conflict in Syria, or parts of it, were to be qualified as an international armed conflict, under specific circumstance this could also change the rules applicable to the non-state parties.⁹⁰

An international armed conflict exists under international humanitarian law “in case of armed hostilities between States through their respective armed forces or other actors acting on behalf of the State.”⁹¹ In the Syria case, this means that if third states or militia acting on behalf of a third state intervene in support and with permission of the Assad regime against non-state forces, the character of the conflict would not change. The conflict would continue to oppose a state and non-state actors. Thus, the law applicable to all parties remains IHL of non-international armed conflicts.

If third states decided to attack the Assad regime, backed by a UN mandate or not, the attack would trigger an international armed conflict between Syria and the intervening states.⁹² However, such international armed conflict would occur parallel to the existing non-international armed conflict and would not change the law applicable in the latter. Again, the rules applicable to non-state armed groups would remain the same. Following the recent judgment of the International Criminal Court in the *Lubanga* case, this may only change if it can be determined that armed opposition groups act under the overall control of a third state.⁹³ In this case, the armed group’s acts become attributable to the state exercising overall control over the group, which would internationalize the conflict.⁹⁴ Overall control, however, is not exercised by “the mere provision of financial assistance or military equipment or training.”⁹⁵ What would be required is “organising, coordinating or planning the military actions”⁹⁶ of the armed group. Only if this relatively high threshold is met would the character of the conflict change, and IHL of international armed conflicts would apply to this inter-state conflict. In these circumstances, the laws of international armed conflicts would similarly bind the armed group that is acting on behalf of the third state. However, given the diversity of armed groups operating in Syria, if one group was acting on behalf

⁸⁶See Human Rights Council, *supra* note 3, ¶ 23.

⁸⁷See Will Fulton, et al., *IRANIAN STRATEGY IN SYRIA*, INSTITUTE FOR THE STUDY OF WAR (May 2013), <http://www.understandi.org/report/iranian-strategy-syria>.

⁸⁸See, for example, Robert Fisk, *World Exclusive: US Urges UK and France to Join in Supplying Arms to Syrian Rebels as MPs Fear that UK Will be Drawn into Growing Conflict*, *The Independent*, June 16, 2013, at <http://www.independent.co.uk/news/world/middle-east/iran-to-send-4000-troops-to-aid-president-assad-forces-in-syria-8660358.html>.

⁸⁹On external support to opposition groups, see U.N. H.R.C. Report of the independent international commission of inquiry on the Syrian Arab Republic, Feb. 5, 2013, ¶¶ 23–28, U.N. Doc A/22/59; GAOR, 22nd Sess., Supp. No. 59 (2013), http://www.ohchr.org/Documents/HRBodies/HRCouncil/ColSyria/A.HRC.22.59_en.pdf.

⁹⁰In international armed conflicts a broad range of international treaties can apply, most notably the Four Geneva Conventions and their Additional Protocol I. In addition, the war crimes regime changes as well, see art. 8(2)(a-b) ICC Statute.

⁹¹*Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, ¶ 223 (ICC, 15 June 2009).

⁹²This was the case, for example, in Libya. See *supra* 21, ¶ 66.

⁹³See Dylko, *supra* note 57, ¶ 541.

⁹⁴The International Court of Justice found that for attributing wrongful acts committed by an armed group to a state on whose behalf the group is allegedly acting, it must be proven that the state exercises ‘effective control’ over the state. ‘Effective control’ requires a higher degree of control than ‘overall control’. See the case concerning application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), (2007) I.C.J. Rep. 43, ¶ 403–406. If, however, the view of the ICC is followed and the ‘overall control’ test applies, this test must also suffice to attribute the wrongful acts to the state on whose behalf they are committed. It would be logically inconsistent to have a conflict between two states in which one state is not responsible for its acts.

⁹⁵Tadic, *supra* note 51, ¶ 137; see also Dylko, *supra* note 57, ¶ 541.

⁹⁶Tadic, *supra* note 51, ¶ 137; see also Dylko, *supra* note 57, ¶ 541.

of a third state and would thus become involved in an international armed conflict, a non-international conflict would continue between the Assad regime and other non-state groups.

Although there is currently no internationalization of the armed conflict in Syria that would change the law applicable to the conflicting parties, IHL of non-international armed conflicts does contain obligations for states that are not directly involved in the conflict. These obligations are particularly relevant for those states that support conflicting parties financially, with weapons, or by providing training. As the International Court of Justice emphasized, under IHL all states have the obligation to ensure respect for the applicable rules by all conflicting parties.⁹⁷ At a minimum, states shall not “encourage persons or groups engaged in the conflict . . . to act in violation of the provisions of Article 3 common to the four 1949 Geneva Conventions.”⁹⁸ The ICRC finds that under customary international law all states have the obligation to “do all in their power to ensure that international humanitarian law is respected.”⁹⁹ This means that especially states that provide support to either of the conflicting parties must use their leverage to ensure respect for the law. In practice, this could mean formally protesting against alleged violations to provide training and advice on lawful conduct, provide financial and material assistance dependent on compliance with fundamental humanitarian provisions, or to prosecute alleged war criminals under their jurisdiction.

IV. PRACTICAL CHALLENGES FOR THE IMPLEMENTATION OF HUMAN RIGHTS AND HUMANITARIAN LAW OBLIGATIONS OF ARMED GROUPS

Determining that non-state armed groups have international legal obligations under both international human rights and humanitarian law leads to questions of their practical implementation. Common Article 3 contains fundamental humanitarian norms that apply to all conflicting parties and additional norms can be drawn from customary IHL.¹⁰⁰ In contrast, it is less clear which international human rights norms form part of customary international law and thus apply to armed groups in Syria, and because Common Article 3 was explicitly established to govern armed conflicts, this provision prevails as *lex specialis*.¹⁰¹ Allegations emerged that non-state groups engaged in the “execution of civilians and individuals no longer participating in hostilities [which] is a clear violation of international human rights and international humanitarian law and may constitute war crimes.”¹⁰² Common Article 3 explicitly prohibits “the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees recognized as indispensable by civilized peoples.”¹⁰³ Even if armed groups were willing to respect this rule, it would pose particular challenges for them.¹⁰⁴

According to the Commission of Inquiry, following the breakdown of the state judicial system in those parts of Syria that are no longer controlled by the Assad regime, opposition groups set up their own judicial infrastructure based on social structures and religious institutions.¹⁰⁵ Given the difficult circumstances in which they operate, tribunals were established on an *ad hoc* basis, judges were either imams or judges who formerly served in state institutions, and they applied a “hybrid of Syrian criminal and Islamic law.”¹⁰⁶ During trials, it is alleged that the accused were not permitted a defense, had no right to appeal, and evidence that had been obtained under torture

⁹⁷This obligation cannot, however, consist of a unilateral decision to use military force against an alleged violator of international humanitarian law.

⁹⁸Case Concerning Military and Paramilitary Activities in and against Yugoslavia (*Nicaragua v. United States of America*), (1986) I.C.J. Rep. 14, ¶ 220.

⁹⁹Doswald-Beck & Henckaerts, *supra* note 83, at 510.

¹⁰⁰For a list of which norms the ICRC considered to be customary, see *id.*

¹⁰¹Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories, (2004) I.C.J. Rep. 136, ¶ 105–106. See also Sassòli & Olson, *supra* note 85.

¹⁰²See High Commissioner for Human Rights, Syria: soaring number of executions in violation of international law – Pillay (January 16, 2014) at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14173>.

¹⁰³Common Article 3 to the Four Geneva Conventions of 1949.

¹⁰⁴Indeed, the U.N. Commission of Inquiry has continuously emphasized that non-state groups engage in extrajudicial killings without conducting trials or if they do so, without affording fundamental judicial guarantees. See Human Rights Council, *supra* note 20, ¶ 58–60; Human Rights Council, *supra* 88 ¶ 63.

¹⁰⁵See Human Rights Council, 4th Report of Commission of Inquiry on Syria, para. Annex V ¶ 15, U.N. Doc. A/HRC/22/59 (Feb. 5, 2013).

¹⁰⁶*Id.*, ¶ 16.

was permitted. Against this background, the Commission of Inquiry concluded that members of armed opposition groups committed “the war crime of murder or the war crime of sentencing or execution without due process.”¹⁰⁷ This finding raises the question of how non-state groups can operate a judicial system in a non-international armed conflict without violating fundamental procedural rules?

According to the ICRC Customary IHL Study, the criterion of a regularly constituted court requires the tribunal be established in accordance with existing laws.¹⁰⁸ The tribunal, as a judicial organ, shall be independent from other branches of government, and the judges shall be impartial with regard to the case before them.¹⁰⁹ During the process, the ICRC found that a significant number of due process guarantees must be respected, including the *nullum crimen sine lege* principle.¹¹⁰ In drawing their comprehensive list of due process guarantees allegedly part of customary international law and thereby interpreting what is a “regularly constituted court” which affords all fundamental judicial guarantees, the ICRC Study drew significantly on international human rights law.¹¹¹ While reflecting state practice and capacity, it is admittedly difficult for armed groups to comply with these requirements.

Still, as Common Article 3 and customary IHL address states and non-state armed groups, it must be assumed that non-state groups should, in principle, be able to apply this norm. The standard of a regularly constituted court respecting the judicial guarantees such as the principle of *nullum crimen sine lege*, however, raises the required standard to a level that is difficult to respect for groups that are engaged in active hostilities and whose control over territory may only be transitory. While a comprehensive discussion of these requirements would go beyond the scope of this article, different interpretations of the relevant criteria could provide guidance to armed groups.¹¹² An interpretation that includes a real possibility for non-state groups to comply with a fair trial standard could be one entailing “a mixture involving a loose interpretation of the legal basis, with emphasis on the judicial guarantees requirement.”¹¹³

According to the ICRC customary law study, a “court is regularly constituted if it has been established and organised in accordance with the laws and procedures already in force in a country.”¹¹⁴ If this meant that only courts established in accordance with state law can be regularly constituted, it is impossible for armed groups to operate a court in accordance with IHL. In contrast, if the laws and procedures in force include laws enacted by a non-state group that exercises *de facto* control over a territory, such groups could effectively set up regularly constituted courts. When states agreed on the ICC Elements of Crimes, they did not emphasize the legal basis of a court as essential, but found that a regularly constituted court must afford “essential guarantees of independence and impartiality.”¹¹⁵ Similarly, article 6(2) of Additional Protocol II does not explicitly require a court to be regularly constituted but places emphasis on that it offers “essential guarantees.” Accordingly, in the particular situation of tribunals established by armed groups in non-international armed conflicts, the independence of the court from the influence of other actors and its impartiality with regard to cases before it should be decisive, and not the question of whether it was setup in accordance with a formally adopted law.

While the principle of *nullum crimen sine lege* is fundamental to avoid arbitrary judgments, this principle would again not provide for the particular situation of non-state parties to armed conflicts if convictions could only be based on “criminal offence under national (meaning state) or international law.”¹¹⁶ Contrary to this specification of which laws can be invoked, Additional Protocol II simply stresses that any convictions must be based on an act constituting a criminal

¹⁰⁷*Id.*, ¶ 33.

¹⁰⁸Doswald-Beck & Henckaerts, *supra* note 83, at 355.

¹⁰⁹*Id.*, at 355–356.

¹¹⁰*See id.* at 352–374; (rules 100–102).

¹¹¹*See*, in particular, art. 14 ICCPR.

¹¹²For comprehensive discussions of the legality of trials by non-state groups under IHL, see Jonathan Somer, *Jungle Justice: Passing Sentence on the Equality of Belligerents in Non-International Armed Conflict*, 89 INTERNATIONAL REVIEW OF THE RED CROSS 655 (2007); Sandesh Sivakumaran, *Courts of Armed Opposition Groups: Fair Trials or Summary Justice?*, 7 J. INT'L CRIM. JUST. 489, (2009).

¹¹³Somer, *supra* note 112, at 687.

¹¹⁴Doswald-Beck & Henckaerts, *supra* note 83, at 355.

¹¹⁵Preparatory Commission for the International Criminal Court, Elements of Crimes, para. 34, U.N. Doc. PCNICC/2000/1/Add.2 (Nov. 2, 2000).

¹¹⁶Doswald-Beck & Henckaerts, *supra* note 83, at 371.

offence “under the law.” Thus, it has been suggested that the principle of *nullum crimen sine lege* should be interpreted as to include laws adopted by non-state groups in the territory they control.¹¹⁷ However, in practice a solution may not be as simple: as control over territory is often contested during internal armed conflicts, parallel legislation could require individuals to comply with different, possibly conflicting, laws adopted by the different conflicting parties. Still, if armed groups control territory and are therefore required to respect fundamental human rights of the people under their control, these groups must also be permitted to adopt legislation. For example, if an armed group liberated parts of a state’s territory from the tyrannical rule of a dictator, it would be contrary to the idea of justice and the rule of law if it was unable to change certain legislation of the ousted regime.

In practice, due to the very different characteristics of non-state armed groups and circumstance in which they operate, examples of their “judicial systems” vary widely.¹¹⁸ As also seen in the Syria conflict, especially during the first years of armed confrontations when non-state groups do not exercise stable control over territory and do not dispose of sufficient resources, they normally do not operate judicial systems that come anywhere close to what international law requires.¹¹⁹ Yet, in situations where conflicts become protracted and non-state groups exercise significant territorial control, they may establish more sophisticated “judicial systems.” For examples, during civil war in El Salvador, the Frente Farabundo Marti para la Liberacion Nacional (FMLN) considered that IHL presupposes that state and non-state parties can prosecute penal law violations, and that guarantees of independence and impartiality do not require that courts be established in accordance with state law.¹²⁰ Accordingly, they established and operated a quasi-judicial system in the territory they controlled. Yet, the courts and the FMLN have been criticized for not meeting due process guarantees.¹²¹

While practical challenges remain, interpreting the requirement of a regularly constituted court and the principle of *nullum crimen sine lege* in the ways suggested here does not contradict the letter of the law and reflects practical challenges in contemporary armed conflicts. While it arguably lowers the applicable standards, it does not lower the protection of the individual against unfair prosecutions to an unacceptable extent. Under the suggested system, any trial must still respect a significant list of fair trial guarantees, which on the one hand require capacities which not all armed groups possess, but on the other hand maintain a level of protection that international law requires for any trial. Especially when considering death sentences as reportedly imposed by non-state groups’ tribunals in Syria, these minimum guarantees are indispensable. However, as to the question of whether and under which conditions non-state groups can lawfully convict individuals under their control, any group is well advised not to execute any detainee.

V. CONCLUSION

Non-state armed groups are subject to different international legal regimes, including international humanitarian, international criminal, and also international human rights law. In the light of the devastating crisis in Syria, international lawyers have both clarified existing legal rules and raised arguments that further develop international law. Following the evolvement of the crisis from peaceful demonstrations into a civil war, Syria presents a rich example for a legal analysis of at what stage confrontations between the opposing parties turn from internal disturbances into an armed conflict. This also determines which fields of international law applies in the situation: IHRL exclusively or IHRL and IHL. Under IHL, an armed conflict exists only if there are armed confrontations between at least two organized forces. If a state employs significant violence against unorganized armed groups that are not able to engage in combat this does not amount to an armed conflict; but may, rather, constitute a crime against humanity. Once the armed conflict threshold is met, all parties to the conflict have equal obligations under IHL, and certain violations of this regime may amount to war crimes.

¹¹⁷See Sivakumaran, *supra* note 112, at 507–509.

¹¹⁸For a good overview of practice by different armed groups, see David Tuck, *Detention by Armed Groups: Overcoming Challenges to Humanitarian Action*, 93 INT’L REV. RED CROSS 761–764 (2011).

¹¹⁹This has also been explained, for example, by a former leaders of the Liberation Tigers of Tamil Eelam (LTTE). See Sandesh Sivakumaran, *supra* note 112, at 494.

¹²⁰For further discussion, see *id.*, at 491–492.

¹²¹Related criticism has also been raised against courts operated by the LTTE. See *id.*, at 491–494.

A contested but very important legal question that emerged prominently in the Syria crisis is whether non-state groups bear international human rights law obligations, especially before the crisis developed into a non-international armed conflict. In a progressive finding, the UN Commission of Inquiry argued that states, individuals, and non-state collective entities are bound by peremptory human rights norms. With this finding, the Commission went one step further than previous UN Commissions or special mandate holders, which emphasized that human rights obligations bind groups that exercise territorial control. By applying peremptory human rights norms to armed groups that were neither in effective control over territory nor party to an armed conflict, the Commission of Inquiry answered a recurring call by different legal experts that some fundamental humanitarian provisions must pertain at all times and be respected by any actor.¹²² Direct human rights obligations for non-state entities are particularly relevant where such groups act beyond states' control.

In any situation of internal disturbances or armed conflicts, in order to achieve minimum protection of all persons affected by the violence engagement with state and non-state actors is essential. Unlike state forces, which normally have a basic training in human rights and humanitarian law, non-state groups that draw their members from the civilian population are unlikely to possess this knowledge. Even if the state bluntly disregards the most fundamental humanitarian provisions, an armed group that claims legitimate representation of the people and wishes to liberate a country cannot commit war crimes or grave human rights violations against its people. Engaging such groups on the applicable humanitarian norms is vital.¹²³ However, in order to provide clear instructions to non-state groups on which international obligations they have, lawyers need to determine which legal regimes apply and bind armed groups. A clarification of this point has been the aim of the present article.

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¹²²The idea of 'fundamental standards of humanity' that bind all conflicting parties at all times is especially reflected in the Turku Declaration of Minimum Humanitarian Standards. For a broader discussion of these standards, see Rodenhäuser, *supra* note 12.

¹²³An innovative and successful example of engagement with non-state groups in Syria is the campaign 'Fighter, not Killer' by the NGO Geneva Call. *Fighter Not Killer Campaign Launched by Geneva Call Against Violations in Syria*, Geneva Call (May 17, 2003), at <http://www.genevacall.org/fighter-killer-campaign-launched-geneva-call-violations-syria/>.