

# Penn State Journal of Law & International Affairs

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Volume 3

Issue 1 3:1

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April 2014

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ISSN: 2168-7951

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### Custom Citation

Jillian Blake & Aqsa Mahmud, *The Arab Spring's Four Seasons: International Protections and the Sovereignty Problem*, 3 Penn. St. J.L. & Int'l Aff. 161 (2014).

*The Penn State Journal of Law & International Affairs* is a joint publication of Penn State's School of Law and School of International Affairs.

**Penn State**  
**Journal of Law & International Affairs**

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2014

VOLUME 3 NO. 1

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**THE ARAB SPRING'S FOUR SEASONS:  
INTERNATIONAL PROTECTIONS AND  
THE SOVEREIGNTY PROBLEM**

*Jillian Blake & Aqsa Mahmud\**

INTRODUCTION

In December 2010, public demonstrations erupted throughout the Middle East against autocratic regimes, igniting a regional political transformation known as the Arab Spring. While some of these demonstrations were peaceful, others escalated into domestic uprisings and civil and international wars. Depending on events, modern international criminal and humanitarian law provided certain protections to vulnerable populations. However, international law did not provide a uniform degree of protection to civilians and combatants who faced similar circumstances. Post-Arab Spring, some countries have been relatively stable while others continue to face internal conflicts; most notably, the violent civil war in Syria continues to this day.

This article argues for a uniform standard of protections for all populations affected by armed conflict, war crimes, and crimes against humanity. Part I presents four legal typologies under current international humanitarian and criminal law using rules codified in

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the Rome Statute and the Geneva Conventions.<sup>1</sup> It evaluates each of five major Arab Spring uprisings (Tunisia, Bahrain, Egypt, Syria, and Libya) and describes the legal protections that applied in each country's revolution or rebellion. Part II analyzes the differences in protection, focusing on the distinction between international and non-international armed conflicts under current law, which affords a significantly lower degree of protection during civil conflicts. Given the substantial number of non-international armed conflicts in the modern era, we argue for a uniform standard of protections for all armed conflicts. Part III shows that current sovereignty trends are moving away from the concept of an absolute sovereign in favor of a responsible sovereign who adheres to international standards. This trend is incompatible with current international law, which provides a minimal level of protection during civil war, and could therefore shield sovereigns from liability for mass atrocity crimes. Finally, Part IV of this article offers solutions to appropriately minimize outdated sovereignty norms and eliminate unjustified distinctions in the international legal system using lessons from the Arab Spring. These solutions include eliminating the distinction between non-international and international armed conflict in international humanitarian law and promoting International Criminal Court (ICC) membership in Arab states.

#### I. THE FOUR SEASONS: REGIME OF PROTECTIONS UNDER INTERNATIONAL CRIMINAL AND HUMANITARIAN LAW

International humanitarian law (“IHL”)<sup>2</sup> and international criminal law (“ICL”) afford certain protections in the event of an armed conflict, genocide, or crimes against humanity. IHL applies in the event of an armed conflict, characterized as either international or

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<sup>1</sup> The Hague Conventions signed in 1899 and 1907 codified many of the rules related to warfare. “Although the Fourth Hague Convention retains modern currency, today’s rules of IHL are largely founded on the four Geneva Conventions of 1949, drafted on the heels of World War II and supplemented by their two 1977 Protocols.” Beth Van Schaack & Ron Slye, *A Concise History of International Criminal Law: Chapter 1 of Understanding International Criminal Law* 17 (Santa Clara Univ. Legal Studies Research Paper No. 07-42, 2007).

<sup>2</sup> International humanitarian law is also commonly referred to as law of armed conflict (LOAC) or law of war.

non-international in nature. Depending on its classification, specific protections apply to civilians affected by and combatants taking part in the conflict. ICL imposes criminal liability on individuals who commit certain offenses, including genocide, war crimes, and crimes against humanity. Crimes against humanity include murder, extermination, enslavement, imprisonment, torture, or rape against a civilian population. Notably, crimes against humanity are distinct from war crimes because they do not need to be committed as part of an armed conflict.

This section outlines an analytical framework to determine current international protections for various conflict scenarios and evaluates each of five Arab Spring countries within the framework. We present four levels of protections based on the occurrence of crimes against humanity, existence of an armed conflict, and whether the conflict is international or non-international in nature. We selected these criteria due to their importance in guiding current application of international law and relevance to the Arab Spring. The four legal seasons of the Arab Spring are: (A) outside the scope of international protections (Tunisia); (B) international criminal non-war crime protections (Bahrain and Egypt); (C) non-international armed conflict protections (Syria); and (D) international armed conflict protections (Libya). This framework will be useful in analyzing the international legal protections that apply to various revolution or rebellion situations, especially in relation to each other.

<b>The Arab Spring's Four Seasons: Layers of Legal Protection<sup>3</sup></b>			
<b><u>Season A</u></b>	<b><u>Season B</u></b>	<b><u>Season C</u></b>	<b><u>Season D</u></b>
<b><u>Tunisia</u></b>	<b><u>Egypt &amp; Bahrain</u></b>	<b><u>Syria</u></b>	<b><u>Libya</u></b>
Domestic Law	Domestic Law	Domestic Law	Domestic Law
Int'l Human Rights Law	Int'l Human Rights Law	Int'l Human Rights Law	Int'l Human Rights Law
	Int'l Criminal Law	Int'l Criminal Law	Int'l Criminal Law
		Non-Int'l Armed Conflict Law	Non-Int'l Armed Conflict Law
			Int'l Armed Conflict Law

#### A. Tunisia: Outside the Scope of International Criminal and Humanitarian Legal Protections

##### 1. Background

On December 17, 2010, a young Tunisian street vendor set himself on fire in protest against harsh treatment by authorities, starting the first Arab Spring revolution.<sup>4</sup> Following his demonstration, riots broke out in the city of Sidi Bouzid and continued throughout the new year,<sup>5</sup> as protestors rallied across the country over socioeconomic and political issues.<sup>6</sup> On January 12, 2011, rioting spread to the capital of Tunis, and a national curfew was

<sup>3</sup> Note that each Season adds to the degree of protections from previous Seasons. For example, Season B includes Season A protections but adds international criminal law protection. Notably, when the various legal bodies conflict, one may trump; for example, international humanitarian law will trump international human rights law as *lex specialis*.

<sup>4</sup> THE 'SPARK' THAT STARTED IT ALL, ARAB SPRING: A RESEARCH & STUDY GUIDE, <http://guides.library.cornell.edu/content.php?pid=259276&sid=2163144> (last visited Dec. 26, 2013).

<sup>5</sup> *Tunisia: 11 die in new clashes after weeks of unrest*, THE GUARDIAN, Jan. 9, 2011, <http://www.guardian.co.uk/world/2011/jan/09/tunisia-clashes-weeks-unrest>.

<sup>6</sup> ALEXIS ARIEFF, CONG. RESEARCH SERV., RS21666, POLITICAL TRANSITION IN TUNISIA 4 (2012), <http://www.fas.org/sgp/crs/row/RS21666.pdf>.

imposed.<sup>7</sup> Reports emerged of police firing on protestors and some protestors being abused in detention,<sup>8</sup> with the abuse rising to a level “that may [have] amount[ed] to torture.”<sup>9</sup> On January 14, 2011, President Zine el-Abidine ben Ali fled to Saudi Arabia, and an interim government took control until future elections.<sup>10</sup> In October 2011, Tunisia held elections that put the new National Constituent Assembly into power.<sup>11</sup>

## 2. *Classification*

The Tunisian revolution (also referred to as the “Jasmine Revolution”) qualifies as “Season A”—outside the scope of ICL and IHL—because no armed conflict took place and the government’s actions fail to meet the standard for international criminal liability. Although at times violent,<sup>12</sup> clashes between demonstrators and security forces did not reach the degree of intensity found in armed conflict.<sup>13</sup> Furthermore, protestors in Tunisia were for the most part unarmed and lacked centralized organization required for an armed conflict.

The government’s attacks against civilians are unlikely to meet the requirements for crimes against humanity. Crimes against humanity are defined as certain enumerated offenses committed as

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<sup>7</sup> ALEXIS ARIEFF, CONG. RESEARCH SERV., RS21666, TUNISIA: RECENT DEVELOPMENTS AND POLICY ISSUES 2 (2011), <http://fpc.state.gov/documents/organization/155560.pdf>.

<sup>8</sup> *Id.* at 1-2.

<sup>9</sup> WORLD REPORT 2012: TUNISIA, HUMAN RIGHTS WATCH (2012), <http://www.hrw.org/world-report-2012/world-report-2012-tunisia>.

<sup>10</sup> Angelique Chrisafis & Ian Black, *Zine al-Abidine Ben Ali forced to flee Tunisia as protesters claim victory*, THE GUARDIAN, Jan. 14, 2011, <http://www.guardian.co.uk/world/2011/jan/14/tunisian-president-flees-country-protests>.

<sup>11</sup> Although Tunisia continues to face transitional challenges, the scope of our analysis focuses on the events leading up to the first transition of power during the Arab Spring revolutions. See ARIEFF, *supra* note 6, at 2.

<sup>12</sup> ARIEFF, *supra* note 7, at 2; *Tunisia: 11 die in new clashes after weeks of unrest*, *supra*, note 5.

<sup>13</sup> See *infra* Part II.C.1, Season C for an in depth discussion of factors determinative of an armed conflict legal classification.

part of a widespread attack against civilians.<sup>14</sup> According to the International Criminal Court's (ICC) Rome Statute, Article 7, crimes against humanity include:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- (i) Enforced disappearance of persons;
- (j) The crime of apartheid;
- (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.<sup>15</sup>

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<sup>14</sup> See *infra* Part II.B.

For acts to be considered “crimes against humanity,” they must be committed as “part of a widespread or systematic attack, directed against any civilian population, with knowledge of the attack.”<sup>16</sup> The population must be predominantly civilian to be characterized as such for crimes against humanity liability.<sup>17</sup> According to the International Criminal Tribunal for the Former Yugoslavia (ICTY), the existence of a “widespread or systematic attack” can be determined by a variety of factors, including the “the number of victims, the nature of the acts, the possible participation of officials or authorities or any identifiable patterns of crimes.”<sup>18</sup> In *Prosecutor v. Jelusic*, the ICTY noted that

[t]he existence of an acknowledged policy targeting a particular community, the establishment of parallel institutions meant to implement this policy, the involvement of high-level political or military authorities, the employment of considerable financial, military or other resources and the scale or the repeated, unchanging and continuous nature of the violence committed against a particular civilian population are among the factors which may demonstrate the widespread or systematic nature of an attack.<sup>19</sup>

According to the United Nations, 300 people died in the Tunisia uprising, and 700 were injured between December 17, 2010

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<sup>15</sup> Rome Statute of the International Criminal Court, art. 7, July 17, 1998, 2187 U.N.T.S. 38544, <http://untreaty.un.org/cod/icc/statute/rome.htm> [hereinafter Rome Statute].

<sup>16</sup> *Id.*

<sup>17</sup> *Prosecutor v. Tadic*, Case No. IT-94-1, Opinion and Judgment, para. 638 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997), <http://www.icty.org/x/cases/tadic/tjug/en/tad-ts70507JT2-e.pdf> [hereinafter *Tadic Judgment*].

<sup>18</sup> *Prosecutor v. Kunarac, Kovac and Vokovic*, Case No. IT-96-23 & IT-96-23/1-A, Appeals Chamber Judgment, para. 95 (Int'l Crim. Trib. for the Former Yugoslavia June 12, 2002), <http://www.icty.org/x/cases/kunarac/acjug/en/kun-aj020612e.pdf>.

<sup>19</sup> *Prosecutor v. Jelusic*, Case No. IT-95-10-T, Trial Chamber Judgment, para. 53 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 14, 1999), <http://www.icty.org/x/cases/jelusic/tjug/en/jel-tj991214e.pdf>.



and January 14, 2011.<sup>20</sup> While the government unlawfully killed many people during the uprising, the crimes did not reach the level of “massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims,” articulated by the International Criminal Tribunal for Rwanda (ICTR) in *Prosecutor v. Akayesu*.<sup>21</sup> However, there is no clear standard for how many victims meet the “widespread” requirement, and the analysis is largely subjective.<sup>22</sup> Therefore, there may be reasonable disagreement on this point.

Furthermore, there was no indication of a “systematic” attack, such as a plan or policy, by the government. The actions of the Tunisian government during the revolution were not part of a “continuous” policy, but rather a short-term, uncoordinated response to a domestic uprising. Because of these requirements for crimes against humanity liability, the actions of the Tunisian government during the Arab Spring do not meet the international definition of crimes against humanity.

### 3. *Protections*

Of the countries to be discussed in this paper, Tunisia suffered the fewest casualties and related crimes during the Arab Spring. Because the case of Tunisia was outside the scope of ICL and IHL, domestic law and applicable international human rights law governed the revolution. Any international protections under customary international law would still apply as well as any human rights agreement to which Tunisia is a party;<sup>23</sup> however, this paper focuses on international criminal and humanitarian protections as

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<sup>20</sup> See *300 people died in Tunisian uprising*—UN, AGENCE FRANCE-PRESSE, May 22, 2011, <http://newsinfo.inquirer.net/7989/300-people-died-in-tunisian-uprising-un>.

<sup>21</sup> *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, para. 580 (Int'l Crim. Trib. Rwanda Sept. 2, 1998), <http://www.unictt.org/Portals/0/Case/English/Akayesu/judgement/akay001.pdf>

<sup>22</sup> See Simon Chesterman, *An Altogether Different Order: Defining the Elements of Crimes Against Humanity*, 10 DUKE J. COMP. & INT'L L. 307, 315 (2000).

<sup>23</sup> For example, Tunisia is a signatory to the International Covenant on Civil and Political Rights (ICCPR).

codified under the Rome Statute and the Geneva Conventions as interpreted by international courts and other authoritative bodies.

## B. Egypt and Bahrain: International Criminal Legal Protections

### 1. Background

*a. Egypt* – The revolution in Egypt began on January 25, 2011 with a series of mass demonstrations in Cairo and other cities, demanding an end to President Hosni Mubarak’s almost 30-year rule.<sup>24</sup> The government blamed the uprising on the officially banned Muslim Brotherhood opposition faction.<sup>25</sup> According to independent observers, however, the discontent with Mubarak was extensive and caused by popular discontent with government corruption and economic grievances.<sup>26</sup>

By February, the unrest had resulted in 900 deaths, Mubarak was forced to resign, and the Supreme Council of the Armed Forces (SCAF) took control of the country.<sup>27</sup> SCAF claimed to work on behalf of the protestors, restoring justice and establishing a new political order.<sup>28</sup> In March 2011, a new constitution was approved with 77 percent support which included provisions on presidential term limits, judicial oversight for elections, and changes in presidential candidate qualifications. In late 2011 and early 2012, the Muslim Brotherhood and other Islamist parties were elected to a majority of the seats in the new Parliament.<sup>29</sup> In June 2012, Mubarak

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<sup>24</sup> THE JANUARY 25 REVOLUTION, EGYPT-ARAB SPRING: A RESEARCH & STUDY GUIDE, <http://guides.library.cornell.edu/content.php?pid=259276&sid=2159613> (last visited Dec. 26, 2013).

<sup>25</sup> Kareem Fahim, *Violent Clashes Mark Protests against Mubarak’s Rule*, N.Y. TIMES, Jan. 25, 2011, <http://www.nytimes.com/2011/01/26/world/middleeast/26egypt.html?pagewanted=all>.

<sup>26</sup> *Id.*

<sup>27</sup> THE JANUARY 25 REVOLUTION, *supra* note 24.

<sup>28</sup> JEREMY M. SHARP, CONG. RESEARCH SERV. RL33003, EGYPT IN TRANSITION 7 (2011) <http://fpc.state.gov/documents/organization/171381.pdf>.

<sup>29</sup> See *Egypt News—Revolution and Aftermath*, Topic Coverage, N.Y. TIMES, <http://topics.nytimes.com/top/news/international/countriesandterritories/egypt/index.html> (last visited Dec. 26, 2013). See also JEREMY STAPP, CONG. RESEARCH

was tried by an Egyptian court and found guilty and convicted as an accomplice in the murder of unarmed protestors during the uprising.<sup>30</sup> However, a few months later, an Egyptian court granted an appeal from Mubarak and ordered a retrial.<sup>31</sup> Egypt continues to face transitional challenges post-Arab Spring—the country’s first democratically elected president, Mohamed Morsi, was ousted by the military in July 2013.<sup>32</sup>

*b. Bahrain* – The Arab Spring uprising in Bahrain was inspired, in part, by the success of the protests in Tunisia and Egypt.<sup>33</sup> In mid-February 2011, demonstrations erupted in the capital Manama against the monarch King Hamad bin Isa Al Khalifa.<sup>34</sup> According to international affairs expert Jane Kinninmont, “[a]t the heart of the uprising [the “Pearl Revolution”] were long-standing grievances over the distribution of power and wealth—including calls for a fully elected parliament, an elected government, and an end to the gerrymandering of elections and corruption.”<sup>35</sup> The government immediately responded with a brutal crackdown, firing on civilians and detaining opposition leaders.<sup>36</sup> One month after the Pearl

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SERV., RL33003, EGYPT: BACKGROUND ON U.S. RELATIONS (2014), <http://www.fas.org/sgp/crs/mideast/RL33003.pdf>.

<sup>30</sup> David D. Kirkpatrick, *New Turmoil in Egypt Greeted Mixed Verdict for Mubarak*, N.Y. TIMES, June 2, 2012, <http://www.nytimes.com/2012/06/03/world/middleeast/egypt-hosni-mubarak-life-sentence-prison.html?pagewanted=all>.

<sup>31</sup> Abigail Hauslohner, *Egyptian court overturns Hosni Mubarak’s life sentence, orders retrial*, WASH. POST, Jan. 13, 2013, [http://articles.washingtonpost.com/2013-01-13/world/36312073\\_1\\_hussein-salem-retrial-order-adli](http://articles.washingtonpost.com/2013-01-13/world/36312073_1_hussein-salem-retrial-order-adli).

<sup>32</sup> Ben Wedeman, Reza Sayah & Matt Smith, *Coup topples Egypt’s Morsi; deposed leader under ‘house arrest,’* CNN.COM, Jul. 4, 2013, <http://www.cnn.com/2013/07/03/world/meast/egypt-protests>.

<sup>33</sup> Lamis Andoni, Opinion, *Bahrain’s contribution to the Arab Spring*, AL-JAZEERA, Aug. 30, 2011, <http://www.aljazeera.com/indepth/opinion/2011/08/20118301473301296.html>.

<sup>34</sup> BAHRAIN, ARAB SPRING: A RESEARCH & STUDY GUIDE, <http://guides.library.cornell.edu/content.php?pid=259276&sid=2163172> (last visited Dec. 26, 2013).

<sup>35</sup> JEAN KINNINMONT, BAHRAIN: BEYOND THE IMPASSE 1 (2012), <http://www.chathamhouse.org/sites/default/files/public/Research/Middle%20East/pr0612kinninmont.pdf>.

<sup>36</sup> Cynthia Johnston & Frederik Richter, *Four killed in Bahrain clashes as Mideast seethes*, REUTERS, Feb. 17, 2011,

Revolution began, King Hamad bin Isa Al Khalifa authorized Saudi troops to enter the country to help put down the revolt.<sup>37</sup> By March, security forces had suppressed the demonstrations, making it the only Arab Spring country to effectively put down its uprising through use of force.<sup>38</sup>

The suppression came at a high cost to human rights. According to an independent commission, the Bahrain Independent Commission of Inquiry, security forces used excessive force in the campaign, including torture.<sup>39</sup> Almost 3,000 people were imprisoned, and sixty-four percent of detainees (1,866 individuals) reported being tortured.<sup>40</sup> The commission found that thirty-five people died during the protests and five detainees were tortured to death.<sup>41</sup> According to Human Rights Watch, Bahrain's police continue to torture and beat detainees.<sup>42</sup>

## 2. *Classification*

The Egyptian and Bahrain revolutions qualify as “Season B”—outside the scope of IHL, but within the scope of ICL. Egypt and Bahrain are distinguishable from “Season A” and Tunisia because crimes committed during the uprisings were more widespread and systematic. The repression in Egypt produced three times as many casualties as in Tunisia. According to a “high-level [Egyptian government] inquiry,” police killed almost 900 people during the uprising and “used snipers on rooftops overlooking

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<http://www.reuters.com/article/2011/02/17/us-protests-idUSTRE71F41K20110217>.

<sup>37</sup> Simon Tisdall, *Arab spring uprisings: the scorecard*, THE GUARDIAN, May 23, 2012, <http://www.guardian.co.uk/world/2012/may/23/arab-spring-uprisings-the-scorecard>.

<sup>38</sup> *Bahrain News-The Protests*, Topic Coverage, N.Y. TIMES, <http://topics.nytimes.com/top/news/international/countriesandterritories/bahrain/index.html> (last visited Dec. 26, 2013).

<sup>39</sup> Nada Bakri, *Torture used on Protesters in Bahrain, Report Says*, N.Y. TIMES, Nov. 23, 2011, <http://www.nytimes.com/2011/11/24/world/middleeast/report-details-excessive-force-used-against-bahrain-protests.html?hp&r=0>

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Bahrain police 'continue to torture detainees'*, BBC, Apr. 29, 2012, <http://www.bbc.co.uk/news/world-middle-east-17887731>.

Cairo's Tahrir Square to shoot into the huge crowds."<sup>43</sup> As many as 1,000 people were "disappeared" during the Egyptian revolt, and Egyptian armed forces reportedly tortured and killed individuals "across the country."<sup>44</sup> While the Tunisian government repressed and killed civilians during the Jasmine Revolution, the crimes committed by the Egyptian government were significantly more widespread, thereby meeting the *chapeau* elements for crimes against humanity.

In Bahrain, torture was widespread and systematic during, and in the wake of, the Pearl Revolution, meeting the requirement for crimes against humanity liability. There were a large number of victims, and torture was part of a continuous government policy. The report of the Bahrain Independent Commission of Inquiry found government agencies "followed a systematic practice of physical and psychological mistreatment, which in many cases amounted to torture, with respect to a large number of detainees in their custody."<sup>45</sup>

IHL and war crimes protections, to be discussed in the following "Season C" and "Season D" sections, do not apply because the revolutions in Egypt and Bahrain did not rise to the level of armed conflicts. No international armed conflict (IAC) existed because the government forces did not engage the armed forces of another state directly or by proxy. Neither situation qualified as a non-international armed conflict (NIAC) because the opposition forces lacked the required organization or the situations were limited in their intensity and protractedness. In Bahrain, the opposition was

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<sup>43</sup> Report: Egyptian police responsible for almost all of 900 deaths during 2011 uprisings and protests, N.Y. DAILY NEWS, Mar. 13, 2013, <http://www.nydailynews.com/news/world/report-egyptian-police-killed-900-arab-spring-uprising-article-1.1287782>.

<sup>44</sup> Evan Hill & Muhammed Mansour, *Egypt's army took part in torture and killings during the revolution, report shows*, THE GUARDIAN, Apr. 10, 2013, <http://www.guardian.co.uk/world/2013/apr/10/egypt-army-torture-killings-revolution>.

<sup>45</sup> REPORT OF THE BAHRAIN INDEPENDENT MISSION OF INQUIRY para. 1238 (2011), <http://files.bici.org/bh/BICIREportEN.pdf>.

mainly composed of the youth protest movement<sup>46</sup> with dispersed leadership hosting varying goals.<sup>47</sup> The opposition never gained significant control over Bahraini territory, unlike the opposition groups in other Arab Spring revolutions.<sup>48</sup> In Egypt, the Muslim Brotherhood represented a highly organized opposition group; however, it did not engage in extended fighting with the Egyptian government and took power only after Mubarak resigned and through the electoral process. In both situations, the violence was limited in its duration: in Bahrain, the fighting lasted for two months, and, in Egypt, it lasted for 18 days. The number of casualties in both situations were significantly less than those in Syria and Libya to be discussed in the next sections and which qualify as armed conflicts.

Uprisings in Bahrain and Egypt also lacked other factors indicative of an armed conflict. For example, the fighting did not spread throughout the country for a long period of time, the Security Council did not issue resolutions on the conflicts, and opposition forces had limited access to military-grade weapons.

### 3. *Protections*

ICL criminalizes and protects against defined acts rather than providing a series of blanket protections triggered by exogenous circumstances, such as an armed conflict. However, enforcement of ICL protections remains a concern. For example, because most Arab states are not party to the Rome Statute,<sup>49</sup> they are outside the Court's jurisdiction except in the case of Security Council referral. Furthermore, even if the state is party to the Statute, the government

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<sup>46</sup> *Bahrain youth movement calls protest on Wednesday*, REUTERS, Mar. 16, 2011, <http://uk.reuters.com/article/2011/03/16/bahrain-protests-march-idUSLDE72F16620110316>; Barbara Surk & Reem Khalifa, *Group: Bahrain detains 5 top opposition activists*, WASH. POST, Mar. 17, 2011, <http://www.washingtonpost.com/wp-dyn/content/article/2011/03/16/AR2011031600375.html>.

<sup>47</sup> Reese Erlich, *Bahrain's opposition split over violence*, DEUTSCHE WELLE, Dec. 28, 2012, <http://www.dw.de/bahrains-opposition-split-over-violence/a-16461501>.

<sup>48</sup> *Id.*

<sup>49</sup> The only Arab states that are party to the Rome Statute are Jordan, Comoro Islands, Djibouti, and Tunisia (which recently joined in 2011).

is unlikely to refer its own leadership to the ICC for charges related to the successful suppression of a revolt. In the case of Egypt, former President Mubarak is currently being tried with other former high-level officials in domestic courts for killing unarmed protestors. However, Egypt is not party to the Rome Statute, and the ICC has no jurisdiction over Mubarak's violation of international criminal law without referral by the Security Council. In Bahrain, the government was able to put down its opposition movement, thereby effectively insulating itself from prosecution. Arguably, crimes against humanity were committed in both instances yet neither situation was prosecuted under ICL.

### C. Syria: Non-International Armed Conflict Legal Protections

#### 1. *Background*

The Arab Spring came to Syria on March 15, 2011, with protests in the city of Deraa against the Ba'ath Party and demands for the resignation of President Bashar al-Assad.<sup>50</sup> Grievances against the regime included rampant corruption, lack of political freedoms, high unemployment, high inflation, limited upward mobility, and repressive security forces.<sup>51</sup> In reaction, the government deployed its military to put down the uprising, and the government reportedly fired on civilians,<sup>52</sup> used disproportional force,<sup>53</sup> and expelled foreign

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<sup>50</sup> *Arab uprising: Country by country - Syria*, BBC, <http://www.bbc.co.uk/news/world-12482309> (last updated Dec. 16, 2013).

<sup>51</sup> JEREMY M. SHARP & CHRISTOPHER M. BLANCHARD, CONG. RESEARCH SERV., RL33487, ARMED CONFLICT IN SYRIA: U.S. AND INTERNATIONAL RESPONSE 1 (2012), <http://fpc.state.gov/documents/organization/195385.pdf>.

<sup>52</sup> See 'Defected Syria security agent' speaks out, AL-JAZEERA, <http://www.aljazeera.com/news/middleeast/2011/06/201168175624573155.html> (last modified June 8, 2011); *Opposition: 127 dead as Syrian forces target civilians*, CNN.COM, April 7, 2012, [http://articles.cnn.com/2012-04-07/middleeast/world\\_meast\\_syria-unrest\\_1\\_homs-and-hama-syrian-observatory-network-of-opposition-activists?s=PM:MIDDLEEAST](http://articles.cnn.com/2012-04-07/middleeast/world_meast_syria-unrest_1_homs-and-hama-syrian-observatory-network-of-opposition-activists?s=PM:MIDDLEEAST).

<sup>53</sup> See JOSEPH HOLLIDAY, INST. FOR THE STUDY OF WAR, THE STRUGGLE FOR SYRIA IN 2011 13 (2011), [http://www.understandingwar.org/sites/default/files/Struggle\\_For\\_Syria.pdf](http://www.understandingwar.org/sites/default/files/Struggle_For_Syria.pdf). (providing a detailed account of military action by the Syrian government through the end of 2011).

journalists and news organizations from the country.<sup>54</sup> With a strong crack down on protestors, the conflict became increasingly militarized between the Syrian government and opposition forces.<sup>55</sup>

As the fighting continued and escalated, international legal bodies described Syria to be on the “brink” of non-international armed conflict.<sup>56</sup> By May 2012, the President of the International Committee of the Red Cross (ICRC) declared that fighting in at least two places was at the level of armed conflict of a non-international character.<sup>57</sup> The next month, the U.N. Under-Secretary-General for Peacekeeping Operations Hervé Ladsous stated that the Syrian situation could be called a civil war.<sup>58</sup> By June 2013, an estimated 100,000 people had been killed in the war and one-third of the casualties were civilians.<sup>59</sup> In an August 2012 report, the U.N. Human Rights Council commission of inquiry on Syria found

reasonable grounds to believe that Government forces . . . had committed the crimes against humanity of murder and of torture, war crimes and gross violations of international human rights law and international humanitarian law, including unlawful killing, torture, arbitrary arrest and detention, sexual violence, indiscriminate attack, pillaging and destruction of property. . . anti-Government armed

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<sup>54</sup> *Silencing global coverage, Syria detains, expels reporters*, COMM. TO PROTECT JOURNALISTS (July 14, 2011), <http://cpj.org/2011/07/silencing-global-coverage-syria-detains-expels-rep.php>.

<sup>55</sup> Joe Sterling, U.N.: Syria more ‘militarized’ amid abuses from regime, resistance forces, CNN.COM, May 24, 2012, <http://www.cnn.com/2012/05/24/world/meast/syria-unrest/index.html>.

<sup>56</sup> *Syria: Rule of Law in Armed Conflicts Project*, GENEVA ACADEMY OF INT’L HUMANITARIAN LAW AND HUMAN RIGHTS, [http://www.geneva-academy.ch/RULAC/applicable\\_international\\_law.php?id\\_state=211](http://www.geneva-academy.ch/RULAC/applicable_international_law.php?id_state=211) (last updated July 13, 2012).

<sup>57</sup> *Id.*

<sup>58</sup> Louis Charbonneau & Dominic Evans, *Syria in civil war*, U.N. official says, REUTERS, June 12, 2012, <http://www.reuters.com/article/2012/06/12/us-syria-idUSBRE85B0DZ20120612>.

<sup>59</sup> Alan Cowell, *War Deaths in Syria Said to Top 100,000*, N.Y. TIMES, June 26, 2013, [http://www.nytimes.com/2013/06/27/world/middleeast/syria.html?\\_r=0](http://www.nytimes.com/2013/06/27/world/middleeast/syria.html?_r=0).



groups did not reach the gravity, frequency and scale of those committed by Government forces . . . .<sup>60</sup>

U.S. President Barack Obama and European allies have called for a U.N. resolution condemning the Assad regime and imposing sanctions.<sup>61</sup> However, as of January 2014, Russia and China have vetoed three such resolutions, claiming that sanctions would pave the way for military intervention.<sup>62</sup> Because of Russian and Chinese opposition, the Security Council is unlikely to issue an authorization for economic sanctions or use of force for third-party intervention.<sup>63</sup> According to U.S. government analysts, “[t]he popular-uprising-turned-armed-rebellion against the Assad regime . . . seems poised to continue, with the government and a bewildering array of militias locked in a bloody struggle of attrition.”<sup>64</sup>

International concern over Syria increased when reports surfaced in May 2013 that chemical weapons had been used in Syria. U.S. Secretary of Defense Chuck Hagel confirmed that the intelligence community “assesses with some degree of varying confidence that the Syrian regime has used chemical weapons on a small scale in Syria . . . .” Turkey also voiced its belief that “the [Assad] regime has used chemical weapons.”<sup>65</sup> Medical teams provided blood samples and eyewitness accounts about victims to the chemical attacks.<sup>66</sup> U.N. investigator Carla Del Ponte also

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<sup>60</sup> Human Rights Council, *Report of the independent international commission of inquiry on the Syrian Arab Republic*, U.N. Doc. A/HRC/21/50 (Aug. 15, 2012).

<sup>61</sup> Julian Pecquet, *Russia, China veto U.N. sanctions Against Syria*, THE HILL (July 19, 2012, 2:55 PM), <http://thehill.com/blogs/global-affairs/middle-east-north-africa/238941-russia-china-veto-us-backed-syria-resolution-for-a-third-time>.

<sup>62</sup> *Id.*

<sup>63</sup> Michelle Nichols, *Russia, China veto U.N. Security Council resolution on Syria*, REUTERS, July 19, 2012, <http://www.reuters.com/article/2012/07/19/us-syria-crisis-un-idUSBRE86I0UD20120719>.

<sup>64</sup> SHARP & BLANCHARD, *supra* note 51, at 1.

<sup>65</sup> *Syria ‘Ready’ to Allow U.N. Chemical Arms Probe*, NUCLEAR THREAT INITIATIVE (May 10, 2013), <http://www.nti.rsvp1.com/gsn/article/syrian-government-ready-allow-un-chemical-arms-probe/?mgh=http%3A%2F%2Fwww.nti.org&mgf=1>.

<sup>66</sup> Interview by Christiane Amanpour with Zaher Sahloul, President of the Syrian American Medical Society (SAMS), in Turkey (April 29, 2013, 5:11 PM

commented on “strong concrete suspicions but not yet incontrovertible proof” that opposition forces may have used the chemical agent sarin.<sup>67</sup> In response, United States and the United Kingdom officials claimed to have found no evidence to support the opposition’s use of chemical weapons.<sup>68</sup>

By summer 2013, the evidence of chemical weapons use prompted the United States government and its allies to consider military intervention absent Security Council authorization.<sup>69</sup> Before any action was taken, Russia proposed with Syrian consent, that Syria join the Chemical Weapons Convention (CWC) and commit to the elimination of its chemical weapons stockpile.<sup>70</sup> Syria joined the CWC in October 2013,<sup>71</sup> de-escalating the confrontation and option for intervention proposed by the United States.<sup>72</sup>

## 2. Classification

The Syrian revolution and subsequent civil war qualify as “Season C” –IHL protections apply for a non-international armed conflict (NIAC). Syria is distinguishable from “Season A” (Tunisia) and “Season B” (Egypt and Bahrain) in terms of the intensity of the violence and organization of the oppositional groups, which rose to the level of an armed conflict.<sup>73</sup>

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ET), <http://amanpour.blogs.cnn.com/2013/04/29/american-doctor-gives-proof-of-chemical-weapon-use-to-u-s/>.

<sup>67</sup> Patrick J. McDonnell, *U.N.’s Carla del Ponte says Syrian Rebels may have used sarin*, L.A. TIMES, May 6, 2013, <http://articles.latimes.com/2013/may/06/world/la-fg-wn-un-syria-rebels-chemical-weapons-20130506>.

<sup>68</sup> Anne Gearan, *U.S. skeptical on reported use of chemical weapons by Syrian rebels*, WASH. POST, May 6, 2013, [http://articles.washingtonpost.com/2013-05-06/world/39054114\\_1\\_chemical-weapons-syrian-government-assad-regime](http://articles.washingtonpost.com/2013-05-06/world/39054114_1_chemical-weapons-syrian-government-assad-regime).

<sup>69</sup> Jillian Blake & Aqsa Mahmud, *A Legal ‘Red Line’? Syria and the Use of Chemical Weapons in Civil Conflicts*, 61 UCLA L. REV. DISCOURSE 244, 249-50 (2013).

<sup>70</sup> *Id.* at 250.

<sup>71</sup> Paul Adams, *Syria chemical weapons: OPCW plea for short ceasefires*, BBC, Oct. 14, 2013, <http://www.bbc.co.uk/news/world-middle-east-24516303>.

<sup>72</sup> Blake & Mahmud, *supra note 69*, at 250.

<sup>73</sup> See *Prosecutor v. Limaj*, Case No. IT-03-66-T, Judgment, para. 90 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 30, 2005),

For IHL protections to apply, the situation must first qualify as an armed conflict. There is no “widely accepted definition of armed conflict in any treaty.”<sup>74</sup> However, all armed conflict “has certain minimal, defining characteristics that distinguish it from situations of non-armed conflict or peace.”<sup>75</sup> In *Prosecutor v. Tadic*, the ICTY found that 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>76</sup> NIAC excludes “conflicts in which two or more States are engaged against each other . . . [and] conflicts extending to the territory of two or more States.”<sup>77</sup>

International courts have defined characteristics of NIAC including the “intensity of the conflict and the organisation of the parties to the conflict.”<sup>78</sup> In *Prosecutor v. Hardinaj*, the ICTY elaborated on the first criterion of organization. The Trial Chamber summarized “several indicative factors, none of which are, in themselves, essential to establish whether the ‘organization’ criterion is fulfilled.” These

. . . include the existence of a command structure and disciplinary rules and mechanisms within the group; the existence of a headquarters; the fact that the

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<http://www.icty.org/x/cases/limaj/tjug/en/lim-tj051130-e.pdf> [hereinafter *Limaj Judgment*].

<sup>74</sup> THE HAGUE CONFERENCE, FINAL REPORT ON THE MEANING OF ARMED CONFLICT IN INTERNATIONAL LAW 1 (2010).

<sup>75</sup> *Id.* at 2.

<sup>76</sup> *Prosecutor v. Tadic*, Case No. IT-94-1-T, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 70 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995),

<http://www.icty.org/x/cases/tadic/acdec/en/51002.htm> [hereinafter *Tadic Interlocutory Appeal*].

<sup>77</sup> *See* INT’L INST. OF HUMANITARIAN L., THE MANUAL ON THE LAW OF NON-INTERNATIONAL ARMED CONFLICT WITH COMMENTARY 2 (2006), <http://www.ihl.org/ihl/Documents/The%20Manual%20on%20the%20Law%20of%20NIAC.pdf> (“When a foreign State extends its military support to the government of a State within which a non-international armed conflict is taking place, the conflict remains non-international in character.”).

<sup>78</sup> *Tadic Judgment*, *supra* note 17, at para. 562. *See also* THE HAGUE CONFERENCE, FINAL REPORT ON THE MEANING OF ARMED CONFLICT IN INTERNATIONAL LAW 15 (2010).

group controls a certain territory; the ability of the group to gain access to weapons, other military equipment, recruits and military training; its ability to plan, coordinate and carry out military operations, including troop movements and logistics; its ability to define a unified military strategy and use military tactics; and its ability to speak with one voice and negotiate and conclude agreements such as cease-fire or peace accords.<sup>79</sup>

The ICTY Judgment identified factors for evaluating the second criterion of intensity, including

. . . the number, duration and intensity of individual confrontations; the type of weapons and other military equipment used; the number and caliber of munitions fired; the number of persons and type of forces partaking in the fighting; the number of casualties; the extent of material destruction; and the number of civilians fleeing combat zones.<sup>80</sup>

In addition, U.N. Security Council resolutions on the situation may indicate the existence of an intense conflict.<sup>81</sup> However, none of the listed factors “are, in themselves, essential to establish that the criterion [of intensity] is satisfied.”<sup>82</sup>

The situation in Syria meets the definition of NIAC because, first, it is confined within the territory of one state<sup>83</sup> and Syria is the

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<sup>79</sup> Prosecutor v. Haradinaj, Case No. IT-04-84-T, Judgment, para. 60 (Int’l Crim. Trib. for the Former Yugoslavia Apr. 3, 2008), <http://www.icty.org/x/cases/haradinaj/tjug/en/080403.pdf> [hereinafter Haradinaj Judgment].

<sup>80</sup> *Id.* at para. 49.

<sup>81</sup> Haradinaj Judgment, *supra* note 79, at para. 49; Limaj Judgment, *supra* note 73, at para. 90.

<sup>82</sup> Haradinaj Judgment, *supra* note 79, at para. 49.

<sup>83</sup> While the vast majority of fighting has been confined within the Syrian State, some fighting has spilled over into Turkey and Lebanon. See Jose Tracey Shelton, *Syria Conflict Continues to Spill Over into Turkey*, GLOBAL POST, Oct. 12, 2012, <http://www.globalpost.com/dispatch/news/regions/middle-east/syria/121012/syria-turkey-border-clashes-tensions-assad-fsa>; Josh Wood,

only state party to the conflict.<sup>84</sup> Additionally, organized groups engaged in intense fighting characterize the conflict. According to military analyst Joseph Holliday at the Institute for the Study of War, “the armed Syrian opposition [the Free Syrian Army] is identifiable, organized and capable, even if not unified.”<sup>85</sup> The Free Syrian Army (FSA) is an overwhelmingly Sunni umbrella group “nominally headquartered in Turkey” with ties to three major Syrian militias: the Khalid bin Walid Brigade, the Harmoush Battalion, and the Omari Battalion.<sup>86</sup> Additionally, “insurgents have been able to maintain control of key terrain near Damascus and central Homs.”<sup>87</sup> Both the Syrian government and FSA forces also face opposition from al-Qaeda-linked armed insurgent groups that have complicated and intensified the civil war.<sup>88</sup>

The fighting has been ongoing for more than three years, outlasting any other Arab Spring uprising in terms of sustained,

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*Sectarian Conflict Kills 17 in Northern Lebanon Spillover of Syrian Civil War*, N.Y. TIMES, Dec. 9, 2012, <http://www.nytimes.com/2012/12/10/world/middleeast/syria-conflict-spills-over-to-northern-lebanon.html>; Joe Parkinson & Maria Abi-Habib, *Syria Fight Spills Over Borders*, WALL ST. J., Apr. 9, 2012, <http://online.wsj.com/news/articles/SB10001424052702303815404577333292759268460>.

<sup>84</sup> Turkey and Israel have been minimally involved in the conflict, launching air strikes and artillery attacks within Syria. These attacks have been relatively isolated incidents and not significant enough to classify the conflict as international. See Isabel Kershner & Michael R. Gordon, *Israeli Airstrike in Syria Targets Arms Convoy, U.S. Says*, N.Y. TIMES, Jan. 30, 2013, <http://www.nytimes.com/2013/01/31/world/middleeast/syria-says-it-was-hit-by-strikes-from-israeli-planes.html>; Seyhmus Cakan & Kadir Celikcan, *Turkey strikes back at Syria after mortar kills five*, REUTERS, Oct. 3, 2012, <http://www.reuters.com/article/2012/10/03/us-syria-crisis-idUSBRE88J0X720121003>.

<sup>85</sup> JOSEPH HOLLIDAY, INST. FOR THE STUDY OF WAR, SYRIA’S ARMED OPPOSITION 6 (2012), [http://www.understandingwar.org/sites/default/files/Syrias\\_Armed\\_Opposition.pdf](http://www.understandingwar.org/sites/default/files/Syrias_Armed_Opposition.pdf).

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 3.

<sup>88</sup> Khaled Yacoub Oweis & Arshad Mohammed, *Syria rebels push al Qaeda back; U.S. open to Iran role*, REUTERS, Jan. 5, 2014, <http://www.reuters.com/article/2014/01/05/us-syria-crisis-idUSBREA040DG20140105>.

intense fighting. Both sides are reportedly using military-grade weapons<sup>89</sup> and reports by the media and government sources cite the use of chemical agents. The government has “relied on artillery attacks and air power” as well as tank ground attacks.<sup>90</sup> It has used multi-barrel rocket launchers, which opposition forces have also accessed—likely by stealing them from government weapons caches.<sup>91</sup> Opposition forces are also launching pipe bombs made from parts taken from unexploded government bombs.<sup>92</sup> Recently, the government has been using cluster bombs, which are inherently more indiscriminate than conventional bombs.<sup>93</sup> Additionally, chemical weapons likely have been used in the conflict by government forces and possibly by rebel forces.

The number of deaths, refugees, and material destruction from the conflict has been devastatingly high. In July 2013, the civil war had claimed the lives of over 100,000 people<sup>94</sup> and the U.N. had registered 1.8 million refugees from Syria.<sup>95</sup> In September 2012, the opposition group Syria Network for Human Rights “estimated more than 2.9 million homes, schools, mosques, churches and hospitals

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<sup>89</sup> David Enders, *Access to heavy weapons changing dynamics of Syrian conflict*, CHARLOTTE OBSERVER, Dec. 1, 2012, <http://www.charlotteobserver.com/2012/12/01/3699940/access-to-heavy-weapons-changing.html>.

<sup>90</sup> *Variety of Weapons Increases in Syrian Conflict* (NPR radio broadcast Oct. 27, 2012) (transcript available at <http://www.npr.org/2012/10/27/163760135/variety-of-weapons-increases-in-syrian-conflict>).

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> C.J. Chivers, *Syria Unleashes Cluster Bombs on Town, Punishing Civilians*, N.Y. TIMES, Dec. 20, 2012, [http://www.nytimes.com/2012/12/21/world/middleeast/syria-uses-cluster-bombs-to-attack-as-many-civilians-as-possible.html?\\_r=0](http://www.nytimes.com/2012/12/21/world/middleeast/syria-uses-cluster-bombs-to-attack-as-many-civilians-as-possible.html?_r=0). See generally *Cluster Munitions*, HUMAN RIGHTS WATCH, <http://www.hrw.org/category/topic/arms/cluster-munitions> (last visited Dec. 26, 2013).

<sup>94</sup> *Syria death toll now about 100,000, says UN chief Ban*, BBC, July 25, 2013, <http://www.bbc.co.uk/news/world-middle-east-23455760>.

<sup>95</sup> Patrick J. McDonnell, *Don't reject refugees from Syrian civil war*, U.N. tells world, L.A. TIMES, July 17, 2013, <http://www.latimes.com/news/nationworld/world/la-fg-wn-un-syrian-refugees-20130717,0,5018699.story>.

had been damaged or destroyed since the uprising began in March 2011.”<sup>96</sup> Although the Security Council has not authorized military action or sanctions, it has issued resolutions condemning the actions of the Syrian government on the Turkish border.<sup>97</sup> Furthermore, the U.N. Human Rights Council has condemned Syria for war atrocities.<sup>98</sup>

The Syrian government has received military support from Iran, Hezbollah, and Russia.<sup>99</sup> The opposition received military support from Saudi Arabia<sup>100</sup> and non-military assistance from the United States,<sup>101</sup> France, and the United Kingdom<sup>102</sup> prior to the recent reports of chemical weapons use. In response to chemical weapons allegations, the United States stated a change in policy from providing only humanitarian aid to providing military support as well.<sup>103</sup> In July 2013, the U.S. was moving weapons to Jordan with

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<sup>96</sup> *Conflict has left Syria a shell of its former self*, L.A. TIMES, Nov. 26, 2012, <http://articles.latimes.com/2012/nov/26/world/la-fg-syria-destruction-20121127>.

<sup>97</sup> *UN condemns Syrian attack on Turkish town*, BBC, Oct. 5, 2012, <http://www.bbc.co.uk/news/world-europe-19840022>.

<sup>98</sup> Human Rights Council, *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, U.N. Doc. A/HRC/21/50 (Aug. 15, 2012).

<sup>99</sup> See Zayn Knaub, *Why is Hezbollah in Syria?*, SMALL WARS J., (Nov. 19, 2013), <http://smallwarsjournal.com/jrnl/art/why-is-hezbollah-in-syria>; Will Fulton, Joseph Holliday & Sam Wyer, *Iranian Strategy in Syria*, INST. FOR THE STUDY OF WAR, <http://www.understandingwar.org/report/iranian-strategy-syria>; Terry Atlas, *Russia increases Syria Arms while joining push for talks*, BLOOMBERG NEWS, Oct. 31, 2013, <http://www.bloomberg.com/news/2013-10-31/russia-increases-syria-arms-while-joining-push-for-talks.html>.

<sup>100</sup> C.J. Chivers & Eric Schmitt, *Saudis Step Up Help for Rebels in Syria with Croatian Arms*, N.Y. TIMES, Feb. 25, 2013, <http://www.nytimes.com/2013/02/26/world/middleeast/in-shift-saudis-are-said-to-arm-rebels-in-syria.html>.

<sup>101</sup> *Syria conflict: John Kerry extends U.S. aid to rebels*, BBC, Feb. 28, 2013, <http://www.bbc.co.uk/news/world-middle-east-21612130>.

<sup>102</sup> Ashley Fantz, *UK joins France in supporting Syrian rebel coalition*, CNN.COM, Nov. 20, 2012, <http://www.cnn.com/2012/11/20/world/syria-civil-war/>.

<sup>103</sup> *Syria: U.S. 'to arm rebels' – latest*, TELEGRAPH, <http://www.telegraph.co.uk/news/worldnews/middleeast/syria/10120064/Syria-US-to-arm-rebels-live.html> (last visited Dec. 26, 2013).

plans to arm “small groups of vetted Syrian rebels . . . .”<sup>104</sup> This change in policy, however, would not internationalize the civil war, changing it from NIAC to an international armed conflict (IAC).

Internationalization may occur when a foreign state provides support to an insurgent group against the local government.<sup>105</sup> Both the ICJ and the ICTY have articulated tests for determining state control, respectively called the effective control test and the overall control test. In *Nicaragua v. U.S.*, the ICJ held that, for “conduct to give rise to legal responsibility . . . it would in principle have to be proved that the state had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.”<sup>106</sup> In *Tadic*, the ICTY espoused its overall control test that requires that the state: “i) provided financial and training assistance, military equipment and operational support as well as; ii) participates in the organization, co-ordination or planning of military operations.”<sup>107</sup> In the case of Syria, U.S. and allied military support to the opposition would not internationalize the conflict under either test. Both tests require a degree of control by the foreign state over the planning of military operations. Sending military supplies, by itself, fails to satisfy either test.

In Syria, crimes against humanity and widespread torture have also triggered ICL liability. According to the Public International Law and Policy Group, “[i]n Syria, mass atrocity crimes are being committed on a scale not seen since Kosovo, Rwanda, and

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<sup>104</sup> Adam Entous, Julian E. Barnes, & Siobhan Gorman, *U.S. Begins Shipping Arms to Syrian Rebels*, WALL ST. J., June 26, 2013, <http://online.wsj.com/article/SB10001424127887323419604578569830070537040.html>.

<sup>105</sup> Sylvain Vité, *Typology of armed conflicts in international humanitarian law: legal concepts and actual situations*, 91 INT’L REV. OF THE RED CROSS 69, 71 (2009), <http://www.icrc.org/eng/assets/files/other/irrc-873-vite.pdf>.

<sup>106</sup> *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, para. 115 (June 27) [hereinafter *Nicaragua*].

<sup>107</sup> *Prosecutor v. Naletilic*, Case No. IT-98-34-T, Judgment, para. 198 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 31, 2003), [http://www.icty.org/x/cases/naletilic\\_martinovic/tjug/en/nal-tj030331-e.pdf](http://www.icty.org/x/cases/naletilic_martinovic/tjug/en/nal-tj030331-e.pdf).



Darfur.”<sup>108</sup> Government and opposition forces have both committed international crimes, including unlawful killing and torture, with the United Nations reporting that the government’s abuses are more widespread and serious.<sup>109</sup> Human Rights Watch reports it has identified at least 27 torture centers run by Syrian government intelligence agencies as of 2012.<sup>110</sup>

Violations of the Geneva Conventions during the civil war would also trigger war crimes liability. War crimes are the most serious violations of IHL,<sup>111</sup> triggering ICL liability and possible prosecution by the ICC.<sup>112</sup> The Rome Statute mirrors the Geneva Conventions IAC-NIAC distinction in its criminalization of war crimes. The Statute sets out four categories of war crimes which include serious violations of: the four Geneva Conventions; the laws and customs of international armed conflict; Common Article 3; and law and customs of non-international armed conflict.<sup>113</sup>

### 3. *Protections*

As a NIAC, the Syrian conflict triggers Article 3, common to all Geneva Conventions. If Syria were a member of the 1977 Protocol Additional (II) to the Geneva Conventions of August 12, 1949—which it is not—additional protections would apply.<sup>114</sup> In

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<sup>108</sup> PUB. INT’L L. & POL’Y GRP., HUMANITARIAN INTERVENTION IN SYRIA: THE LEGAL BASIS, EXECUTIVE SUMMARY (2012), <http://www.internationallawbureau.com/wp-content/uploads/2012/08/PILPG-The-Legal-Basis-for-Humanitarian-Intervention-in-Syria.pdf>.

<sup>109</sup> *Update 4-Syrian govt forces, rebels committing war crimes* –U.N., REUTERS, Aug. 15, 2012, <http://www.reuters.com/article/2012/08/15/syria-crisis-un-rights-idUSL6E8JFA3220120815>.

<sup>110</sup> *Syria: Torture Centers Revealed*, HUMAN RIGHTS WATCH (July 3, 2012), <http://www.hrw.org/news/2012/07/03/syria-torture-centers-revealed>.

<sup>111</sup> Tadic Interlocutory Appeal, *supra* note 76, at para. 128.

<sup>112</sup> AMERICAN UNIV. WASHINGTON COLL. OF LAW, INTERNATIONAL CRIMINAL LAW: A DISCUSSION GUIDE 12 (John Cerone & Susana SaCouto eds.) (last visited Dec. 26, 2013).

<sup>113</sup> Knut Dormann, *War Crimes under the Rome Statute of the International Criminal Court, with a Special Focus on the Negotiations on the Elements of the Crimes*, 7 MAX PLANCK Y.B. OF U.N. L. 341, 343-45 (2003).

<sup>114</sup> Common Article 3 is the only provision applicable to non-international armed conflict unless another arrangement is agreed to by the parties.

addition to NIAC protections, the parties' conduct also triggers individual criminal liability under ICL<sup>115</sup> including war crimes liability.

Common Article 3 ("CA3") is a blanket provision that promises humane treatment by prohibiting the most egregious of conduct. In certain situations, Protocol II may also apply and go beyond CA3 to address distinct groups of people and prohibit certain military conduct. CA3 is the only provision in the Geneva Conventions to address armed conflict that is non-international in nature.<sup>116</sup> Under CA3,

- (1) Persons taking no active part in the hostilities, including members of any armed forces who have laid down their arms and those placed 'hors de combat' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

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NIAC may trigger additional protections depending on the state's status as a party to other treaty regimes. Examples of other treaty regimes include the 1980 Convention on Certain Conventional Weapons and its Protocols; the 1997 Ottawa Convention banning anti-personnel land mines; the 1993 Chemical Weapons Convention; and the Convention for the Protection of Cultural Property and its 1999 Second Protocol.

<sup>115</sup> See discussion *infra* in Season Two analysis, Part II.B.

<sup>116</sup> Commentary to the Geneva Conventions (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field at 48 ("... Article 3... is only applicable to them until such time as a special agreement between the Parties has brought into force between them all or part of the other provisions of the Convention.") [hereinafter Commentary to Geneva Convention I].

- (b) taking of hostages;
  - (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
  - (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.
- (2) The wounded and sick shall be collected and cared for.

Protocol II provides additional protections to CA3 but has a narrower scope of applicability.<sup>117</sup> While Syria is party to the Geneva Conventions, it is not party to Protocol II. Protocol II is triggered in the following situations:

The conflict is between the armed forces of a Party and “dissident armed forces”;

The dissident armed forces are “under responsible command”; and

These dissident armed forces “exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations” and adhere to the Protocol.<sup>118</sup>

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<sup>117</sup> “[W]here the conditions of application of the Protocol are met, the Protocol and common Article 3 will apply simultaneously, as the Protocol’s field of application is included in the broader one of common Article 3. On the other hand, in a conflict where the level of strife is low, and which does not contain the characteristic features required by the Protocol, only common Article 3 will apply.” Commentary to Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) 4457 [hereinafter Commentary to Additional Protocol II].

<sup>118</sup> Protocol Additional to the Geneva Conventions of 1949 (Protocol II) art. 1, Dec. 12, 1977 16 I.L.M. 1442 (1977) [hereinafter Additional Protocol II]. *See*

Protocol II expands the list of fundamental guarantees for persons not taking part or who have ceased to take part in hostilities. These include:

- (a) violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;
- (b) collective punishments;
- (c) taking of hostages;
- (d) acts of terrorism;
- (e) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;
- (f) slavery and the slave trade in all forms;
- (g) pillage;
- (h) threats to commit any of the foregoing acts.”<sup>119</sup>

Where it applies, Protocol II provides the civilian population a “general protection against the dangers arising from military operations.”<sup>120</sup> It promulgates the following rule: “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

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*Qualification of Armed Conflicts*, GENEVA ACADEMY OF INT’L HUMANITARIAN LAW AND HUMAN RIGHTS,  
[http://www.geneva-academy.ch/RULAC/qualification\\_of\\_armed\\_conflict.php](http://www.geneva-academy.ch/RULAC/qualification_of_armed_conflict.php)  
(last visited Dec. 27, 2013).

<sup>119</sup> Additional Protocol II, *supra* note 118, at art. 4(2).

<sup>120</sup> *Id.* at art. 13.

which is to spread terror among the civilian population are prohibited.”<sup>121</sup>

#### D. Libya: International and Non-International Armed Conflict Legal Protections

##### 1. *Background*

The dictator Muammar Gaddafi ruled Libya since he seized power in a military coup in 1969. During Gaddafi’s rule, U.S.-Libyan relations deteriorated, and the Libyan government allegedly committed a number of state-sponsored acts of terrorism against U.S. nationals including the 1988 Lockerbie bombings.<sup>122</sup> The regime also pursued weapons of mass destruction, but changed its position in 2003, leading to a lifting of international sanctions.<sup>123</sup> Still, there was little domestic political change in Libya during this period, and tensions intensified between the Gaddafi government, the Libyan Islamist Fighting Group (LIFG), and the Muslim Brotherhood.<sup>124</sup>

The Arab Spring revolutions in Tunisia and Egypt provided a catalyst for a domestic revolution in Libya in February 2011.<sup>125</sup> Protests broke out in eastern region of Cyrenaica and spread to Benghazi and the capital of Tripoli.<sup>126</sup> On February 17, the opposition movement, called the National Conference for the Libyan

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<sup>121</sup> *Id.* at art. 13.2

<sup>122</sup> CHRISTOPHER BLANCHARD, CONG. RESEARCH SERV., RL33142, LIBYA: TRANSITION AND U.S. POLICY 15, 16 (2012), <http://www.fas.org/sgp/crs/row/RL33142.pdf>; Ian Black & Peter Beaumont, *Gaddafi ordered Lockerbie bombing- ex-minister*, THE GUARDIAN, Feb. 23, 2011, <http://www.guardian.co.uk/uk/2011/feb/23/gaddafi-lockerbie-bombing-minister-libya>.

<sup>123</sup> BLANCHARD, *supra* note 122, at 16.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Protests in Libya: Blood in the Streets*, THE ECONOMIST ONLINE (Feb. 20, 2011, 16:40), [http://www.economist.com/blogs/newsbook/2011/02/protests\\_libya](http://www.economist.com/blogs/newsbook/2011/02/protests_libya). See also Maggie Michael & Bassem Mroue, *Libya Protests: Tripoli in Open Revolt, Pro-Gaddafi Gangs Terrorize Capital*, THE HUFFINGTON POST (May 25, 2011), [http://www.huffingtonpost.com/2011/02/26/libya-protests-tripoli-re\\_n\\_828586.html](http://www.huffingtonpost.com/2011/02/26/libya-protests-tripoli-re_n_828586.html).



government forces, known as Operation Unified Defender.<sup>134</sup> By August, the opposition was able to attack Gaddafi strongholds, and the Libyan National Transitional Council had killed Gaddafi and established control over Libyan territory.<sup>135</sup> By November 2011, NATO forces had withdrawn from Libya.<sup>136</sup>

## 2. Classification

The conflict in Libya qualifies as “Season D”—IHL protections apply for IAC and NIAC, and ICL protections also apply. An IAC generally refers to an armed conflict between states or, as previously discussed,<sup>137</sup> an internal armed conflict that is internationalized by foreign state intervention, as was the case in Libya.

Under Common Article 2 of the Geneva Conventions, an IAC exists in the case of “declared war or of any other armed conflict . . . between two or more of the High Contracting Parties, even if the state of war is not recognized by them.”<sup>138</sup> A state does not have to formally declare war, nor do all parties to the conflict have to recognize the armed conflict for the situation to qualify as an international armed conflict and trigger IHL protections.<sup>139</sup>

The conflict between the Libyan government and domestic rebel forces met the organization and intensity requirements of a NIAC. Beginning in February 2011, the situation could be classified as a NIAC due to the organization and intensity of the fighting

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<sup>134</sup> Ivo H. Daalder & James G. Stavridis, *NATO's Victory in Libya: The Right Way to Run an Intervention*, 91 FOR. AFF. (2012), <http://www.foreignaffairs.com/articles/137073/ivo-h-daalder-and-james-g-stavridis/natos-victory-in-libya>; *NATO and Libya: Operation Unified Protector*, NATO OTAN (Feb./Oct. 2011), <http://www.nato.int/cps/en/natolive/71679.htm>.

<sup>135</sup> *Id.*

<sup>136</sup> *UN Security Council votes to end Libya operations*, BBC, Oct. 27, 2012, <http://www.bbc.co.uk/news/world-africa-15481143>.

<sup>137</sup> See *infra* Part III.C(2) (discussing internationalization of a non-international armed conflict).

<sup>138</sup> Geneva Conventions Relative to the Treatment of Prisoners of War art. 2, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135. Article 2 is common to all Geneva Conventions.

<sup>139</sup> Commentary to Geneva Convention I, *supra* note 116, at 32.

between the Libyan government and opposition forces.<sup>140</sup> The rebels were organized under the National Conference for the Libyan Opposition and, within the first days of the conflict, gained control of significant areas of Libyan territory.<sup>141</sup> Both sides employed military-grade weapons, including “automatic weapons, rocket-propelled grenades, and heavy machine guns.” The government has also used tanks and surface-to-air missiles.<sup>142</sup>

As the conflict continued and the government’s abuses came to light, the Security Council authorized U.N. members to take all means necessary to protect civilians.<sup>143</sup> By the end of March, NATO forces had taken international military action in Libya, which internationalized the civil conflict by direct intervention. IAC protections were triggered once fighting between NATO and the Libyan government commenced, while NIAC protections applied to the conflict between the government and domestic opposition forces. In August, the opposition forces took control of Tripoli and held the Gaddafi stronghold of Sirte by October 2011.<sup>144</sup> This marked the initial de-escalation of the revolution and eventual end of both armed conflicts.

The conflict in Libya can be described as a “mixed” IAC-NIAC conflict. Between February and November 2011, Libya was engaged in both non-international and international armed conflicts.<sup>145</sup> The revolution against Gaddafi began in February 2011 as a non-international armed conflict; in March 2011, with NATO’s

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<sup>140</sup> See *infra* Season Three discussion on organization and intensity criteria, Part II.C.1.

<sup>141</sup> CHRISTOPHER BLANCHARD & JIM ZANOTTI, *supra* note 121, at 1.

<sup>142</sup> Harriet Sherwood & Xan Rice, *Gaddafi troops captured in Tunisia while fighting intensifies in Misrata*, THE GUARDIAN, Apr. 29, 2011, <http://www.guardian.co.uk/world/2011/apr/29/gaddafi-troops-captured-in-tunisia>.

<sup>143</sup> S.C. Res. 1973, paras. 4, 6, U.N. Doc. S/RES/1973 (Mar. 17, 2011).

<sup>144</sup> Mehrdad Payandeh, *The United Nations, Military Intervention, and Regime Change in Libya*, 52 VA. J. INT’L L. 355, 358 (2012).

<sup>145</sup> *Libya: Rule of Law in Armed Conflicts Project*, GENEVA ACADEMY OF INT’L HUMANITARIAN LAW AND HUMAN RIGHTS, [http://www.genevaacademy.ch/RULAC/applicable\\_international\\_law.php?id\\_stat\\_e=128](http://www.genevaacademy.ch/RULAC/applicable_international_law.php?id_stat_e=128) (last updated Feb. 28, 2012).



intervention, the conflict became a mixed IAC-NIAC. In November, when NATO forces withdrew and the National Transitional Council consolidated power, the situation returned to a conflict of a non-international nature. By February 2012, there was no longer an armed conflict of either type in Libya.

### 3. *Protections*

The conflict between the Gaddafi regime and NATO forces triggered IAC protections under the Geneva Conventions and Additional Protocol I. IAC triggers the highest degree of protections for civilians and combatants under IHL. Separately, the conflict between the Libyan government and rebel forces triggered NIAC protections.<sup>146</sup>

IAC law affords protection to the wounded and sick, prisoners of war (POWs), and the civilian population. During IAC, the Geneva Conventions and Additional Protocol I regulate the conduct of warfare.

First, the Geneva Conventions provide protections for the sick and wounded of the armed forces during both land and naval conflicts.<sup>147</sup> Such personnel are regarded as “ ‘hors de combat,’ [and] from that moment sacred and inviolable.”<sup>148</sup> Under the Conventions, they

shall be treated humanely and cared for by the Parties to the conflict in whose power they may be, without any adverse distinction founded on sex, race, nationality, religion, political opinions, or any other similar criteria. Any attempts upon their lives, or violence to their persons, shall be strictly prohibited;

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<sup>146</sup> See *infra* Part II.C.3.

<sup>147</sup> Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 13, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 134 [hereinafter Geneva Convention I]; Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 13, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 134 [hereinafter Geneva Convention II].

<sup>148</sup> Commentary to Geneva Convention I, *supra* note 116, at 132.

in particular, they shall not be murdered or exterminated, subjected to torture or to biological experiments; they shall not wilfully be left without medical assistance and care, nor shall conditions exposing them to contagion or infection be created.<sup>149</sup>

Second, the Geneva Conventions require state parties to protect POWs. POW status is specifically reserved for combatants taking part in international armed conflict. POWs must be “humanely treated” and “[a]ny unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody is prohibited, and will be regarded as a serious breach of the present Convention.”<sup>150</sup> The Third Geneva Convention forbids “physical mutilation or . . . medical or scientific experiments of any kind which are not justified by the medical, dental or hospital treatment of the prisoner concerned and carried out in his interest.”<sup>151</sup> The Convention also maintains a standard of humane treatment for combatants during the time of captivity.<sup>152</sup> POWs are protected from physical and mental torture for purposes of information<sup>153</sup> and have the right to complain about the conditions of their captivity.<sup>154</sup>

Finally, the Conventions protect civilians and civilian objects under the rule of distinction. As a rule, “the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objects and accordingly shall direct their operations only against military objectives.”<sup>155</sup> Civilians are protected from being the “object of

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<sup>149</sup> Geneva Conventions I, *supra* note 147, at art. 12; Geneva Conventions II, *supra* note 147, at art. 12.

<sup>150</sup> Geneva Convention (III) Relative to the Treatment of Prisoners of War art. 13, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III].

<sup>151</sup> *Id.*

<sup>152</sup> *See id.* at arts. 13, 17-18, 26, 29, 78.

<sup>153</sup> *Id.*, at art. 17.

<sup>154</sup> *Id.*, at art. 78.

<sup>155</sup> Protocol Additional to the Geneva Conventions of 1949 (Protocol I), arts. 48-52, Dec. 12, 1977, 16 I.L.M. 1391 (1977) [hereinafter Additional Protocol I].

attack . . . [and] [a]cts or threats of violence the primary purpose of which is to spread terror among the civilian population . . . .”<sup>156</sup>

As a general rule, “the right of Parties to the conflict to choose methods or means of warfare is not unlimited.”<sup>157</sup> Under article 35 of API,

(2) [i]t is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering. (3) It is [also] prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.<sup>158</sup>

Military strategy must also take into account the principle of proportionality. As applied,

the attack must be directed against a military objective with means which are not disproportionate in relation to the objective, but are suited to destroying only that objective, and the effects of the attacks must be limited in the way required by the Protocol; ‘moreover,’ even after those conditions are fulfilled, the incidental civilian losses and the damages must not be excessive.<sup>159</sup>

If faced with several options “for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects.”<sup>160</sup>

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<sup>156</sup> *Id.* at art. 51(2).

<sup>157</sup> *Id.* at art. 35(1).

<sup>158</sup> *Id.* at art. 35.

<sup>159</sup> *Id.* at art. 51(5); Commentary to Additional Protocol I, 624-25.

<sup>160</sup> Additional Protocol I, *supra* note 155, at art. 57(c)(3).

### III. JUSTIFIED AND UNJUSTIFIED DIFFERENCES IN PROTECTIONS UNDER CURRENT INTERNATIONAL LAW

International law did not apply to the Arab Spring in a uniform manner. Although IHL protections only applied in Libya and Syria, ICL offered a baseline of protection for civilians facing egregious government attacks in Egypt and Bahrain. For the armed conflicts in Libya and Syria, IHL provided a lower degree of protection for civilians and combatants in Syria's civil war than in Libya's international conflict. This distinction is unjustified because it assigns a different weight to human integrity based on the sovereign status of the parties to the conflict. In addition, it does not reflect the reality that NIAC poses an equivalent, if not greater, threat to affected populations and the international community. A lesser protection regime also provides the opportunity for abuse during NIAC. Furthermore, the dual system of a mixed conflict creates practical problems of legal compliance and enforcement.

#### A. ICL v. IHL: A Justified Distinction

Distinctions between international criminal ("Season B") and humanitarian ("Season C" and "Season D") legal protections under the current regime are justified. ICL (non-war crime) liability applies irrespective of an armed conflict. It prohibits large-scale violations against the civilian population, including crimes against humanity and genocide. In contrast, IHL protections are triggered by the existence of an armed conflict. It provides a set of protections specific to armed conflict that address combatants, prisoners of war, and civilians through the principles of distinction and proportionality.

ICL protections are better suited to situations that do not rise to the level of an armed conflict. During an armed conflict, IHL recognizes legally permissible killings while providing protections to persons not taking part in hostilities. For example, CA3 prohibits the killing of individuals not taking part in the conflict, and IAC goes further, requiring that attacks be carried out in a manner "expected to cause the least danger to civilian objects."<sup>161</sup> In situations of non-

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<sup>161</sup> *Id.* at art. 57.

armed conflict, IHL would not apply; however, ICL protections trigger criminal liability for widespread or systematic attack against the population. ICL liability depends on the impact on the affected population without any reference to military calculations.

The distinction between international criminal and humanitarian legal protections is justified. ICL protections are important intermediary protections between basic international human rights protections and international protections exclusive to the time of war.

#### B. IAC v. NIAC: An Unjustified Distinction

The distinction between IAC (“Season C”) and NIAC (“Season D”) in IHL is unjustified. Protections are assigned based on the sovereign status of the parties, ignoring the factual reality that NIAC threatens vulnerable populations as well. Thus, the IAC-NIAC distinction is unjustified because it fails to provide a uniform legal standard of protections against potential atrocities. This is illustrated by the comparison of Libya and Syria, which did not merit the same protections under current international law.

While IHL affords a lesser degree of protections in Syria, the civil war poses a greater threat to the population and international security than the Libyan conflict. Libya and Syria both experienced prolonged periods of violence. In Libya, the IAC lasted for eight months; and, by October 2011, the combined casualties for the IAC and NIAC were estimated at 25,000.<sup>162</sup> By July 2013, the Syrian conflict had been ongoing for more than two years with a death count exceeding 100,000 including more than 36,000 civilians.<sup>163</sup> The Syrian civil conflict has greatly destabilized the region, creating almost two million refugees,<sup>164</sup> drawing in mercenaries and foreign

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<sup>162</sup> Ian Black, *Libyan revolution casualties lower than expected, says new government*, THE GUARDIAN, Jan. 8, 2013, <http://www.guardian.co.uk/world/2013/jan/08/libyan-revolution-casualties-lower-expected-government>.

<sup>163</sup> *Syria death toll tops 100,000*, TELEGRAPH, Jun. 26, 2013, <http://www.telegraph.co.uk/news/worldnews/middleeast/syria/10142892/Syria-death-toll-tops-100000.html>.

<sup>164</sup> McDonnell, *supra* note 95.

fighters,<sup>165</sup> and heightening sectarian violence.<sup>166</sup> Despite the seriousness of the civil conflict, IHL affords a lesser degree of protection in Syria than the Libyan armed conflict.

Under the Geneva Conventions, CA3 is the only provision that applies in Syria.<sup>167</sup> CA3 does not govern the conduct of warfare or distinguish the wounded combatant from the general population. In the absence of a POW status, Common Article 3 protects the captured combatant from inhumane treatment and unfair prosecution; however, the individual remains vulnerable to national laws against treason and other crimes. In effect, CA3 is a compromised text, weighing the concern for human integrity against the state's interest in sovereign authority to govern its internal affairs.<sup>168</sup> It “merely provides for the application of the principles of the Convention and not for the application of specific provisions . . . .”<sup>169</sup> Under CA3, the Syrian government is held to general principles and allowed greater flexibility relative to IAC in its conduct against perceived threats.

In contrast, the Libyan armed conflict triggered an extensive number of provisions that, unlike CA3, are more specific, practical, and less vague.<sup>170</sup> As a rule, IAC requires the parties to distinguish

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<sup>165</sup> Bassem Mroue, *Assad says Syria is fighting foreign mercenaries*, TORONTO STAR, May 16, 2012, [http://www.thestar.com/news/world/2012/05/16/assad\\_says\\_syria\\_is\\_fighting\\_foreign\\_mercenaries.html](http://www.thestar.com/news/world/2012/05/16/assad_says_syria_is_fighting_foreign_mercenaries.html).

<sup>166</sup> See AMB. FREDERIC C. HOF, RAFIK HARIRI & ALEX SIMON, THE CENTER FOR THE PREVENTION OF GENOCIDE, SECTARIAN VIOLENCE IN SYRIA'S CIVIL WAR: CAUSES, CONSEQUENCES AND RECOMMENDATIONS FOR MITIGATION (2013), <http://www.ushmm.org/m/pdfs/20130325-syria-report.pdf>.

<sup>167</sup> See Commentary to the Geneva Conventions I, *supra* note 116.

<sup>168</sup> See *id.* at 48. “It [art. 3] at least ensures the application of the rules of humanity which are recognized as essential by civilized nations and provides a legal basis for charitable interventions by the International Committee of the Red Cross or any other impartial humanitarian organization—interventions which in the past were all too often refused on the ground that they represented unfriendly interference in the internal affairs of a State.”

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at 150 (comparing Article 15 with Common Article 3, which provides general principles of protection without specific provisions as to the parties responsibilities and conduct in achieving the protections).

between civilians and military objects and “direct their operations only against military objectives.”<sup>171</sup> Civilians are protected from being the “object of attack . . . [and] [a]cts or threats of violence the primary purpose of which is to spread terror among the civilian population . . . .”<sup>172</sup> Furthermore, IAC limits the means of warfare<sup>173</sup> and requires military action to adhere to the principle of proportionality.<sup>174</sup> IAC protections also give legal status to the wounded and sick and “lay down the actual steps to be taken for their benefit from the moment they fall on the battlefield.”<sup>175</sup> POW status also applies to captured combatants and confers a series of protections that maintain a standard for humane treatment during the time of custody.<sup>176</sup>

In *Nicaragua*, the ICJ referred to CA3, which applies in Syria, as “rules which, in the court’s opinion, reflect . . . ‘elementary considerations of humanity.’”<sup>177</sup> Protocol II (which applies to certain non-international armed conflicts) embodies, to an extent, the principle of distinction,<sup>178</sup> but, as the Commentary points out, “[u]nlike Protocol I [related to international armed conflict], which contains detailed rules, only the fundamental principles on protection for the civilian population are formulated in Protocol II . . . .”<sup>179</sup> Even these fundamental protections may not apply in Syria because Syria is not party to Protocol II. Although courts and states can interpret and apply rules of IAC to NIAC as customary law,<sup>180</sup> the codified regime at the core of IHL protections still differentiates the situation and the applicable protections. There is significant disagreement over the

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<sup>171</sup> Additional Protocol I, *supra* note 155, at arts. 48-52.

<sup>172</sup> *Id.* at art. 51(2).

<sup>173</sup> *Id.* at art. 35.

<sup>174</sup> *Id.* at art. 51(5); Commentary to Additional Protocol I at 624-25.

<sup>175</sup> Commentary to Geneva Convention I, *supra* note 116, at 150 (discussing art. 15).

<sup>176</sup> *See* Geneva Convention III, *supra* note 150, at arts. 13, 17, 18, 26, 29, 78.

<sup>177</sup> *Nicaragua*, *supra* note 106. The ICJ views Common Article 3 as reflecting the “elementary considerations of humanity” referred to in its prior 1949 opinion of *Corfu Channel, Merits*, 1949 I.C.J. 22 (April 9).

<sup>178</sup> *See infra* note 194.

<sup>179</sup> Commentary to Additional Protocol II, *supra* note 117, at 4762.

<sup>180</sup> *See* INT’L INST. OF HUMANITARIAN LAW, *supra* note 77.

substance of customary international law, creating ambiguity in possibly applying and enforcing IAC protections in NIAC. The IAC-NIAC distinction is mirrored in ICL war crimes liability established by the Rome Statute.

The IAC-NIAC distinction is also subject to abuse. During NIAC, the government or opposition forces may take advantage of the less restrictive protections regime, especially if the state is not a party to subsequent agreements that regulate the conduct of war. In Syria, for example, President Assad used cluster bombs against the oppositional forces with significant impact on the civilian population. The legal argument against the use of cluster bombs is stronger under IAC either because they violate articulated rules of distinction or because many states have banned their use,<sup>181</sup> but this protection is less clear in NIAC.<sup>182</sup> Because Syria is not party to the Convention on Cluster Munitions, the government might legitimately argue their use is permissible under the current legal regime. A similar analysis applies to the use of chemical weapons. At the start of the current conflict, Syria was not a party to the Chemical Weapons Convention(CWC), which prohibits the use of chemical weapons, and it did not join the CWC until October 2013.<sup>183</sup> Although IHL regulates the use of weapons during IAC,<sup>184</sup> it does not include a similar provision for NIAC unless agreed to in arrangements beyond the Geneva Conventions.

In addition to the potential for abuse by government forces, current international law leaves “little incentive for insurgent forces to comply with laws of war . . . [and] granting the privileges to insurgents might promote greater reciprocity on their part.”<sup>185</sup> NIAC offers few protections for and restrictions on the opposition group. This increases the likelihood that the opposition will also commit atrocities and ignore basic humanitarian concerns. In the case of

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<sup>181</sup> See Additional Protocol II, *supra* note 118, at art. 13.

<sup>182</sup> See *id.*

<sup>183</sup> Blake & Mahmud, *supra* note 69, at 250.

<sup>184</sup> Additional Protocol I, *supra* note 155, at art. 35.

<sup>185</sup> James G. Stewart, *Towards a single definition of armed conflict in international humanitarian law: A critique of internationalized armed conflict*, 85 INT'L REV. OF THE RED CROSS 313, 347 (2003), [http://www.icrc.org/eng/assets/files/other/irrc\\_850\\_stewart.pdf](http://www.icrc.org/eng/assets/files/other/irrc_850_stewart.pdf).



Syria, the opposition has allegedly committed human rights abuses for which it should be held accountable. Elimination of the IAC-NIAC distinction would promote greater compliance on both sides, offering greater protections and incentive for adhering to international law.

The continuation of a dual system of protections also poses theoretical and practical problems. Situations that trigger both sets of protections, the so-called “mixed conflict,” create confusion and complicate the application of IHL. For example, Libya hosted both an NIAC and IAC, creating a dual system of law within a single conflict. To determine the applicable protections regime, each engagement would require a separate evaluation and classification as part of the international or non-international armed conflict. Mixed conflicts may further complicate the analyses in situations when opposition forces of each armed conflict physically mix during an altercation. Furthermore, the current system creates virtuous and vicious cycles of protections. For example, when the international community decides in favor of intervention (as was the case in Libya), the internationalization of that conflict leads to a greater set of protections. On the other hand, in Syria, the international community’s failure to act has led to lesser protections because the conflict remains non-international. These cycles are also problematic because they give bodies such as the Security Council or NATO considerable power in determining the legal protections that apply to a conflict, instead of creating standing and determinate legal regimes. Yet, the most apparent flaw of the dual system is its assignment of two protections regimes in the same conflict, in which one set of protections arbitrarily gives a different weight to human integrity depending on the sovereign status of the oppositional force. Ultimately, the IAC-NIAC distinction assigns a different weight to human integrity depending on the sovereign status of the parties to the conflict. In *Tadić*, the ICTY argued that the different weight given to human integrity under current IHL was unjust. The court asked:

Why protect civilians from belligerent violence, or ban rape, torture or the wanton destruction of hospitals, churches, museums or private property, as well as proscribe weapons causing unnecessary suffering when two sovereign states are engaged in

war, and yet refrain from enacting the same bans or providing the same protection when armed violence has erupted ‘only’ within the territory of a sovereign state? If international law, while of course duly safeguarding the legitimate interests of states, must gradually turn to the protection of human beings, it is only natural that the aforementioned dichotomy should gradually lose its weight.<sup>186</sup>

A dual system of law in a mixed conflict is avoidable if the NIAC is “internationalized,” thereby applying one protections regime to both conflicts. However, one must apply a burdensome and uncertain test on whether or not the conflict has met the criteria to be “internationalized”—a standard which international courts continue to debate. For example, Syria already exhibits some factors of foreign involvement that suggest a future internationalized conflict. However, the transition from NIAC to IAC is a gray area and difficult to determine. Eliminating the distinction between IAC and NIAC would also resolve the internationalization dilemma by rendering it a moot point and making universal application of IHL less complicated and contentious.

Finally, the international character of modern civil conflicts justifies a collapsed single protection regime. This would reflect the reality of domestic conflict and its contribution to international destabilization. For example, although Syria is involved in a traditional civil war, numerous foreign states have been affected. Regional security concerns have prompted the direct involvement of Israel, Turkey, and Lebanon. In addition, the refugee situation has impacted Jordan, Lebanon, Turkey, Iraq, and Egypt. The Syrian conflict is not an isolated situation. Foreign alliances currently play a role in providing military and non-military assistance to both parties to the conflict.

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<sup>186</sup> Tadic Interlocutory Appeal, *supra* note 76, at para. 97.

## IV. THE SOVEREIGNTY PROBLEM

In the latter part of the twentieth century, international legal trends have transformed the concept of state sovereignty. Current analysis of the Arab Spring demonstrates that sovereignty norms in ICL and IHL must be interpreted in light of these changes. The next section describes the foundations and transformation of state sovereignty and argues that the current problems in applying IHL and ICL to the Arab Spring are attributed to an undue preference for traditional and outdated conceptions of sovereignty. The Geneva Conventions were ratified in the 1940s and the Rome Statute in the 1990s. They preceded the changing conceptions of sovereignty in the latter part of the twentieth century and the emergence of the Responsibility to Protect movement in the beginning of the twenty-first century, respectively. IHL and ICL should be understood in light of changing contexts and the international understanding of sovereignty. Given the continued occurrence of armed conflict in the modern era and the international community's changing understanding of sovereignty, we must re-evaluate the current treatment and application of IHL and ICL protections. International protections should be a uniform standard of protections that apply to all populations affected by conflict, genocide, and crimes against humanity.

## A. IAC-NIAC Distinction Incompatible with Sovereignty Trends

The problems identified in this Article stem from the same conceptual source: sovereignty. The IAC-NIAC distinction reflects the traditional sensitivity of a state's right to govern its domestic affairs without intrusion. The drafting history shows that states vehemently opposed a single protection regime for armed conflict (IAC and NIAC), fearing that internal insurgencies would take advantage of international protections from domestic action and gain legal status.<sup>187</sup> Historically, as the Commentary points out,

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<sup>187</sup> Commentary to the Geneva Convention I, *supra note* 116, at art. 3, para. 60. The last sentence of Article 3 prohibits such protections from conferring legal status on the belligerent group. This “meets the fear—always the same one—that the application of the Convention, even to a very limited extent, in cases of civil war may interfere with the de jure Government's lawful suppression of the

“[a]pplications by a foreign Red Cross or by the International Committee of the Red Cross have more than once been treated as unfriendly attempts to interfere in the internal affairs of the country concerned.”<sup>188</sup>

Similarly, ICL protections are also limited because of sovereignty concerns. The Rome Statute is a consent-based document, consistent with the Westphalian model in that states are only bound to the international law to which they agree.<sup>189</sup> Many countries, including the United States, Israel, and most Arab states are not party to the Rome Statute. This creates practical enforcement issues. Similarly, Security Council action and ICC referral are based on the consent of the five permanent members (P5). As noted by international legal scholar Andrew Guzman,

[a]ny issue that is of truly global importance will affect each of the P5 members in a different way and a resolution can only be adopted if each of them believes it to serve their interests . . . The need to focus on areas where the P5 can agree limits the Council to a relatively small subset of the world’s problems.<sup>190</sup>

## B. Foundations of Sovereignty

Traditional sovereignty or “the conception that a state must have control of its external policies and be free of external authority structures is an essentially European invention, dating from the sixteenth and seventeenth centuries”<sup>191</sup> with the signing of the Treaty

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revolt, or that it may confer belligerent status, and consequently increased authority, upon the adverse Party.”

<sup>188</sup> Commentary to the Geneva Conventions, *supra note* 116, at art. 3, para. 39.

<sup>189</sup> For a recent argument that consent should be minimized in international law, see Andrew T. Guzman, *Against Consent*, 52 VA. J. INT’L L. 747 (2012).

<sup>190</sup> *Id.* at 780.

<sup>191</sup> Robert O. Keohane, *Ironies of Sovereignty: The European Union and the United States*, 40 JCMS 743 (2002),

of Westphalia.<sup>192</sup> At the time, Hugo Grotius, the “father of international law”<sup>193</sup> conceived of “an authentic law of nations which was based on the ‘mutual consent’ of sovereigns acting in the context of a ‘great society of States.’”<sup>194</sup> The paradox of this system, however, was that “sovereignty created the territorial state and the international system.”<sup>195</sup> This system would be held together by states that were each independent and did not have to answer to a higher authority.

Stephen Krasner identifies several sovereignty typologies including Westphalian sovereignty and international legal sovereignty. According to Krasner, Westphalian sovereignty is the idea that a “state has the right to determine its own authority structures, which implies that states should avoid intervening in each other’s internal affairs.”<sup>196</sup> International legal sovereignty is the idea that “juridically independent territorial entities merit recognition and with it such rights and privileges as membership in international organizations.”<sup>197</sup>

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[http://isites.harvard.edu/fs/docs/icb.topic162929.files/B\\_Political\\_Integration/KeohaneIroniesOfSovereignty.pdf](http://isites.harvard.edu/fs/docs/icb.topic162929.files/B_Political_Integration/KeohaneIroniesOfSovereignty.pdf).

<sup>192</sup> While the peace of Westphalia was a significant watershed moment in the international system and for the codification of traditional sovereignty norms “[it] was not a clear break with the past: political entities with exclusive control over a well-defined territory existed well before the Peace...” Stephen D. Krasner, *Westphalia and All That*, in IDEAS AND FOREIGN POLICY: BELIEFS, INSTITUTIONS, AND POLITICAL CHANGE (Judith Goldstein & Robert O. Keohane eds., 1993), <http://www.polsci.wvu.edu/faculty/hauser/PS362/KrasnerIdeasForeignPolicyWestphalia.pdf>.

<sup>193</sup> Boutros Boutros-Ghali, *A Grotian Moment*, 18 FORDHAM INT’L L.J. 1609, 1609 (1995).

<sup>194</sup> Mark W. Janis, *Sovereignty and International Law: Hobbes and Grotius*, in ESSAYS IN HONOUR OF WANG TIEYA 391, 396 (Ronald St. John Macdonald ed., 1993) (quoting HUGO GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES 20 (Francis W. Kelsey trans., The Classics of International Law vol. 2) (1913)).

<sup>195</sup> FRANCIS M. DENG, SADAIKIEL KIMARO, TERRENCE LYONS, DONALD ROTHCHILD & I. WILLIAM ZARTMAN, SOVEREIGNTY AS RESPONSIBILITY 11 (1996).

<sup>196</sup> Jack Donnelly, *State Sovereignty and Human Rights* 71 (Univ. of Denver Hum. Rts. & Welfare Working Paper, Paper No. 21, 2004), <http://www.du.edu/korbel/hrhw/workingpapers/2004/21-donnelly-2004.pdf>.

<sup>197</sup> Stephen D. Krasner, *The Case for Shared Sovereignty*, 16 J. OF DEMOCRACY 69, 70-71 (2005).

The United Nations Charter, the foundational document of modern international law, enshrines both concepts of sovereignty and also sets their limits. Article 2(4) of the Charter upholds the notion of Westphalian sovereignty, asserting that states “shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state. . .”<sup>198</sup> Chapter VII of the Charter then limits that sovereignty by giving power to the Security Council to take military and non-military action against a member to “restore international peace and security.”<sup>199</sup>

Article 2(1) of the Charter codifies international legal sovereignty, stating that the United Nations is “based on the principle of the sovereign equality of all its Members.”<sup>200</sup> State membership in the United Nations necessarily enhances international legal sovereignty by recognizing each state as an independent and legitimate legal entity, able to enter into treaties and conventions and participate in the General Assembly, Security Council, and other U.N. bodies. Chapter II of the Charter then sets out mechanisms and justifications for limiting international legal sovereignty by expelling members from various U.N. committees or from the U.N. itself.<sup>201</sup>

### C. Transformation of Sovereignty: The Fading of the Westphalian Model

In the latter part of the twentieth century, international trends have transformed the concept of sovereignty and have eroded the prominence of Westphalian sovereignty. States have acceded to international regimes that promote universal standards, agreed to the jurisdiction of international judicial bodies, and authorized non-governmental bodies to monitor and enforce states’ commitments. In exercise of their legal sovereignty, states have consented to external authorities and thereby weakened the Westphalian model. These international trends are illustrated in the fields of human rights, international security, and the creation of international criminal courts.

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<sup>198</sup> U.N. Charter art. 2(4).

<sup>199</sup> *Id.*, at art. 39.

<sup>200</sup> *Id.*, at art. 2(1).

<sup>201</sup> *Id.*, at arts. 3-6.

### 1. *Human rights*

In the twentieth century, human rights protections have gained universal standing with states that have acceded to agreements and joined organizations that promote global norms for human rights.<sup>202</sup> States “enter into such [human rights] accords with the full understanding that in so doing they might limit their own autonomy by altering domestic views about legitimate behavior, authorizing external monitoring of internal practices, or creating third-party adjudication procedures that give individual citizens, not just states, legal standing.”<sup>203</sup> Each is evidence to the fact that the state no longer enjoys the exclusive right to define humane treatment under its jurisdiction.

### 2. *International security*

International security institutions illustrate states’ consent for an international body to take coercive measures against a sovereign. Under Art. 42 of the United Nations Charter, “[s]hould the Security Council consider that measures provided for in Art. 41 [use of un-armed force] would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security.” Such enforcement actions are exceptions to Art. 2(7) and the limitations on intervention in “matters which are essentially within the domestic jurisdiction of any state . . . .”<sup>204</sup> States have also agreed to support the Council’s decisions, even if they are non-permanent members or took no part in the vote. This further violates the Westphalian system, which promotes the state’s external authority and “prohibits governments from agreeing to rules defining a process, over which it does not have a veto, that can confer obligations not specifically provided for in the original agreement.” Beyond supporting the

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<sup>202</sup> STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY 110-12 (1999).

<sup>203</sup> *Id.* at 106.

<sup>204</sup> U.N. Charter art. 2(7).

Council's decisions, some states have supported military intervention absent Security Council authorization for humanitarian reasons.<sup>205</sup>

### 3. *International criminal courts*

The enforcement of international criminal law has made significant progress in the twentieth century with the creation of international courts and tribunals.<sup>206</sup> Following World War II, the London Agreement of August 8, 1945, called for a "trial of war crimes whose offenses have no particular geographic location."<sup>207</sup> This established the Trial of German Major War Criminals, known as the Nuremberg Trial, and, in Asia, the Allied Forces established a similar proceeding known as the Tokyo Tribunal. Both tribunals exercised jurisdiction over individuals charged with crimes against peace, war crimes, and crimes against humanity. These adjudications enforced the principle of individual liability for international crimes<sup>208</sup> and international adjudication, independent of the state where the crimes occurred or the nationality of the actors.

In the 1990s, the United Nations created tribunals to address the atrocities committed in Yugoslavia and Rwanda.<sup>209</sup> In both cases,

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<sup>205</sup> See *infra* Part IV.D (discussing humanitarian intervention and the emerging norm of responsibility to protect).

<sup>206</sup> The 1919 Treaty of Versailles included provisions for an international tribunal and domestic military courts (of the Allied and Associated Powers) to try German officials. The enforcement of such provisions was unsuccessful. However, the Netherlands refused to extradite the Kaiser, and the other provisions of the Treaty were unsuccessfully enforced. See BETH VAN SCHAAK & RON SLYE, *A CONCISE HISTORY OF INTERNATIONAL CRIMINAL LAW* 23-25 (2007) (referring to arts. 227-28 of the 1919 Treaty of Versailles).

<sup>207</sup> London Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis art. 1, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279.

<sup>208</sup> Judgment of Nuremberg Tribunal (also cited in the Rome Statute). In its judgment, the Nuremberg Tribunal stated that "crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can international criminal law be enforced."

<sup>209</sup> The ICTY was established by S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993), and the ICTR was established by S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994). The United Nations also assisted in the establishment of criminal tribunals for atrocities associated with Cambodia, East Timore, and Sierra Leone.



the Security Council cited the situation “to constitute a threat to international peace and security,” a clear reference to its Chapter VII powers and the states’ assent to international action in domestic affairs. The tribunals function under the procedures and substantive rules of their respective Statutes and outside the domestic judicial system. Both Statutes include general provisions for a fair trial;<sup>210</sup> reference to the international standard of due process under the International Covenant on Civil and Political Rights;<sup>211</sup> and an appeals process with interlocutory review and a separate Appeals Chamber.<sup>212</sup> The Statutes include substantive provisions that assign individual criminal responsibility,<sup>213</sup> and the tribunals exercise personal, territorial, and temporal jurisdiction.<sup>214</sup> The tribunals have concurrent jurisdiction with national courts.<sup>215</sup> However, they take precedence over domestic proceedings,<sup>216</sup> and national adjudication does not bar the tribunal from initiating a subsequent proceeding. Whereas the ICTY and ICTR are limited to their respective conflicts, the ICC is “a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern . . . .”<sup>217</sup>

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<sup>210</sup> Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 15, Annex to S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993), <http://www.icty.org/sid/135> [hereinafter ICTY Statute].

<sup>211</sup> *Id.* at art. 21. *See also* Statute of the International Criminal Tribunal for Rwanda, art. 14, Annex to S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994), <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N95/140/97/PDF/N9514097.pdf?OpenElement> (adopting the rules of procedure and evidence of the ICTY) [hereinafter ICTR Statute].

<sup>212</sup> ICTY Statute, *supra* note 211, at art. 25(1). *See also* ICTR Statute, *supra* note 212, at art. 12 (stating the original intention for the ICTR to share the same Appeals Chamber as created under the ICTY Statute).

<sup>213</sup> ICTY Statute, *supra* note 211, at art. 7; ICTR Statute, *supra* note 212, at art. 6.

<sup>214</sup> ICTY Statute, *supra* note 211, at arts. 6, 8; ICTR Statute, *supra* note 212, at arts. 5,7.

<sup>215</sup> ICTR Statute, *supra* note 212, at art. 8(1); ICTY Statute, *supra* note 211, at art. 9(1).

<sup>216</sup> ICTY Statute, *supra* note 211, at art. 9(2); ICTR Statute, *supra* note 212, at art. 8(2) (granting concurrent jurisdiction with “primacy over the national courts of all States.”).

<sup>217</sup> Rome Statute, *supra* note 15, at art. 1.

The creation of international criminal courts arguably violates a state's Westphalian sovereignty by giving power to an entity outside of the state's control. First, the courts are created by third parties, whether by a coalition of states or an international organization such as the United Nations. The trial is generally outside the state's judicial system, and its procedures are established through external documents (Charters and Statutes) also adopted by third parties. Second, these tribunals create substantive changes to the state's penal system. They impose international standards and assign individual liability, prosecuting conduct for which there may not be a domestic equivalent.<sup>218</sup> Third, international courts exercise jurisdiction over the individuals of or conduct that occurred in a particular state that would otherwise fall under the state's sovereign jurisdiction.<sup>219</sup> The tribunals and courts take precedence over national proceedings, a stark contradiction to the traditional notion that a state has primary authority to govern its own affairs.

#### D. Responsibility to Protect (R2P)

The emergence of Responsibility to Protect (R2P) represents a culmination of the decline of traditional notions of Westphalian sovereignty in international law. It is a recent doctrine that highlights the importance of humanitarian protections against absolute sovereignty. The IAC-NIAC distinction is incompatible with this notion that humanitarian protections are not secondary to sovereignty concerns.

Responsibility to Protect is an emerging norm that recognizes

- (1) the *jus cogens*, or fundamental nature of the prohibition against atrocity crimes; (2) historical state practice regarding humanitarian intervention; and (3)

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<sup>218</sup> See London Agreement, *supra* note 208, for the definition of "crimes against humanity."

<sup>219</sup> See ICTR Statute, *supra* note 212, at arts. 1, 5-8 (establishing the competence of the tribunal, personal jurisdiction, individual criminal responsibility, territorial and temporal jurisdiction, and concurrent jurisdiction); S.C. Res. 827, *supra* note 210 (establishing a tribunal "for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 . . .").

*opinio juris*, or state belief, that when atrocity crimes are unchecked within a state, the threat to international stability is so great that states can justifiably use force for the limited purpose of stopping these crimes.<sup>220</sup>

At the 2005 United Nations World Summit, “Heads of State and Government unanimously endorsed the Responsibility to Protect, pledging to never again abandon people threatened by the crimes of genocide, war crimes, crimes against humanity and ethnic cleansing.”<sup>221</sup> The Summit, first, affirmed the view that, “[w]hen individual states fail to protect their own populations, they have no sovereign right to nonintervention.”<sup>222</sup> It also “set a new standard for the United Nations and the international community as a whole: Failure to take action to protect populations from genocide and other atrocities is failure to fulfill a clearly acknowledged duty.”<sup>223</sup> Of importance, R2P challenges the sovereign right of nonintervention that is the primary characteristic of the Westphalian model. The IAC-NIAC distinction fails to reflect the current understanding that traditional sovereignty has given way to universal standards and protections.

According to Secretary General Boutros Boutros-Ghali at the end of the twentieth century:

A major intellectual requirement of our time is to rethink the question of sovereignty—not to weaken its essence, which is crucial to international security and cooperation, but to recognize that it may take more than one form and perform more than one function. This perception could help solve problems both within and among states. And underlying the rights of the individual and the rights of peoples is a dimension of universal sovereignty that resides in all

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<sup>220</sup> PUB. INT’L L. & POL’Y GRP., *supra* note 108, at 7.

<sup>221</sup> *Id.*

<sup>222</sup> Alicia L. Bannon, Comment, *The Responsibility to Protect: The U.N. World Summit and the Question of Unilateralism*, 115 YALE L.J. 1157, 1161 (2006).

<sup>223</sup> *Id.* at 1162.

humanity and provides all peoples with legitimate involvement in issues affecting the world as a whole. It is a sense that increasingly finds expression in the gradual expansion of international law.<sup>224</sup>

## V. SOLUTIONS

### A. International Humanitarian Law Solutions

Populations affected by armed conflict should benefit from the same regime of heightened protections. This requires the creation of one protection regime for all armed conflict that corrects the existing flaws. Armed conflict should be evaluated under a uniform standard, irrespective of its international nature, to determine whether or not the situation triggers IHL protections. This analysis should consider such factors that infer an adverse effect on the population and need for a protections regime. Second, the same protections regime should apply to all populations in armed conflict.

For the purposes of IHL protections, we propose that “armed conflict” be defined as the following:

- (a) conflict between two or more organized armed forces under the responsible command of authorities, with the ability to exercise control over the territory, engaged in fighting of some intensity; or
- (b) a conflict between two or more states, or declared war between two or more states.

Subpart (b) embodies the traditional notion of international armed conflict. It reflects the situation of imminent or actual conflict where a hierarchal command (the state) intends to use, or has already used, armed force.

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<sup>224</sup> Boutros Boutros-Ghali, *Empowering the United Nations*, 71 FOR. AFF. 99 (1992), <http://www.foreignaffairs.com/articles/48466/boutros-boutros-ghali/empowering-the-united-nations>.

Subpart (a) eliminates the distinction between IAC and NIAC in favor of criteria that indicate a situation of intense violence and need for international protections. This standard incorporates the elements of armed conflict, irrespective of the parties' status as sovereign states. It requires the existence of two or more organized armed forces under the responsible command of authorities. The criterion of a responsible command "implies some degree of organization of the insurgent armed group or dissident armed forces . . . . It means an organization capable, on the one hand, of planning and carrying out sustained and concerted operations, and on the other, of imposing discipline in the name of a de facto authority."<sup>225</sup> The existence of an armed force with an identifiable command distinguishes the armed conflict from internal disturbance and does not affect the state's ability to handle insurgencies or situations of unorganized violence.<sup>226</sup> Subpart (a) also requires the authorities to have "the ability to control the territory." This criterion assures the ability of all parties—whether states or opposition forces—to enforce the rules of war.

A significant level of organization and territorial control for the insurgent party is required. This is "likely to exclude internal disturbances, riots, and terrorist activities from the scope of a single body of international humanitarian law."<sup>227</sup> Subpart (a) also depends on a threshold level of violence. This reflects the key value of IHL as a protection of human life during a period of vulnerability and potential threat.

Under the proposed definition, a situation that meets either Subpart (a) or (b) is an armed conflict and triggers traditional IAC protections. The protection regime should, however, contain the caveat that the triggering of protections does not affect the legal status of the parties. This alleviates the historical concern that application of international protections confers legal status on rebel forces equivalent to that of a state. Under the proposed analysis,

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<sup>225</sup> Commentary to Additional Protocol II, *supra* note 117, at 4463.

<sup>226</sup> Stewart, *supra* note 186, at 345-46 (referring to Brazilian government's suggestion for APII threshold).

<sup>227</sup> *Id.* at 346.

armed conflict would trigger IAC protections, rendering CA3 and Protocol II obsolete.

Indeed, the proposed analysis reflects the international community's finding that IAC-like protections and principles should apply to NIAC. For example, the Manual on the Law of Non-international Armed Conflict details the rules and protections that apply during NIAC; however, many of these principles are extensions of IAC protections interpreted by courts as customary international law and applied to all armed conflict, including NIAC.<sup>228</sup> Courts and other authoritative bodies have recognized that certain aspects of IAC are customary law for NIAC; however, which aspects apply to NIAC remains unsettled. These developments demonstrate a recognition that the IAC-NIAC distinction is unjustified, but at the same time, the distinction remains a significant feature of treaty and customary international law.

#### B. International Criminal Law Solutions

The undue preference for traditional sovereignty norms must also be minimized in the current enforcement of ICL and at the ICC. While ICC enforcement has thus far taken place in African conflicts, the Arab Spring's call for major judicial reform might provide a catalyst for the Middle Eastern countries to join ICL institutions. ICL enforcement could be achieved by promoting ICC membership within the Arab League. Furthermore, the creation of a regional or other independent ICC referral mechanism would encourage Arab nations to join and make the process less politicized.

It is fitting that Tunisia, the country that set the Arab Spring in motion, has also been the first Middle Eastern country to ratify the Rome Statute post-Arab Spring.<sup>229</sup> As countries in the region deal domestically with judicial reform issues in the coming years, ICC

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<sup>228</sup> For example, the principle of military necessity is not found in Common Article 3 or Additional Protocol II. However, the ICTY has found the principle to apply based on customary international law. See INT'L INST. OF HUMANITARIAN LAW, *supra* note 77.

<sup>229</sup> Daniel Makosky, *Tunisia Ratifies Rome Statute, Joining ICC*, JURIST (Jun. 25, 2011), <http://jurist.org/paperchase/2011/06/tunisia-ratifies-rome-statute-joining-icc.php>.

membership could aid in “national judicial reform, spurring spates . . . to enact legislation that reflects a responsibility to ensure accountability for grave crimes at the national level. In turn, civil society monitors [can] ensure that governments follow through on their commitments to combat impunity, and advance good governance and rule of law.”<sup>230</sup>

The Arab League, with international assistance, might also set up an *ad hoc* war crimes tribunal to prosecute war criminals in Syria, the site of the most serious of the Arab Spring’s war crimes, after the conflict has ended.<sup>231</sup> Such an institution would be similar to the ICTY or ICTR, or hybrid courts, and could provide a realistic alternative to embracing international law within Arab institutions in the absence of widespread acceptance of ICC jurisdiction.<sup>232</sup> U.N. investigators are currently compiling information on international criminal violations in Syria.<sup>233</sup> Given the scale of atrocities already committed, the international community must identify a proper forum for future prosecution.

#### CONCLUSION

The Arab Spring has been called “the world’s first true human rights revolution: the young protestors of the Arab street

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<sup>230</sup> Leila Hanafi & Haidi Sadik, *ICC Membership Can Protect Arab Spring Gains*, MUFTAH (Jan. 3, 2013), <http://muftah.org/icc-membership-can-protect-arab-spring-gains/>.

<sup>231</sup> A proposed statute for an international tribunal to prosecute Syrian war crimes has been drafted by a group of international experts led by the Public International Law and Policy Group. See <http://www.csmonitor.com/World/2013/1003/Revenge-or-retribution-Is-it-possible-to-prosecute-war-crimes-for-Syria>.

<sup>232</sup> Aryeh Neier, *An Arab War-Crimes Court for Syria*, N.Y. TIMES, Apr. 4, 2012, <http://www.nytimes.com/2012/04/05/opinion/an-arab-war-crimes-court-for-syria.html? r=0>.

<sup>233</sup> Stephanie Nebehay, *UN investigators urge ICC trials for Syria’s war criminals*, CHRISTIAN SCI. MONITOR (Feb. 18, 2013), <http://www.csmonitor.com/World/Latest-News-Wires/2013/0218/UN-investigators-urge-ICC-trials-for-Syria-s-war-criminals>; Ian Black, *Syrian leaders should face justice at ICC, UN says*, GUARDIAN, Feb. 18, 2013, <http://www.theguardian.com/world/2013/feb/18/syria-murder-torture-charges-icc>.

spoke the language of democracy and human rights, and the international community responded with the same lexicon.”<sup>234</sup> The Arab revolutions and international legal trends demonstrate the global advancement and acceptance of universal human rights values in the past sixty years. The idea that foreign intervention is justified against states committing mass atrocity crimes against its own people has gained widespread support. Still, international law continues to provide inconsistent protections during armed conflicts based on the sovereign status of the parties, and ICL continues to face enforcement problems. While these issues are difficult to resolve, the international community can take certain actions to correct these concerns. These include the elimination of the unjustified distinction between IAC and NIAC and promotion of increased ICC membership. Time and again, the international community has promised “never again” in the wake of the world’s most horrific atrocities. The international community must address the flaws in its current legal regime if it is to stand beside its promise.

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<sup>234</sup> Rosa Brooks, *Lessons for International Law from the Arab Spring*, 28 AM. U. INT’L L. REV. 101 (2013).