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Brendan Delany

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Note

Just Wars with Unjust Allies: Use of Force and Human Rights Considerations on the Russian Intervention in Syria

Brendan Delany*

Main Syrian Loyalist Factions	General Religious/Ethnic Composition	Armed Forces	Allies	Enemies
The Syrian Arab Republic ("SAR") (a.k.a. the Assad regime)	Arab Shia Muslims, Druze, Christians, other religious minority groups, pro-regime Sunni Arab Muslims.	The Military of Syria, including the Syrian Arab Army ("SAA") and the irregular National Defense Forces ("NDF").	Russia, Iran, all loyalist factions, other Iranian backed militias. (Note: All loyalist factions have a truce with Syrian Kurdistan.)	ISIL, all opposition factions.
Hezbollah	Shia Arab Muslims	Irregular armed groups	Russia, Iran, and all loyalist factions.	ISIL, all opposition factions.

* Brendan Delany is a third year law student graduating in May 2017, focusing his legal studies primarily on international and criminal law. He obtained his Bachelor of Arts Degree in History from Rutgers University, New Brunswick, and has had a lifelong interest in the history of the Middle East and Central Asia. In September 2016, this Note won the National Institute of Military Justice Admiral John S. Jenkins Prize for Excellence in Military. Brendan was also a member of the University of Minnesota team participating in the 4th Clara Barton International Humanitarian Law Competition in March 2017, where they won first prize as a team.

Main Syrian Loyalist Factions	General Religious/Ethnic Composition	Armed Forces	Allies	Enemies
Liwa Fatemiyoun	Shia Afghan Muslims (this is a foreign militia trained by Iran)	Irregular armed groups	Russia, Iran, and all loyalist factions.	ISIL, all opposition factions.
The Ba'ath Brigades	Sunni Arab Muslims	Irregular armed groups	Russia, Iran, and all loyalist factions.	ISIL, all opposition factions.
Syrian Social Nationalist Party	n/a	Irregular armed groups	Russia, Iran, and all loyalist factions.	ISIL, all opposition factions.

Main Syrian Opposition Factions	General Religious/Ethnic Composition	Armed Forces	Allies	Enemies
The Islamic State of Iraq and the Levant ("ISIL")	Sunni Arab Muslims	Irregular armed groups	Some minor Islamist opposition factions, Turkey (alleged).	Russia, Iran, all loyalist, Kurdish, and opposition factions.
Jabhat Fateh al-Sham ("JAN") (formerly Jabhat al-Nusra)	Sunni Arab Muslims	Irregular armed groups	Other Islamist opposition factions and some factions within the FSA.	Russia, Iran, all loyalist factions, ISIL, some factions within the FSA.
Free Syrian Army ("FSA")	Sunni Arab Muslims	Irregular armed groups	United States, France, Saudi Arabia, Turkey, Qatar, IF, some factions of JAN.	Russia, Iran, all loyalist factions; IF, some factions of JAN.

Main Syrian Opposition Factions	General Religious/Ethnic Composition	Armed Forces	Allies	Enemies
Islamic Front (“IF”)	Sunni Arab Muslims	Irregular armed groups	Turkey, Saudi Arabia, Qatar, JAN, FSA,	Russia, Iran, all loyalist factions; ISIL, Syrian Kurdistan.

Syrian Kurdish Factions	General Religious/Ethnic Composition	Armed Forces	Allies	Enemies
Syrian Kurdistan (Rojava)	Sunni Kurdish Muslims	The People’s Protection Units (“YPG”) and the Women’s Protection Units (“YPJ”) which are both irregular armed groups	Combined Joint Task Force – Operation Inherent Resolve (US led anti-ISIL military coalition), Russia, some groups of the FSA, currently have a truce with loyalist factions.	Turkey, ISIL, JAN, some factions within IF, some other Islamist opposition factions.

Table(s): Overview of the Syrian Civil War¹

1. See generally Elliot Friedland, Who’s Who in the Syrian Civil War, CLARION PROJECT, <https://www.clarionproject.org/factsheet/whos-who-syrian-war#> (last visited Feb. 28, 2017) (identifying and explaining the involved parties to the Syrian Civil War); see also Kathy Gilsinan, The Confused Person’s Guide to the Syrian Civil War, ATLANTIC (Oct. 29, 2015), <http://www.theatlantic.com/international/archive/2015/10/syrian-civil-war-guide-isis/410746/>; Hashmatallah Moslih, Iran ‘Foreign Legion’ Leans on Afghan Shia in Syria War, AL JAZEERA (Jan. 22, 2016), <http://www.aljazeera.com/news/2016/01/iran-foreign-legion-leans-afghan-shia-syria-war-160122130355206.html> (explaining how an estimated 20,000 Afghan Shia fighters fight with Iranian troops on behalf of the Assad regime); Mona Mahmood & Martin Chulov, Syrian War Widens Sunni-Shia Schism as Foreign Jihadis Join Fight for Shrines, GUARDIAN (June 4, 2013), <http://www.theguardian.com/world/2013/jun/04/>

I. INTRODUCTION AND BACKGROUND

Since the drafting of the United Nations (“UN”) Charter, many states have engaged in acts of armed intervention abroad. These states have justified such actions on the grounds of individual or collective self-defense, often claiming their troops were lawfully invited onto foreign soil by another state. In September 2015, Russian President Vladimir Putin justified Russia’s intervention in the Syrian Civil War in support of the Syrian government in the following terms:

Russia has always been firm and consistent in opposing terrorism in all its forms. Today, we provide military and technical assistance both to Iraq and Syria that are fighting terrorist groups. We think it is an enormous mistake to refuse to cooperate with the Syrian government and its Armed Forces, who are valiantly fighting terrorism face-to-face. We should finally acknowledge that no one but President Assad’s Armed Forces and Kurd Militia are truly fighting the Islamic State and other terrorist organizations in Syria.²

The government of Syria since 2011 has been fighting insurgent groups, which control vast swathes of territory within Syria, and both government and opposition forces have committed war crimes and other egregious human rights violations as a matter of systemic policy.³ While Russian military involvement was

syria-islamic-sunni-shia-shrines-volunteers; Aron Lund, *The Baath Battalions Move Into Damascus*, CARNEGIE ENDOWMENT FOR INT’L PEACE (Jan. 13, 2014), <http://carnegie-mec.org/diwan/54167?lang=en>; Nour Samaha, *The Eagles of the Whirlwind*, FOREIGN POL’Y (Mar. 28, 2016), http://foreignpolicy.com/2016/03/28/the-eagles-of-the-whirlwind/?utm_source=Sailthru&utm_medium=email&utm_campaign=New%20Campaign&utm_term=Flashpoints (explaining the SSNP’s participation in the civil war).

2. Vladimir V. Putin, President of the Russian Federation, Statement at the 70th Session of the UN General Assembly 6 (Sept. 28, 2015) (unofficial translation), http://gadebate.un.org/sites/default/files/gastatements/70/70_RU_EN.pdf; see also *Who Is Fighting Whom in Syria*, N.Y. TIMES (Sept. 30, 2015), <http://www.nytimes.com/2015/10/01/world/middleeast/the-syria-conflicts-overlapping-agendas-and-competing-visions.html> (explaining that Russia backs Assad’s regime).

3. See Human Rights Council, Rep. of the Independent International Commission of Inquiry on the Syrian Arab Republic, ¶ 26, U.N. Doc. A/HRC/30/48 (Aug. 13, 2015) [hereinafter UNHRC Report] (explaining how parties to the conflict “[c]onduct hostilities with little, if any, regard for the laws of war and, in particular, its foundational principle of distinction”); LAW AND

initially limited to airstrikes and the provision of armaments, Russian ground troops have increasingly become involved in Syrian government offensives, despite President Putin's recent announcement of a partial Russian withdrawal from the conflict.⁴ The Russian intervention raises questions regarding the legality of one state invoking self-defense, humanitarian intervention, or intervention by invitation as a basis for intervening in another state's internal armed conflict, where the inviting government lacks effective control of the nation's territory. State governments have a sovereign right under international law to invite foreign troops onto their territory but that right can erode or vanish in situations of internal armed conflict, as in Syria, where the legal legitimacy of an inviting government becomes uncertain.⁵ The intervention also raises questions regarding the potential liability incurred from willing collaboration with a government engaged in systemic human rights violations.

The civil war in Syria developed out of a period of civil unrest, beginning in March 2011 as part of the Arab Spring, when mass demonstrations against the dictatorial regime of President Bashar al-Assad began.⁶ The Assad regime responded

WAR IN SYRIA 3 (Willem-Jan Van Der Wolf & Claudia Tofan eds., 2013); *Syria: 'Shoot to Kill' Commanders Named: Security Council Should Refer Syria to ICC for Crimes Against Humanity*, HUM. RTS. WATCH (Dec. 15, 2011), <https://www.hrw.org/news/2011/12/15/syria-shoot-kill-commanders-named>.

4. See William Watkinson, *War on Isis: 'Hero' Russian Special Forces Soldier Calls Airstrike on Himself to Kill Daesh Fighters*, INT'L BUS. TIMES (Mar. 25, 2016), <http://www.ibtimes.co.uk/war-isis-hero-russian-special-forces-soldier-calls-airstrike-himself-kill-daesh-fighters-1551636>; *Report of the Russian Centre for Reconciliation of Opposing Sides in the Syrian Arab Republic*, MINISTRY DEF. RUSSIAN FED'N (Mar. 26, 2016), http://eng.mil.ru/en/news_page/country/more.htm?id=12081622@egNews ("In the course of last 24 hours, near [Palmyra, Homs province], the Russian Aerospace Forces have performed 40 sorties engaging 158 objects of terrorists."); *Second Group of Russian Sappers Arrived at Hmeymim Airbase in Syria*, MINISTRY DEF. RUSSIAN FED'N (Apr. 1, 2016), http://eng.mil.ru/en/news_page/country/more.htm?id=12082062@egNews (explaining Russian mine clearing operations in Palmyra, Syria).

5. See Christopher J. Le Mon, *Unilateral Intervention by Invitation in Civil Wars: The Effective Control Test Tested*, 35 N.Y.U. J. INT'L L. & POL. 741, 742–43 (2003); see also Yoram Dinstein, *Comments on War*, 27 HARV. J.L. & PUB. POL'Y 877, 882 (2004) ("Absent authorization by the Security Council, the only licit use of force today by one State against another—under both the Charter and customary international law—is in self-defense against an armed attack, and this is true whether the action is taken individually (by the direct victim of an armed attack) or collectively (by third States coming to the assistance of the victim State).").

6. Alexander De Juan & André Bank, *The Ba'athist Blackout? Selective*

to these protests by imprisoning, torturing, and killing thousands of opposition protestors, and, by June of 2011, an armed insurrection seeking the overthrow of the regime had emerged.⁷ Opposition insurgents, who are predominantly Sunni Arab, have since fractured into numerous groups, which include moderate groups backed by Western nations, such as the Free Syrian Army, as well as hardline Islamist groups, such as Jabhat Fateh al-Sham (al-Qaeda in Syria), and the Islamic State of Iraq and the Levant (“ISIL”).⁸ ISIL is also at war with various Kurdish militias who control much of northern Syria, and who are backed by a Western led military coalition in the form of airstrikes against ISIL.⁹ The Syrian government has received military assistance in the form of financing, weapons, special operations troops, and air support from Russia and Iran while many of the major opposition rebel groups have received weapons from Turkey and certain Sunni Arab Gulf States opposed to Syria and Iran.¹⁰ In July 2015, following a series of military defeats and rebel territorial gains, the Assad regime made a formal request to Russia for airstrikes targeting rebel groups.¹¹ Russian President Vladimir Putin condemned Western military support for opposition rebels as “attempts to undermine

Goods Provision and Political Violence in the Syrian Civil War, 52(1) J. PEACE RES. 91, 93–94 (2015); see also *Syria: The Story of the Conflict*, BBC NEWS (Oct. 9, 2015), <http://www.bbc.com/news/world-middle-east-26116868>.

7. *Syria: The Story of the Conflict*, *supra* note 6; see also LAW AND WAR IN SYRIA, *supra* note 3, at 3.

8. See generally sources cited *supra* note 6 (explaining the origins of the Syrian Civil War and the various parties to the conflict).

9. See generally *id.* (explaining ISIL’s alignment in relation to other groups in the Syrian Civil War).

10. See Laila Bessam & Tom Perry, *How Iranian General Plotted Out Syrian Assault in Moscow*, REUTERS (Oct. 6, 2015), <http://www.reuters.com/article/2015/10/06/us-mideast-crisis-syria-soleimani-insigh-idUSKCN0S02BV20151006>; see also Ilya Arkhipov, Stephan Kravechenko & Henry Meyer, *Putin Officials Said to Admit Real Syria Goal is Far Broader*, BLOOMBERG (Oct. 19, 2015), <https://www.bloomberg.com/news/articles/2015-10-19/putin-officials-said-to-admit-real-syrian-goals-are-far-broader>; *Russia Arming Syria to Counter Terrorism: Russian Weapons Will Help the Syrian Army Defeat Terrorism*, SPUTNIK NEWS (Sept. 9, 2015), <http://sputniknews.com/middle-east/20150909/1026775138/russia-syria-weapons.html#ixzz3sSkuEahK>; *Russia Carries Out First Air Strikes in Syria: Russian Bombs Target Positions, Vehicles and Warehouses that Moscow Believes Belong to ISIL, Defence Minister Says*, AL JAZEERA (Sept. 30, 2015), <http://www.aljazeera.com/news/2015/09/russian-carries-air-strikes-syria-150930133155190.html>; see generally sources cited *supra* note 6 (explaining the origins of the Syrian Civil War and the various parties to the conflict); sources cited *supra* note 4 (explaining Russian and Iranian assistance in the Syrian Civil War).

11. *Russia Carries Out First Air Strikes in Syria*, *supra* note 10.

the authority and legitimacy of the United Nations” and to “export revolutions” against a sovereign government.¹² The Russian Air Force began bombing opposition rebel targets within Syria in late September 2015.¹³ These airstrikes have succeeded in drastically shifting the momentum of the war in the Assad regime’s favor as the Syrian Arab Army (“SAA”) and pro-Assad paramilitary fighters in the National Defense Forces (“NDF”) have advanced on multiple fronts aided with Russian air support, as was recently shown in the encirclement and capture of the city Aleppo by the SAA.¹⁴

Russia’s attempted rescue of the faltering Assad regime likely carries several potential consequences under international law. If the Russian decision to intervene in Syria’s civil war is unlawful, then the Russian nation might be held liable for its breach of international obligations. This Note will examine three questions in the context of the Russian decision to intervene: First, may the government of a state legally invite another state to assist it in winning its own civil war? Second, if such invitations to intervene are lawful, is the legality of such interventions affected by the human rights record of the inviting state? Finally, if human rights concerns do not factor into the legality of interventions by invitation under international law, should they? The heinous and widespread atrocities committed against combatants and civilians alike, by members of the SAA and NDF, may also implicate Russian military commanders and political leaders. This Note will also analyze such potential issues of individual criminal liability, which will hinge on the current state of international humanitarian law, human rights law, and international criminal law.

12. Putin, *supra* note 2, at 3, 4.

13. See *Who is Fighting Whom in Syria*, *supra* note 2.

14. See generally Raja Abdulrahim, *Syrian Forces, Helped by Russian Airstrikes, Seize Rebel Stronghold: Advances in Northwestern Latakia Province Put Assad Regime in Striking Distance of Region Under Opposition Control*, WALL ST. J. (Jan. 24, 2016), <http://www.wsj.com/articles/syrian-forces-helped-by-russian-airstrikes-seize-rebel-stronghold-1453663114>; *What Comes Next in Aleppo?*, AL MASDAR NEWS (Dec. 19, 2016), <https://www.almasdarnews.com/article/comes-next-aleppo/>; sources cited *supra* note 4 (explaining Russian and Iranian assistance in the Syrian Civil War).

A. THE LAWS OF ARMED CONFLICT (*JUS AD BELLUM*):
REGULATING THE RESORT TO USE OF FORCE AND STATE
LIABILITY FOR WAGING WAR

International law regulates the decision by States to go to war (*jus ad bellum*) and the sub-category of international humanitarian law (“IHL”), also referred to as the law of armed conflict or law of war, regulates the conduct of forces while engaged in armed conflicts (*jus in bello*). IHL also defines the conduct and obligations of all parties and persons involved in an armed conflict. International law *jus ad bellum*, as such, concerns any breach of the non-use of force principle, such as crimes against peace or waging a war of aggression. IHL applies only in situations involving an “armed conflict” and operates differently in situations of international and non-international (internal) armed conflicts. Only in international armed conflicts do the protections of all four of the 1949 Geneva Conventions apply in their entirety, and, for states who have ratified it, those of Additional Protocol I to the Geneva Conventions as well. In contrast, non-international armed conflicts are covered by only the minimal humanitarian protections of Article 3 common to all four of the 1949 Geneva Conventions (Common Article 3), the universally applicable peremptory norms of IHL and human rights law, the domestic law of the state experiencing the internal armed conflict, and potentially Additional Protocol II to the Geneva Conventions.¹⁵ Given the intensity of the internal conflict, the absence of open or significant participation of the foreign State’s armed forces against the Assad government, and the degree of organization of the Syrian opposition rebel groups

15. See GARY D. SOLIS, *THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR* 22–27 (2010); see also Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field arts. 2–3, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GC I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea arts. 2–3, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter GC II]; Geneva Convention Relative to the Treatment of Prisoners of War arts. 2–3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War arts. 2–3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3, 16 I.L.M. 1391 [hereinafter Additional Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609, 26 I.L.M. 568 [hereinafter Additional Protocol II].

exerting effective control of territory, the civil war within the territorial borders of Syria is most likely an internal armed conflict within IHL.¹⁶

The sources of international law include treaty law, customary international law, and *jus cogens* (peremptory) norms, which are considered so fundamental to international law, and which are accepted by nations so universally that no derogation from them is permissible.¹⁷ Violations of certain peremptory norms confer universal jurisdiction for any nation to apprehend and prosecute violators in their domestic courts, and such violators are deemed enemies of humanity.¹⁸ Peremptory norms, including the principles of non-intervention, the prohibition of the use of force, self-defense, and the prohibition against torture, may apply to individuals or states and are relevant to analyzing the Russian intervention.

16. See SOLIS, *supra* note 15, at 142 (explaining the test for the existence of armed conflict focuses on the “intensity of the conflict and the organization of the parties to the conflict”); see also INT’L COMM. OF THE RED CROSS, IV COMMENTARY: IV GENEVA CONVENTION 49–50, art. 3.1 (Jean S. Pictet ed., 1952), <https://www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?viewComments=LookUpCOMART&articleUNID=A4E145A2A7A68875C12563CD0051B9AE>; see also Prosecutor v. Tadić, Case No. IT-94-1-A, Decision on Defense Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) (“[A]n 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.”); *Treaties, States Parties and Commentaries*, INT’L COMM. OF THE RED CROSS, https://www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=475.

17. Statute of the International Court of Justice art. 38(1), June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993 [hereinafter ICJ Statute] (“The Court . . . shall apply: (a) international conventions . . . (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; (d) . . . judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.”); Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT] (holding that treaty laws are void if they conflict with a peremptory norm of international law); VCLT, *supra* art. 64 (“If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.”); LAW AND WAR IN SYRIA, *supra* note 3, at 41.

18. TERRY GILL & DIETER FLECK, THE HANDBOOK OF THE INTERNATIONAL LAW OF MILITARY OPERATIONS 502–27 (2d ed. 2015).

1. The Prohibition of the Use of Force, the Non-Intervention Principle, Self-Defense, and Intervention by Invitation

The prohibition on the use of military force, in the absence of an explicit authorization by the United Nations Security Council or for means other than self-defense, has become a peremptory norm of international law as has the customary principle of non-intervention in the internal affairs of nations.¹⁹ The non-use of force principle, enshrined in Article 2(4) of the UN Charter, directs that “[a]ll members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state,” and is directed at inter-state conflicts.²⁰ This prohibition on the use of force by nations as a matter of political policy does not prohibit nations from invoking their customary right to use force in self-defense.²¹ Article 51 of the UN Charter states that all nations have an “[i]nherent right of individual or collective self-defence if an armed attack occurs . . . until the Security Council has taken measures necessary to maintain international peace and security.”²² Both individual and collective self-defense require an “armed attack” to occur against a state, and in the case of collective self-defense against a state which invites a foreign state to intervene and consents to the presence of foreign troops on its territory.²³ IHL in any exercise of self-defense requires that the core legal norms applicable to armed conflicts be observed by State and non-State parties to the conflict, and those norms are the principles of distinction, military necessity,

19. See Karine Bannelier & Theodore Christakis, *Under the UN Security Council's Watchful Eyes: Military Intervention by Invitation in the Malian Conflict*, 26 LEIDEN J. INT'L L. 855, 862 (2013); see also U.N. Charter arts. 2, 39–42.

20. U.N. Charter art. 2, ¶ 4.

21. *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 176 (June 27) (“Moreover, a definition of the ‘armed attack’ which, if found to exist, authorizes the exercise of the ‘inherent right’ of self-defence, is not provided in the Charter, and is not part of treaty law. It cannot therefore be held that Article 51 is a provision which ‘subsumes and supervenes’ customary international law. It rather demonstrates that in the field in question, the importance of which for the present dispute need hardly be stressed, customary international law continues to exist alongside treaty law. The areas governed by the two sources of law thus do not overlap exactly, and the rules do not have the same content. This could also be demonstrated for other subjects, in particular for the principle of non-intervention.”).

22. U.N. Charter art. 51.

23. See generally *Nicar. v. U.S.*, 1986 I.C.J. Rep. 14.

proportionality, and the prohibition against causing unnecessary suffering.²⁴

Certain exceptions to Article 2(4)'s general prohibition on the use of force have been asserted by legal scholars and through state practice, including humanitarian intervention and the intervention by invitation exception, which overlaps with collective self-defense considerably, but the legality of these exceptions has proven to be highly controversial.²⁵ The consent of one host nation for another nation to militarily intervene in its own territory "is generally recognized as a ground for precluding the wrongfulness of an act which would otherwise be illegal under international law," including military interventions which would otherwise violate Article 2(4), or where no right to self-defense exists under certain conditions.²⁶ The Russian position that it was invited to intervene by the legitimate government of Syria could be described as a collective self-defense justification, and President Putin's statements of the presence of Russian citizens fighting in opposition rebel groups could be interpreted as a justification for individual self-defense.

2. The Doctrines of State Responsibility and Attribution

States invited to intervene are still bound by international law, as the inviting state may not grant more authority than it itself possesses.²⁷ International law holds states accountable for their wrongful acts, such as violations of the non-intervention principle or other peremptory norms, under the doctrines of state responsibility and attribution.²⁸ State responsibility attaches legal liability for a state's commission of internationally wrongful acts to that state, and the doctrine of attribution determines when a state should be held liable for such acts

24. See *id.* ¶ 176; see also SOLIS, *supra* note 15, at 250.

25. Ahmed Ali M. Khayre, *Self-Defence, Intervention by Invitation, or Proxy War? The Legality of the 2006 Ethiopian Invasion of Somalia*, 22 AFR. J. INT'L & COMP. L. 208, 211 (2014).

26. See GILL & FLECK, *supra* note 18, at 252.

27. *Id.* at 253.

28. See James Crawford, *The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect*, 96 AM. J. INT'L L. 874, 876 (2002) ("To be precise, the key idea is that a breach of a primary obligation gives rise, immediately by operation of the law of state responsibility, to a secondary obligation or series of such obligations (cessation, reparation . . .).").

under state responsibility.²⁹ The doctrine of attribution requires proof of a causal connection between an act or omission of state, or state organ, and a breach of an international obligation to attribute liability to such state under international law.³⁰ Russia thus remains bound by international law in its decision to enter the Syrian conflict, as well as for the conduct of their political leaders and military forces with respect to the civil war in Syria, and any actors within Syria deemed to be organs of the Russian State may make Russia liable for any breaches of international law caused by such actors under state responsibility.

B. INTERNATIONAL HUMANITARIAN AND CRIMINAL LAW (*JUS IN BELLO*): REGULATING THE CONDUCT OF INDIVIDUAL PARTICIPANTS IN ARMED CONFLICT AND PRESCRIBING PUNISHMENTS FOR VIOLATIONS OF INTERNATIONAL LAW

1. IHL Will Govern the Conduct of Russian Military and Political Leaders in Relation to Syria and International Criminal Law Prescribes Punishments for Any Violations of IHL

Jus in bello regulates the conduct of individuals once an armed conflict has begun and includes criminal sanctions for actions designated by IHL as war crimes.³¹ IHL is divided into two strands of law, the (1) Geneva Law, or humanitarian law governing the protections afforded to individuals in armed

29. Int'l Law Comm'n, Rep. on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10, at 63, art. 1 (2001) [hereinafter 2001 ILC Report] ("Every internationally wrongful act of a State entails the international responsibility of that State."), at 177, art. 21 ("The wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations.").

30. *Id.* at 68, art. 2 ("There is an internationally wrongful act of a State when conduct consisting of an act or omission: (a) Is attributable to the State under international law; and (b) Constitutes a breach of an international obligation of the State."), at 74, art. 3, at 84, art. 4(1) ("The conduct of any State organ shall be considered an act of that State under international law . . ."), at 92, art. 5 ("The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance."), at 95, art. 6 ("The conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed.").

31. SOLIS, *supra* note 15, at 22, 301–02.

conflict and limitations on means available to participants in armed conflict, and (2) Hague Law, which defines armed combatants and assesses the legality of military objectives and regulates the methods of armed warfare generally.³² Core IHL peremptory norms, derived from these sources of law and state practice, include the principles of proportionality, unnecessary suffering, military necessity, and distinction. These principles together generally allow attacking armed forces, who have conducted a prior collateral damage analysis, to carry out proportionate attacks against military objectives even when it is known that some civilian deaths or injuries will occur.³³ Such attacks are lawful under IHL when the resulting civilian casualties are not disproportionate to the military advantage gained from the attack, so long as civilians are distinguished from armed combatants and not directly targeted, and so long as weapons incapable of meeting the distinction requirement or which cause unnecessary suffering are not employed.³⁴

International criminal law (“ICL”) is a category within public international law, which aims to prohibit certain acts or omissions by individuals, including certain violations of IHL, international human rights law, and peremptory norms, and to prescribe punishments for such violations.³⁵ As a result of the widespread violations of human rights by both regime and

32. *Id.* at 22–24.

33. See Yoram Dinstein, *Direct Participation in Hostilities*, 18 *TILBURG L. REV.* 3, 4–5 (2013) (“The essence of the principle of distinction is that civilians (or civilian objects) ought to be protected from attack. This protection has three dimensions. The first is barring direct attacks against civilians *qua* civilians . . . [t]he second dimension . . . is the prohibition of indiscriminate attacks . . . the third dimension . . . [is] known as the principle of proportionality.”).

34. See Letter from Luis Moreno-Ocampo, Chief Prosecutor of the Int’l Criminal Court 5 (Feb. 9, 2006) (on file with the International Criminal Court) (“A crime occurs if there is an intentional attack directed against civilians (principle of distinction) (Article 8(2)(b)(i)) or an attack is launched on a military objective in the knowledge that the incidental civilian injuries would be clearly excessive in relation to the anticipated military advantage (principle of proportionality) (Article 8(2)(b)(iv)).”); FRITS KALSHOVEN & LIESBETH ZEGVELD, *CONSTRAINTS ON THE WAGING OF WAR: AN INTRODUCTION TO INTERNATIONAL HUMANITARIAN LAW* 41 (3d ed. 2001) (“The most basic tenet of humanitarian law with respect to the employment of means of warfare is the rule laid down in Article 22 of the Hague Regulations: ‘The right of belligerents to adopt means of injuring the enemy is not unlimited.’ The principle was reaffirmed in Resolution XXVIII of the 20th International Conference of the Red Cross and Red Crescent (Vienna, 1965) and subsequently, in 1968, in Resolution 2444 (XXIII) of the UN General Assembly.”).

35. See KAI AMBOS, *TREATISE ON INTERNATIONAL CRIMINAL LAW VOLUME: FOUNDATIONS AND GENERAL PART* 55–56 (2013).

opposition forces, these fields of law will bind Russian military forces and political leaders with respect to their acts and omissions in Syria.³⁶ Russia and Syria have signed but have not ratified the 1998 Rome Statute of the International Criminal Court (“ICC”), yet many of the provisions of that statute have developed into peremptory norms of international law.³⁷ Some *jus cogens* norms of IHL applicable to the Russian intervention on behalf of the Assad regime include the prohibitions against torture,³⁸ against genocide, war crimes and crimes against humanity,³⁹ and of proportionality.⁴⁰ All uses of force must

36. *See id.* at 54–56.

37. LAW AND WAR IN SYRIA, *supra* note 3, at 47 (“Syria is not a party to the Rome Statute, and therefore the International Criminal Court may not exercise jurisdiction over war crimes alleged to have been committed by on its territory unless the situation is referred to the Court by the UN Security Council.”).

38. *See* Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgment, ¶ 156 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998) (noting that the ICTY has recognized this norm, which it has said confers universal jurisdiction for every State “to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction.”); *see also* Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85; Rome Statute of the International Criminal Court art. 7(1)(f), 2187 U.N.T.S. 90, 37 I.L.M. 1002 (1998) [hereinafter Rome Statute].

39. Rome Statute, *supra* note 38, art. 6 (“For the purpose of this Statute, ‘genocide’ means any of the following acts committed with [mens rea] intent to [actus reus] destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part . . .”), art. 7(1) (“For the purpose of this Statute, ‘crime against humanity’ means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with [mens rea] knowledge of the attack: (a) Murder; (b) Extermination; . . . (e) Imprisonment . . . (f) Torture; (g) Rape . . . (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, . . . or other grounds . . . (i) Enforced disappearance of persons; . . . (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.”), art. 8(1)–(2) (“The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes. For the purpose of this Statute, ‘war crimes’ means: (a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property . . . (i) Wilful killing; (ii) Torture or inhuman treatment, . . . (iii) Wilfully causing great suffering, or serious injury to body or health; (iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; . . . (vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial . . .”).

40. Additional Protocol I, *supra* note 15, art. 51 (stating that the civilian

adhere to the principle of proportionality, embedded as a peremptory norm by Protocol I of the Geneva Convention, which prevents the use of military force in a manner, which unnecessarily endangers or harms civilians.⁴¹

2. Individual Criminal Liability and Command Responsibility in ICL

Within ICL there are several ways in which international criminal courts, such as the ICC, as well as the internal courts of states, may punish violations of IHL or human rights law.⁴² Violations of peremptory norms confer universal jurisdiction allowing nations to apprehend and charge violators in their own courts, and this precedent has been strengthened by the customary duty of states to prosecute or hand over such violators.⁴³ Modes of liability in ICL pertinent to military commanders in armed conflict include individual liability, direct command responsibility, and indirect command responsibility.⁴⁴ Individual liability means that “[p]ersons who actually commit an offence while possessing the requisite mental element are criminally responsible.”⁴⁵ Individual liability can also derive from the acts of others as international treaty and customary law has taken the position that persons who planned, instigated, ordered, committed, or otherwise aided and abetted in the

population and individual civilians “shall not be the object of attack” and prohibiting indiscriminate attacks), art. 57 (“In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects.”).

41. *Id.* art. 52.

42. See Marta Bo, *The Situation in Libya and the ICC’s Understanding of Complementarity in the Context of UNSC-Referred Cases*, 25 CRIM. L. F. 505, 506 (2014) (“Complementarity embodies the concept that the Court was designed to ‘supplement . . . rather than supplant domestic enforcement of international norms’: in brief, the Court should step in exclusively when states fall short of exercising their primary obligation to prosecute crimes falling within the jurisdiction of the Court.”).

43. See generally *Att’y-Gen. of the Gov’t of Israel v. Adolf Eichmann*, 36 I. L. R. 5, 287 (1962) (“It is a peculiarly universal character of these crimes that vests in every state the authority to try and punish anyone who participated in their commission.”).

44. See generally INT’L CRIM. LAW SERV., MODULE 9: MODES OF LIABILITY: COMMISSION & PARTICIPATION, http://wcjp.unicri.it/deliverables/docs/Module_9_Modes_of_liability.pdf.

45. GILL & FLECK, *supra* note 18, at 550.

planning, preparation, or execution of a crime are individually criminally responsible for that crime.⁴⁶

Command responsibility derives from the relationship between a commander and his subordinates and makes a military or civilian commander, who possesses authority to issue binding orders to the perpetrator of an international crime, and who indirectly or directly orders that perpetrator to commit a crime to be held criminally liable for that crime, if it is committed.⁴⁷ Direct command responsibility involves a commander's liability for the wrongful acts of his direct subordinates (i.e. soldiers of the same army he is commander of) and likely will apply to Russia in Syria only through the direct participation of the Russian Air Force and any violations of IHL by those forces, as Russian ground troops officially act only in an advisory capacity in providing technical assistance to SAA ground units and likely do not exercise direct control over SAA or Iranian military units.⁴⁸ Indirect command responsibility confers criminal liability to a military commander, for actions committed by forces deemed his subordinates, on various theories of negligence or recklessness in a commander's acts or omissions.⁴⁹ Given the reports of widespread atrocities by the SAA and forces allied to them, the doctrine of indirect command responsibility may bear more serious consequences to the Russian intervention in Syria, as the overwhelming majority of ground offensives on behalf of the Assad regime are conducted by SAA, Iranian, and paramilitary troops friendly to both.⁵⁰

46. Rome Statute, *supra* note 38, art. 25; Statute of the International Criminal Tribunal for Rwanda art. 6, Nov. 8, 1994, 33 I.L.M. 1600; Statute of the International Criminal Tribunal for the Former Yugoslavia art. 7, May 25, 1993, 32 I.L.M. 1163.

47. See GILL & FLECK, *supra* note 18, at 552; see also Prosecutor v. Tihomir Blaskic, Case No. IT-95-14-T, Judgment, ¶ 290 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000) (demonstrating that ICTY judgments are evidence that this is a rule of customary international law where a commander or superior who issues an order which does not explicitly require that a crime must be committed may still be held liable for a crime if he issues an apparently lawful order which both he and the recipient understand to implicitly authorize the commission of a crime).

48. See generally Steve Rosenberg, *Syria conflict: Russia's Build-Up Looks Long-Term*, BBC NEWS (Jan. 23, 2016), <http://www.bbc.com/news/world-middle-east-35391241> (describing the deployment of ground troops to guard air bases and the fact that the Russian offensive combat operations are currently limited to airstrikes and bombardments).

49. See SOLIS, *supra* note 15, at 381–96.

50. See Martin Chulov, Saeed Kamali Dehghan & Patrick Wintour, *Iran Hails Victory in Aleppo as Shia Militias Boost Syria's Bashar al-Assad*,

Furthermore, mounting evidence suggests that some SAA offensives are conducted under the supervision of Russian commanders or with the cooperation of Russian special forces units.⁵¹

C. CONCLUSORY REMARKS

The UN Charter's prohibition of the use of force in the absence of a corresponding Security Council authorization is limited by a peremptory norm for a state to exercise its right of individual or collective self-defense if an armed attack occurs, as well as by the lawful invitation of a legitimate state government to intervene on its soil.⁵² Identifying what events qualify as an "armed attack" and which entities constitute a state's "government" competent to invite intervention in cases of internal armed conflicts, such as in Syria, are unresolved issues within international law.⁵³ The doctrines of state responsibility and attribution provide that a state's use of force in any circumstance must be carried out in accordance with international law, or that state risks incurring liability for its breach of international obligations.⁵⁴ Determining the legality of the decision by Russian political leaders to intervene in Syria and any potential corresponding legal liability the Russian State might incur will be the first issue this Note will address.

Russian military personnel and their superiors may clearly be held individually liable for the commission of international crimes, but to what degree may Russian military commanders be held liable as commanders for the actions of their Syrian and Iranian allies? Can Russian military advisors and officers be said to exercise the degree of control over Syrian military personnel to attach command liability for their crimes? Russian

GUARDIAN (Dec. 14, 2016), <https://www.theguardian.com/world/2016/dec/14/iran-aleppo-syria-shia-militia>.

51. See Siobhan O'Grady & Reid Standish, *Russian Troops in Syria will 'Stay Until the End'*, FOREIGN POLY (Oct. 22, 2015), <http://foreignpolicy.com/2015/10/22/russian-troops-in-syria-will-stay-until-the-end/> (speculating that an SAA offensive in Latakia Province is being led by Russian generals).

52. U.N. Charter art. 2, ¶ 4, art. 51; see also GILL & FLECK, *supra* note 18, at 229.

53. Le Mon, *supra* note 5, at 748–49 (explaining that inconsistencies between the effective control test and standards of belligerency test have created incoherency in international law regarding invitations to intervene).

54. See Crawford, *supra* note 28, at 876. See generally 2001 ILC Report, *supra* note 29.

airstrikes in support of the military objectives of the SAA and its allies, so long as they meet certain IHL standards of proportionality, are not in and of themselves violations of international law, but they still amount to collaboration with a regime responsible for grave human rights violations and present a new and uncertain collision of *jus in bello* considerations with *jus ad bellum* justifications for going to war, and may be resolved through the development of new peremptory norms of international law.

II. ANALYSIS

The Russian intervention in Syria is likely permissible under international law as individual self-defense, collective self-defense, or under the legally vague intervention by invitation exception to the non-intervention principle. The UN Security Council is powerless to authorize the use of force in the case of Syria, as Russia and China have vetoed any resolution directed against the Assad government, leaving self-defense and intervention by invitation as the only applicable justifications available to Russia.⁵⁵ Article 51 of the UN Charter preserves the customary and “[i]nherent right of individual or collective self-defence if an armed attack occurs,”⁵⁶ although the precise definition of what constitutes an “armed attack” and whether the Assad regime was subjected to one is unclear. The legality of Russian airstrikes aiding the Assad controlled Syrian Arab Republic (“SAR”) remain questionable, as the legal legitimacy of the Assad government will control whether the SAR was legally competent to invite the Russian intervention.⁵⁷ Recent state practice suggests that the Russian intervention is permissible as individual self-defense as thousands of Russian citizens, who have formerly served in Islamist groups which have carried out major attacks on Russian soil, are currently serving within the ranks of IS and other Islamist rebel groups.⁵⁸ An analysis of

55. See Ian Black, *Russia and China Veto UN Move to Refer Syria to International Criminal Court*, GUARDIAN (May 22, 2014), <http://www.theguardian.com/world/2014/may/22/russia-china-veto-un-draft-resolution-refer-syria-international-criminal-court>; James Reinl, *Syria's War and Veto-Wielding UN Powerplays*, AL JAZEERA (Sept. 30, 2015), <http://www.aljazeera.com/indepth/features/2015/09/syria-war-veto-wielding-powerplays-150930064603153.html>.

56. U.N. Charter art. 51.

57. See *Nicar. v. U.S.*, 1986 I.C.J. Rep. 14, ¶ 115.

58. See Kim Sengupta, *Russia in Syria: President Putin's Middle East*

recent developments in IHL reveals that the Russian intervention in Syria is most likely justified under the intervention by invitation exception to Article 2(4) of the UN Charter, as Russia has not justified its intervention on humanitarian grounds, such as a responsibility to protect civilians, nor could it do so in good faith given the extent of the Assad regime's atrocities.⁵⁹

Notwithstanding the presumable legality of the intervention, Russian civilian and military commanders will very likely become criminally liable for the actions of their allies in the SAA and other pro-Assad forces under command responsibility.⁶⁰ Less certain is the legality of the Russian airstrikes assisting the SAA against opposition rebels as the question of whether Russian commanders ordering the airstrikes should be held accountable for assisting the military forces responsible for grave violations of IHL and human rights law remains undetermined. In respect to the latter question, a new legal standard prohibiting military cooperation of any kind with war criminals and human rights violators should be developed, linking *jus ad bellum* considerations such as the legality of a collective self-defense action with *jus in bello* considerations regarding the legality of the actions of participants in an armed conflict. This proposed linkage would be limited in scope but would attribute liability on a State's civilian leadership for authorizing force, which rendered military assistance to a party to an armed conflict, if those leaders knew or had reason to know that grave IHL human rights violations had been, or were being, committed by the recipient of such military assistance. This section will address the legality of the Russian intervention, identify the manner in which Russian commanders will be likely held criminally liable under IHL, and finally will outline the previously mentioned proposed legal standard which would seek to limit invocations of self-defense and intervention by invitation if the inviting state

Adventure Exposes Terrorist Threat Now Facing Moscow, INDEP. (Oct. 9, 2015), <http://www.independent.co.uk/news/world/europe/russia-in-syria-president-putins-middle-east-adventure-exposes-terrorist-threat-now-facing-russia-a6688661.html>; Adam Taylor, *Why Being Chechen is a Badge of Honor for Islamist Militants*, WASH. POST (July 3, 2014), <https://www.washingtonpost.com/news/worldviews/wp/2014/07/03/why-being-chechen-is-a-badge-of-honor-for-islamist-militants/>.

59. See Indep. Int'l Comm'n of Inquiry on the Syrian Arab Republic, Rep. ¶ 26, U.N. Doc. A/HRC/30/48 (Aug. 13, 2015).

60. See SOLIS, *supra* note 15, at 381–96.

has committed grave violations of IHL or human rights law during the armed conflict at issue.

A. INTERVENTION BY INVITATION: THE RUSSIAN INTERVENTION IS LIKELY LAWFUL, DUE TO THE INVITATION OF THE SYRIAN GOVERNMENT, AND WILL REMAIN LAWFUL SO LONG AS RUSSIA LIMITS ITS EXPRESS PURPOSE TO FIGHTING TERRORIST GROUPS

Syria has been recognized as an independent state since receiving its independence from France in 1945 and was a founding member of the UN.⁶¹ Yet, the legal legitimacy of the Assad government and its corresponding ability to invite foreign intervention is in question given its loss of control over considerable amounts of territory to opposition and Kurdish rebel groups.⁶² The question of legitimacy is central to the legality of the Russian intervention as only the legitimate government may invite foreign intervention, and as the UN General Assembly has stated: “[t]he act of calling in the forces of a foreign State for the repression of internal disturbances is . . . of so serious a character as to justify the expectation that no uncertainty should be allowed to exist regarding the actual presentation of such a request by a duly constituted Government.”⁶³ The SAR has not been formally recognized as the legitimate government of Syria by most states, but a government’s legal legitimacy is determined by the effective control principle rather than by state recognition.⁶⁴ For the Russian intervention in Syria to be lawful as intervention by invitation there must, firstly, be an invitation made by the legitimate government of a “state” and, secondly, the scope of the

61. *Activities of the Member States*, UNITED NATIONS, <http://www.un.org/depts/dhl/unms/founders.shtml> (last visited March 1, 2017).

62. See Khayre, *supra* note 25, at 225. *But see* Le Mon, *supra* note 5, at 748–49.

63. Rep. of the Special Comm. on the Problem of Hung., ¶ 266, U.N. Doc. A/3592 (1957) (concluding that there was insufficient evidence that a lawful invitation by the Hungarian state had been made).

64. See THOMAS ERLICH & MARY ELLEN O’CONNELL, INTERNATIONAL LAW AND THE USE OF FORCE 138–40 (1993); *see also* Kerstin Odendahl, *National and International Legitimacy of Governments*, 4 EUR. SOC’Y INT’L L. 1 (2015) (explaining that most states have withdrawn from recognizing or have never recognized the Syrian Arab Republic yet Russia and China continue to); Brian Rohan, *Bashar Assad’s Battlefield Gains Cast Loud on Upcoming Syria Talks*, WASH. TIMES (Jan. 19, 2016), <http://www.washingtontimes.com/news/2016/jan/19/assads-battlefield-gains-cast-cloud-on-upcoming-sy/?page=all>.

invited intervention must not violate the peremptory norm of non-interference in the internal affairs of another state.⁶⁵ Furthermore, collective self-defense requires, in addition to the necessity and proportionality requirements of self-defense generally, an “armed attack,” the consent of the inviting state to the presence of foreign military troops, and a request for help.⁶⁶ In brief, the legality of the intervention hinges on the legitimacy of the SAR, the nature of its internal armed conflict, and the state of IHL given recent state practice in the global War on Terrorism.

1. State Recognition and Effective Control in Internal Armed Conflict: Recent State Practice on Intervention by Invitation Favors Classifying the Russian Intervention as Permissible under IHL

The legal determination of whether a political entity constitutes a “state” in international law is complex but the declaratory view of statehood, espoused in the 1933 Montevideo Convention, currently predominates.⁶⁷ Under the standards of that treaty it is debatable whether Syria remains a “state” or whether it is in the process of dissolution into several independent states, Syria arguably possesses a permanent population and defined territory but it has no “government” which exercises effective control over all of its territory, even though the Assad-led SAR continues to represent Syria in the

65. See Bannelier & Christakis, *supra* note 19, at 861 (“Louise Doswald-Beck referred to the principles of self-determination and non-interference in the internal affairs of states to conclude that ‘there is, at the least, a very serious doubt whether a State may validly aid another government to suppress a rebellion, particularly if the rebellion is widespread and seriously aimed at the overthrow of the incumbent regime.’”).

66. See *Independent International Fact-Finding Mission on the Conflict in Georgia*, Vol. II, at 286 (Sept. 2009), http://echr.coe.int/Documents/HUDOC_38263_08_Annexes_ENG.pdf (explaining that self-defense cannot be legitimate without meeting all its conditions); see also *Nicar. v. U.S.*, 1986 I.C.J. Rep. 14, ¶¶ 297, 313 (explaining necessity and proportionality as requirements for legitimate self-defense).

67. Convention on Rights and Duties of States art. 1, Dec. 26, 1933, 49 Stat. 3097, 165 L.N.T.S. 19 [hereinafter Montevideo Convention] (“The state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states.”); see also Robert D. Sloane, *The Changing Face of Recognition in International Law: A Case Study of Tibet*, 16 EMORY INT’L L. REV. 107, 117 (2002) (explaining that the declaratory view [Montevideo Convention] of recognition predominates in international law).

UN and can be said to have the capacity to enter into foreign relations on behalf of Syria.⁶⁸ International law traditionally allowed only a government which exercised effective (*de facto*) control over their State's territory to invite foreign nations to intervene under certain conditions, including in suppressing an insurgency, but conversely in states of internal conflict rebel forces could not invite such interventions unless they controlled enough territory to constitute "a belligerency."⁶⁹

While the belligerency analysis has fallen out of favor, in theory the effective control test still determines the legitimacy of whether a political entity represents the "government" of a state. Interpreting "effective control" narrowly to mean anything less than undisputed *de facto* governmental authority over a nation's internal territory would bar any nation in the midst of a civil war from inviting foreign intervention, and some legal scholars have stated that control of most of the national territory is sufficient to meet the effective control test.⁷⁰ Recent state practice and the UN do not endorse such a narrow view of the effective control test within customary international law, and in several recent cases the UN has either acquiesced to or implicitly endorsed interventions in situations of civil war which would seem to violate the test.⁷¹

In 2013, French forces launched Operation Serval at the invitation of the Malian government and drove out Islamist rebels, which had occupied over half of Mali's territory, and, in spite of a lack of an explicit Security Council authorization, the UN expressed its view that the intervention was conducted in accordance with international law.⁷² Operation Serval was

68. *See generally* Interview with Fabrice Balanche, Carnegie Endowment for International Peace (Jan. 30, 2015), <http://carnegieendowment.org/syriaincrisis/?fa=58875> ("The Syrian government [as of 1/30/2015] controls around 50 percent of the territory, but it rules between 55 and 72 percent of the population left inside Syria. The rebels control 45 percent of the territory and 17–34 percent of the population, while the Kurds control no more than 5 percent of the territory with 5–10 percent of the population.").

69. ERLICH & O'CONNELL, *supra* note 64, at 138–40.

70. *See* Dinstein, *supra* note 5, at 888 ("The fact that the Taliban regime was in control of most of the territory of Afghanistan meant that—recognized or not—it was the *de facto* Government, and the regime's actions had to 'be treated as the actions of the state of Afghanistan.'").

71. *See* Le Mon, *supra* note 5, at 790–91 ("The positive reaction of the international community to long-term Russian intervention [in Tajikistan's Civil War], an intervention that the standards of belligerency strictly would have prohibited, displays the continued dissonance between these principles of law and post-Charter state action.").

72. *See* Bannelier & Christakis, *supra* note 19, at 865–67.

distinguishable from the Russian intervention, in that the invitation for the French to intervene came from a government whose legal legitimacy no nation had disputed, and because the French military limited their focus solely to groups classified as terrorist organizations by the UN.⁷³ This unconditioned UN approval of Operation Serval, in spite of prior French misgivings about intervening at the invitation of the Central African Republic during a period of internal unrest,⁷⁴ indicate that even a government which controls less than half of the physical territory of a state may invite a foreign army to destroy designated terrorist groups on its own soil under international law.⁷⁵ Nevertheless, such recent state practice demonstrates the unsettled state of international law on the legitimacy of governments in times of internal conflict as well as the manner in which the non-intervention principle may be skirted by classifying the opponents of an inviting state as terrorist groups, which both Russia and the SAR have done.⁷⁶

2. Non-Intervention and the War on Terrorism: It is Likely that the Assad Regime Remains the Government of the State of Syria, and Lawfully Requested Russian Military Assistance

Syria is politically dominated by the Arab Socialist Ba'ath Party.⁷⁷ Since elements of that party seized control of the Syrian government in 1963, and since Ba'athist General Hafez al-Assad took control of the government during the Corrective Revolution of November 13, 1970, Syria has been ruled by the Assad family, members of the minority Alawite sect of Shia Islam.⁷⁸ Hafez al-Assad ruled until his death in 2000 whereby his son Bashar succeeded him as President and as the head of the ruling Ba'ath Party. And although the SAR Constitution was revised in 2012 to leave the exercise of the SAR's sovereignty to "[t]he people,"

73. *Id.*

74. *Id.* at 864.

75. *Id.* at 865–67; *see also* Le Mon, *supra* note 5, at 790–91.

76. *See Putin: No Need to Distinguish Between 'Moderate' & Other Terrorists*, RUSS. TODAY (Oct. 22, 2015), <https://www.rt.com/news/319405-putin-valdai-discussion-club/>.

77. *See* Michael Bröning, *The Sturdy House that Assad Built: Why Damascus is Not Cairo*, FOREIGN AFF. (Mar. 11, 2011), <https://www.foreignaffairs.com/articles/syria/2011-03-07/sturdy-house-assad-built>.

78. *See id.*

the SAR retains single party authoritarian rule.⁷⁹ Until the uprisings of 2011, and their escalation into an internal armed conflict, the SAR had continuously exerted control over the territory within the defined geographic boundaries of Syria, with the exception of a series of revolts led by Islamist political parties between 1979 and 1982 and a brief period of rioting in certain Kurdish populated cities in 2004, both of which were swiftly crushed by the SAA.⁸⁰ Due to the lack of political unity between armed opposition groups in the Syrian Civil War at the present time, the SAR likely remains the legitimate government of Syria notwithstanding its substantial loss of territorial control as a result of the civil war.⁸¹ Despite the SAR exerting control of only a fraction of the territory of Syria, that zone of territorial control includes most of Syria's major cities, as well as the majority of the Syrian population, many of whom support the Assad regime.⁸² The SAR was expelled from multiple regional organizations following the uprising, including the Arab League, which chose instead to seat members of the Syrian opposition rebel groups; however, the SAR government retains its representation within the UN and has been repeatedly invited to represent itself in peace talks regarding the conflict.⁸³ Iran, a

79. *Id.*; see also Article 2, Constitution of the Syrian Arab Republic of 2012 (Amended to remove reference to the Ba'ath Party as the leader of the people and stating that "[s]overeignty is an attribute of the people; and no individual or group may claim sovereignty. Sovereignty shall be based on the principle of the rule of the people by the people and for the people; The People shall exercise their sovereignty within the aspects and limits prescribed in the Constitution."), http://sana.sy/en/?page_id=1489.

80. See Bröning, *supra* note 77; see also Robert Fisk, *Freedom, Democracy and Human Rights in Syria*, INDEP. (Sept. 15, 2010), <http://www.independent.co.uk/voices/commentators/fisk/robert-fisk-freedom-democracy-and-human-rights-in-syria-2080463.html> (explaining the eventual suppression of a series of Islamist revolts in the 1982 Hama massacre); Albert Aji, *Tension Unabated After Riots in Syria*, BOS. GLOBE (Mar. 16, 2004), http://archive.boston.com/news/world/middleeast/articles/2004/03/16/tension_unabated_after_riots_in_syria/.

81. See Bröning, *supra* note 77; see generally Le Mon, *supra* note 5.

82. See ORB INT'L, *Syria Public Opinion – July 2015*, <https://www.orb-international.com/perch/resources/syriadata.pdf> (showing that 47% said Assad was a somewhat or completely positive influence).

83. Neil McFarquhar, *Arab League Votes to Suspend Syria Over Crackdown*, N.Y. TIMES (Nov. 12, 2011), <http://www.nytimes.com/2011/11/13/world/middleeast/arab-league-votes-to-suspend-syria-over-its-crack-down-on-protesters.html>; *Regional Group Votes to Suspend Syria; Rebels Claim Downing of Jet*, CNN (Aug. 14, 2011), http://edition.cnn.com/2012/08/13/world/meast/syria-unrest/index.html?hpt=hp_t1; *Syria Suspends its Membership in Mediterranean Union*, XINHUA (Dec. 2, 2011), http://news.xinhuanet.com/english2010/world/2011-12/01/c_131282989.htm; *Syrian*

principal ally of Assad and the SAR which has sent thousands of troops to fight against opposition rebels, notably was also given a seat in recent peace negotiations.⁸⁴ These facts tend to show that the SAR was considered the *de facto* government of a state before the uprising began in 2011 and has likely remained one since, as no singular opposition group has exceeded its power or authority within the territorial boundaries of the Syrian nation.⁸⁵ Indeed the UN Security Council has in at least one instance announced that a government which had lost effective territorial control in a civil war nevertheless possessed sovereign rights over all territory within its national borders, stating that the South African occupation of rebel-controlled territory within Angola violated the non-intervention principle.⁸⁶ Since the Syrian invitation came from the highest levels of the SAR government it is very likely that, if the SAR is the legitimate government, its request to Russia for military assistance was properly conducted in accordance with the law of armed conflict (*jus ad bellum*).⁸⁷

Governments exerting effective (*de facto*) control over a state's territory may invite foreign troops onto their own soil. However, identifying the conditions under which a state may invite another state to intervene in its own internal armed conflict, where the sovereign authority of a government to invite foreign intervention weakens as it loses control over territory to rebel groups, is a separate consideration which is supplied with

Opposition Takes Arab League Seat, GUARDIAN (Mar. 26, 2013), <http://www.theguardian.com/world/2013/mar/26/syrian-opposition-appeals-nato-support>.

84. Thomas Erdbrink et. al., *After a U.S. Shift, Iran Has a Seat at Talks on War in Syria*, N.Y. TIMES (Oct. 28, 2015), <http://www.nytimes.com/2015/10/29/world/middleeast/syria-talks-vienna-iran.html>.

85. *See Who Has Gained Ground in Syria*, N.Y. TIMES (Oct. 29, 2015), <http://www.nytimes.com/interactive/2015/09/30/world/middleeast/syria-control-map-isis-rebels-airstrikes.html>.

86. *See* S.C. Res. 602, ¶ 1 (Nov. 25, 1987) (“Strongly condemns [South Africa] for its continued and intensified acts of aggression against [the MPLA-controlled government in Angola] as well as its continuing occupation of parts of that State, which constitute a flagrant violation of the sovereignty and territorial integrity of Angola.”).

87. *See* Walid Al-Moualem, Syrian Arab Republic, Deputy Prime Minister, Minister of Foreign Affairs and Expatriates, Statement at 70th Session of the U.N. General Assembly (Oct. 2, 2015), https://gadebate.un.org/sites/default/files/gastatements/70/70_SY_en.pdf; Corky Siemaszko, *Syrian Government Invites Russia to Send in Ground Troops to Protect Assad Regime from ISIS*, N.Y. DAILY NEWS (Oct. 2, 2015), <http://www.nydailynews.com/news/world/russia-launches-attacks-syria-day-article-1.2382933>.

no clear answer.⁸⁸ State practice has generally evidenced customary IHL principles forbidding intervention in another nation's civil war in order to decide the outcome of that war, but if the scope of such interventions is strictly limited to clearly defined purposes such as fighting terrorism, it may nevertheless be permissible under IHL.⁸⁹ The 2009 European Union Fact Finding Mission in Georgia ruled that South Ossetia, a territory part of Georgia but recognized as a state by Russia, was not legally capable of inviting Russia to militarily intervene against Georgia.⁹⁰ That commission identified three separate legal standards on intervention by invitation: the doctrine of asymmetry, where "[o]nly the established and internationally recognized government can pronounce an invitation with legal effect;" the doctrine of negative equality, which means to "[a]cknowledge that in a state of civil war, none of the competing factions can be said to be effective, stable, and legitimate," so that none is competent to invite outside intervention; and the doctrine of positive equality, which holds that outside intervention is permissible on behalf of either party to a civil war "[f]rom that moment on when in an internal war the control of the state's territory is divided between the warring parties."⁹¹ The doctrine of asymmetry has been the traditional standard under international law, yet, in Syria's case it provides little assistance in determining whether the invitation was lawful, as though the Assad family-led SAR has been the "established" government of Syria for over four decades, is it not formally internationally recognized by most states.⁹²

In its effective control over territory within Syria's borders, the SAR certainly possesses much more authority as an "established and internationally recognized government" than did the South Ossetian authorities in 2008, and at least as much authority as the collapsing Malian government which invited the

88. See generally Le Mon, *supra* note 5 (explaining the effective control principle and the uncertain state of international law regarding statehood in periods of civil unrest).

89. See Bannelier & Christakis, *supra* note 19, at 864 ("[m]ilitary assistance on request is perfectly legal in a series of cases, including the hypothesis of joint fight against terrorism.").

90. *Independent International Fact-Finding Mission on the Conflict in Georgia, Vol. I*, 1–33, http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/30_09_09_iiffmgc_report.pdf.

91. *Independent International Fact-Finding Mission on the Conflict in Georgia, Vol. II*, *supra* note 66, at 276–80.

92. *Id.*; see also sources cited *supra* note 64 (explaining the lack of international recognition of the Syria Arab Republic).

French intervention in 2013.⁹³ As evidence of this, the ICJ determined in *Nicaragua v. US* that the dictatorial regime in El Salvador, which had been established by a military coup less than ten years before that decision, and which faced an internal armed conflict throughout the 1980's, would have been competent to invite foreign intervention under collective self-defense in the event of an "armed attack."⁹⁴ It is also worth noting that the composition of opposition rebels has shifted dramatically since the start of the war with ISIL entering the conflict from Iraq as outsiders to the initially nationalist uprising, and quickly becoming the most successful rebel group within Syria and Iraq.⁹⁵ The rule of non-intervention in another state's internal armed conflict is related to the peremptory norm of self-determination, whereby a distinct populace may determine their own political destiny by taking up arms against their own government, yet ISIL and Jabhat al-Nusrah are organizations led by outsiders with no direct connection to the Syrian nationalist rebel groups which initiated the rebellion.⁹⁶ Given this new state of affairs, it is debatable whether the considerable foreign state support for such groups, including allegations of harboring rebel groups and allowing them to

93. See *Who's Who in the Syria Conflict*, AL MONITOR (Jan. 21, 2017), <http://www.al-monitor.com/pulse/afp/2017/01/syria-conflict-players.html> ("The government controls 34 percent of Syria's territory, including key cities such as Damascus and second city Aleppo").

94. See *Nicar. v. U.S.*, 1986 I.C.J. Rep. 14, ¶ 230.

95. See generally Samia Nakhoul, *Saddam's Former Army is Secret of Baghdadi's Success*, REUTERS (June 16, 2015), <http://www.reuters.com/article/us-mideast-crisis-baghdadi-insight-idUSKBN0OW1VN20150616>; see also Patrick Cockburn, *Whose Side is Turkey On?*, 36 LONDON REV. BOOKS 8, 9 (2014) ("This was a political problem for the US, as Joe Biden revealed to the embarrassment of the administration in a talk at Harvard on 2 October. He said that Turkey, Saudi Arabia and the UAE had promoted 'a proxy Sunni-Shia war' in Syria and 'poured hundreds of millions of dollars and tens of thousands of tons of weapons into anyone who would fight against Assad—except that the people who were being supplied were al-Nusra and al-Qaida and the extremist element of jihadis coming from other parts of the world'. He admitted that the moderate Syrian rebels, supposedly central to US policy in Syria, were a negligible military force.").

96. See *Armed Activities on Territory of Congo*, (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. Rep. 168, ¶ 164 (Dec. 19) (noting that the Nicaragua case had "made it clear that the principle of non-intervention prohibits a State 'to intervene, directly or indirectly, with or without armed force, in support of an internal opposition in another state'"); see also U.N. Charter art. 1, ¶ 2 ("The Purposes of the United Nations are . . . To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace.").

attack SAR targets in cross-border operations, could “internationalize” Syria’s internal armed conflict and alter the applicability of the non-intervention principle to the Russian intervention by invitation.⁹⁷

B. SELF-DEFENSE: THE RUSSIAN INTERVENTION MAY BE PERMISSIBLE UNDER IHL AS INDIVIDUAL OR COLLECTIVE SELF-DEFENSE, BUT NOT AS ANTICIPATORY SELF-DEFENSE

1. Collective Self-Defense May Justify the Russian Intervention if the Conduct of Turkey in Assisting Syrian Rebels Rose to the Level of an “Armed Attack” Against the Syrian Arab Republic

Given the likelihood that the SAR continues to remain a “state,” the element of international recognition it lacks should not defeat its competency to lawfully invite another nation to intervene in its conflict. However, even assuming that the SAR remains the legitimate government of Syria, Russia can only justify this intervention as collective self-defense if the SAR was subject to an “armed attack.”⁹⁸ A precise legal definition of “armed attack” has remained elusive, but typically such an attack would come from the conventional military forces of another state, yet there is strong evidence in customary IHL that armed irregular groups can initiate armed attacks against states provided those groups are backed by another state and provided the attack is similar in gravity to those launched by conventional forces.⁹⁹ Imputing the conduct of such irregular groups to another state is difficult; the *Nicaragua v. United States* attribution standard requiring evidentiary proof that a state “had effective control of the military or paramilitary operations in the course of which the alleged violations were committed,” and the mere provision of arms to opposition groups in another

97. See UNHRC Report, *supra* note 3, ¶ 165 (“The livelihood of the Syrian population is subverted daily by the increasingly internationalized nature of this non-international armed conflict, as well as the ferocity of confrontations at the ground level, compounded by the spread of extremism.”).

98. See *Nicar. v. U.S.*, 1986 I.C.J. Rep. 14, ¶ 211.

99. G.A. Res. 3314 (XXIX), art. 3(g) (Dec. 14, 1974) (“The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.”).

country was held by the ICJ not to constitute an “armed attack.”¹⁰⁰

In the Syrian Civil War, the military forces of the SAR have been waging conventional and asymmetric warfare against numerous Islamist and nationalist insurgent groups, who often possess armaments and equipment superior to that of the SAA, and several of these groups are backed by foreign nations seeking the SAR’s overthrow.¹⁰¹ The SAA has fought these foreign backed insurgents in conventional battles, such as the Siege of Zabadani, with resulting casualties rivaling those that the United States military experienced in the Vietnam War.¹⁰² The war has resulted in the deaths of over 250,000 people, including soldiers, rebels, and civilians, and in the forced displacement of millions of Syrian citizens.¹⁰³

Over the course of the war, Turkey has invaded Syria briefly, shelled the Syrian town of Kobani, and there is mounting evidence that the Turkish government or Turkish intelligence services has collaborated with IS in cross-border attacks against Syrian Kurdish groups.¹⁰⁴ Moreover, there is strong evidence

100. See *Nicar. v. U.S.*, 1986 I.C.J. Rep. 14, ¶ 115 (“All the forms of United States participation mentioned above, and even the general control by the respondent State over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State. Such acts could well be committed by members of the contras without the control of the United States.”); *id.* at ¶ 230.

101. *Arab League Allows Members to Arm Rebels and Offers Seat to Opposition*, AL BAWABA NEWS (Mar. 7, 2013), <http://www.albawaba.com/news/arab-league-syria-475662>; Tara McKelvey, *Arming Syrian rebels: Where the US Went Wrong*, BBC NEWS (Oct. 10, 2015), <http://www.bbc.com/news/magazine-33997408>.

102. See generally *Syrian Army, Hezbollah Capture 17 Militants in Zabadani*, AL BAWABA NEWS (July 27, 2015), <http://www.albawaba.com/news/syrian-army-hezbollah-capture-17-militants-zabadani-723810> (explaining that 28 SAA and 15 allied Hezbollah were killed in Zabadani in first three weeks of assault); see also *Zabadani Battles Have Claimed over 400 Rebels, 60 Hezbollah Fighters*, DAILY STAR NEWS: LEBANON (Sept. 4, 2015), <http://www.dailystar.com.lb/News/Lebanon-News/2015/Sep-04/313930-zabadani-battles-have-claimed-over-400-rebels-60-hezbollah-fighters.ashx>.

103. See Chris York & George Bowden, *Syria Civil War Death Toll Paints a Horrifically Complex Picture*, HUFFINGTON POST UK (Oct. 31, 2015), http://www.huffingtonpost.co.uk/2015/10/31/syrian-civil-war-death-_n_8440378.html.

104. See generally Barney Guiton, *ISIS Sees Turkey as Its Ally: Former Islamic State Member Reveals Turkish Army Cooperation*, NEWSWEEK (Nov. 7, 2014), <http://europe.newsweek.com/isis-and-turkey-cooperate-destroy-kurds-former-isis-member-reveals-turkish-282920?rx=us>; *Kurdish Forces Accuse*

that Turkey has openly allowed thousands of foreign nationals to pass through its borders and cross into Syria in order to join IS and other opposition rebel groups, and, in at least one battle, Turkey is suspected of harboring opposition rebels on its territory.¹⁰⁵ If the ICJ holding in *Nicaragua v. US* accurately states customary IHL, excluding from the definition of “armed attack” arming and aiding rebels but including within such definition the mining of another state’s harbors,¹⁰⁶ then the Turkish Army’s shelling of Kurdish-controlled Kobani or the Turkish government’s allowance of rebel groups to use its territory to stage cross-border attacks would seem to fall under the definition of “armed attack.” ICJ precedent held that the mere provision of arms to opposition groups in another nation was not enough to constitute an armed attack; however, that decision was rendered in the context of the conflict between Nicaragua and El Salvador, which was a conflict with a lesser death toll and the provision of much less sophisticated weaponry than in Syria today.¹⁰⁷ Indeed, the allegations of Turkey

Turkey of Launching Pro-ISIS Operations in Kobane, ARA NEWS (Aug. 1, 2015), <http://aranews.net/2015/08/kurdish-forces-acuse-turkey-of-launching-pro-isis-operations-in-kobane/>; Alex MacDonald, *Turkey ‘Shells Kobane’ as Kurdish-Arab Forces Advance on Strategic Town*, MIDDLE EAST EYE, (Nov. 10, 2015), <http://www.middleeasteye.net/news/turkish-military-allegedly-shell-kobane-ypp-and-arabs-advances-strategic-town-1894959234>; *Syria Crisis: IS Makes Deadly Return to Kobane*, BBC NEWS (June 25, 2015), <http://www.bbc.com/news/world-middle-east-33266399>.

105. See *UN Says ‘25,000 Foreign Fighters’ Joined Islamist Militants*, BBC NEWS (Apr. 2, 2015), http://www.bbc.com/news/world-middle-east-32156541?utm_source=Sailthru&utm_medium=email&utm_term=*Mideast%20Brief&utm_campaign=2014_The%20Middle%20East%20Daily; Natasha Bertrand, *Senior Western Official: Links Between Turkey and ISIS are Now ‘Undeniable’*, YAHOO! (July 28, 2015), <http://finance.yahoo.com/news/links-between-turkey-isis-now-195700510.html> (“Ankara officially ended its loose border policy last year, but not before its southern frontier became a transit point for cheap oil, weapons, foreign fighters, and pillaged antiquities.”); Patrick Cockburn, *Whose Side Is Turkey on?*, 36 LONDON REV. BOOKS No. 21, 8-10 (Nov. 6, 2014), <http://www.lrb.co.uk/v36/n21/patrick-cockburn/whose-side-is-turkey-on> (“When Syrian rebels led by al-Nusra captured the Armenian town of Kassab in Syrian government-held territory early this year, it seemed that the Turks had allowed them to operate from inside Turkish territory.”).

106. See *Nicar. v. U.S.*, 1986 I.C.J. Rep. 14, ¶¶ 115, 230–31.

107. *Id.* ¶¶ 230–31; see also Richard Johnson, *Syrian Rebels Acquire U.S. Made Antitank Missiles*, WASH. POST (Apr. 28, 2014), <https://www.washingtonpost.com/apps/g/page/world/syrian-rebels-acquire-us-made-antitank-missiles/980/>; Mark Mazzetti & Matt Apuzzo, *Saudi Arabia, the CIA and the Arming of Syrian Rebels*, IRISH TIMES (Jan. 24, 2016), <http://www.irishtimes.com/news/world/us/saudi-arabia-the-cia-and-the-arming-of-syrian-rebels-1.2508641>; *U.N. Syria Chemical Weapons Probe Points to Sarin Exposure; Rebel Use Doubted*, JAPAN TIMES (Jan. 5, 2016), <http://www.japan>

harboring opposition rebels which launch cross-border military style attacks, if substantiated by evidence, should indicate that the SAR suffered an “armed attack” sufficient to trigger Russia’s right to exercise collective self-defense on behalf of the SAR. This conclusion seems inescapable in light of the fact that the United States invasion of Afghanistan, justified by the U.S.-led coalition as individual or collective self-defense, was deemed permissible under IHL without a prior UN Security Council authorization against an arguably non-state actor (the Taliban) on a novel theory of being an accomplice in a non-state actor’s (al-Qaeda) armed attack.¹⁰⁸

2. Chechen Rebels Who Have Conducted Terrorist Attacks Against Russia Are Heavily Represented Among the Syrian Rebels, Potentially Justifying the Russian Intervention as Individual Self-Defense

Russia has dealt with Chechen and Dagestani separatist movements and insurgencies since the Russian Empire conquered the Northern Caucasus region in the early 19th century, and within the last twenty-five years it has fought two wars to suppress armed Islamist insurrections in Chechnya and Dagestan. Islamist groups affiliated with these separatist movements have conducted multiple terrorist attacks against civilian targets within Russia, resulting in massive casualties.¹⁰⁹

times.co.jp/news/2016/01/05/world/u-n-syria-chemical-weapons-probe-points-sarin-exposure-rebel-use-doubted/#.Vq2hkVLaQ5w (regime suspected of continuing to use chemical weapons).

108. See Ben Smith & Arabella Thorp, *The Legal Basis for the Invasion of Afghanistan*, House of Commons Library Standard Note SN/LA/5340 (Feb. 26, 2010), at 4–5.

109. See Greg Myre, *Warlord Becoming Most Feared Man In Russia*, SEATTLE TIMES (Sept. 15, 1999), <http://community.seattletimes.nwsourc.com/archive/?date=19990915&slug=2983256> (apartment bombings kill over 250); John B. Dunlop, *The October 2002 Moscow Hostage-Taking Incident*, RADIO FREE EUR. (Dec. 8, 2003), <http://www.rferl.org/content/article/1342392.html> (over 200 dead in theater hostage crisis); *Volgograd Railway Station Blast*, LIVE UPDATES, RT (Dec. 29, 2013), <https://www.rt.com/news/volgograd-suicide-bombing-updates-940/> (32 killed in suicide bombings); Chloe Arnold, *Beslan Mothers’ Futile Quest for Relief*, BBC NEWS (June 4, 2005), <http://news.bbc.co.uk/2/hi/europe/4608785.stm> (over 320 dead in school hostage crisis); Richard Galpin, *Russia Train crash ‘Caused by Bomb’*, BBC NEWS (Nov. 28, 2009), <http://news.bbc.co.uk/2/hi/europe/8383960.stm> (train bombing killed 29); *Moscow Bombing: Carnage at Russia’s Domodedovo Airport*, BBC NEWS (Jan. 24, 2011), <http://www.bbc.com/news/world-europe-12268662> (over 35 dead in train bombing); *Two Blasts in Dagestan: 14 Dead, 87 Injured*, RUSS. TODAY

Thousands of militants serving in anti-Assad rebel groups include peoples from the Caucasus who are Russian citizens, many of whom are also members of Islamist insurgent groups which have carried out terrorist attacks on Russian civilian and military targets.¹¹⁰ Shortly after the Russian intervention began, ISIL successfully downed a Russian commercial airliner flying over Egypt, killing 224 people—including dozens of Russian citizens—and demonstrating the continuing threat Russia faces from Islamist terror groups.¹¹¹ The large presence of Chechen fighters in Syria within groups like ISIL has therefore heightened the Russian interest in the outcome of the Syrian conflict, and may justify the Russian intervention on individual self-defense grounds should Russia have been subjected to an “armed attack” by those groups.¹¹²

As mentioned above, the UN Charter prohibits the use of force in the absence of a Security Council authorization or a justification under self-defense.¹¹³ To invoke individual or collective self-defense, the ICJ held in *Nicaragua v. United States* that a nation must have sustained an “armed attack,” and a recent international claims decision deemed minor border clashes between the conventional troops of two states to not qualify as armed attacks.¹¹⁴ In *Nicaragua v. United States*, the ICJ held that El Salvador had not been subjected to an “armed attack,” yet the court also stated that it lacked evidence of direct

(May 3, 2012), <https://www.rt.com/news/mahachkala-explosions-five-dead-547/>; *Russia Chechnya: Deadly Rebel Attack Rocks Grozny*, BBC NEWS (Dec. 4, 2014), <http://www.bbc.com/news/world-europe-30323751> (dozens of Russian soldiers and policemen killed in gun battle with Chechen Emirate militants); *Five Killed in Suicide Bombing in Chechen Capital*, BBC NEWS (Oct. 5, 2014), <http://www.bbc.com/news/world-europe-29498909>.

110. See Lidia Kelley, *Moscow Says About 2,400 Russians Fighting with Islamic State: RIA*, REUTERS (Sept. 18, 2015), <http://www.reuters.com/article/2015/09/18/us-mideast-crisis-russia-islamic-state-idUSKCN0RI0PG20150918>.

111. Gianluca Mezzofiore, *Isis Claims 'Schweppes Can Bomb' Blew Up Russian Metrojet Flight 9268 in Egypt's Sinai - Dabiq*, INT'L BUS. TIMES (Nov. 18, 2015), <http://www.ibtimes.co.uk/isis-claim-schweppes-can-bomb-blew-russian-metrojet-flight-9268-egypts-sinai-dabiq-1529374> (explaining that IS claims responsibility for deadliest airliner attack in Russian history).

112. See *supra* Section I.A.1.; see also *supra* Section II.B.1.

113. See *supra* Section I.A.1.; see also *supra* Section II.B.1.

114. See generally Partial Award on the Jus Ad Bellum Eth.'s Claims 1–8 (Eth. v. Eri.), 26 R.I.A.A. 457, 465 (Eri.-Eth. Claims Comm'n 2015) (“As the text of Article 51 of the Charter makes clear, the predicate for a valid claim of self-defense under the Charter is that the party resorting to force has been subjected to an armed attack. Localized border encounters between small infantry units, even those involving the loss of life, do not constitute an armed attack for purposes of the Charter.”).

Nicaraguan involvement in the El Salvador's Civil War.¹¹⁵ In either case, the issue of an "armed attack" related to the direct involvement of a state, whereas neither ISIL nor their Chechen Islamist allies receive any direct state support nor could either be called a state.¹¹⁶ Given these holdings it would seem unlikely that several major terrorist attacks against Russian civilians by stateless militant groups, supported openly by no other state, would fit the conventional definition of "armed attack." Yet a comparison to the almost unquestioned legal basis of the United States invasion and occupation of Afghanistan raises questions about how closely related an irregular terrorist group must be to a state sponsor to make a terrorist attack an "armed attack" as defined by the ICJ.¹¹⁷

The United States Ambassador to the UN legally justified the American invasion of Afghanistan prior to UN Security Council authorization by invoking the nation's inherent right of individual and collective self-defense under Article 51, on the basis of al-Qaeda's relationship to the Taliban regime, and the UN Security Council subsequently issued a resolution authorizing the continuing use of force in Afghanistan.¹¹⁸ In fact, the Taliban regime was engaged in a brutal civil war from the

115. *See Nicar. v. U.S.*, 1986 I.C.J. Rep. 14, ¶¶ 230–32.

116. *See* Bill Roggio, *Chechen Commander in Syria Pledges to Islamic Caucasus Emirate*, LONG WAR J. (July 10, 2015), <http://www.longwarjournal.org/archives/2015/07/chechen-commander-in-syria-pledges-to-islamic-caucasus-emirates.php>; Mairbek Vatchagaev, *Caucasus Emirate Reverses Position on Syrian Jihad*, THE JAMESTOWN FOUND. (June 28, 2013), [http://www.jamestown.org/single/?no_cache=1&tx_ttnews\[tt_news\]=41091&tx_ttnews\[backPid\]=7&cHash=e52244ad41ac68df14f5f09a58799d97#.Vq2w-1LaQ5y](http://www.jamestown.org/single/?no_cache=1&tx_ttnews[tt_news]=41091&tx_ttnews[backPid]=7&cHash=e52244ad41ac68df14f5f09a58799d97#.Vq2w-1LaQ5y) (describing the tension between Syrian and Chechen rebel groups).

117. *See Nicar. v. U.S.*, 1986 I.C.J. Rep. 14, ¶¶ 190–191 (explaining that customary IL forbids organizing irregular groups for the purpose of incursions into another state's territory and in supporting groups in another state's internal conflict for the purpose of overthrowing that government).

118. Permanent Rep. of the U.S. to the U.N., Letter Dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2001/946 (Oct. 7 2001) ("From the territory of Afghanistan, the Al-Qaeda organization continues to train and support agents of terror who attack innocent people throughout the world and target United States nationals and interests in the United States and abroad. In response to these attacks, and in accordance with the inherent right of individual and collective self-defence, United States armed forces have initiated actions designed to prevent and deter further attacks on the United States."); *see also* S.C. Res. 1386, ¶ 3 (Dec. 20, 2001) ("Authorizes the Member States participating in the International Security Assistance Force to take all necessary measures to fulfil its mandate . . ."); *see also* Smith & Thorp, *supra* note 108, at 4–5.

time of its formation and never exerted effective control over all of the territory of Afghanistan.¹¹⁹ The Taliban led regime was never internationally recognized as the legitimate government of Afghanistan as most nations continued to view the ousted Islamic State of Afghanistan and its Northern Alliance rebel coalition, which controlled a significant portion of Afghanistan up until the U.S. invasion, as the legitimate government.¹²⁰ This begs a series of questions: if a nation must suffer an “armed attack” to justify individual self-defense, and if an “armed attack” can only be initiated by conventional or irregular forces directed by a “State,” then how could the Taliban launch an “armed attack” against the United States if they never exerted the effective control over Afghanistan necessary to constitute a “state?”¹²¹ If no “armed attack” occurred under this strict ICJ definition, then on what basis in IHL is the American intervention in and occupation of Afghanistan justified? If the international community is willing to accept the American intervention as permissible without addressing this void in legal justification, then the Russian intervention in Syria would presumably also be permissible, if directed explicitly against Chechen insurgent groups and their allies, such as ISIL, given state practice in the aforementioned Angola, Tajikistan, Afghanistan, and Mali interventions.

3. Due to the Scope of Russian Operations the Russian Intervention Likely Cannot Be Justified as Anticipatory Self-Defense

If, however, it cannot be said that the Chechen Islamist terrorist attacks on Russia rose to the level of “armed attacks,” Russia may have to turn to preemptive warfare as a justification

119. See *Who are the Northern Alliance?*, BBC NEWS (Nov. 13, 2001), http://news.bbc.co.uk/2/hi/south_asia/1652187.stm; see also sources cited *infra* note 132.

120. ADRIAN GUELKE, *TERRORISM AND GLOBAL DISORDER: POLITICAL VIOLENCE IN THE CONTEMPORARY WORLD*, at 55 (1st ed. 2006) (explaining that the Taliban achieved recognition only from the KSA, Pakistan, and the UAE); *Afghanistan & the United Nations*, UN, <http://www.un.org/News/dh/latest/afghan/un-afghan-history.shtml> (Islamic State of Afghanistan remained recognized until 2001 when Afghanistan transitioned to a new government); Zachary Laub, *The Taliban in Afghanistan*, COUNCIL ON FOREIGN REL. (July 4, 2014), <http://www.cfr.org/afghanistan/taliban-afghanistan/p10551> (explaining that 10% of Afghanistan remained in Northern Alliance control at the time of the United States invasion).

121. See *supra* Section II.A.

for the intervention. Notably the terrorist attacks of Chechen and Dagestani Islamic insurgent groups differ from the Afghanistan model in that Chechnya and Dagestan are a part of Russia, and as such, the spread of these militants into opposition rebel groups in Syria could be characterized as the spread of non-state parties to Russia's internal armed conflict into Syria's internal armed conflict, rather than an "armed attack" from a foreign terrorist group with a state sponsor.¹²² The Syrian government, as the result of sustaining heavy casualties and defections within the military, was unable to defeat these jihadi groups and was unable to make significant military progress until Iranian and Russian assistance increased.¹²³ Given the helpless state of the SAR to suppress these powerful rebel groups, which include terrorist groups whose members have committed acts of mass murder against Russian citizens in Russia and abroad, the Russian intervention could potentially be justified as anticipatory self-defense.¹²⁴

Peremptory norms of IHL hold that a pre-emptive attack or defensive operation must meet the necessity and proportionality

122. See Commission on Human Rights Res. 2000/58, U.N. Doc. E/CN.4/RES/2000/58 (Apr. 25, 2000) (explaining the Second Chechen War in terms of obligations under IHL, which by implication defined that war was an internal armed conflict); Valery Dzutsati, *Experts: Russia's Crackdown on Salafists at Home and Military Campaign in Syria Could Destabilize North Caucasus*, JAMESTOWN FOUND. (Mar. 30, 2016), [http://www.jamestown.org/single/?tx_ttnews\[tt_news\]=45253&tx_ttnews\[backPid\]=228&cHash=758db675522151c461e01282ed6ff790#VwBotXr4D7J](http://www.jamestown.org/single/?tx_ttnews[tt_news]=45253&tx_ttnews[backPid]=228&cHash=758db675522151c461e01282ed6ff790#VwBotXr4D7J); Valery Dzutsati, *International Crisis Group: Russia Deliberately 'Exported' Jihadis to Middle East*, JAMESTOWN FOUND. (Mar. 23, 2016), [http://www.jamestown.org/regions/middle-east/single/?tx_ttnews\[tt_news\]=45230&tx_ttnews\[backPid\]=49&cHash=0c54cad59ae23fb26423b694f412bafc#VwBpGHR4D7I](http://www.jamestown.org/regions/middle-east/single/?tx_ttnews[tt_news]=45230&tx_ttnews[backPid]=49&cHash=0c54cad59ae23fb26423b694f412bafc#VwBpGHR4D7I) (explaining reports alleging a Russian policy of encouraging Islamic militants to leave the Caucasus region and go to Syria).

123. See Jay Solomon & Sam Dagher, *Russia, Iran Seen Coordinating on Defense of Assad Regime in Syria*, WALL ST. J. (Sept. 21, 2015, 2:56 PM), <http://www.wsj.com/articles/russia-iran-seen-coordinating-on-defense-of-assad-regime-in-syria-1442856556>; Dr. Azeem Ibrahim, *Russia Is Clearing the Decks for Assad*, AL-ARABIYA NEWS (Jan. 3, 2016), <http://english.alarabiya.net/en/views/news/middle-east/2016/01/03/Russia-is-clearing-the-decks-for-Assad.html>.

124. See generally James Dever & John Dever, *Making Waves: Refitting the Caroline Doctrine for the Twenty-First Century*, 31 QUINNIPIAC L. REV. 165, 174 (2013) (discussing what constitutes a permissible use of force in an anticipation of an attack on a state); see also sources cited *supra* note 109 (describing Chechen jihadi group attacks on Russian soil); Kelley, *supra* note 110 (stating migrants from Middle East pose "great threat" to Russia); sources cited *supra* note 116 (explaining the involvement of Chechens in Syrian jihadi video addresses).

requirements.¹²⁵ The necessity doctrine holds that a government seeking to employ anticipatory self-defense must demonstrate “a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation.”¹²⁶ The proportionality doctrine for anticipatory self-defense limits the range and gravity of military action available and obligated the soldiers conducting any such operations to do “nothing unreasonable or excessive, since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it.”¹²⁷ Assuming the presence of Chechen insurgents is a grave and imminent threat to Russian security and assuming that the necessity requirement is thereby met, the scope of the Russian military intervention will be restricted by proportionality to attacking only those groups which had prompted that “necessity of self-defence.”¹²⁸ This would presumably limit available targets to the Chechen insurgent groups in Syria and their direct allies such as ISIL, yet Russian airstrikes have been conducted predominantly against Western backed rebels such as the Free Syrian Army until the more recent offensive against ISIL in Palmyra.¹²⁹ Even recognizing that most groups fighting Assad in Syria are often closer to ISIL in ideology than they are to their secular Western patrons, opposition rebel groups aligned with the Free Syrian Army are generally enemies of hardline Islamist groups like Jabhat al-Nusra unless military necessity dictates that they fight together.¹³⁰ The Russian airstrikes have therefore likely

125. See ICRC, *Rule 14. Proportionality in Attack*, CUSTOMARY IHL DATABASE, https://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter4_rule14 (last visited Feb. 27, 2017) (“The principle of proportionality in attack is codified in Article 51(5)(b) of Additional Protocol I, and repeated in Article 57.”); *Military Necessity*, INT’L COMM. OF THE RED CROSS, <https://www.icrc.org/casebook/doc/glossary/military-necessity-glossary.htm> (last visited Feb. 27, 2017) (“The principle of military necessity is, like the related principle of proportionality, an essential component of international humanitarian law. The ‘principle of military necessity’ permits measures which are actually necessary to accomplish a legitimate military purpose and are not otherwise prohibited by international humanitarian law. In the case of an armed conflict the only legitimate military purpose is to weaken the military capacity of the other parties to the conflict.”).

126. Dever & Dever, *supra* note 124.

127. *Id.*

128. *Id.*

129. See *More than 90% of Russian Airstrikes in Syria Have Not Targeted Isis*, *US Says*, GUARDIAN (Oct. 7, 2015, 5:39 PM), <http://www.theguardian.com/world/2015/oct/07/russia-airstrikes-syria-not-targeting-isis>.

130. See *Hardline Islamists Among Syria’s Moderate Opposition*, David

exceeded the scope of the necessity doctrine by attacking groups unrelated to Chechen insurgents or their Islamist allies in ISIL and Jabhat al-Nusra, making the intervention unjustifiable as anticipatory self-defense.

C. STATE RESPONSIBILITY MAY INCULPATE THE RUSSIAN
STATE AND COMMAND RESPONSIBILITY MAY INCULPATE
RUSSIAN MILITARY AND CIVILIAN COMMANDERS AS A
RESULT OF THE SYRIAN INTERVENTION

IHL *jus in bello* imposes stringent regulations on the methods Russian military forces, and any forces subordinate to Russian commanders, employ in their operations. IHL imposes obligations on combatants in an armed conflict to distinguish civilians from enemy combatants, to target only legitimate military objectives, and to prepare and execute attacks on such objectives so that any resulting civilian casualties and damage to civilian property is not disproportionate to the military advantage gained.¹³¹ Russian Defense Ministry Spokesmen Major General Igor Konashenkov has stated that “[o]ur aviation in Syria does not target populated localities,” yet there is ample evidence of Russian bombings of densely populated areas in rebel-controlled territory, which have resulted in hundreds of civilian casualties.¹³² There is also mounting but unconfirmed evidence of Russian generals directing SAA offensives, and of Russian combat troops directly participating in such

Cameron Concedes, BELFAST TELEGRAPH (Dec. 1, 2016), <http://www.belfasttelegraph.co.uk/news/uk/hardline-islamists-among-syrias-moderate-opposition-david-cameron-concedes-34358936.html>; David Bromwich, *Syria, the Times and the Mystery of the “Moderate Rebels”*, HUFFINGTON POST (Oct. 2, 2015, 9:32 PM), http://www.huffingtonpost.com/david-bromwich/syria-the-times-and-myste_b_8236164.html (discussing speculations that Russia’s entry into the war will “push ‘Independent Islamists’ to ally themselves with al-Nusra, and hence presumably will take them a degree closer to ISIS”).

131. See SOLIS, *supra* note 15, at 250; see also sources cited *supra* note 34 (explaining the cardinal principles of international humanitarian law including proportionality and distinction); Additional Protocol I, *supra* note 15, arts. 51, 57.

132. *Russian Defense Ministry Disproves Media Reports About Russian Airstrikes in Palmira*, RUSS. NEWS AGENCY (Oct. 6, 2015, 5:47 PM), <http://tass.ru/en/defense/826656> (statement by General Konashenkov); see also Martin Chulov & Kareem Shaheen, *Russia’s Airstrikes on Syria Appear Futile with Little Progress on Ground*, GUARDIAN (Dec. 23, 2015, 8:46 AM), <http://www.theguardian.com/world/2015/dec/21/russias-airstrikes-on-syria-struggle-to-spur-progress-on-the-ground> (at least 600 civilian deaths caused by Russian air strikes by this date).

offensives.¹³³ If the scope of the Russian intervention is limited to airstrikes, with minimal or no command and control over SAA offensives and no direct Russian combat operations, then Russia need only concern itself with the rules of IHL pertaining to the permissible methods of conducting airstrikes within the aforementioned peremptory norms. On the other hand, if Russian control over the operations of the SAA and its allies rises to a level creating commander-subordinate relationships between Russian commanders and pro-Assad forces, then state responsibility and command responsibility will broaden the scope of criminal liability applicable to Russian military operations in Syria.¹³⁴ Command responsibility will hold Russian military and civilian commanders criminally liable for knowingly failing to prevent, suppress, or punish war crimes and other violations of IHL or ICL committed by their subordinates in the Russian Military, the SAA, and other loyalist factions of the conflict.¹³⁵ Since Russian military commanders act as agents of the Russian state, any such liability they incur under command responsibility will be attributed to the Russian State, making it liable under state responsibility.¹³⁶

1. State Responsibility: Pro-Assad Forces Have Committed Grave Violations of IHL, but State Responsibility Only Potentially Inculcates Russia for the Operations of the Russian Air Force in the Absence of Direct Russian Involvement in Ground Offensives

The Assad regime has committed many atrocities, which rise to the level of war crimes or crimes against humanity, in

133. See Thomas Gibbons-Neff, *New Battlefield Video Shows How Russia's Elite KSO Military Unit Is Fighting in Syria*, WASH. POST (Dec. 13, 2016), https://www.washingtonpost.com/news/checkpoint/wp/2016/12/13/new-battlefield-video-shows-how-russias-elite-kso-military-unit-is-fighting-in-syria/?utm_term=.7d0e48a4cd42; Siobhan O'Grady & Reid Standish, *Russian Troops in Syria Will 'Stay Until the End'*, FOREIGN POL'Y (Oct. 22, 2015, 4:22 PM), <http://foreignpolicy.com/2015/10/22/russian-troops-in-syria-will-stay-until-the-end/> (speculation that the SAA offensive in Latakia Province is being led by Russian generals); Ryan Rifai, *Activists Geolocate Russian Soldiers on Ground in Syria*, AL JAZEERA (Nov. 8, 2015, 5:47 PM), <http://www.aljazeera.com/news/2015/11/activists-geolocate-russian-soldiers-ground-syria-151108135416902.html> (speculation that Russian ground troops are directly participating in Syrian offensive operations).

134. See SOLIS, *supra* note 15, at 391–96.

135. See *id.*

136. See 2001 ILC Report, *supra* note 29, arts. 1–2, 4–6, 8, 16.

flagrant violation of peremptory norms of IHL and the 1998 Rome Statute.¹³⁷ Forces aligned with President Assad infamously launched chemical weapons attacks on rebel held areas in Damascus, which various estimates have stated killed between 281 and 1,729 people.¹³⁸ Among the other human rights and IHL violations committed by pro-Assad forces are looting, torture, rape, murder, ethnic cleansing, forced starvation of besieged populations in rebel-held cities, the use of indiscriminate weapons such as barrel bombs,¹³⁹ and other grave violations of international law.¹⁴⁰ Russian cooperation with the SAR government puts Russia in the undesirable position of having the acts of pro-Assad forces in the SAA and NDF attributed to it as a state under the doctrines of state responsibility and attribution.

Article 1 of the International Law Commission's Report on the Responsibility of States for Internationally Wrongful Acts (2001) declares state responsibility to mean that "[e]very internationally wrongful act of a State entails the international

137. See Human Rights Council, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, 30th Sess., ¶ 26, U.N. Doc. A/HRC/30/48 (Aug. 13, 2015).

138. See Office of the Press Secretary, *Government Assessment of the Syrian Government's Use of Chemical Weapons on August 21, 2013*, THE WHITE HOUSE: PRESIDENT BARACK OBAMA (Aug. 30, 2013), <https://www.whitehouse.gov/the-press-office/2013/08/30/government-assessment-syrian-government-s-use-chemical-weapons-august-21>; S.B., *If This Isn't A Red Line, What Is?*, ECONOMIST (Aug. 21, 2013, 9:48 PM), <http://www.economist.com/blogs/pomegranate/2013/08/syria-s-war>; *Syria - National Executive Summary of Declassified Intelligence*, FRENCH EMBASSY IN PRETORIA (Sept. 3, 2013), <http://www.ambafrance-rsa.org/Syria-National-executive-summary>; *Bodies Still Being Found After Alleged Syria Chemical Attack: Opposition*, DAILY STAR: LEBANON (Aug. 22, 2013, 2:20 PM), <http://www.dailystar.com.lb/News/Middle-East/2013/Aug-22/228268-bodies-still-being-found-after-alleged-syria-chemical-attack-opposition.ashx#axzz2chzutFua>.

139. See S.C. Res. 2139, ¶¶ 1, 3, 5, 11 (Feb. 22, 2014) ("Demands that all parties immediately cease all attacks against civilians, as well as the indiscriminate employment of weapons in populated areas, including shelling and aerial bombardment, such as the use of barrel bombs, and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering, and recalls in this regard the obligation to respect and ensure respect for international humanitarian law in all circumstances, and further recalls, in particular, the obligation to distinguish between civilian populations and combatants, and the prohibition against indiscriminate attacks, and attacks against civilians and civilian objects as such.") (emphasis omitted).

140. *Id.*; see also *World Report 2015: Syria*, HUM. RTS. WATCH (Jan. 2015), <https://www.hrw.org/world-report/2015/country-chapters/syria>.

responsibility of that State.”¹⁴¹ Internationally wrongful acts involve conduct consisting of an act or omission attributable to the state under international law and “[c]onstitutes a breach of an international obligation of the State” through its officials or state organs.¹⁴² Individuals other than state organs and officials can also have their conduct attributed to the state should they be “empowered by the law of that State to exercise elements of the governmental authority . . . provided the person or entity is acting in that capacity in the particular instance.”¹⁴³ The placing of state organs under the command of another state will not obviate attribution to the former state if such state organ “is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed.”¹⁴⁴ The conduct of individuals will also be attributed to a state if they are “acting on the instructions of . . . that State in carrying out the conduct,” and a state knowingly assisting another state in the commission of an internationally wrongful act will also inculcate the former state.¹⁴⁵

As applied to the Russian intervention, these rules would attribute any breaches of international law committed by individuals, deemed *de facto* agents of the Russian State, to the state directly.¹⁴⁶ While the Russian government claims that its assistance to the SAR is limited to airstrikes, training, and supplying arms, there are allegations that Russian commanders stationed in Western Syria are overseeing SAA offensives against opposition rebels.¹⁴⁷ Some reports allege that Russian troops are directly participating in SAA ground offensives, although the existence of direct Russian participation in such offensives beyond the use of Special Forces units during the SAA re-conquest of Palmyra from ISIL remains unconfirmed.¹⁴⁸ If Russian involvement in the intervention escalates beyond this

141. 2001 ILC Report, *supra* note 29, art. 1.

142. *Id.* arts. 2, 4.

143. *Id.* art 5.

144. *Id.* art. 6.

145. *Id.* arts. 8, 16.

146. *Id.* arts. 1–2, 4–6, 8, 16.

147. *See supra* note 133 and accompanying text (explaining the evidence for Russian command and control over pro-Assad forces).

148. *See* sources cited *supra* note 133 (explaining the evidence for Russian command and control over pro-Assad forces); *see also* sources cited *supra* note 4 and accompanying text (explaining Russian aerial and ground operations in Syria); sources cited *supra* note 10 and accompanying text (explaining Russian and Iranian assistance in the Syrian Civil War, the origins of the Syrian Civil War, and the various parties to the conflict).

stage of participation, however, Russian commanders and any Russian or pro-Assad forces placed under their command will be deemed organs of the Russian State. In the absence of such evidence confirming this level of involvement, it is unlikely that the actions of Syrian or Iranian forces will inculcate the Russian State directly.¹⁴⁹ The Russian operations still retain the potential to blame the Russian State for any military action taken which violates IHL or knowingly assisting the pro-Assad forces in committing an internationally wrongful act.¹⁵⁰

2. Command Responsibility: Russian Commanders May Be Held Liable Under Indirect Command Responsibility for the Crimes of pro-Assad Forces if a Commander-Subordinate Relationship Exists, but Evidence of Such a Relationship is Currently Lacking

Russian military assistance to a government engaged in systemic atrocities could create individual command liability for Russian military commanders. Civilian and military commanders are criminally responsible under ICL for violations of IHL by their subordinates if they knew or had reason to know that their subordinates committed, or were going to commit, such crimes if they did not take all necessary and reasonable measures in their power to prevent their commission, or if such crimes had been committed and they did not take reasonable measures to punish the perpetrators.¹⁵¹ Command responsibility can be direct or indirect, with direct responsibility involving a direct order and indirect responsibility involving the negligence or recklessness of a civilian or military commander.¹⁵² Indirect command responsibility was illustrated in *United States v. Yamashita*, where a Japanese military commander was controversially convicted and sentenced to death for atrocities committed by Japanese troops on a *respondeat superior* (“let the

149. See generally *Nicar. v. U.S.*, 1986 I.C.J. Rep. 14, ¶ 115 (“The Court has taken the view that United States participation, even if preponderant or decisive, in the financing, organizing, training, supplying and equipping of the contras, the selection of its military or paramilitary targets, and the planning of the whole of its operation, is still insufficient in itself, on the basis of the evidence in the possession of the Court, for the purpose of attributing to the United States the acts committed by the contras in the course of their military or paramilitary operations in Nicaragua.”).

150. See 2001 ILC Report, *supra* note 29, art. 16.

151. See GILL & FLECK, *supra* note 18, at 507.

152. See SOLIS, *supra* note 15, at 391–96.

master answer”) theory of liability, even though he was unable to communicate with his subordinate troops during the period in which the crimes were perpetrated.¹⁵³ From evidence of the circumstances surrounding the crimes, the tribunal reasoned that Yamashita was liable because he knew or should have known about the crimes committed by his army and omitted to establish the type of effective control over his troops that would have been required under the circumstances.¹⁵⁴

In the absence of compelling evidence of direct Russian command over pro-Assad forces, indirect command responsibility for joint operations of Russian and SAA, NDF, or Iranian troops is more immediately relevant to the Syrian Civil War. Customary IHL has generally endorsed an effective control test to determine whether a commander-subordinate relationship exists. The United Nations International Criminal Tribunal for the Former Yugoslavia has held that a commander may consider a perpetrator his “subordinate” if he exercises a degree of control rising to “[e]ffective control . . . in the sense of having the material ability to prevent and punish the commission of [the] offences.”¹⁵⁵ This test allows for indirect command responsibility for the actions of armed forces not officially subordinate to a commander, as it does not require a traditional military style commander-subordinate relationship for command responsibility to attach.¹⁵⁶

Determining whether a Russian commander exerts effective control, and thereby bears indirect command responsibility, over a member of pro-Assad forces is difficult given the decentralized command structure of those forces.¹⁵⁷ The SAA has suffered heavy defections and casualties since the civil war began in

153. See GILL & FLECK, *supra* note 18, at 45; see also SOLIS, *supra* note 15, at 384; United States v. Tomoyuki Yamashita, U.S. Military Commission, Manila 8 Oct.-7 Dec. 1945; In Re Yamashita, 327 U.S. 1, 16 (1946).

154. See sources cited *supra* note 153 (explaining command responsibility).

155. Prosecutor v. Dalalic *et. al.* (Celebici case), Case No. IT-96-21-A, Judgment, ¶ 256 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998); see also Prosecutor v. Halilovic, Case No. IT-01-48-A, Judgment, ¶ 59 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 16, 2007).

156. See SOLIS, *supra* note 15, at 403.

157. See SAMER N. ABOUD, SYRIA 112 (2016) (“The local [loyalist] Syrian militias have played a pivotal role during the conflict. Although they operate with relative autonomy from the regime their participation in fighting rebel units has reduced the burden on the increasingly emasculated SAA. Indeed, four years after the conflict began, it is clear that the regime would not have survived and maintained control over large parts of the country without the active participation of militias.”).

2011. SAA has compensated for its manpower deficit by turning to paramilitary groups like the NDF, whose leaders some analysts believe have become provincial warlords who are autonomous from the Assad regime's control.¹⁵⁸ Furthermore, there are reports that commanders in the Iranian military forces, thousands of whom are currently fighting in Syria, are increasingly exercising operational control of major ground offensives involving the SAA, NDF, and other loyalist militias.¹⁵⁹ The fragmentation of command and control over pro-Assad forces will make it more difficult to determine which superior exercises effective control and command responsibility. Even minor direct participation by Russian ground troops can implicate indirect command responsibility if the facts and circumstances indicate Russian commanders exercise effective control over allied loyalist militias.

A prominent example of indirect command responsibility over the actions of allied militias not formally subordinate to a military commander was shown in the Kahan Report, an Israeli government inquiry into the 1983 Sabra and Shatila Massacres in Lebanon. The Report explained how Israeli Defense Forces ("IDF") surrounded a refugee camp and, issuing no order to

158. *Id.* at 112 ("The presence of militias throughout the country and the absence of rebel groups in those territories actually reflects the regime's weakness, for its reliance on decentralized, privatized violence has dispersed decision-making power to centers potentially outside of the regime's control. As the SAA contracts further the army is forced to engage in military attacks alongside local and regional militias. Such reliance on militias that are outside of the immediate command and control of the regime implies a withering and not a strengthening of the regime."), 116 (explaining that it is estimated over 40,000 soldiers in the Syrian Arab Army have died since the start of the conflict). *But see* Paul Bucala & Frederick W. Kagan, *Iran's Evolving Way of War: How the IRGC Fights in Syria*, CRITICAL THREATS (Mar. 2016), http://www.irantracker.org/sites/default/files/imce-images/Irans_Evolving_Way_of_War_IRGC_in_Syria_FINAL.pdf ("The National Defense Forces have been foot soldiers and sometimes cannon fodder, but have never been in charge of the fighting.")

159. *See* Bucala & Kagan, *supra* note 158, at 2 ("The data shows, however, that Iranian officers are unlikely to have been commanding Iranian troops in Syria, as there have not been enough casualties reported among IRGC enlisted personnel to account for the number of officers killed based on normal casualty ratios. We hypothesize, therefore, that the IRGC has developed the ability to send a unit cadre to Syria, implant it among groups of militias, and successfully lead those militias in extremely hard fighting."); *see also id.* at 12 ("But senior, active duty IRGC Ground Forces commanders have also been present in the fight since at least the summer of 2012 . . . These senior commanders were likely providing operational and strategic support to their Syrian counterparts in operation rooms far from the frontlines, as they were not dying in significant numbers during the early years of the conflict.")

attack the camp, stood by as a contingent of allied Phalangist militants entered the refugee camp and massacred over 1,000 Palestinian civilians.¹⁶⁰ A government commission held that the IDF officers bore indirect command responsibility for the attack because they allowed the Phalangists to enter the camp and should have foreseen the danger of a massacre. In having such foresight, they omitted to adopt any appropriate measure to prevent the potential risk of crime from happening.¹⁶¹ The commission determined the IDF commanders knew about the planned operation and had a duty to inform their superior officers of the dangers involved in the operation, which they omitted to perform.¹⁶² The commission also found that the IDF officers who received the first reports of the massacre did not expedite actions to prevent the continuation of the criminal acts, thus failing to do everything in their power to prevent the massacres.¹⁶³

If a commander-subordinate relationship between Russian commanders and Syrian and Iranian ground forces can be shown by evidence, which it currently cannot, then Russian commanders would likely have foresight of the atrocities those forces intend to commit against regime opponents. In that case, Russian commanders could be liable under the Kahan Report standard.¹⁶⁴ There are many difficulties associated with arresting and prosecuting war criminals shielded by states. As such, very few convictions have been sustained on a command responsibility theory.¹⁶⁵ Sanctions based on command responsibility poses as a negligible deterrent towards Russian collaboration with the Assad regime and its allies. Alternative methods of deterring Russian collaboration with the Assad regime include imposing United Nations sanctions for Russian violations of IHL or ICL in Syria, but this may prove to be a futile proposition given Russia's veto power on the United Nations

160. CHANTAL MELONI, *COMMAND RESPONSIBILITY IN INTERNATIONAL CRIMINAL LAW* 73 (2010).

161. *See generally id.*; *see also* REPORT OF THE COMMISSION OF INQUIRY INTO THE EVENTS AT THE REFUGEE CAMPS IN BEIRUT, ISRAEL MINISTRY OF FOREIGN AFF. (1983) [hereinafter KAHAN REPORT].

162. *See* KAHAN REPORT, *supra* note 161 (explaining Israeli Defense Forces' knowledge of the planned militia attack).

163. *Id.*

164. *See generally id.* (explaining the standard for indirect command responsibility).

165. *See* SOLIS, *supra* note 15, at 404–05.

Security Council.¹⁶⁶ If the law of armed conflict, *jus ad bellum*, permits Russian intervention in Syria, and if IHL provides no adequate deterrent to Russian military collaboration with individual war criminals, then a narrow linkage of those two fields of international law should be developed through state practice tying the initial lawfulness of a state's decision to use military force to human rights and IHL considerations.¹⁶⁷

D. REVISITING THE *NICARAGUA* DECISION: PROPOSALS FOR
INTEGRATING HUMAN RIGHTS AND USE OF FORCE
CONSIDERATIONS

The separation of the law of armed conflict on the legality of a state's use of military force from IHL, governing the lawfulness of an individual's conduct while engaged in an armed conflict, currently allows for the provision of direct military assistance to rogue states like the SAR under a presumably lawful pretense of intervention by invitation or self-defense. A remedy to the undesirable incentive of supporting state and non-state actors engaged in war crimes and human rights violations may be developed in customary international law through consistent state practice prohibiting such assistance. The legality of any use of force in another state's internal armed conflict, which is not authorized by the United Nations Security Council, including self-defense and intervention by invitation, should be regulated by a new peremptory norm illustrated in the proposed Draft Article below:

166. See Michelle Nichols, *Russia Vetoes U.N. Demand for End to Bombing of Syria's Aleppo*, REUTERS (Oct. 8, 2016), <http://www.reuters.com/article/us-mideast-crisis-syria-un-idUSKCN1280VJ?il=0>.

167. *Contra* Dinstein, *supra* note 5, at 881 (“[O]ne of the most basic principles of modern international law is that of a total separation between the *jus ad bellum* and the *jus in bello*.”).

Draft Article: The Prohibition on Providing Military Assistance to Violators of International Humanitarian and Human Rights Law

Any State which engages in the use of force in a non-international armed conflict, not pursuant to an explicit authorization of the UN Security Council, is bound by the following provisions:

- (1) If an organ of a State, authorizing the use of force, is aware of a substantial likelihood under the circumstances that by such use of force:
 - a. It would be providing military assistance to a State or non-State actor, which has committed or is committing serious violations of international humanitarian or human rights law, including grave breaches of international humanitarian law under the 1949 Geneva Conventions and Protocol I, and
 - b. The use of force is authorized, then;
- (2) Such use of force by that State will constitute an internationally wrongful act and a breach of international law which will be attributed to:
 - a. The State which engaged in such use of force; and
 - b. Any persons who are organs of that State responsible for authorizing such use of force.
- (3) Definitions.
 - a. Use of Force. The term "use of force" includes the sending of any military forces of a state, including troops [as defined in (3)(c)], onto the territory of another state for purposes not limited to but including the provision of military assistance.

- b. Military Assistance. The term “military assistance” in this article means assistance in the form of (i) providing airstrikes, (ii) providing military forces, and (iii) providing artillery bombardments or missile strikes.
- c. Military Forces. The term “military forces” includes all uniformed military troops, all volunteer and mercenary forces that are organs of that State, mechanized infantry, tanks, and any other armored vehicles.
- d. Substantial Likelihood. The term “aware of a substantial likelihood” [in (1)(a)] includes:
 - i. Gross negligence in the awareness of,
 - ii. Reckless indifference in the awareness of, or
 - iii. Knowledge of, the existence of such violations [in (1)(a)].
- e. “Organs” of a state include the definitions listed in the 2001 ILC Report.

These proposed provisions would not offend past precedent in the law of armed conflict regarding the use of force, as they are consistent with the ICJ’s opinion in *Nicaragua v. United States*. The mere provision of arms alone does not constitute an “armed attack” which would violate the prohibition on the use of force in Article 2(4) of the United Nations Charter.¹⁶⁸ If the substance of this provision developed into a new peremptory norm of international law, it would link international law regulating decisions to go to war (*jus ad bellum*) with laws regulating the conduct of the participants in an armed conflict (*jus in bello*) by restraining invocations of self-defense or

168. See *Nicar. v. U.S.*, 1986 I.C.J. Rep. 14, ¶ 115.

intervention by invitation to prop up entities which violate IHL, international human rights law, and any of their applicable peremptory norms.

In all non-international (internal) armed conflicts this Draft Article would create a new type of internationally wrongful act under state responsibility, authorizations of the use of force by state organs, which provide military assistance to state or non-state actors who have been or are engaged in grave breaches or “serious” violations of IHL or international human rights law. Such acts, committed where there is knowledge of or reason to know of the existence of such violations, would attach individual criminal liability under ICL to the state organs involved in authorizing force and would attribute legal liability to the state. To trigger the provision the state organ authorizing such force must possess a *mens rea* of either knowing of, or being grossly negligent or recklessly indifferent in ascertaining knowledge of the existence of such violations, which would be determined by an international tribunal through drawing evidentiary inferences from case-by-case facts by the totality of the circumstances. The Russian state would thus be liable for the internationally wrongful act of its President (a state “organ”) as Russia’s close and longstanding alliance with Syria make it likely that President Putin, had knowledge of the now widely publicized IHL and human rights violations of the Assad regime at the time he authorized the Russian intervention in Syria. Such a norm is unlikely to succeed through state practice in the near future, as it would conflict with the geopolitical interests of many states, including the permanent five members of the UN Security Council, which have provided and continue to provide political, economic, or military support to various governments with appalling human rights records for a variety of reasons.¹⁶⁹

169. See J. Sana Stuster, *Mapped: The 7 Governments the U.S. Has Overthrown*, FOREIGN POL’Y (Aug. 20, 2013), <http://foreignpolicy.com/2013/08/20/mapped-the-7-governments-the-u-s-has-overthrown/> (explaining U.S. and U.K. support for the overthrow of the democratically elected government of Iran in favor of reestablishing the Iranian monarchy and U.S. support for other dictators); see also Max Fisher, *Why China Still Supports North Korea, in Six Little Words*, WASH. POST (Feb. 12, 2013), <https://www.washingtonpost.com/news/worldviews/wp/2013/02/12/why-china-still-supports-north-korea-in-six-little-words>; see generally Robert Marquand, *An Embarrassed France Backpedals from its Support of Tunisia’s Ben Ali*, CHRISTIAN SCI. MONITOR (Jan. 20, 2011), <http://www.csmonitor.com/World/Europe/2011/0120/An-embarrassed-France-backpedals-from-its-support-of-Tunisia-s-Ben-Ali/> /.

III. CONCLUSION

Russia's military intervention in Syria is likely justifiable under the intervention by invitation exception to the non-use of force principle if limited in scope to the military targeting of terrorist groups such as ISIL, and may also be justifiable as a lawful exercise of collective or individual self-defense. Those self-defense justifications, while bolstered by recent state practice, are likely weaker than the intervention by invitation exception, and anticipatory self-defense provides no adequate legal justification. State responsibility and attribution will hold the Russian State to be liable for violations of international law committed by state organs, and command responsibility could inculcate Russian civilian and military commanders for the actions of Russian troops and allied forces in Syria, but there is currently insufficient evidence to establish indirect command responsibility of SAA or NDF troops. The separation of international law *jus ad bellum* from IHL *jus in bello* has therefore enabled State governments such as Russia's to back governments which commit systemic atrocities, and no clear peremptory norm currently forbids an otherwise lawful use of force solely on such *jus in bello* grounds. The principles of the draft article in the previous section would bring about a desirable focus on human rights in regulating decisions by states to enter into armed conflicts and would restrain the relative permissibility of the intervention by invitation exception, which may legally permit Russia to militarily back a mass-murdering dictator so long as the scope of the military assistance Russia provides is limited to a co-operative war against nebulously defined "terrorist" groups.