INTERNATIONAL REVIEW
of the Red Cross

Humanitarian debate: Law, policy, action

Conflict in Syria

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EDITORIAL

CONFLICT IN SYRIA: FINDING HOPE AMID THE RUINS

Vincent Bernard, Editor-in-Chief

Humanity has been undergoing a trial of fire and blood in Syria since 2011. What is happening? Over time, this conflict has exhibited all possible guises of war: civil war, proxy war, siege warfare, cyber-warfare and war against terror. All forms of past and present warfare seem to converge in this one conflict. A war against children, against hospitals, against cities, against first-aid workers, against memory, against justice – maybe these are more accurate titles for this war.

Whatever names we give it, we can attempt to grasp the enormity of this tragedy with some figures and orders of magnitude. Although there is no widespread agreement on the number of dead, a *New York Times* article published in April 2018 puts the most widely accepted death count at 470,000.[1] According to a UNICEF report, as of March 2018, around 30,000 people were wounded per month, 1.5 million were living with a permanent handicap, 6.5 million were suffering from food shortages, and 70% of the population was living in extreme poverty. 1.75 million children were not able to attend school, with one out of every three schools unfit for use owing to the war.[2]

More than 11 million people, or around half of the pre-war population, have been uprooted from their homes. Some 5 million people have had to flee the country, and 13.5 million rely on humanitarian assistance to survive.[3] Most of the country's infrastructure has been destroyed, the economy has collapsed, the country's health-care system – among the best in the region before the war – has imploded, and entire cities and neighbourhoods have been reduced to vast ruins.

But any attempt to estimate the losses in terms of human lives or material damage simply does not convey the suffering that has been inflicted, the physical and psychological trauma that will plague the war's victims and their loved ones for the rest of their lives, or the impact of the violence and physical displacement on future generations.

The shockwaves from the war in Syria are being felt well beyond the country's borders. This is most apparent in the fate of the millions of Syrians who have had to flee the country. Their future is now in the hands of their host countries, which in many cases are deeply divided over the question of asylum. Beyond the community divisions that the war has laid bare, the involvement of both regional and great powers in support of one side or the other has turned the Syrian people into hostages of competing interests that they have nothing to do with. The chaos in Syria has spawned attacks by transnational armed groups acting both within the country's borders and thousands of miles away, wherever

lone individuals or networks of terrorists strike in their name. What will become of the thousands of foreign fighters who have gone off to join the fight in Syria? What should be done with them and their families when they are captured?

The war in Syria has even helped to revive the spectre of the Cold War: what began as the so-called "Arab spring" popular uprising has evolved into a regional conflict, with several great powers stepping in and providing support to the opposing sides. In another throwback to the Cold War era, multilateral mechanisms designed to restore peace were quickly paralyzed, and as a result the horrors produced by the conflict have exploded since 2011.

Now that government forces have taken back control of many urban areas, the war seems to be entering a new phase. People who fled the fighting are starting to return home. However, while the period of major siege operations aimed at winning back territory appears to be ending, the conflict drags on. And while the humanitarian needs are changing, they are no less daunting.

Given the scope of the destruction, the significance of this conflict as a new paradigm of war and the utter contempt that has been shown for international humanitarian law (IHL), the *Review* chose to devote this issue to Syria. What's more, we wanted Syrians to speak for themselves. With this in mind, and with the support of the International Committee of the Red Cross (ICRC) delegation in Damascus, the *Review* went to Syria in February 2018 – just as the siege of Ghouta was getting under way – in order to meet with researchers, civil society practitioners, legal experts and doctors, along with aid workers from the ICRC and the Syrian Arab Red Crescent (SARC). The articles in this issue, which highlight important insights from a humanitarian, legal, psychological and urban-planning perspective, unexpectedly provide a glimmer of hope for the country's recovery.

Destructive rage

Day 1: To enter Syria, the ICRC has us transit through Lebanon. From Beirut, we take the road to the Syrian border. In a sad twist of fate, at the border crossing, tourist posters still tout the country's architectural and historical riches: the ancient city of Palmyra, Aleppo's medieval citadel, and Krak des Chevaliers – the largest Crusader castle.

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1   Megan Specia, "How Syria's Death Toll Is Lost in the Fog of War", *The New York Times*, 13 April 2018, available at: www.nytimes.com/2018/04/13/world/middleeast/syria-death-toll.html. The Syrian Observatory for Human Rights, based in the UK, reports a figure of 511,000 people killed between March 2011 and March 2018; see Angus McDowall, "Syrian Observatory Says War Has Killed More Than Half a Million', *Reuters*, 12 March 2018, available at: www.reuters.com/article/us-mideast-crisis-syria/syrian-observatory-says-war-has-killed-more-than-half-a-million-idUSKCN1GO13M. Other sources provide smaller figures; see, for example: "Monthly Statistical Report on Casualties in Syria – March 2018", Violations Documentation Center in Syria, 2018, available at: http://vdc-sy.net/wp-content/uploads/2018/04/Monthly_Stat_Rep_Mar18_EN.pdf.

2   UNICEF numbers (gathered with WHO and Handicap International) as of March 2018, available at: www.unicef.org/mena/stories/seven-years-war-syria-numbers.

3   See the ICRC's "War in Syria" web page, available at: www.icrc.org/en/where-we-work/middle-east/syria/war-syria.

This is my second time in this country. I was lucky enough to visit Syria in the 1990s, invited by a friend who took us to most of these wonderful sites. Although less well-known and less visited than Egypt and Jordan, Syria has an incredibly rich history and contains within its borders several of the world's most important historic sites and a number of gems of both ancient and medieval architecture. While numerous archaeological missions have unearthed, explored and preserved the country's historical ruins, these out-of-the-way sites received few visitors until the end of the twentieth century. This made the experience all the more enchanting: like us, the handful of tourists who strayed from the beaten path to visit these sites could almost feel that they were among the first people to walk these ruins after centuries of neglect. We never imagined that some of these centuries-old treasures would disappear, surviving only in our memories and as faded images on old tourist posters.

The country's tourism industry was just starting to flower when the crisis broke out. The intense bombing, coupled with a destructive rage on the part of the belligerents, has taken a great toll on this heritage of mankind. Sadly, many people only learned of Palmyra – the amazing desert city – when the so-called Islamic State group started destroying its most beautiful monuments.

The destruction of Syria's protected cultural property is now being used for purposes of propaganda and terror, and has become one of the defining features of this conflict. In this issue of the *Review*, Ross Burns reports on the damage inflicted on Syria's cultural heritage and argues in favour of rebuilding sites that have been laid waste by the war rather than simply reconstructing them in 3D models. Polina Levina Mahnad sets out the legal instruments that protect cultural property as well as several clever, practical measures taken during the conflict to further safeguard them. The measures she describes could serve to improve compliance with the law in other areas as well, apart from cultural property.

Portrait of a disaster

Day 2: We are now in Syria, and our nerves are immediately assailed by the thunder of bombing, both near and far. From the rooftop we see warplanes above us and, in the distance, large mushrooms of grey smoke whenever a bomb or shell hits a building. Our thoughts soon turn to anguish as our colleagues and new acquaintances share their worries for family members living in dangerous areas and their sense of dread at the prospect of receiving the terrible news of a loved one being seriously wounded.

While the attacks on cultural property were shocking, large parts of the country have in fact been destroyed. The massive and relentless bombing of Syria's cities is another feature of this war. After years of fighting, the scope of destruction is mind-boggling – an impression that ICRC president Peter Maurer shares in his interview for this issue when comparing Syria to the many other war zones that he has visited in recent years. For Mr Maurer, the other striking feature of this conflict is the disregard for the safety of hospitals and medical

staff. First-aid centres now have to be located underground in order to continue operating and to shield patients from the bombs. These medical shelters are one of the conflict's tell-tale images.

In our 2016 issue on "War in Cities", an Aleppo resident named Yasser gave his account of life in that war-torn place. "We were caught between the two conflicting sides", he said. "We seemed to have been stuck between a rock and hard place as there was no way out. I would not have wanted any human being to go through the kind of hardships that we did."[4] As explained in that issue, including through the accounts of Aleppo residents, the conflicts in Syria and neighbouring Iraq were primarily urban in nature. Urban warfare can cut civilians off from essential services.[5] Limiting or blocking access to water is one tactic that various parties to the Syrian conflict have employed in an attempt to cause indiscriminate harm to their adversary.[6]

In another sad twist of fate, with Syria's cities reduced to fields of rubble, experts have identified poorly managed urban development and various demographic challenges as two of the underlying causes of the conflict. We met with architect Marwa Al-Sabouni, who survived the protracted battle of Homs along with her family. In her book *The Battle for Home*, she writes about how the destruction of the traditional urban fabric in Syrian cities created or stoked sectarian and community animosity, which ultimately led to the war. In her article for this issue, she proposes a new approach to urban planning when it comes time to rebuild Syria's cities – one that will promote peaceful coexistence and avoid past errors.

Despite the threat of bombardment, Professor Yassar Abdin made the dangerous journey to meet with the *Review* team. Abdin, an architect and urban planner, agreed to write a study on the "social insecurity" of Greater Damascus before the war. During our discussion a mortar shell hit the building next door, and we all had to rush to a safe room in the basement.

The destruction of the built environment only hints at the psychological devastation that the people have suffered: for every city or village that has been destroyed, how many bereavements and separations take place, how many people are impoverished, uprooted or humiliated, and how many are traumatized by sexual violence? Professor Mazen Hedar, president of the Syrian Association of Psychiatry, painted a dismal picture of the impact of the war on Syrians' mental health. Working in a country where admitting to psychological disorders was still considered taboo before the war, Dr Hedar discusses remote online consultations with patients – an innovative solution adopted by therapists in response to the

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4   "Life in a War-Torn City: Residents of Aleppo Tell Their Stories", *International Review of the Red Cross*, Vol. 98, No. 901, 2016, p. 17, available at: www.icrc.org/en/international-review/article/life-war-torn-city-residents-aleppo-tell-their-stories.

5   See, e.g., ICRC, *Urban Services During Protracted Armed Conflict: A Call for a Better Approach to Assisting Affected People*, October 2015, available at: www.icrc.org/en/publication/4249-urban-services-during-protracted-armed-conflict.

6   "Red Cross: Water Being Used as Weapon of War in Syria", *Al Jazeera*, 2 September 2015, available at: www.aljazeera.com/news/2015/09/red-cross-water-weapon-war-syria-150902114347090.html.

lack of skilled practitioners in the country and the challenge of meeting with patients in person.

Not enough space for humanitarian workers

Day 3: At the end of a long day at work, Marianne Gasser, the head of the ICRC's delegation in Syria, sits down with us in her office to brief us on her experience. She has spent years working in this country both before and during the war. She speaks of tense negotiations, dangerous forays across front lines, the "successes" and limits of humanitarian work, and the frustrations.

Armed groups have splintered and multiplied, religious and community radicalism – which includes a rejection of any foreign presence – has proliferated, and bombings are either indiscriminate or specifically target medical facilities. How can a humanitarian organization operate in such a dangerous and volatile environment?

The challenges posed by the conflict in Syria are especially complex given its particular features and the growing number of groups engaged in violence. How can you convince the fighters to allow humanitarian organizations through, in order to help civilians caught in the middle? How can you get safety guarantees from increasingly radical and fragmented groups? How can you maintain a neutral, independent and impartial humanitarian space in a conflict where each side demonizes the other? In reality, the conflict is a fight not only for the streets of Syria's cities, but also for people's minds. Each side engages in intense propaganda both inside and outside Syria through social media, online proselytism and fake news, in order to win over adherents.

For humanitarian organizations, the question of access is crucial. In Syria, humanitarian action is further constrained by the inability to operate freely on both sides of the lines of control. The question of humanitarian access was already a concern when the conflict broke out;[7] since 2012, the *Review* has published several articles on the rules governing humanitarian access.[8]

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7   In 2012, Rony Brauman of Médecins sans Frontières (MSF) admonished the ICRC on these pages for its decision to engage in dialogue with the Syrian government and carry out its humanitarian work in government-controlled zones by crossing lines rather than by working from "liberated zones" (i.e., areas under the control of the government's opponents). He contrasted the ICRC's operational decision with that of MSF, which was working solely in the opposition zones; it reached the zones by crossing borders without requesting the authorities' approval. The situation on the ground then evolved, and radicalized armed groups took control of large zones, rejecting the presence of humanitarian organizations. Rony Brauman, "Médecins sans Frontières and the ICRC: Matters of Principle", *International Review of the Red Cross*, Vol. 94, No. 888, 2012, available at: www.icrc.org/en/international-review/article/medecins-sans-frontieres-and-icrc-matters-principle.

8   Emanuela-Chiara Gillard, "The Law Regulating Cross-Border Relief Operations", *International Review of the Red Cross*, Vol. 95, No. 890, 2013, available at: www.icrc.org/en/international-review/article/law-regulating-cross-border-relief-operations; Françoise Bouchet-Saulnier, "Consent to Humanitarian Access: An Obligation Triggered by Territorial Control, not States' Rights", *International Review of the Red Cross*, Vol. 96, No. 893, 2014, available at: www.icrc.org/en/international-review/article/consent-humanitarian-access-obligation-triggered-territorial-control.

The ICRC has been unable to enter all conflict zones but has strived to stay true to its humanitarian principles of neutrality, independence and impartiality. It has also sought to fulfil its role as a neutral intermediary and has supported the relief efforts of the SARC, which the Syrian government chose as the exclusive partner for international aid organizations. In this issue, a series of photos taken by the SARC and the ICRC shows the work being done by the International Red Cross and Red Crescent Movement in the conflict, and the support that the Movement provides to those seeking to rebuild their lives.

Despite these extraordinary difficulties, relief workers in Syria continue to draw on a wellspring of courage and creativity in carrying out their work. Alongside the images of destruction that have come to epitomize this conflict, we will remember the images of courage and solidarity – those showing the perseverance of Syrian and foreign doctors, the first responders pulling victims from the debris, and the courage of the SARC volunteers, sixty-six of whom have been killed while carrying out their duties since the conflict began.[9]

For the ICRC, "[h]umanity cannot be measured in terms of relief provided, but in the real recovery of affected people".[10] The organization provided food assistance to 3,269,593 beneficiaries in 2017 and, thanks to its efforts, 15 million people country-wide have benefited from a regular supply of water and adequate living conditions.[11] Aid workers are learning to work in cities, which are not only the site of massive infrastructure damage but are also receiving more and more displaced people.[12]

Ongoing struggle to uphold the law

Day 4: After a night filled with bombings, a staff member reaches the ICRC delegation in tears: her cousin has just been seriously wounded at home – in a residential neighbourhood far from any military objective – after a shell hit her kitchen window. Debris from the window lodged in her back, potentially paralyzing her for life.

There is a loud explosion nearby. A plume of black smoke rises above the rooftops. A lone rocket, fired at random, has just destroyed a taxi driving down a nearby street, killing the driver. There is no possible military justification for this type of attack.

Some of the most basic tenets of IHL have been violated during the conflict in Syria in the form of attacks on civilians, hospitals and first-aid posts, the use of

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9   See ICRC, *Annual Report 2017*, 13 June 2018, p. 488, available at: www.icrc.org/en/document/annual-report-2017.

10 Peter Maurer, "*Humanity* not Measured by Relief Items Distributed but by Recovery of People in Need", speech to UN General Assembly High-Level Event on Syria, 26 September 2018, available at: www.icrc.org/en/document/humanity-not-measured-relief-items-distributed-recovery-people-need.

11 ICRC, above note 9, pp. 487–492.

12 See ICRC, above note 5; ICRC, *Displaced in Cities: Experiencing and Responding to Urban Internal Displacement Outside Camps*, 16 August 2018, available at: www.icrc.org/en/publication/4344-displaced-cities-experiencing-and-responding-urban-internal-displacement-outside.

chemical weapons and the torturing of detainees. Of course, most armed conflicts see their share of crimes, and a golden age of full compliance with IHL has never existed. Still, maybe what IHL's defenders are discouraged by is the contrast between the progress achieved in recent decades in the further development and dissemination of IHL and international criminal justice, on the one hand, and the reality on the ground, on the other. Every war crime that goes unpunished represents a failure of IHL and its defenders – and a failure for all of humanity.

The use of chemical weapons during the conflict is one of the most tragic symbols of this contempt for IHL. Yet this violation of one of the most universally accepted rules was met with unanimous condemnation, hoisting the issue of IHL compliance to its rightful place in the discourse surrounding this conflict. In this issue of the *Review*, Yasmin Naqvi, an international law expert, argues that the special importance placed by the international community on the use of chemical weapons could serve as the basis for creating a Syria tribunal.

Another sign of the importance of IHL compliance can be seen in the efforts of the international community to protect civilians from the effects of hostilities. The idea of creating "safe zones" for civilians was raised more than once. The Astana Memorandum, in May 2017, set up "de-escalation zones" in order to ease the humanitarian plight in Syria.[13] In November 2017, the ICRC and the Russian International Affairs Council held a conference on these zones in Moscow in order to clarify the respective responsibilities of States and humanitarian organizations towards civilians in the zones.[14] In this issue, Emanuela-Chiara Gillard presents the IHL rules that apply to these zones and other so-called "safe areas".

Humanitarian norms should not be considered the sole province of the international community – they are also deeply rooted in Islamic tradition. In his article for this issue, Egyptian professor Ahmed Al-Dawoody, who advises the ICRC on questions of Islamic law and jurisprudence, lays out the rules of Islamic law on the use of force and compares them with the rules of IHL.

Despite the numerous and egregious violations taking place, IHL remains the minimum standard against which the seriousness of crimes is measured, and the only bulwark against an even greater surge in violence. It is also fundamental to the ICRC's work. As Peter Maurer notes:

> The Geneva Conventions are an important framework to allow us to negotiate access to populations, to engage in a conversation on the conduct of hostilities [and] to negotiate access to detention facilities. … [I]t's a framework which is

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13 "Final De-escalation Zones Agreed on in Astana", *Al Jazeera*, 15 September 2017, available at: www.aljazeera.com/news/2017/09/final-de-escalation-zones-agreed-astana-170915102811730.html.
14 ICRC, "Moscow Humanitarium: In Dialogue with Russian Officials and Experts on De-escalation Zones in Syria", 29 November 2017, available at: www.icrc.org/en/document/moscow-humanitarium-dialogue-russian-officials-and-experts-de-escalation-zones-syria.

an important guidance on how we can engage with states in order to respect those laws, and not only states but also non-state actors.[15]

The catastrophe in Syria can largely be attributed to impunity for IHL violations. It is clear that so much suffering and destruction, so many uprooted lives and demolished buildings, could have been avoided if the parties to the conflict had decided to follow the simple rules of humanity. Syria represents more than a failure to apply IHL. It represents the failure of the mechanisms created to restore long-term peace – a failure that has nourished a terrible sense of helplessness in the face of a multitude of crimes. It is also clear that, in order to be lasting, peace must be restored through compliance with international rules.

Simply lamenting the fact that the law has been flouted is not enough. A series of straightforward measures, if implemented by the parties to the conflict, could improve the humanitarian situation today and clear the path to peace tomorrow.

- Allow aid workers to reach people caught up in the war.
- Safeguard medical staff and structures.
- Avoid indiscriminate attacks and do not target civilians.

States with influence over the parties to the conflict can also make a difference by linking their support to compliance with the law. The ICRC presented three recommendations for these States at the Second Brussels Conference on Syria, in 2018:

- First, clarify responsibilities. Who is responsible for what, and on whose behalf? Ambiguity increases the risk of IHL violations.
- Second, improve accountability. States should implement clear procedures to collect allegations of violations, and then investigate them.
- Third, States should add safeguards to arms transfers to parties that are involved in committing violations of IHL.

As Dominik Stillhart, the ICRC's director of operations, stated at the conference: "Humanitarians can put a bandage on the patient. But it's only States that can cure that patient."[16]

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Talking about the catastrophe in Syria leaves a bitter taste: the international conflict resolution system is paralyzed, the humanitarian space is being continually chipped

15 "Peter Maurer: Why the Red Cross Talks to 'Terrorists'", Al Jazeera, 5 November 2016, available at: www.aljazeera.com/programmes/talktojazeera/2016/11/peter-maurer-red-cross-talks-terrorists-161103155915754.html.
16 ICRC, "Déclaration du CICR à la deuxième Conférence sur la Syrie qui se tient à Bruxelles aujourd'hui", 25 April 2018, available at: www.icrc.org/fr/document/declaration-du-cicr-la-deuxieme-conference-sur-la-syrie-qui-se-tient-bruxelles-aujourdhui.

away at, violations of IHL are deliberate and designed to sow terror, and cruel tactics of the past – such as siege and chemical warfare – have made a comeback.

Yet the writers appearing in this issue of the *Review*, in their analyses of the causes of the conflict, reject that bitterness. They propose practicable solutions to the problems at hand, and they share a passion for Syria and its people. The *Review* wishes to thank these authors and everyone who provided input for this issue. They show that there is hope amid the ruins.

Interview with Peter Maurer

President of the ICRC*

Since 2011, the humanitarian impact of the crisis in Syria has continued to worsen. The conflict is characterized by frequent violations of international humanitarian law (IHL): indiscriminate attacks in urban areas, the targeting of civilians and essential services such as water supply and health care, and the use of prohibited weapons, to name just a few. All of these have devastating consequences for the Syrian people, who are caught between the opposing sides. The conflict has brought not only bombs and missiles but also harsh living conditions, displacement, lack of access to food, water and medicine, uncertainty regarding the fate of missing or detained loved ones, and interruption of all aspects of life, including the education of a generation of Syrian children. Many people have fled, while others have stayed and attempted to live their lives amid the chaos of war.

In the face of these overwhelming needs, humanitarian organizations such as the International Committee of the Red Cross (ICRC) struggle to respond. The ICRC is helping people both inside Syria, who are facing extremely difficult conditions because of the conflict, and the hundreds of thousands of Syrian refugees in Jordan, Lebanon, Iraq and elsewhere. In partnership with the Syrian Arab Red Crescent, the ICRC distributes food and other essentials, restores water supplies and supports medical services.

In this interview, ICRC president Peter Maurer reflects on the complexities of the armed conflict in Syria, the difficulties of providing a neutral and impartial humanitarian response in this context and the importance of the parties to the conflict upholding their obligations to the civilian population.

Keywords: Syria, humanitarian system, IHL, neutrality, impartiality, independence, humanity, ICRC.

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You have been to Syria several times since the conflict began. What can you tell us about what you have seen there?

Whenever I speak to my predecessor, I am always struck by how much, during his time as president of the ICRC between 2000 and 2012, his main concern was coping with a unipolar world that had the United States defining the interpretation of IHL in the combat operations where it was involved.

It's almost symbolic that only a couple of weeks after I became ICRC president in 2012, the organization publicly classified the crisis in Syria as a non-international armed conflict. Many of my experiences in the years since have been closely connected to this conflict. It is the context I have visited most often, the conflict I have had to follow most closely and whose actors I know best. It is also a conflict in which I have had some remarkable experiences, from standing in the middle of destroyed homes, to talking to armed groups, to listening to the men, women and children of the civilian population in order to understand their suffering.

I still remember my first experience in Syria in 2012, when I had a conversation with displaced people in a half-finished, new construction. They told me that, just a few months earlier, there had been real prospects for development in Syria, with a lot of ongoing construction. The contrast between these unfinished buildings on the outskirts of Damascus, Ghouta or Homs as provisional homes for displaced people rather than beacons of hope for the future was stark. And it was emblematic of what the conflict meant for Syrians.

As president of the ICRC, I visit countries at war around the world and, inevitably, I end up comparing the contexts. Two observations from my experience in Syria:

First, the effects of intensive warfare were much more visible from the beginning of the conflict in Syria. In many of the contexts I visit, you don't see the obvious signs of war right away, because combat operations are often not so obvious and fairly limited in location and scope, so you have to look closely to see the impact of armed conflict on people. In Afghanistan, for example, which was my first trip as president, poverty is very visible, but the impact of large-scale warfare is not. Syria is quite different. From my first visit there, in September 2012, the signs and impact of armed conflict were obvious, in terms of destruction of infrastructure, populations displaced, social services disrupted and the increasing difficulty of providing humanitarian assistance.

In terms of the ICRC's operational response, our challenge over time has been to tailor our humanitarian assistance more closely to the needs of the Syrian people. On another visit to the country, in 2017, I met two teachers, who spoke passionately about their communities' needs. They thanked me for the food aid provided by the ICRC but emphasized that what was really important to them

was the schools being able to reopen. This was a clear reminder that listening carefully to populations affected by war to ensure we fully understand their needs must be at the heart of our work. Consequently, we have integrated this priority into the ICRC's new institutional strategy.

Visiting Homs, Eastern Ghouta and other affected neighbourhoods reminded me of the emblematic battles between the government and the opposition, perhaps at a turning point of the humanitarian sector there because of the dimension of needs and the limitations of our response. In March 2018, when I visited Eastern Ghouta during the period of intense shelling, the scene was one of utter destruction. People had been sheltering in basements for weeks with little food, water or medicine. The sick couldn't access treatment, families were going without meals, and all were living in constant fear of the deadly bombs.

My second observation relates to the medical sector. During my many visits to the region, I almost always visit hospitals or clinics. In an illustration of the degree of disrespect for IHL throughout the region, I saw how health clinics have had to be moved underground for protection. The first such clinic I saw, in Mohadamia in Eastern Ghouta, was an early and concerning indication that attacking hospitals was no longer considered a taboo.

What are the main challenges facing the ICRC in terms of its response in Syria?

There are, of course, many challenges. One is that the war is being conducted by all sides in ways that repeatedly violate IHL and the principles of proportionality, precaution and distinction. The result is a massive and deep impact on civilians, and this sheer scale is a challenge for any humanitarian responder.

Yes, there are other crisis situations in the world where, perhaps, the number of people struggling for survival is greater than in Syria, but it is the level of destruction there that makes it extraordinary. People's living standards have decreased enormously from their pre-war levels, as the country's physical infrastructure, but also its social fabric, have been torn apart. There is not a family in Syria that is untouched by this conflict. So, humanitarian actors have to ask themselves: what is the real problem that must be addressed?

The scale of the impact of war and violence is undeniably huge, but there is a moment when the qualitative change in people's way of life becomes more important than issues of size. While humanitarians are used to coping with large numbers of people being displaced – keeping track of their numbers and delivering basic social services – they have faced extra challenges in Syria because of increased system failures.

The health system, for example, is collapsing, and the water, sanitation and education systems are in deep crisis. Families are grieving for loved ones who are missing or have been detained, and children are growing up without ever having known a life without war. Some of the distressing effects of the war on Syria's children reported by ICRC teams include psychological distress, violence and

cruelty, injuries and amputations. These children will require long-term care if they are to recover their physical and mental health. And let us not forget the children and families of foreign fighters, who are also visited by our teams, and who are just as deserving of our humanity.

Another challenge lies in the fact that, from the beginning, this has been one of the most publicized and politicized conflicts in which the ICRC has operated. Consequently, negotiations to carve out a neutral and impartial humanitarian space, in which we can work close to people and deliver the humanitarian assistance they need, have been much more difficult. This is because each and every humanitarian activity in Syria has been directly linked to the political agendas of the actors involved – not just Syrian but also regional and global actors.

From its very early days, this conflict has constituted a major international political crisis with a considerable humanitarian impact and very specific challenges for humanitarian actors: technical, due to the scale of the war and the force of its impact on the Syrian people; communication-related, due to its visibility; and political, due to the unique interconnection of the humanitarian and political issues at stake. Traditional understanding of the separation of neutral, humanitarian and political spaces has been much more difficult to ensure and manage in a context in which the humanitarian issues are simultaneously on the agenda of the UN Security Council and the bilateral meetings of big powers in Geneva and Astana.

We now face the following challenges: the international community will have to answer questions about the long-term reconstruction of Syria and the resulting political ramifications, while humanitarian actors will have to respond to people's urgent needs, helping them live in dignity as they try to get their lives back on track. Their most pressing needs as they attempt to do so cannot wait for political consensus. Therefore, we will work to support people in rebuilding their houses and basic infrastructure, in finding jobs and economic opportunities, in searching for their missing relatives, and in reminding the authorities of their obligations towards their own citizens.

We will have to address the humanitarian consequences of some of the devastating impacts of urban warfare in Syria – just as we would in Mosul, in Saada or in Gaza. Our action will not be motivated by political considerations but will be based on an independent and impartial assessment of the humanitarian needs of individuals and communities.

This brings us to the principles of neutrality, impartiality and independence in humanitarian action. The ICRC has been criticized in the past for operating out of government-held territory. How do you balance the need to engage with the Syrian government on the one hand and the ICRC's Fundamental Principles on the other?

The Fundamental Principles have helped the ICRC remain neutral in its engagement with belligerents, and we have a credible track record in Syria and beyond. At the same time, we have to recognize that not all the actors have been

willing to engage with the ICRC, despite our principled approach of engaging with all sides. Obviously, we were not able to overcome the resistance to engaging with us in all instances.

Where there was no reciprocal desire to engage, we faced a dilemma: either to do what we could with those belligerents that were engaging with us, or opt not to engage at all. In some critical instances and in the interest of saving lives, we decided to continue to work with one side in the absence of a readiness from the other side. But we never gave up either our efforts or our willingness to engage with all sides and to get a "licence to operate" in all places where people were affected by the conflict.

The Syrian crisis also illustrates the legal landscape of humanitarian action today – the Geneva Conventions and UN Resolution 46/182 on "Strengthening the Coordination of Humanitarian Emergency Assistance of the United Nations", which places humanitarian activities within the context of State sovereignty. Under IHL, there is no unfettered right of access for humanitarian organizations. They must seek and obtain the consent of the State on whose territory they intend to carry out their humanitarian activities.

Sovereignty is the frame within which the international community has decided it wants humanitarian activities to be set. However, IHL strikes a careful balance between parties' interests and humanitarian imperatives. It is not entirely deferential to State sovereignty when it comes to humanitarian activities. There are circumstances under which consent must be given by the belligerent State to impartial humanitarian organizations – for instance, when basic needs of the population are not met. Yet, the extent of these circumstances needs to be clarified.

Although the ICRC has a mandate to fulfil its mission in a neutral, impartial and independent way, and although that mandate is conferred upon it by the four Geneva Conventions of 1949, by which all States are bound, as an organization we must nevertheless have the consent of a State if we are to operate in its territory and be able to assess the impact of our overall operations where we conduct them in areas outside the control of the government.

As we know, the Geneva Conventions offer the ICRC a licence to engage with all parties to a conflict, including non-State actors in areas not controlled by the State. But in practical terms, while we always strive to obtain the consensus of the parties, the reality is that, often, there is no consensus of the parties.

Theoretically, you can always criticize the construct that humanitarian organizations are not automatically granted unrestricted access, but it's what the international community has decided. I'm very much aware that there are organizations which have decided to operate in territory held by non-State armed groups without the consent of the Syrian government, that they have operated from neighbouring countries and with a licence from neighbouring countries. We also recognize that the UN Security Council has made efforts to mitigate the problems in deciding on procedures for cross-border operations applicable to UN agencies and implementing partners only. Ultimately, however, none of these efforts has really changed the nature of the challenges under which we are operating today and which leave some populations outside the scope of the ICRC's humanitarian services.

The last few years have confirmed that the best possible avenue has been to engage with the Syrian government, as, by doing so, we have increasingly been able to do more for all Syrians, including those on the other side of the front lines, gaining access to populations living under the authority and control of armed groups, while maintaining the consent and trust of the Syrian government.

In the last two years, we have considerably increased our operations across front lines – but still not to the extent we would like. In that sense, I do recognize that consensus-building and negotiating across front lines in order to be able to work on both sides is very time-consuming, but it's a concept that very much defines the ICRC, and one which we cannot easily set aside.

The international community has tried to solve this conundrum. In the last fifteen years or so, there has been a lot of discussion around concepts like responsibility to protect and humanitarian intervention, and attempts to define the threshold beyond which States and international organizations would be allowed to respond to important humanitarian crises without the consent of the territorial State. The problem is that these lively discussions have not crystallized into recognized and agreed legal norms, thus illustrating the lack of consensus on this issue within the international community.

The crisis in Syria and the lack of adequate response to the needs of the Syrian people have forced humanitarian actors and political actors to think more about what is fundamentally wrong with the system. While many would agree that the conflict and its impact have taken an unacceptable toll on civilians, there is very little appetite within the international community at the moment to engage openly about other ways of delivering humanitarian assistance in the absence of the consent of the territorial State.

The ICRC does much of its work in Syria in partnership with the Syrian Arab Red Crescent (SARC). Can you explain the roles of the SARC, other National Red Cross and Red Crescent Societies (National Societies) that might be operating in Syria, the International Federation of Red Cross and Red Crescent Societies and the ICRC – especially for those who might be less familiar with the International Red Cross and Red Crescent Movement (the Movement)?

A specific aspect of the situation in Syria was the decision by the Syrian government that the SARC was to be not only an auxiliary of the government but also the coordinator of international humanitarian assistance for Syria. That was a political decision.

One can always question whether it was a wise decision or not, but as a political decision it has shaped the humanitarian reality since the beginning of the conflict. This framework gave the SARC the authority to coordinate all the international assistance coming into the country, including via the UN system, the Movement and NGOs. So, it's not only because we are a member of the Movement that we work in this way with the SARC.

We would certainly, as in any other place in the world, prioritize working with a National Society to the extent that we can. And we would ensure the work is divided up so that the National Society is covering certain needs, while the international component of the Movement is covering certain other important activities. That's generally how we operate in most contexts. But I don't know of any other context in which the National Society, as a Movement partner, has been not only an auxiliary of the government but also the chief coordinator of international humanitarian assistance.

This leaves us with a situation in which a lot of our assistance is delivered in cooperation with the SARC, as is a lot of the UN assistance. In practical terms, there has also been a level of trust established between the ICRC and the SARC, which has meant that the ICRC has been able to work alone in certain instances, as has the SARC on certain issues. This is particularly true in places of detention, for instance, where the SARC is not present.

The role of the SARC as the coordinating body for humanitarian assistance in Syria is part of the complexity and also the special nature of the Syrian situation. In other contexts, sometimes the role of coordinator of humanitarian assistance is assumed by the State or by a State agency, or is left to the UN system. In Syria, we have had to adapt to the particular situation there. In the meantime, the ICRC and the SARC have become mutually dependent: while we cannot operate without the agreement, consent and cooperation of the SARC, the SARC cannot cover the needs of the people without cooperating with the UN system and the Movement.

This poses a series of challenges in terms of who defines what, exactly, neutral and impartial humanitarian assistance is, and raises other questions, such as whether a convoy delivered by the SARC on behalf of the UN is a different convoy, obeying different rules and principles, from a convoy delivered by the SARC with the support of the ICRC.

The war in Syria has witnessed the violation of some of the most basic tenets of IHL, such as attacks on the SARC and other humanitarian organizations, as well as on health care, and the use of chemical weapons. As the guardian of IHL, how can the ICRC respond? As its president, what is your view of this tragic phenomenon?

For some time, the response in Syria has been largely on an emergency basis, so the ICRC has not always been able to carry out its preventive and protective activities to the extent that it would like.

The ICRC's standard approach is always to engage with all weapon bearers in order to train them, review operational activities and combat operations, and, ultimately, improve their behaviour and respect for international law. These positive efforts to ensure that the law is better respected on the ground haven't been progressing as easily and speedily as we would have hoped, given the seriousness of the crisis. Despite this, we have managed to find spaces in which to

engage parties on the subject of respect for IHL. We have been visiting detainees in standard detention facilities, which is clearly important to ensure that they are receiving the protections afforded them under IHL.

We have also been able to contribute to the creation of the National Commission for IHL in Syria, which has become a place to engage with the Syrian armed forces on training and IHL implementation. Regretfully, because of the highly politicized nature of the Syrian conflict, it has never really been possible to make sufficient headway in terms of a strong, broad, consistent and deep engagement on IHL and challenges relating to its protective functions.

What we have seen are questionable military strategies, on all sides, in the light of IHL obligations, as well as disrespect for the principles of distinction, proportionality and precaution. In addition, there has been an insufficient response from all sides in engaging with the ICRC to improve respect. The Syrian conflict is one of the many contexts that illustrate how more respect would result in fewer negative outcomes for people. If the armed actors had, early on, responded more positively to our offers to engage with them to find ways of fighting that would have a less damaging impact on the civilian population, Syria and Syrians would be in a different situation today.

Of course, like many others, I'm particularly disturbed by the obvious use of illegal weapons, including chemical weapons, which have brought a new dimensions to violations of the law in this conflict.

We are now at a critical juncture: the big battles in the heartland of Syria appear to be over, and new possibilities for lives and livelihoods to return to normal are emerging. We now have to reassess the humanitarian needs, to refocus, reshape and ponder anew the priorities of the ICRC's activities, and to focus more on ensuring that IHL, as it applies to those who have been displaced, gone missing or been detained, is adhered to. I'm convinced we are at yet another crossroads, where compliance with IHL, fundamental changes in the behaviour of belligerents and legal protections for the population will have a new significance.

IHL is most often talked about when it is violated, which can lead to the impression that it is never respected and has no impact. In a context like Syria, where the violations of the law are quite high-profile, what impact does IHL have?

It would be wrong – and even dangerous – to believe that IHL is always violated and is therefore useless. Although there are also political, material and credibility costs and benefits that can motivate States to respect IHL, there is an insufficiently communicated truth that the law is also respected because it is the *law*, because it is *right* to respect the norms of IHL and not only because there are sanctions or international accountability mechanisms in the event of failing to do so. It is important to find a better balance in how we interpret and communicate about violations of IHL.

The difficulty is that when you start to overemphasize violations, as you suggested in your question, you are basically delegitimizing IHL because you are focusing only on the violations. On the other hand, if you talk only about instances in which the law is respected, you tend to idealize respect for IHL. So, there is a balance to be found, and that balance needs to be based on accurate analysis of where the law functions, where it doesn't function and what best practice, in terms of making the law function, looks like.

The systematic and widespread violation of IHL in Syria demands a critical review. We have done some interesting work trying to understand what leads to behavioural restraint by armed actors and observation of the rules over time. An important study on the norms of restraint that has just been released emphasizes the importance of engaging with community-based influencers, religious leaders and community leaders in order to reinforce respect for IHL. Communities need to be encouraged to find strategies to influence the behaviour of non-State armed groups, especially when confronted with decentralized armed groups that do not have a clear hierarchy.

There are many ways to broaden the application of IHL, but it won't happen by itself. We need strategies of engagement, encouragement and communication to demonstrate the usefulness of IHL as a practical tool for regulating the behaviour of actors in the particularly delicate situation of war.

In summary, a balanced reading is required, to cut through the general cacophony that comes from looking only at violations. The tendency of the international discussion to focus exclusively on violations, and by extension, very often to limit the issue of respect for the law to criminal accountability after the fact, is a reductionist one. While legal accountability for violations is important, the belief that these rules have ethical, moral and legal standing is important as well.

Too often, we end up debating the wrong issue, and viewing IHL as some abstract, outdated body of law that is somehow irrelevant with regard to new developments in warfare. That's a completely wrong perspective.

The Syrian conflict is emblematic. It crystallizes so many problems, on which we will be working for quite some time, such as normative acceptance, difficulties in implementing the law, and the practicalities of understanding the law. These difficulties are exemplified in the high-visibility events and politics that surround the Syrian conflict, where carving out a neutral space is more challenging than it may be in other places.

What can be done to ensure that civilians are better protected and to alleviate the suffering caused by the war in Syria?

Given the current situation in Syria, I'm more convinced than ever that the ICRC is in a unique position because of its legal, operational and policy mandate. So, in terms of what more we can do, we can ensure that the applicable legal standards are maintained, support practical arrangements to improve respect for the law and create policy engagement which allows for better protection of civilians.

Yet the Syrian conflict cannot be solved by humanitarians. The underlying political dynamics of the conflict caused the humanitarian problems, and the humanitarian response cannot solve those underlying problems.

There is a lack of political will to resolve the power dynamics in Syria, even though the cost of the conflict seems to be slowly entering into political calculations. There is still an oversupply of problems, actors and complexities, and too much fragmentation, all of which makes this conflict particularly difficult. Everything in Syria is always linked to local, national, regional and global politics. This complicates the ICRC's intervention, in that attempting to nudge actors into correct behaviour is more complex than in other situations, where you can eventually manage to grow local initiatives and then prop them up. It's much more difficult in a conflict where what is happening locally is, at the same time, being factored into the political calculations of the big powers and big international institutions.

This situation forces humanitarian actors to work at much more differentiated levels: strengthening local authorities, working with local partners, influencing national partners and trying to align the international community.

The best the ICRC can do as an impartial humanitarian organization is to draw the attention of the international community and all other actors to the enormous humanitarian costs of this conflict and the overall failure of the system to respond. In light of the outrageous and unacceptable costs for civilians, the international community should eventually be able to generate political will and re-energize the political processes to solve some of the underlying issues. Eventually, those international actors who are involved in Syria will come to recognize that continuation of the conflict will cause more problems than its diplomatic settlement. At the moment, we are just in limbo. Right now, in the capital cities of the key actors in Syria, there is a sort of recalculation happening. And that's what creates opportunities.

I can't know what the future looks like. Taking a positive view, perhaps Turkey, Russia, Iran, the United States, Europe, Saudi Arabia and others, including the Syrian State and non-State actors, may suddenly come to the conclusion that there is a prevailing reason to change course. There are ongoing conversations, which may reveal some light on the horizon.

But it is unclear whether these actors will seize these opportunities and recognize that the costs of carrying on are unacceptably high and so encourage political compromise. Have the big battles really come to an end? Are we heading into a situation where front lines are stabilizing, zones of influence are settling, institutions are slowly being rebuilt, political processes are commencing, and there is a prospect of reconciliation? I think it is clear what is in the best interest of both the Syrian population and humanitarian law and principles.

We can only hope that the political actors *will* take advantage of the options on the table. But as humanitarians, we cannot, at the same time, exclude the possibility that this is just a temporary calming down of some of the most extreme military activities and violations of international law.

INTERNATIONAL
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of the Red Cross

PHOTO GALLERY

The Syrian Arab Red Cross and the International Committee of the Red Cross: A true partnership to help the most vulnerable*

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Fig. 1 - Colour online, Colour in print

Figure 1. The SARC and the ICRC work together for the people of Syria. © SARC.

The Syrian Arab Red Crescent (SARC) and the International Committee of the Red Cross (ICRC) have stood shoulder to shoulder in partnership to help the most vulnerable and address the needs of millions of people throughout Syria. Particularly since 2011, the two organizations have collaborated to respond to diverse humanitarian needs with the ultimate goal of protecting human dignity.

Fig. 2 - Colour online, Colour in print

Figure 2. Crossing the front lines to provide humanitarian relief. © SARC.

Through humanitarian work carried out under the mantra "For all people everywhere", SARC volunteers have been deployed in the field, delivering aid via hundreds of humanitarian convoys throughout the crisis, often in collaboration with the ICRC. Seeking access to besieged areas and providing humanitarian assistance to alleviate the suffering of people are objectives that the SARC and ICRC have not abandoned. This has required coordination with relevant authorities, all parties to the conflict and other stakeholders. Many times, the SARC and the ICRC have crossed the front lines to evacuate people in need of medical care to other areas so they could receive adequate treatment that was not otherwise available.

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Figure 3. Arrival of a humanitarian convoy at Der Al-Zour. © SARC.

Driven by their commitment to the principles of the International Red Cross and Red Crescent Movement, the SARC and ICRC work together to respond to humanitarian needs across Syria, including directly providing medical services, ensuring those in hard-to-reach areas can receive medical assistance, delivery of aid convoys, ensuring internally displaced people (IDPs) have access to food and basic necessities, equipping IDP shelters, and helping to restore family links.

Figure 4. Evacuation of people in need from Aleppo. © SARC.

Figure 5. Joint convoy to Aleppo. © SARC.

Not a target

The SARC and ICRC emphasize the protection of their personnel and volunteers. It is a key norm of international humanitarian law that humanitarian volunteers and staff are not a target. Despite this, sixty-five SARC volunteers have sacrificed their lives for the sake of their humanitarian duty. SARC facilities and vehicles have also been badly damaged.

Figure 6. The SARC has tragically lost sixty-five volunteers who have sacrificed their lives in pursuit of their humanitarian mission. © SARC.

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Emad's story

SARC volunteer paramedic Emad Hamed will never quite forget 21 February 2018. "I was aware of the serious responsibility and risk of being a SARC volunteer since I joined in 2013, but this did not discourage me from trying to help those in my community who are in need", the 32-year-old says, referring to his work with first-aid teams at the Rural Damascus branch of the SARC.

At 11:30 p.m. on 21 February 2018, the local SARC team received a report about shells dropped on a neighbourhood in Douma. Emad hurried to the area with two colleagues to evacuate families from their homes and aid wounded people. Upon their arrival, the ambulance in which they were travelling was hit. "At that moment, I could no longer hear anything and we suffered burns before we could exit the car", he recalls. Emad lost hearing in his left ear in August 2018.

His fellow paramedics treated Emad and other volunteers who were suffering from multiple injuries, varying from first- and second-degree burns on their hands, faces and scalps to multiple shrapnel wounds on their bodies. In spite of the fateful day he will never forget, Emad resumed his humanitarian duties once he had recovered. Volunteering "flows in my veins", he says.

"I am proud to be a member of the Syrian Arab Red Crescent team since they have a humanitarian impact in the harsh circumstances that our country has faced. We have never fallen short of our duties and we will stay equally dedicated."

Fig. 7 - Colour online, Colour in print

Figure 7. SARC paramedic Emad Hamed says volunteering flows in his veins. © SARC.

Walking again with hope

Like other countries that have seen conflict, Syria has not been spared from the consequences of people losing limbs.

Losing a limb can have a terrible impact far beyond the person who has been injured. There are patients who have difficulty finding work, providing food for their families or managing their household tasks. There are children who are unable to play and move as their friends do, and may not complete their education.

The SARC and the ICRC provide physical rehabilitation and other services, which for many have restored their hope and their self-sufficiency. These services include the manufacturing, fitting and maintenance of prosthetic limbs, in addition to physical therapy and psychological support to allow people who rely on prosthetic limbs to pursue their dreams.

One young patient benefiting from SARC and ICRC services, Abdulazeem, summed up his story in a single sentence: "Now, I'll go back to school."

Fig. 8 - Colour online, Colour in print

Figure 8. The SARC and ICRC provide physical therapy and psychological support, as well as the manufacturing, fitting and maintenance of prosthetic limbs. © SARC.

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Fig. 9 - Colour online, Colour in print

Figure 9. Abdulazeem summed up his story in a single sentence: "Now, I'll go back to school." © SARC.

Reuniting families

In November 2017 at the Kasab border crossing between Syria and Turkey, two children were reunited with their families after being separated for six months and nineteen months respectively. The SARC worked to facilitate these reunifications, securing the consent of all stakeholders concerned, and brought the families to the border for these unforgettable reunions.

Figure 10. An emotional moment. Elaf is in her mother's arms after they are reunited. © SARC.

Fig. 10 - Colour online, Colour in print

Rebuilding livelihoods, restoring normalcy

The SARC-ICRC livelihoods programme allows families to achieve food security and restores economic stability through microeconomic grants, which vary depending on the beneficiary's skills and background and are appropriate to the economic opportunities in the surrounding area.

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Hisham's plans for the future

Despite their young age, Hisham's daughters, aged 10 and 7, understand their father's precarious health and financial situation. Hisham lost a leg in an accident that cost him his job as a tailor.

He tells his story in his own words: "We left our house in the Al-Shaar neighbourhood as it was totally destroyed. I lost my job because of the injury. Our financial situation worsened and I could no longer secure the needs of my wife and children."

"I was unemployed for a year and eight months," adds the 29-year-old father. "I was angry and devastated… A young man, yet unable to provide for my family."

With the help of the SARC, Hisham was able to start over. After getting fitted with a prosthetic leg, he started his own business with a grant from the SARC-ICRC livelihoods programme. "Now, I have my grocery shop and I am able to provide for my family, and with the profits I opened another store", he says. "Today, I no longer pay attention to looks of pity or hurtful words."

The small family now lives in Salaheddine, a community in rural Aleppo, and some normalcy has been restored to their lives. The girls are back at school and have made new friends. Pursuing his dreams for his little ones, Hisham spends much of his time at work, without taking days off. He hopes that one day he will be able to drive his own car, but he will have to wait as his first priority is ensuring stability for his family.

Fig. 11 - Colour online, Colour in print

Figure 11. Hisham, father of two daughters, talks to SARC volunteers. © SARC.

Figure 12. Hisham pictured in his shop. © SARC.

Figure 13. A coffee machine in Hisham's shop. © SARC.

Fig. 12 - Colour online, Colour in print

Fig. 13 - Colour online, Colour in print

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17.3 million
PEOPLE
benefited from water
and habitat projects.

7.8+ million
PEOPLE
in 13 governorates
received food.

895
PEOPLE
received support to
start a small business.

853,280
PEOPLE
have access to improved
health-care services.

24,000+
PEOPLE
attended mine risk
education sessions.

Fig. 14 - Colour online, Colour in print

Figure 14. Syria facts and figures, 2018.

OPINION NOTE

The fragility of community security in Damascus and its environs

Yassar Abdin
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Abstract

The organizational errors of Syrian urban planning have been a major cause of the escalation of the Syrian crisis and its continuation. Syrian cities, including Damascus and its environs, have suffered from the fragility of social security, which is manifested in the form of cohesive human groups in closed communities, influenced by religion, culture, family, class, place of origin of the population, occupation, etc. This article examines the fragility of security during the crisis of 2011–18, with the aim of clarifying the impact of the organizational problems and the processing delay that has generated social security fragility because these closed communities are looking for their own security and safety outside the control of local administrations. The article proposes that the inherent fragility of security in Damascus and its environs should be associated with poverty, organizational errors and slums as a model for the fragility of all Syrian cities.

Keywords: social cohesion, Damascus, Damascus environs, Syrian crisis, social housing/informal settlements.

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Cities have their own distinctive identities which they impose on their indigenous and migrant populations, who are influenced by each city's character and customs, refined by its culture and bound by its norms. The city is not in the habit of changing its particularities, except through urbanization in step with the latest scientific and technological developments, and its administration evolves

through the application of local and universal managerial programmes propagated by international organizations or through relations with developed cities in other States in the form of economic, scientific or cultural exchanges or through agreements establishing sister cities, etc.

The most influential factor in the life of major cities like Damascus is their population, consisting of their residents and permanent and temporary immigrants, the intermixture of which gives rise to a pluralistic urban society governed by a local civic administration that imposes the city's identity on all of them. The ongoing influx of migrants makes it difficult for these cities to provide housing and services and even more difficult for the constant waves of migrants to acclimatize to the groups that have been socially, culturally and economically long-established in the city. The city therefore suffers from phenomena that fragilize its basic planning and its developmental, socioeconomic and environmental structures. This fragility is manifested in the form of social instability, gains that can be lost at any moment, dismal future prospects, disquiet and difficulties in meeting the requirements needed to ensure that all members of society enjoy a decent life. The populace are in a fragile condition when they are living on the poverty line and are at risk of falling below it in the event of any fluctuations in their socioeconomic circumstances. They are particularly vulnerable to negative events and may be treated in an inappropriate manner by governmental and social institutions. Symptoms of social fragility are revealed by a high level of unsatisfied basic needs, widespread poverty, inequality and deprivation of services, resources and development opportunities.[1] Some groups adopt the principle of social solidarity within closed communities as a compensatory means to regain security by making individual conscience subservient to tribal, religious, ethnic or regional factionalism.[2]

This Opinion Note will illustrate the latent fragility of community security in the major Syrian cities by analyzing a sample from Damascus and its environs. This analysis will show the fragility resulting from the disparate structures of the closed groups in the neighbourhoods and districts constituting the city of Damascus and its hinterland, which proved to be flashpoints for the crisis. The paper will also explain how this situation still poses a threat, notwithstanding indications of an end to the armed conflict, since those districts were, and still are, suffering from a lack of confidence in the "community security" that the administrative system should provide in the city and all its residential districts, neighbourhoods and agglomerations by nurturing a feeling of belonging, continuity, stability and permanence. Due to administrative neglect and a failure to establish socioeconomic programmes affirming the identity of the local administrations and reducing the disparities between districts, all those districts are endeavouring, through cohesion and homogeneity, to strengthen the concepts of "security" (as a situation in which a person is not in danger or under threat

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1   Abu Bakr, Rashiq Biaqadir and Hassan Warashiquin, *Anthropology in the Arab World* [ا لأنثربولوجيا في الوطن العربي], Dar Al-Fikr, Damascus, 2012, p. 208.

2   Faisal Hamad, "Social Love" [المخاطر الاجتماعية], *Bridge Development Journal*, No. 124, 2015, pp. 2–4.

and feels free from fear) and "safety" (as a state of peace of mind in regard to self and household in a tribal environment that dispels any feeling of danger). By distancing itself in this way from the civic administration, any cohesive and closed district can achieve a form of "social stability" for itself at the expense of the stability of the city's wider primal society, which feels threatened by the presence of disparate groups with their own particularities, links, security, safety and means of cohesion. In consequence, society in this context can be more accurately portrayed as a set of spatial zones exhibiting cohesive socioeconomic particularities and prepared to defend themselves against any external aggressor because of their weakened sense of direct belonging to the wider primal society due to its inadequate interaction with them or the small extent to which they are influenced by it.

This Opinion Note will also endeavour to explain the need for local administrations and competent authorities to play their role by taking developmental and planning measures to reduce disparities and promote cultural open-mindedness between these communities and the wider Damascene urban society. After this introduction, the paper will focus on the overall spatial characterization of Damascus and its environs, and will then provide a commentary on the cohesive but disparate human agglomerations in the city and its hinterland with an analytical generic description of the demographic factor, leading to the question of community security and its relation to demographic dissimilarities. This will be followed by an analytical description of urban planning developments in Damascus and its environs prior to 2010 and during the 2011–18 crisis, in order to clarify the manner in which planning problems and delays in resolving them fragilized community security as a result of the proliferation of cohesive closed communities seeking to ensure their own security and safety outside the control of local administrative authorities. The paper will then analyze the particularities of rural and urban areas during the ongoing crisis in 2018 and thereafter, as well as the latent fragility of the security situation in Damascus and its environs. Finally, the paper will assess the planning, social, developmental and security situation by projecting maps of three specific determinants on a map of the armed conflict in Damascus and its environs and highlighting the inevitability of fragility in the event of ongoing poverty, faulty city planning and informal settlements as an example of the fragile community security situation from which all major and intermediate Syrian cities are suffering.

The city of Damascus and its environs

Damascus, being the country's capital, is Syria's principal city and is surrounded by the lands of the Governorate of Rural Damascus, which form a ring representing the sphere of overall spatial influence of the city of Damascus.

Damascus is divided into fifteen municipal districts which, in turn, are subdivided into ninety-five neighbourhoods. As a result of the city's urban expansion, its administrative boundaries are contiguous with its suburbs, which, from the administrative standpoint, form part of the Governorate of Rural

Damascus. Some of these expansions are relatively new districts, such as Jaramana and Ashrafiyat Sahnaya, while others are historic towns such as Arabeen and Duma. It is noteworthy that numerous Damascene families have moved from the city to the suburbs, where the cost of living and real estate prices are lower.

Rural Damascus consists of nine districts: Markaz (Central) Rural Damascus, Duma, al-Qutayfah, al-Tall, Yabroud, al-Nabk, al-Zabadani, Qatana, Darayya and Qudsayya. They comprise twenty-seven sub-districts, twenty-eight towns, 190 villages and eighty-two farms.

According to the 2010 census, the population of the city of Damascus, together with its rural hinterland, amounted to around 4.4 million persons, of whom 1.724 million were living in the Governorate of Damascus and 2.701 million in the Governorate of Rural Damascus.[3] From the standpoint of population size in Syria as a whole, the Governorate of Rural Damascus therefore ranks second after the Governorate of Aleppo.

The city of Damascus is linked and adjacent to, and largely integrated with, large parts of its environs which are administered by the Governorate of Rural Damascus, to such an extent that it is difficult to distinguish the administrative boundaries separating them in the contiguous built-up areas. It is impossible to obtain any separate socioeconomic statistical data or indicators for the city of Damascus, so the data for its contiguous rural hinterland must therefore be taken into account in order to form an accurate picture of the situation in the city.

Social agglomerations in Damascus and its environs

Urban Damascus

The districts of Damascus and its environs can be categorized in light of several socioeconomic indicators and characteristics. However, the religious indicator always provides a clearer distinction than all the other indicators, as in the case of districts such as al-Akrad, al-Salihiya, Abu Rummaneh, al-Maliki, al-Midan, al-Qassa'a, Nahr Eisha, Kafr Souseh, Dummar, Jabal al-Rizz, Wadi al-Mashari, al-Woroud neighbourhood, old parts of Damascus, Duweili'a and Jaramana. Although other indicators, such as income and economic level, are highly pertinent, they merely serve to support the religious indicator. Social studies on these districts could be undertaken in the future only through precise questionnaires designed to produce indicators concerning the impact of the crisis, its causes and consequences, and future projections.

The districts can also be categorized as traditional neighbourhoods, modern neighbourhoods, informal settlements, districts of villas and mansions, residential suburbs, towns within the city's hinterland, army or police housing, low-income housing neighbourhoods, ethnic neighbourhoods, special housing, and modern suburbs.

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3   Information on the 2010 Damascus census available at: https://tinyurl.com/yy8vnm2a (in Arabic). There are no accurate statistics after 2010, the main indicator of any comparison during and after the war.
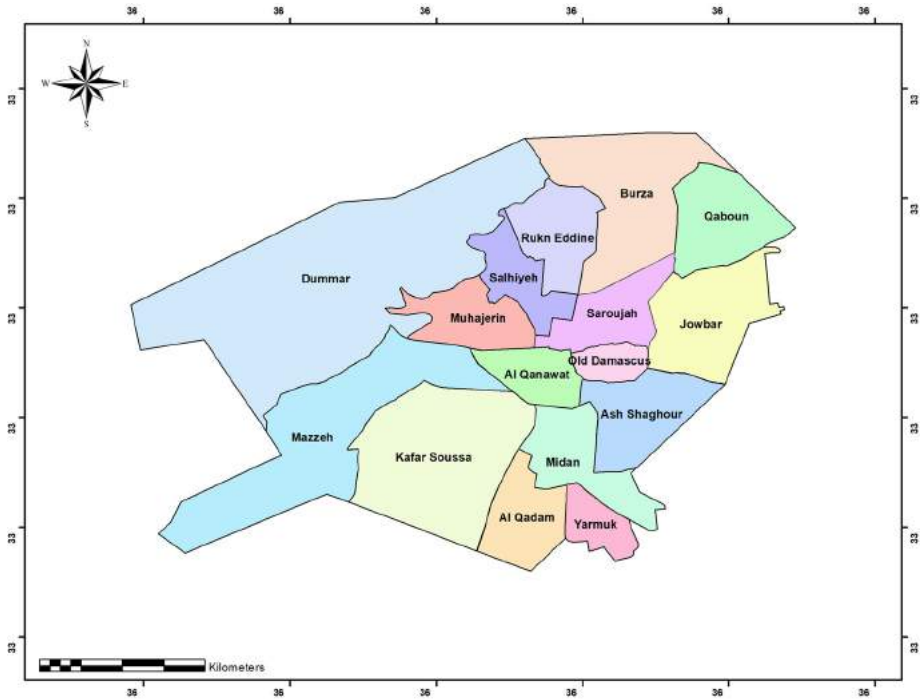
Figure 1. The Governorate of Damascus. Source: Governorate of Damascus, *Report of the First Phase of the New General Topographer of Damascus and its Environs, Khatib and Alami Company*, Urban Planning Directorate, 2010, p. 101. Image by Yassar Abdin.

Informal settlements are closed areas, populated exclusively by specific types of residents exhibiting a tribal defensive attitude towards neighbouring communities and urban society in general; they are not characterized by any economic, recreational or cultural activity that is allowed. Since their residents trade in smuggled merchandise and engage in a number of socially unacceptable activities, these areas are usually associated with misconduct and delinquency. They accommodate a large number of low-income and indigent persons.

Private residential neighbourhoods are areas inside the city that are inhabited by wealthy persons and persons with political and administrative influence. They are currently known as the "security zone" and contain a presidential palace and the residences of most of the high-ranking government officials. There are also areas outside the city, such as Qura al-Assad near al-Dimas and the Ya'four district, containing mansions and villas occupied by wealthy and influential persons and many government officials and army officers. All these high-income areas are well serviced and surrounded by strong barriers to ensure their protection.

Traditional neighbourhoods are old Damascene neighbourhoods, such as al-Midan, al-Salihiya and al-Shaghour, that are characterized by their high degree

Fig. 2 - Colour online, Colour in print
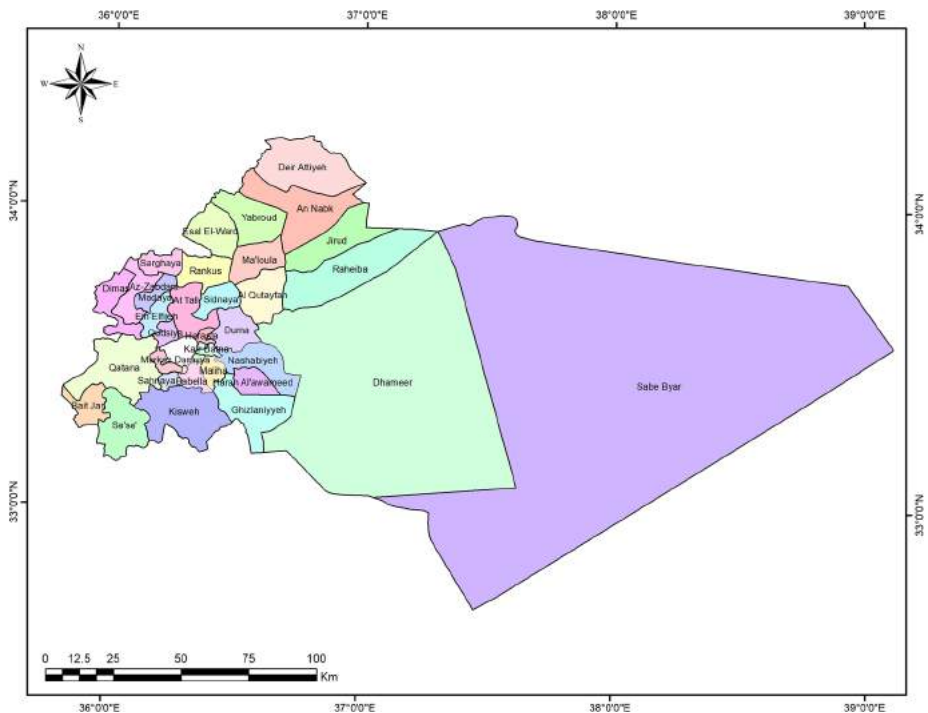
Figure 2. The Governorate of Rural Damascus. Source: Governorate of Rural Damascus, *Report of the First Phase of the Planning Project for Damascus Rif Governorate: General Technical Studies*, 2011, p. 32. Image by Yassar Abdin.

of social cohesion and the great pride that their residents take in appending these spatial honorifics to their names. The houses are handed down within the family from one generation to the next and are rarely sold to outsiders. They are mostly middle-income neighbourhoods but include many limited-income and some low-income residents.

The residents of ethnic neighbourhoods, such as al-Akrad, Jabal al-Rizz, Sayyida Zeinab and Jaramana, are proud of and deeply attached to their language, dialects, customs and culture. The city seems to have had little effect on the lives of these closed communities, which are impervious to cultural influence by the urban or neighbouring communities. They have many low-income residents.

Low-income neighbourhoods such as Masaken Mezzeh, Masaken al-Zahira and Masaken Barzeh, which were planned and built in the 1970s and 1980s, rank low on the social indicators due to their poor urban planning and layout, their failure to meet proper housing standards, their severe lack of public services, and managerial neglect to the extent that, in appearance, composition and characteristics, they have become more like informal settlements. They have many low-income residents.

Special housing complexes for intelligence, police and army personnel constitute fully self-contained entities with their own security systems, and

they are usually walled and isolated from the urban and neighbouring communities, with which they have little physical resemblance. They are attached to their own administrations and are not subject to local administrative authorities or regulations.

Most of the modern suburban residential districts, such as Barzeh Prefabricated Homes, al-Zahira Prefabricated Homes, the Dummar Project and the Qudsayya Suburb, were developed in accordance with housing plans drawn up by public sector institutions. In contrast to the above-mentioned categories, they constitute successful social pilot projects since each of them exhibits a high degree of the diversity needed to ensure open-minded contact between all social classes, and they give a clear example of a healthy urban society that is not isolated or secluded. The demographic diversity manifested in the successful Dummar Project could serve as a model for the design of future middle-income housing projects in Damascus and its environs.

Geographic districts of Rural Damascus

The Governorate of Rural Damascus comprises four geographical districts: the Eastern Ghouta district, the Southwestern Ghouta district, the Barada River Valley region, and the mountainous district.

The Eastern Ghouta district constitutes an extension of Damascus to the flat plains of the Hamad in the east and al-Talle and Mneen in the north, through which the Barada River flows, to Damascus and onwards to al-Utaybah Lake and al-Haijana. The population of the towns of Eastern Ghouta consists of closed cohesive communities maintaining strict religious observances and practices and not welcoming outsiders. Accordingly, the surplus population from the city of Damascus and other governorates has been absorbed selectively in a manner consistent with the prevailing social mores. Most of the newcomers originally lived in similar communities. While the indigenous population usually continued living in their traditional areas, the newcomers tended to settle in planned or improvised modern extensions. This gave rise to a new community that was fairly cohesive but separate from the migrants, even when the latter were from a similar social culture.

The majority of the population of the sub-districts and towns of Eastern Ghouta work in seasonal agriculture and some building and construction trades, from which they earn a low income. It is noteworthy that most of the land in Ghouta has been converted from agricultural to other uses. This was due to a lack of governmental planning, which led to a drop in land prices when such land fell prey to unregulated building and other uses and the majority of its farmhands became unskilled labourers working in the unregulated occupations that replaced agricultural activity.

The public authorities acquired vast areas of land at extremely low prices to establish a number of activities on both sides of the airport road passing through Ghouta. Areas of land were also acquired for the army by unspecified means, either by purchase or expropriation without any compensation or returns for

their owners. Moreover, land prices in Ghouta fell in the real estate market due to a lack of planning and ongoing land pollution.

Notwithstanding the proximity of the towns of Ghouta to the city of Damascus, these towns differ from the city in regard to the extent and quality of available services, the most basic of which are lacking in almost all of the towns.[4]

The Southwestern Ghouta district constitutes an extension of Damascus to the southwest, up to the borders of the southern Syrian governorates, and comprises the lands traversed by the A'waj River from its sources to the administrative boundaries of Damascus. It consists of flat plains extending without any natural obstacles to the fertile lands of the Houran plateau and opening onto Mount Hermon and all the southern districts. The towns of Southwestern Ghouta have a diverse population consisting mostly of closed cohesive communities except in some towns such as Sahnaya, Jdeidat Sahnaya and Qatana, which, after absorbing surplus population from the city of Damascus and other Syrian governorates, have established open communities from a homogeneous mixture of cultures. The other towns have manifestly retained a culture of seclusion, and many of their residents exhibit a sense of tribal rather than spatial belonging and remain staunchly impervious to the social culture and lifestyle of the towns in which they are living. This has given rise to closed communities living in the same space but without mutual interaction.

The majority of the population have incomes equivalent to those of public and private sector employees since most of them work in the services sector. The remaining few work in seasonal agriculture, nomadic stockbreeding or various building and construction trades. It is noteworthy that declining land prices have attracted many factories seeking to benefit from cheap labour in the district.

The district is suffering from a proliferation of military sites due to its proximity to the occupied Golan Heights region, and also from declining land prices due to the paucity of surface water and the depth of the groundwater aquifers. This was instrumental in the transformation of agricultural land into summer resorts for high-income holidaymakers, and the landowners who were thereby stripped of their property at paltry prices were obliged to work as labourers for the new owners.[5] Despite the population, agglomerations in this district lack basic services and the services that are available differ in type and quality from those provided in Damascus.

The Barada River Valley region is mountainous terrain interspersed with fertile plains that are separated from Damascus by Mount Qasioun in the northwest. The communities in the towns and sub-districts of the Barada River Valley are relatively open since they are in an area of summer tourist and holiday resorts. Although the region had a high population growth rate brought about by influxes of permanent residents and holidaymakers, all of the new planned or unregulated expansion projects were isolated from the conservative indigenous population living in their

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4   Governorate of Rural Damascus, *Diagnostic and Prospects Report, Regional Planning of Damascus: General Technical Studies and Consultations*, unpublished report, 2011, p. 42.

5   Governorate of Rural Damascus, *Report on the Protection of Agricultural Resources in Rural Damascus for the Regional Planning Project of the Damascus Countryside: General Studies and Technical Consultations*, unpublished report, 2012, p. 54.
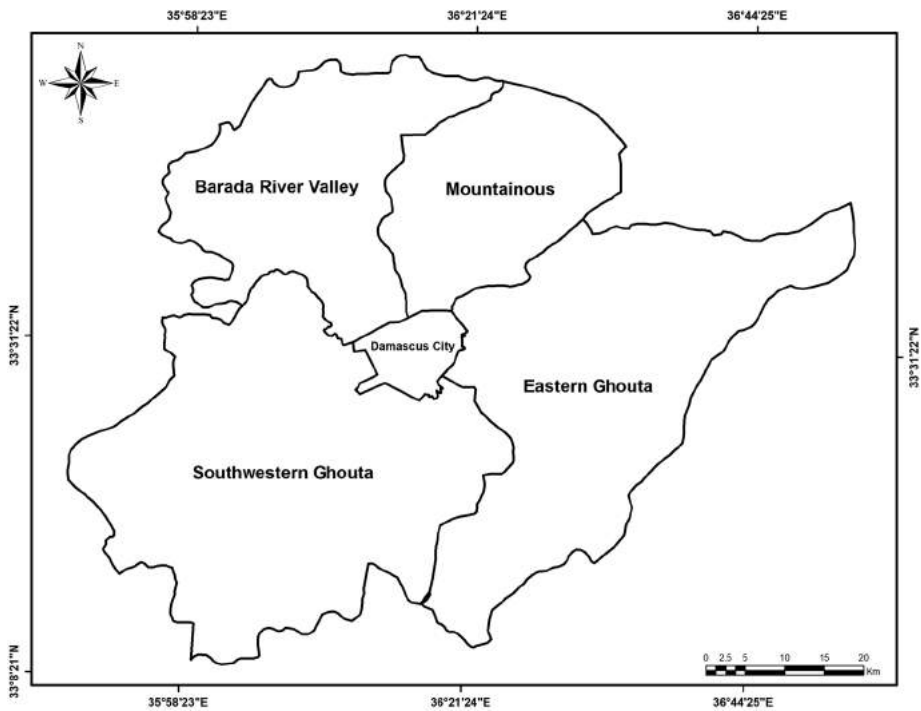
Figure 3. Main districts around the City of Damascus. Source: Damascus Regional Governorate, *Report of Regional Strategies for Development Projects and Implementation Plans for the Regional Planning Project for Damascus Rif Governorate: General Technical Studies*, 2012, p. 69. Image by Yassar Abdin.

traditional habitats in which they were not in contact with the newcomers with whom they nevertheless shared a similar social culture. In addition, the large number of informal settlements that have sprung up alongside military camps constitute communities that are alien to the indigenous local community. Even after several years, there has been no integration or rapprochement between these communities. The administrative authorities concerned have not attempted to regulate social life or provide community security, nor have they organized collective cultural activities to alleviate the increasing intercommunal antipathy.

The incomes of most of the residents of the towns and sub-districts have declined following the elimination of their agricultural and pastoral occupations. Most of these residents are now employed in the services sector, while the others are used as unskilled labour by the tourist and leisure facilities that have proliferated on the banks of the Barada River.

The public authorities acquired vast areas of land at extremely low prices for the implementation of a number of large projects and, as in all the districts, land was also acquired for military purposes. In addition, when this region began to attract holidaymakers, land passed into the hands of wealthy new owners

through estate agencies which acquired it at derisory prices from its original owners, who subsequently worked for the new owners as labourers or watchmen.

The towns in the sub-districts enjoy better services than those provided elsewhere in the Governorate of Rural Damascus because they are a favourite destination for holidaymakers and tourists.[6]

The mountainous district is the mountainous terrain to the north of Damascus from the town of al-Talle to the Qalamoun mountains. The population of its towns and sub-districts constitute closed cohesive communities due to their marked sense of religious and spatial belonging and their lack of receptiveness to outsiders. The district covers large areas ranging from primitive rural lands to urbanized holiday resorts such as Sednaya. Migrants from outside are rarely allowed to settle here, and the remote sub-districts such as al-Rhaiba have taken on a military appearance due to the army units that are deployed and accommodated there.

The towns and sub-districts that are far from Damascus have seen an exponential decrease in the incomes of their residents, the majority of whom are employed in the services sector and production facilities. Most of the sub-districts are neglected by the local administration due to their remote location, their unattractiveness and the influence exerted by the military zones.

The public authorities have acquired vast areas of land for numerous construction projects which, decades later, have never been implemented, and extensive areas were also acquired, without payment or appropriate compensation, for the purpose of widening roads and endowing them with a security perimeter. The district is suffering from the largest expropriations of land for military and other special purposes. Most of the sub-districts and their towns are suffering from the non-availability or inadequacy of services except in al-Talle, the local administrative centre.

Communities in rural Damascus

The population of Rural Damascus consists largely of the following generic communities, which are more disparate than those in the city of Damascus.

The people of Rural Damascus fall into six distinct categories: the peasantry, the Bedouin, new arrivals from other governorates, new arrivals from Damascus, Syrians displaced by the 1967 Six-Day War, and Palestinian refugees.

The peasantry are local townspeople, some of whom are currently employed in occupational sectors such as services, construction, automotive repair, commerce and manual labour, while the others continue to work in agriculture and stockbreeding. The term "peasants" is customarily applied to all of them. They bear names comprising a patronymic and a surname, and many of them own land and real estate.[7]

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6 Governorate of Rural Damascus, *Summary of the Tourism Study for the Rural Damascus Building Planning Project*, 2012, p. 34.
7 Governorate of Rural Damascus, *Report of Specialized Works for the Rural Damascus Planning Project: General Technical Studies and Consultations*, unpublished report, 2011.

The Bedouin are a group that arrived in Damascus from the Arabian Peninsula during the Ottoman era. Bedouin work principally in animal husbandry and agriculture. Clans use the name of the original tribe as a surname, and the majority are from the Al-Naeem tribe, a sedentary urbanized Muslim tribe and the largest in Syria. For the Bedouin, the ties of kinship are stronger than the ties of statehood, and they maintain the purity of their lineages through clan intermarriage.[8]

New arrivals from other governorates include those who come to perform military service or to search for work. They often live near to their place of employment in close-knit communities bound by the ties of kinship, district, sect or historical nation, underpinned by their own language or dialect.[9]

New arrivals from Damascus are former residents of Damascus who could not get accommodation in the city because of the housing shortage and high prices.[10]

Syrians displaced by the 1967 Six-Day War are internally displaced persons. They are the former inhabitants of the southern regions who started arriving in 1967 owing to Israeli attacks against Syrian territories. Most are from the occupied Golan Heights region and the Governorate of Quneitra. They work in the service sector and other occupations and are generally poor. Their communities are overseen by the local authority.[11]

Palestinian refugees came from Palestine and Jordan in 1948 as a result of the Palestinian exodus that year, known as the Nakba. They work in the service sector and other occupations but not in agriculture or animal husbandry because they do not own land and are generally very poor. International organizations help to care for these communities.[12]

These six categories illustrate the current state of affairs in Rural Damascus. Far from achieving a rapprochement during the decades preceding the crisis, these communities remained at odds with each other, and the mental barriers between them were strengthened and transformed into physical barriers when the Syrian crisis erupted.

The population of Rural Damascus failed to comply fully with the spatial planning directives handed down by the government, and informal settlements were established as an easy way to circumvent them. This gave rise to closed neighbouring communities attracted from various regions and diligently preserving the particularities that led to their establishment.

The latent fragility of the population agglomerations in the city of Damascus and its environs is an indication of the weakness of the administrative structures in the area and the extent to which the social contract has collapsed due to the inability or unwillingness of the local administration to perform its basic functions, fulfil its regulatory obligations and shoulder its responsibilities to

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8   *Ibid.*, p. 61.
9   *Ibid.*, p. 64.
10   *Ibid.*, p. 64.
11   *Ibid.*, p. 66.
12   *Ibid.*, p. 66.

protect fundamental rights and freedoms, ensure the security and safety of its population, reduce poverty, provide services and manage resources in a transparent and equitable manner.

Damascus and its surrounding areas prior to 2010

Urban growth in Damascus developed at a steady pace until the second half of the twentieth century, after which it accelerated rapidly. The data indicate an unprecedented growth during the period from 2002 to 2010,[13] which led to a huge expansion of the built-up area, further loss of arable land and the proliferation of informal settlements forming a ring around the city.

The population of the city's planned neighbourhoods consists of class-, creed- and culture-based agglomerations which may be homogeneous to a large degree. The situation becomes more delicate if such neighbourhoods are virtually closed to outsiders, especially in regard to accommodation, property ownership and the practice of trades and professions. It is noteworthy that the new suburbs that have grown up around Damascus are playing an important role in the establishment of open neighbourhoods exhibiting the diversity and pluralism required in urban environments, under the supervision of their local authorities.

The city of Damascus is administered in accordance with a plan drawn up in 1968.[14] Despite numerous attempts, no plans to regulate the city's development have since been issued. Consequently, the problems caused by the adoption of several ill-considered planning decisions have had a detrimental effect on the socioeconomic situation of the population of the city and its environs. Being a large metropolis exercising considerable administrative, political and economic influence, the city has monopolized the resources of its rural hinterland for its own benefit at the expense of the rural districts, thereby increasing the socioeconomic developmental disparity between the city and those districts. Moreover, the city of Damascus has expanded by annexing adjacent districts or parts of towns in its rural hinterland and bringing them under its administrative and service structures in its own interest. The complex and costly application procedures for building permits, exacerbated by widespread administrative corruption, have led to a proliferation of unregulated construction that has considerably marred the city's overall appearance.

No planning studies or proposals for Rural Damascus have been published since it was declared a governorate independent of Damascus in 1972,[15] and under the concept that has been applied, namely "expansion of the

13 Central Bureau of Statistics, *Statistical Data of the City of Damascus: Annual Statistics, 2002–2010*, Presidency of the Council of Ministers, Syria, 2010.
14 Governorate of Damascus, Damascus City Building Plan for 1968, Decision No. 10/7, Municipal Ministry, 1970.
15 Union of Syrian Engineers, *Damascus Building Plan and its Annexes until December 1971*, Damascus, 1980.

spatial plan for rural towns",[16] building permits could be issued for all types of land adjacent to the old plan. As a result, up to 80% of the construction projects in most of the rural areas close to Damascus have been unregulated, and shanty towns have become the most glaring manifestation of the low standard of urban development. The situation has been aggravated by inadequate provision of services, high population density and disregard for structural engineering norms and health requirements.

The local administrations in the districts have adopted the tactic of "acquisition" as a means to obtain land and real estate for the implementation of their vital projects in Rural Damascus, such as road construction and the establishment of industrial zones or housing estates, while neglecting to pay adequate and satisfactory financial compensation to the owners. Subsequent decades-long delays in implementation of the projects for which the acquisitions were made proved highly detrimental to the land concerned. When the administration failed to implement the projects, the former landowners sought to either recover their property through annulment of the acquisition orders or obtain some form of compensation by allowing their lands to be transformed into informal settlements.

Human agglomerations in the form of informal settlements have drawbacks from the standpoint of community security, since they are far from being residential areas in harmony and concordance with their surroundings. Families from a single village moving to an informal settlement bring their customs, traditions, values and lifestyles with them, and remain loyal to the locality from which they came. They have no sense of belonging to the wider society under the influence of which they are living, and may even feel antagonistic towards it.

The planned districts within the city of Damascus are also affected by the "informal settlement mentality" prevailing around them due to the ease with which the building codes and regulations can be circumvented. The ideology and culture of contravening the building regulations has spread inside the city to all the neighbourhoods covered by the spatial plan, where many infractions can be observed in the form of modifications and additions to previously constructed buildings and encroachments on planned public and private open spaces.

Although the local administrations have conducted numerous studies, they have not proposed any practical measures or ideas to develop Rural Damascus. They have not devised any means to open up the informal settlements and integrate them into urban society, nor have they resolved any of the planning problems. They have not formulated any plans to address the demand for housing or curb the growth of informal settlements. They have tackled certain aspects of specific problems merely by proposing solutions that could cause many other, more intractable problems. This has led to a total lack of public confidence in the local administrations and their promises, and has greatly diminished the population's hopes and expectations in this regard.

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16 Governorate of Damascus, Law Enforcement Procedure No. 26 (Amending Law No. 60 of 1979), Urban Organization Directorate, 2000.

Damascus and its surrounding areas in 2011–18

The marginalized, fragile and socially closed districts were hit hard by the crisis, for which they constituted fertile ground in view of their intercommunal antipathy, aggravated by discontent that could easily be transformed into a high level of hostility. Such emotions were boosted by the primal tribal instincts that abounded in the recent memory of cohesive population groups which had suffered from a crushing accumulation of planning and regulatory problems in their districts. These problems began with the unfair expropriation of their land and included a long list of ill-considered attempts to address the plight of indigenous population groups and migrant communities in the informal settlements, in addition to their hostile negative attitude towards urban society and the local administrative structures. This created an explosive situation characterized by a state of general indignation which the rival factions viewed as an opportunity to recover usurped rights, redress inequities, ensure their self-defence or avenge themselves in a manner justified by the causes of that indignation. The factions mobilized under appropriate historical regional, ethnic and sectarian banners that incited all the closed communities to participate in the crisis.

The Syrian crisis began in March 2011 when numerous incidents took place in conservative neighbourhoods of Damascus. Although these were brought under control within the city, they spread to more cohesive communities in larger districts of Rural Damascus, where clashes broke out, especially after the crisis became fully militarized in 2012 and isolated the city from large parts of its rural hinterland and even from some of its suburbs. This led to mass migration from the conflict zones to safer parts of Rural Damascus. In general, the rural hinterland and even some of the city's suburbs witnessed recurrent skirmishes and battles, and the city suffered from road closures, a proliferation of security checkpoints and an influx of thousands of internally displaced persons from the districts surrounding Damascus into safe districts inside the city.

The increasing fragility during the crisis can be inferred from the mounting demographic and spatial pressures caused by the sporadic and random movements of refugees and the growing inherited sense of hostility felt by unfairly treated groups waiting for justice.[17] The socially closed districts, and particularly those inhabited by rural communities that had been neglected for the benefit of the city, as well as the informal settlements in the city's hinterland, formed appropriate environments in which extremist groups could be nurtured and harboured in view of the social cohesion of their residents, their low ranking in the socioeconomic indicators, the belief that they were being ill-treated by the city and their lack of any sense of belonging to urban society. The accumulated planning mistakes that had a direct or indirect effect in triggering the crisis can be summarized as follows:

- Failure to address the concerns of the ethnic, regional, tribal and confessional communities in the planned and unplanned districts.

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17 Regional Centre for Strategic Studies, "Threats of a Rift: The Internal Situation in Fragile Middle Eastern States" [تهديدات التصدع : الأوضاع الداخلية للشرق الأوسط في مؤشر الدول الهشة], *Regional Studies*, Vol. 3, No. 107, 2014.

- Failure to encourage cultural projects and activities designed to rally and unite the population around a single social objective, and allowing religious manifestations to assume the guise of important social activities and, as such, to receive support from the administrations concerned.
- Failure to respond in an earnest and reasonable manner to the demand for housing, failure to consider the issue of informal settlements from the standpoint of the interests of their residents and the landowners, and failure to prevent plans to address the issue of informal settlements from being transformed into opportunities for real estate investment or exploitation by influential traders at the expense of the indigenous population.
- Failure to address the issue of large-scale expropriations of land that, a quarter of a century later, has still not been used for the purposes for which it was acquired, and failure to provide the owners with realistic and adequate compensation for such land.
- Delays in rectifying the mistakes made in the planning and regulation of the city and its hinterland, failure to implement the proposed plan in a systematic, comprehensive and transparent manner, and reliance by decision-makers on improvised means to address problems and meet needs.
- Long-standing and severe lack of public confidence in the soundness of the decisions and means adopted by the administrative authorities to meet essential current and future needs.

As the events in the Syrian crisis evolved, the population sought refuge in the districts which, not having been directly affected by the conflict, were regarded as safe. Damascus suffered more than the other cities from high population density, housing shortages and the large proportion of home-seekers resorting to the informal settlements. Numerous economic and service-related problems arose and, since it remained safe during the crisis in which its neighbouring districts were damaged, the city became the principal place of refuge for the rural population and persons fleeing from cities in the conflict-torn governorates. This led to a serious population imbalance and demographic change in the city, as well as a consequent housing crisis, and its residents suffered from rising prices, unemployment and shortages in the provision of the principal services. A number of schools were turned into shelters for homeless persons, and green spaces, public parks and playing fields disappeared after being converted into investments in real estate and commercial and leisure centres. This was caused by the demand for space for the provision of alternatives to the unavailable services that were needed as a result of the higher population density. This had a detrimental effect on social life in Damascus neighbourhoods and the services sector came under pressure, especially in regard to health and compulsory, intermediate and university education, due to the large and sudden increase in the population during the years of the crisis. The relatively safe informal settlements, in which persons fleeing the high costs of housing in the city sought refuge, expanded and currently accommodate more than 60% of the internally displaced persons who moved to Damascus. Population density in the informal

settlements was thereby doubled, placing increased pressure on the limited services available in the neighbouring planned districts.

During the crisis, the sociocultural divide motivated by homogeneous cohesion automatically became more entrenched in Damascus and its environs, and the local administration made no attempt to address this issue through sociocultural development projects. Damascus continues to suffer from this phenomenon, brought about by the population's agglomeration in regional and religious groups. The residents of the low-cost housing neighbourhoods, the traditional neighbourhoods and the informal settlements still preserve their closed sociocultural lifestyle to a large extent, and the administrations concerned treat them in a manner that perpetuates and deepens this divide through security checkpoints and special housing and residence permits. Even the open mixed neighbourhoods and suburbs in Damascus suffer from this phenomenon when they are surrounded by closed cohesive communities. This explains the highly fragile security situation, attributable to the presence of a hotbed ready to trigger the type of crisis that could degenerate into clashes and constitute a turning point at any time.

Characteristics of rural and urban environments during the ongoing crisis

It is evident from the course of events, up to the time of preparation of this paper, that the areas of conflict and armed confrontation around the city of Damascus have shrunk and, consequently, the number of districts requiring support and assistance to ensure their stability and security has increased. Several attempts have been made to enable displaced persons to return to the districts that are no longer scenes of conflict. Their service and technical networks are being rehabilitated by the local administrations and United Nations agencies and, in particular, by the Damascus delegation of the International Committee of the Red Cross. In the districts that are no longer scenes of armed conflict, public services and infrastructure have deteriorated to a large extent and there is a severe shortage of financial, technical and human resources. The serviceability of all the technical networks has deteriorated, and maintenance operations in the city have been delayed due to the lack of sufficient financial resources and technical expertise.

No men in the productive 18–25 age group play a socioeconomic role for numerous reasons, but primarily because they are performing compulsory military service, studying or living abroad. The same applies to those in the 25–45 age group, because they are either serving in the reserves or living abroad to evade military service. This has severely distorted the composition of the household and social structures and has weakened community safety.[18]

Housing demand and rents have increased in all the planned and unplanned districts, and housing costs have risen out of proportion to the limited

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18 Natalya Atafat, *Spatial Reading of the Regional Planning Experiment of Rural Damascus* [القراءة المكانية للأراضي في تجربة التخطيط الإقليمي لريف دمشق], Damascus University, 2015.

Syrian incomes. In the planned parts of the city, there are manifestations of unregulated activities exemplified by the presence of peddlers, particularly in kiosks and permanent pavement displays, at pedestrian crossings, and on top of walls outside buildings in the main streets. The number of unplanned residential and commercial buildings is continuing to increase throughout the city, and there has been an evident simultaneous increase in the growth of informal settlements.

Movement is difficult in the city's neighbourhoods and in the districts constituting its hinterland due to the numerous security checkpoints on all the roads and the closure of most of the streets and points of access in order to maintain optimum control and surveillance. There are no development projects to support the local population's continued existence and safety, and no lawful opportunities for secondary employment to cover the mounting costs of basic needs. None of the planning problems that arose prior or subsequent to 2011 have been addressed – planning mistakes are still proliferating, administrative reforms are being delayed and difficulties are still being tackled by the same methods applied before the crisis.

There has been a quantitative and qualitative decline in cultural activities and an increase in the cost of any remaining recreational activities. Since financial circumstances preclude expenditure on entertainment and luxury items, spending is limited to basic and essential items, and the availability of some of these items is affected by temporary or permanent shortages.

All sporting and cultural activities have diminished, and little concern is being shown for their facilities. Public open spaces and playing fields have been converted into economic investments for certain investors and, consequently, places in which communities could meet and manifest their solidarity have become commercial premises operated at high prices instead of being freely accessible facilities meeting important requirements for a peaceful social life. It is important to note that this signifies that the planning and regulatory failures which proved detrimental to the socioeconomic life of the various population groups in Damascus and its environs are continuing, and even increasing, in all the disturbed and peaceful districts.

The socioeconomic indicators for the population of Damascus paint the following picture. The economic situation of households is deteriorating on a daily basis, and their problems are being aggravated by the rising cost of their needs and the depreciation of the local currency, which has declined to less than one tenth of its value before the crisis. This has prompted people to use up any savings that they had, sell what they could manage without, seek secondary employment or request support from a charitable association. The main concern of households is to meet their basic needs on a daily or weekly basis, as they are unable to stock essential food supplies in advance. Although numerous local and imported commodities are available in the various district markets, the vast majority of the population are unable to obtain them due to their high prices.

Personal health care has deteriorated, and people are either resorting to traditional forms of herbal medicine whenever appropriate or relying on prayers and divine intervention when their maladies cannot be treated in that way. This is

due to the fact that a large number of the physicians of the older generation who were well known in their districts have left the country and some local pharmaceutical laboratories have closed down. The prices of local, imported and smuggled medicines have risen, as have the fees for clinical examinations and procedures and the costs of hospitalization and all medical, surgical and pharmaceutical requisites.

By law, men in the 17–45 age group are subject to compulsory basic military service and may subsequently be required to serve as reservists. As a result, a large proportion of society's human resources are no longer productive because they have been conscripted for compulsory military service or service in the active reserve; they have evaded conscription by travelling outside the Syrian Arab Republic; or they have evaded conscription by absconding and not appearing in public places.

This legal obligation has had a detrimental impact on all the public and private production sectors and has also distorted the social structure as a whole.[19] The standard of all material and intellectual production has dropped, and the income of every household has declined because of the absence of at least one of its members performing military service. The financial circumstances and morale of households have been adversely affected and there seems to be little prospect of a solution to the problems of compulsory military and reserve service.

The crisis has affected all levels and branches of education, without exception, due to the large-scale loss of teachers and other qualified and experienced personnel through migration, as well as the lax application of administrative and statutory procedures to the academic cycles on which the education system is based. This has reduced the standard of educational output, and the exceptional measures and new laws that were introduced during the crisis to help students to succeed fostered a general feeling of indifference among them. These problems have been aggravated by the degraded infrastructure of the educational facilities as a whole, with the situation being even worse in special educational institutions.

No literary, artistic or musical works were presented in the Syrian Arab Republic as a parallel chronicle of the major events taking place there. This might be attributable to a lack of financial or moral support for cultural manifestations, fear of irresponsible reactions against cultural works by persons holding differing opinions, or other reasons that are difficult to determine.

A number of relatively new phenomena have appeared in local society, such as the full or partial military uniform worn by civilians having no connection with any military body. Such mimicry of military personnel reflects a desire to gain higher social status or dominate others through the fear that the uniform inspires. Weapons are carried by civilians and military personnel in their daily lives, leading

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19 Syrian Centre for Research Studies and Institute of Social Justice and Conflict Resolution, *Forced Migration (Dispersion), The Human Condition in Syria: Demographic Report* [التقرير الديمغرافي, سورية في الإنسان حالة القسري، لتشتت], Lebanese American University, Beirut, 8 December 2016.

to the use of those weapons during simple disagreements about places in a queue of vehicles waiting for petrol, arguments over taxi fares, etc. Public sector officials and private businessmen flaunt changes in their social status and their higher level of wealth than that of ordinary individuals.

The latent fragility of security

The severe and prolonged Syrian crisis has dislocated the historical cohesion of the components of Syrian society, the close and harmonious relations that have existed between its different cultures and religions and the similarities between their living standards and incomes, and has created deep rifts between the country's population groups. This might be attributable to the fact that individuals spontaneously fall back on their instinctive primal tribal cohesion when they lose the security provided by an urban administration. The symptoms of latent fragile security can be observed through the following terminology.[20]

Communal introversion

The lack of improvement in the population's socioeconomic situation was an indication that no local or international public or private body had come up with any solutions or proposals to address the critical situation or remedy its causes. In actual fact, all the measures taken to tackle the planning situation in Damascus and its environs during the crisis merely exacerbated the schisms in the social life of the population as a whole. The inhabitants know each other by the traditional districts in which they live, and the old neighbourhoods consist of homogeneous and cohesive groupings in which a sense of belonging to the neighbourhood, with a commitment to its customs and traditions, and religious affiliation are usually the main driving forces. This ongoing spatial and religious affiliation may be carried over to the new residential districts in accordance with the planning theories which begin with a group's "incursion" into a residential district, their promotion of the district among other members of the group with a view to the latter's "translocation" and consequent achievement of residential "continuity" therein, and the subsequent establishment of a community akin to the community of origin. This is what happened in most of the new residential districts. Hence, all the districts, neighbourhoods and residential agglomerations can be distinguished and categorized by the social characteristics shared by their inhabitants. Most of the residential districts are characterized by their "communal introversion", accompanied by a desire for security and safety other than that which should be provided by the local administrations.

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20 Syrian Centre for Research Studies, *Social Rift in Syria: Impact of the Conflict on Social Capital* [أثر النزاع في رأس المال الاجتماعي – سورية في الاجتماعي], Damascus, 1 June 2017.

Fragile cohesion

This introversion contributed to the escalation of events during the Syrian crisis and constituted a tinderbox that could trigger strife and violent confrontations. The environs of the city of Damascus currently give the impression of being a peaceful group of neighbourhoods, townships and informal settlements with distinctive and differing social, cultural, economic, religious and political characteristics but endowed with their own separate social cohesion independent of the urban society in Damascus. However, it should be noted that any of them could adopt a hostile attitude towards others during any occurrences that they regard as an existential threat. These districts are separated from each other by strict security measures, resembling walls, in the form of barriers and roads closed by concrete blocks and earth embankments with limited entry and exit points under security surveillance.

Fragmentation through introversion

The present-day security barriers and checkpoints have entrenched the division of the residential districts in the city and its peaceful environs along religious, regional and ethnic lines and even on the basis of economic class. These security measures have made the districts even more introverted than before and have prevented any residential intermixture, especially in regard to accommodation of the refugees flooding into Damascus and its environs, who are distributed in accordance with a security agenda consistent with the identity and characteristics of each residential district. This can be designated as fragile cohesion under the influence of security barriers, or fragmentation through the introversion to which communities resort when they feel insecure and need to achieve some minimum level of security and safety for themselves.

The above picture illustrates the fragility of the community security situation in the districts of Damascus and its hinterland as a whole, and clearly shows that this situation could take a catastrophic turn in the event of any party triggering strife. It is evident from the state in which the neighbourhoods and districts in the city of Damascus and its environs find themselves that the planning and regulatory measures needed to put an end to this social segregation in the residential districts are still being avoided or delayed. The primary requirement to resolve such critical situations is the practical implementation of physical planning solutions to mitigate the introversion of closed communities by enhancing the urban infrastructure, providing services, addressing regulatory problems, improving living standards and ensuring the availability of appropriate employment opportunities to alleviate the burdens on the population. There is a need for community participation to create a mindset in which people will be ready to assume responsibility for their social development.

The solution lies in the adoption of methods based on open-minded urban planning policies. The neighbourhoods used to be interlinked by commercial,

recreational and cultural activities, and a balanced social cohesion can be restored only by taking earnest and resolute action. This could include interlinking the districts by removing anything that symbolizes a border; constructing roads and highways that traverse closed districts in such a way as to achieve a visual, cultural and economic interconnection; linking closed residential districts through the establishment of model cultural and economic activities, the attraction and influence of which would transcend their boundaries; improving public services, especially in regard to public spaces and parks, cultural facilities and sports clubs; and other measures conducive to interrelation and cohesion in important aspects of the population's daily life.

Assessment of the physical planning, social and security situations

Community security can be assessed in light of a large number of principal determinants, the spatial accumulation of which was a direct cause of the crisis. Three of these determinants – informal settlements, poverty, and districts in which planning was delayed – have been selected for discussion below in view of their separate and direct spatial impact and the availability of relevant information and data that can be mapped, segmented and projected onto a map indicating the areas of armed conflict. The results show that the closed, ideologically strict and poor neighbourhoods suffering from administrative neglect largely coincide with the areas of armed conflict.

Informal settlements in the city of Damascus and its environs

The difficulty of finding accommodation is one of the main problems facing the poor and middle classes. Consequently, informal settlements have sprung up within the administrative boundaries of the city and on the agricultural land of its rural hinterland to the east and south. These unplanned residential areas have proliferated to such an extent that they form an uninterrupted ribbon along the main roads around the city and even extend to the agricultural land in Ghouta and the State-owned land on the slopes and foothills of Mount Qasioun, thereby virtually surrounding the city from all sides.

These informal settlements are characterized by their high population density, ranging from 400 to 1,200 persons per hectare. Most of them are irregularly connected to public infrastructural services such as sewers, drinking water, electricity, telephones and roads. In appearance they are largely of a rural nature, as can be seen from the customs and habits of their residents, who breed poultry and even keep cattle in the interiors and on the roofs of their houses. Their layout is fairly standard in regard to street width and the absence of green and empty spaces, since they are intended mainly for residential purposes. Social

services such as health and educational facilities and police stations are totally non-existent.[21]

Their administrative links and other connections with the city depend on whether they are located within or outside its administrative boundaries. About twenty informal settlements have been established within the city's boundaries in areas not classified as residential, and more than twenty others are located outside the spatial plan but close to the city on the main roads linking it to districts within its region or on highways leading to other major cities.[22]

Internal migration, primarily from areas with high unemployment to areas offering employment opportunities in the public or private sectors or better living conditions, is one of the most obvious causes of the growth and expansion of these informal settlements. Hence, the most prevalent pattern of internal migration has been from rural areas to the informal settlements in and around Damascus. These settlements have constantly expanded as a result of this uninterrupted migration by cohesive population groups to specific locations where, maintaining their ties of kinship, religious faith or regional links, they have formed communities bonded by similar sociocultural concepts and a shared history. They continue to lead their traditional lives in the closed community of the informal settlement, without merging or intermingling with the wider society around them, and maintain the traditions that they brought with them from their original habitat. On the whole, they form closed communal entities within Damascus and in its rural hinterland, and the residents of each informal settlement usually have virtually identical geographical origins and are loath to accept outsiders amongst them. This proclivity can give rise to hostility and the adoption of a defensive posture in regard to any form of integration into surrounding or neighbouring communities.

Poverty in Damascus and its hinterland

Poverty is an important indicator for any assessment of the districts in Damascus and its environs because it explains the population's basic socioeconomic structure. In Damascus, poverty has been found to be closely related to the educational level and occupational status of the head of the household.[23] The following table shows the areas with high levels of poverty in Damascus and its hinterland as determined by a United Nations Development Programme study

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21 Regional Planning Commission, *Report of the Informal Settlements of Damascus Rural Governorate*, Municipal Ministry, unpublished report, Damascus, April 2013, p. 31.

22 *Ibid.*, p. 43.

23 Navar Abd-el Hamid, *A Guide to Multidimensional Poverty: Policies to Address the Problems of Disconnected Disabilities in the Arab States*, Arab Human Development Report, Research Paper Series, United Nations Development Programme (UNDP), Regional Office for Arab States, 2014; Alithi Heba and Abu Ismail Khalid, *Poverty in Syria: 1996–2004*, Development Policy Office, UNDP, Beirut, 2005.

conducted in 2005.[24] It is not surprising that these areas are situated on the eastern side of the periphery around Damascus and coincide to a large extent not only with the locations of the informal settlements in the city and its rural hinterland, but also with the rural districts. The problem of community security could be attributed to the contiguity of a number of impoverished, closed and mutually hostile population agglomerations with negative attitudes towards the metropolis, Damascus. Such a situation constitutes a volatile environment that could be ignited by any simple dispute deteriorating into a controversy and leading to a major intercommunal crisis.

Poverty rates in Damascus and its rural hinterland can be compared on the basis of the percentage of households living below the poverty line and the extent of the poverty gap in each governorate. These indicators show that in 2004, poverty rates amounted to 4.7% in Damascus and 5.44% in Rural Damascus; in 2010, these rates had risen to 9.17% and 11.89% respectively. The high increases in these rates during such a short period of time are alarming, and it is noteworthy that the poverty-stricken areas coincided spatially with the informal settlements in the hinterland of the city of Damascus.[25]

Lack of follow-up to planning studies

The spatial plan regulating development and services in Damascus and its environs was drawn up fifty years ago. Several earnest attempts have been made to update it, and extensive local studies, some with assistance from various international bodies, have been conducted. However, none of these studies has been adopted, due to administrative and technical obstacles, differing personal interests and other ill-defined competing factors, and the entire Damascus region has therefore been left with an outdated spatial plan. Developmental operations are still being conducted on the basis of improvised planning and regulatory decisions, and the city's affairs are being run at the expense of its rural hinterland, which has been fully subordinated to it insofar as the city consumes the useful resources, such as drinking water, of its hinterland and exploits the latter as a dumping ground for its sewage, solid waste, industrial pollution, etc. This urban monopoly over the rural hinterland is exacerbated by the fact that the city is permitted to annex planned districts contiguous to its neighbourhoods and can expropriate any land in the Rural Damascus governorate for its own benefit.

Planning delays and the increasing demand for urban expansion, in order to absorb surplus population and satisfy the needs of other construction and real estate activities, led to a situation in which this demand was met by allowing exceptions and circumventing regulations. The widespread corruption in the local

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24 A. Heba and A. I. Khalid, above note 23. See also Central Bureau of Statistics, *Household Income and Expenditure Survey: Annual Statistical Collections from 2004 to 2010*, Presidency of the Council of Ministers, Damascus, 2010; Governorate of Damascus, *Report of Detailed Planning and Organizational Studies for the Approved Urban Development areas in Damascus: Action Plan 2010–2025*, Municipal Ministry, 2010.

25 Central Bureau of Statistics, above note 24.
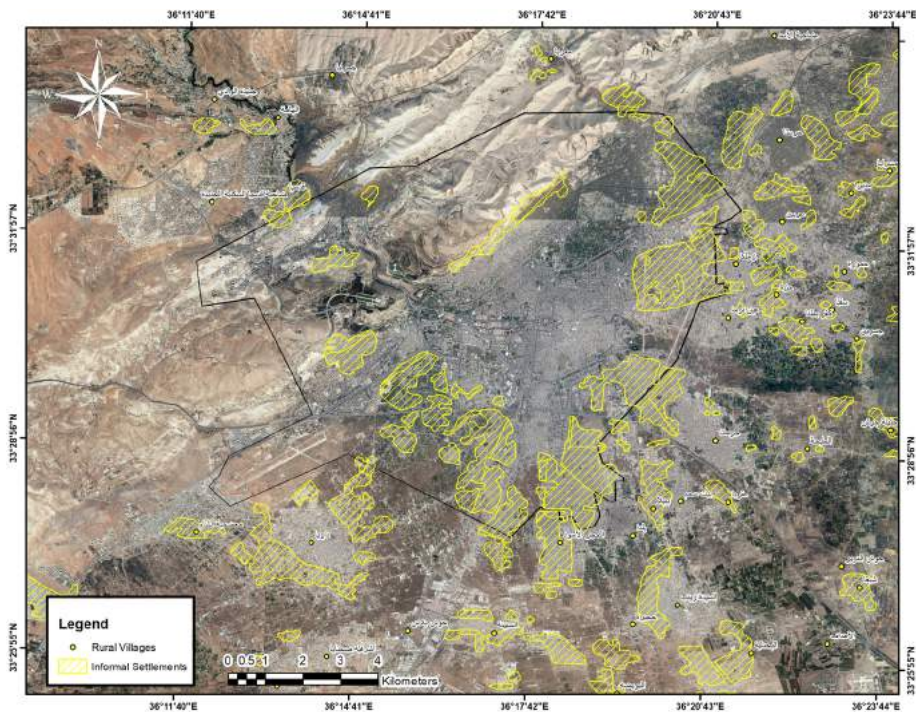
Figure 4. Informal settlements in and around the city of Damascus. Source: Regional Planning Commission, *Report of the Informal Settlements of Damascus Rural Governorate*, Municipal Ministry, April 2013, p. 43. Image by Yassar Abdin.

administrations was reflected in the deteriorating urban infrastructure of the planned districts and the large-scale proliferation of informal settlements. Planning delays were exploited as a means to trigger and escalate the crisis, and this applied, in particular, to the measures taken to prevent landowners from disposing of their property in many rural districts for years on the pretext that planning studies were pending, even though these studies were never conducted and sometimes never even announced. Projects for the development of seventeen areas in and around Damascus which had been planned years ago were never implemented, and public indignation was increased when the only project that was implemented was transformed into a series of real estate speculations that were far from being in the interests of the original owners. Rural Damascus as a whole reacted negatively to the planning delays. Those seventeen proposed planning areas will be segmented with the other data in order to provide a proper illustration of the impact of urban development.[26]

26 Governorate of Damascus, above note 24.
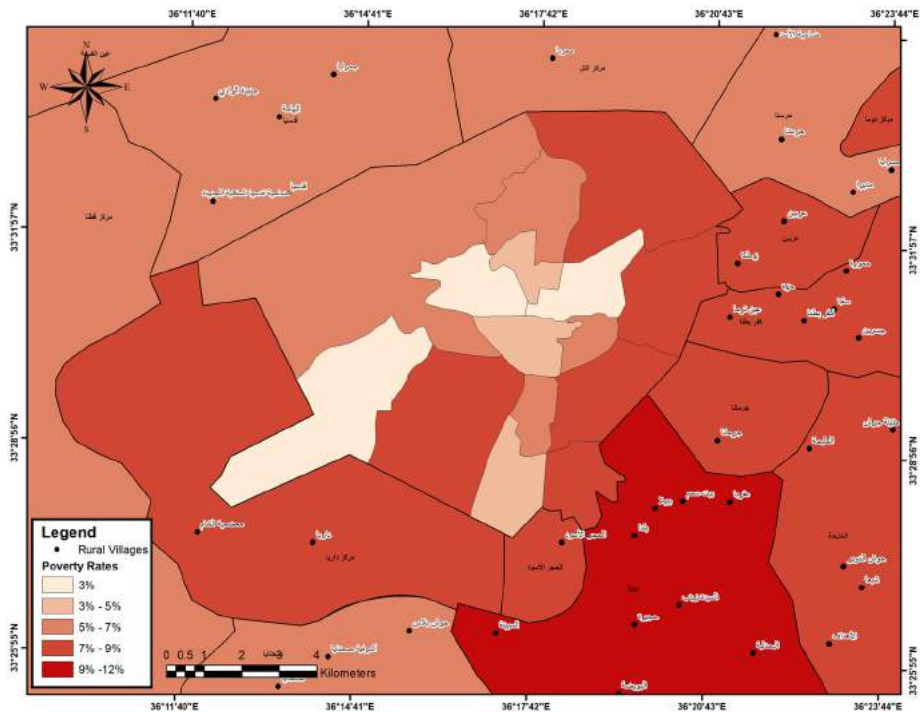
Figure 5. Poverty rates in Damascus and its rural hinterland. Source: Central Bureau of Statistics, *Population Status Report of Damascus Governorate: Annual Statistical Collections from 2012 to 2017*, Presidency of the Council of Ministers. Image by Yassar Abdin.

Areas of armed conflict

Maps of the armed conflict during the 2012–17 crisis were compiled on the basis of the chronology of major events that shrank or expanded the area controlled by any of the contending groups in Damascus and its rural hinterland. There were about 100 maps showing the areas of conflict during the last six years up to the time of preparation of this paper, as well as the front lines that witnessed the fighting and destruction and the areas which, no longer being scenes of conflict, could benefit from assistance to ensure the return and resettlement of their population. The latest map shows that the conflict has receded in some sub-districts of Eastern Ghouta such as Duma, Harasta, Arabeen, al-Nashabiyya, Kafr Batna and al-Hajar al-Aswad, which have begun to enter into direct or indirect negotiations and settlements. There is a need to collect data on the damage, establish working mechanisms, draw up proactive development plans for these newly conflict-free areas on the basis of an assessment of their needs, and mobilize resources for the provision of appropriate support to facilitate the safe return and resettlement of their populations. In view of the difficulty of determining the changes in a precise manner, it was decided to select a map portraying the situation in the third quarter of 2017 so that it could be segmented with the maps showing other changes.
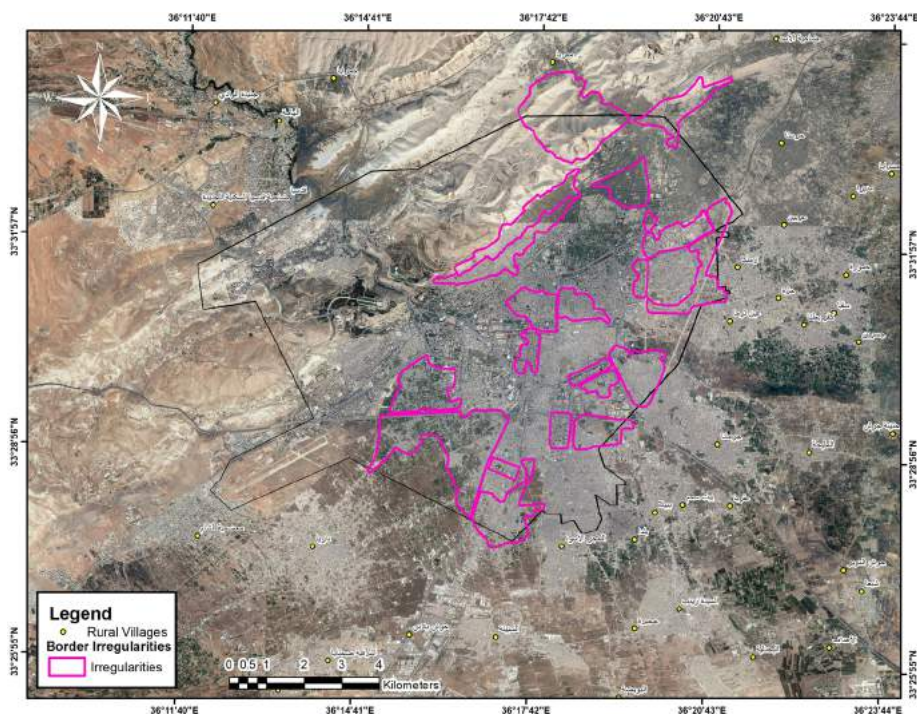
Figure 6. Proposed but unimplemented district plans. Source: Governorate of Damascus, *Report of Detailed Planning and Organizational Studies for the Approved Urban Development areas in Damascus: Action Plan 2010–2025*, Municipal Ministry, 2010. Image by Yassar Abdin.

The spatial coincidence of negative factors that helped to trigger the crisis

The spatial segmentation of the data in Figures 4, 5, 6 and 7 illustrates the relationship between the events taking place and the above-mentioned determinants. Figure 8 shows the close coincidence and constant correlation between the districts with high poverty rates, the informal settlements and the various closed communities sharing a feeling of injustice and marginalization, the latent fragility of which was manifest in their demands for planning rights, more equitable satisfaction of their needs and provision of the requisite services in their districts. This fragility was transformed into a state of armed conflict when it was aggravated by other special circumstances.[27]

In fact, in all the districts and neighbourhoods of Damascus and its environs, it is possible to monitor this phenomenon of latent fragility, which, when aggravated, can turn into conflict. It went unnoticed for a long time, and

27 Rif Dimashq Governorate campaign, "Maps 2012–2018", available at: https://en.wikipedia.org/wiki/Rif_Dimashq_Governorate_campaign.

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Fig. 7 - Colour online, Colour in print
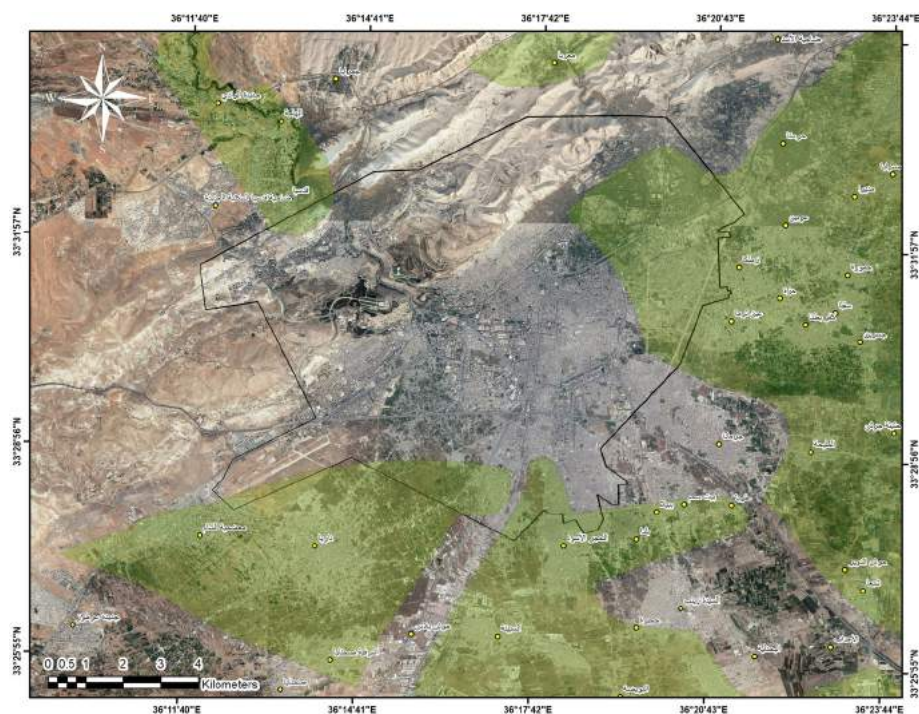
Figure 7. Areas of armed confrontation in the environs of Damascus. Source: Rif Dimashq Governorate campaign, "Maps 2012–2018", available at: https://en.wikipedia.org/wiki/Rif_Dimashq_Governorate_campaign. Image by Yassar Abdin.

no attempt was made to address it in a meticulous and practical manner by establishing databases, conducting analytical studies to interpret the occurrences and constructing development scenarios conducive to a peaceful future for these districts. Such studies should be conducted without further delay, and direct interventions will be needed to ensure the full recovery and rehabilitation of these districts in the specific manner required by their respective situations.

In general, all the neighbourhoods of Damascus need to open up to each other under the guidance of a strong and vigilant municipal administration pursuing a cultural reform programme and seeking to develop the city, resolve its problems and meet its requirements. The towns of Rural Damascus also need similar administrations capable of ensuring their development and rehabilitation on a basis of open-mindedness and closer cultural ties with urban society in the city. The objective should be to encourage closer relations between the various population groups, develop citizenship, promote patriotism and achieve a social stability in which changes can take place at a sufficiently gradual pace that would allow adaptation to all aspects of sociocultural development without any imbalances or fragmentation. In this way, those groups could eventually be able to enjoy the community security that constitutes the first line of defence for the

Fig. 8 - Colour online, Colour in print
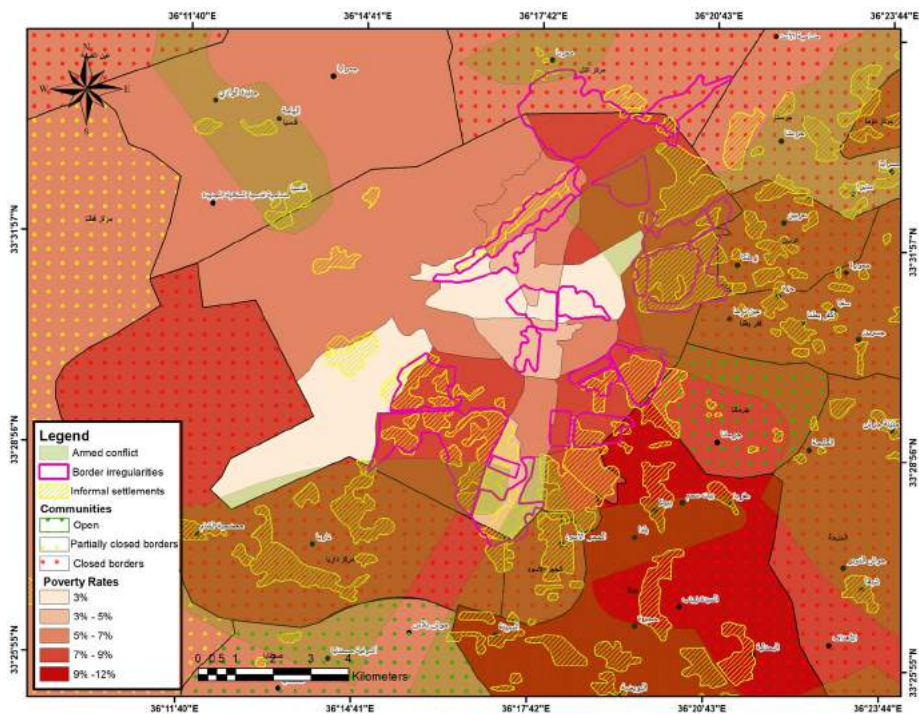
Figure 8. The spatial coincidence of the accumulation of negative factors. Data intersection map by Yassar Abdin.

protection of the homeland and its citizens against any internal socioeconomic dangers, at the same time ensuring a decent and tranquil life for individuals by dispelling their fears and endowing them with peace of mind and recognition of their presence and status as components of society. This necessarily implies that the local administrations, their official institutions and civil society organizations must assume heavy responsibilities in regard to the upgrading and equitable provision of public services in all districts, the satisfaction of needs and the establishment of an appropriate climate of social justice in which all communities feel accepted and secure and can cooperate within a harmonious framework in which a sense of belonging and loyalty to the wider society is promoted and disparities and controversies conducive to conflicts are rarely encountered.

When re-planning these districts, short- and medium-term development programmes need to be proposed in order to address, in a serious manner, a number of important issues. These include the equitable provision and distribution of public services in the towns and sub-districts; provision of decent housing and the formulation of a plan to resolve the problem of informal settlements; prevention of iniquitous expropriations; promotion of cultural activities exerting greater influence than religious activities; interlinkage of the districts through a network of roads wide enough to facilitate an effective transport system between

them; and increased reliance on the tourism, recreational and economic activities for which each district is best known. Neglect or disregard of these issues could perpetuate the fragile security situation because of the potential reconstitution of closed communities characterized by extremist ideology either of a religious nature or relating to regional origin or ethnic affiliation.

There is a pressing need for a series of socioeconomic measures, programmes and plans to fully ensure the well-being of all members of society and optimize the development of their capabilities to an acceptable degree within a framework of political freedom and social justice which would make every individual better able to assume his or her responsibility for the achievement of social development and progress. Self-knowledge and close familiarity with their environment and civil obligations make people more aware that the source of their security lies within themselves when they fulfil their humanitarian and civil obligations and duties towards the society in which they live.

OPINION NOTE

Mental health during the Syrian crisis: How Syrians are dealing with the psychological effects

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Abstract

Looking at the physical damage caused by the Syrian war, one can begin to imagine the scale of the psychological toll that eight years of crisis have taken on the Syrian people. In a country where mental health was still considered an emerging field before the war, Syrians are working to address and manage the mental health and psychological effects of war. Despite this disastrous situation, there appears to have been significant progress in the field of mental health during the crisis. This article explores the mental health situation in Syria prior to 2011, the effects of the crisis on Syrians, and how these have been managed in recent years. It concludes by citing some examples of progress that have been made in mental health care in Syria and discussing some of the challenges that remain to be addressed.

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Introduction

More than seven years since the onset of the Syrian crisis, the human cost is estimated at over 400,000 killed, more than 6 million internally displaced, and some 5 million refugees.[1] Moreover, one of the most recent studies[2] indicates that, in addition to losses in agriculture, tourism, oil and banking, more than 2.4 million homes have been damaged, 67% of Syria's industrial capacity has been destroyed, 45% of health centres are no longer functioning and 30% of educational institutions have been demolished, forcing 89% of Syrians into extreme poverty.[3] From here, we can imagine (or maybe we cannot) the magnitude of the psychological damage that those living through the crisis are experiencing.

This article explores the mental health situation in Syria prior to 2011, the effects of the crisis on Syrians, and how these have been managed in recent years. It concludes by citing some examples of progress that has been made in mental health care in Syria and discussing some of the challenges that remain to be addressed.

The mental health situation in Syria before the crisis

In Syria, mental health is generally still considered a new field and society has not yet come to grips with the concepts of mental health, psychiatry and clinical psychology. Psychological disorders continue to be heavily stigmatized, and this sometimes even affects those working in this field. Consequently, up to 2011, there were never more than 120 psychiatrists in the country.[4] This begs the question: who was providing mental health services in Syria up to 2011?

For psychiatry, there were various services. First, the Ministry of Health provided three large hospitals for mental illness and substance abuse treatment (Ibn Sina Hospital in Rural Damascus, Ibn Rushd Hospital in Damascus and Ibn Khaldoun Hospital in Aleppo), in addition to clinics in several health centres or general hospitals. These three hospitals were considered centres for training doctors in psychiatry. Only Ibn Sina had a paediatric wing. Second, the Ministry of Higher Education provided a mental health service in Damascus Paediatric Hospital, which had a children's outpatient psychiatric clinic, and in Al-Mouwasat Hospital, which had a psychiatric department and a psychiatric outpatient clinic; it also provided training to students from the Damascus University Faculty of Medicine and doctors specializing in psychiatry. Third, the Ministry of Defence had a psychiatric department and an outpatient psychiatric

1 Human Rights Watch, "Syria: Events of 2017", in *World Report 2018*, 2018, available at: www.hrw.org/world-report/2018/country-chapters/syria.
2 Ammar Yusuf, "Study of Shocking Figures: Syrian Losses in Five Years", *business 2 business*, 7 January 2017, available at: http://b2b-sy.com/news/40984/ (in Arabic).
3 Rehab al-Ibrahim, "Khasa'ir al-harb al-suriyya qarabat 1170 milyar dolar [Syrian War Damages Approach 1.17 Trillion Dollars]", *Al-Akhbar*, 11 January 2017, available at: https://al-akhbar.com/Syria/224584.
4 According to the Syrian Arab Psychiatric Association, available at: www.psysyr.org/ (in Arabic).

clinic in Tishreen Military Hospital in Damascus and provided specialist psychiatry training. Fourth, the Interior Ministry provided an outpatient psychiatric clinic. Fifth, there was the private sector, in which psychiatrists ran their own private clinics. There were also two private psychiatric hospitals in the governorate of Rural Damascus, the Modern Psychiatry Centre in Al-Malihah and Al-Bisher Hospital in Harasta. Lastly, some non-governmental organizations opened psychiatric clinics or were offering psychiatric services, such as the Syrian Arab Red Crescent, the International Medical Corps (IMC), the Syrian Organization for the Disabled, and the Syrian Brotherhood Family Association (linked to Terre des Hommes).[5]

As for clinical psychology,[6] there were no licensed psychologists because the field was unknown in Syria and there was therefore no licensing or training. However, there were up to ten specialists who had received training abroad in clinical psychology or who had studied it privately. At Syrian universities, the faculty of education offers theoretical academic courses in psychological counselling and psychology, but this is not supplemented with any clinical skills or scientific training in clinical psychology.

There were eighty-four psychiatrists (about 70% of the country's total) in the city of Damascus, four in Aleppo, six in Homs, five in Lattakia, three in Tartus, two in Hama, two in Al-Hasakah, one in Daraa and one in Raqqa. The governorates of Idlib, Al-Suwayda and Deir Ezzor did not have a single psychiatrist or psychologist.[7]

Despite this huge service gap, the actual need was not visible because of stigma, denial and misunderstanding of mental illness. Health insurance in Syria does not cover psychiatry, psychiatric medication or any other type of psychiatric treatment, meaning that patients must shoulder the entire cost of treatment even if they have health insurance. Furthermore, even doctors lacked understanding about mental health. Medical students at Syrian universities were not interested in the psychiatry curriculum, which was no more than thirty hours of theory and eight hours of practical work throughout the entire degree, and their aversion to specializing in psychiatry was only reinforced by stigma and visits to psychiatric hospitals where generally the only examples of mental illness were patients with intractable psychosis.

Psychological effects of the crisis on Syrians

There were no surveys on the prevalence rates of psychological disorders among Syrians before the crisis, but they appear to have been comparable to global rates.

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5   For more information, see "Syrian Brotherhood Family", *Quenshrin*, available at: www.qenshrin.com/details.php?id=3670#.XFg26umWwid (in Arabic).

6   Psychiatrists study medicine and then specialize in mental health. In Syria this means studying medicine for six years and psychiatry for four years, making a total of ten years of secondary school in the scientific branch. Psychologists, in contrast, study psychology for five years (previously for four years) after secondary school.

7   Figures courtesy of the Syrian Arab Psychiatric Association, available at: www.psysyr.org/ (in Arabic).

As concerns the prevalence of such disorders during or after the crisis, no comprehensive research has been carried out at the national level. However, we can base our estimates on the World Health Organization (WHO) projections shown in Table 1, which indicate that the prevalence of psychological disorders doubles during crises.

Based on these figures, it is estimated that some 1 million Syrians (4% of the population) suffer from severe psychological disorders, while about 5 million suffer from moderate psychological disorders. The Syrian Association of Psychiatry recorded eighty psychiatrists working in Syrian territories in 2018.[8] Assuming that they work five days a week for fifty-two weeks of the year, that each can follow up on fifteen cases a day and that they do not follow up on each patient more than three times a year, the total number of cases that they can follow up on annually is 104,000 (i.e. (80×15×5×52)/3), which is roughly 10% of severe cases. In other words, over 90% of severe cases are not followed up on.

Other estimates, however, indicate a much higher prevalence of psychological disorders. For example, the German Federal Chamber of Psychotherapists found that half of the Syrian refugees in Germany had mental health problems,[9] with the Turkish authorities producing similar findings about refugees in Turkey.[10] An analysis by the IMC,[11] carried out through IMC-supported health facilities for the Syrian refugee and internally displaced populations in Syria, Jordan, Lebanon and Turkey, showed that 54% of the Syrians using the facilities had emotional disorders and 26.6% of the children had intellectual and developmental problems. Other research indicates that 50% of refugee children have post-traumatic stress disorder (PTSD) or depression, abductees and tens of thousands of combatants on all sides suffer from mental illness, and women and girls are particularly vulnerable to violations such as domestic violence, sexual violence, child marriage and sexual exploitation.[12]

Higher still were the results of Mohammed Bahaa Aldin Alhaffar et al.'s study on oral health and the prevalence of severe PTSD among children, which showed that 91.5% of children in the city of Damascus suffered from PTSD,[13] the highest rates being concentrated in eastern and south-eastern areas of Damascus, namely Dwelah, Nahr Aisha, Tabbaleh and Jaramana.

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8 Figures courtesy of the Syrian Arab Psychiatric Association, available at: www.psysyr.org/ (in Arabic).
9 Bundes Psychotherapeuten Kammer (German Chamber of Psychotherapists), *Psychotherapeutic Care for Refugees in Europe*, June 2017, available at: https://tinyurl.com/y3ysdmbj.
10 Omer Karasapan, "Syria's Mental Health Crisis", *Future Development*, 25 April 2016, available at: www.brookings.edu/blog/future-development/2016/04/25/syrias-mental-health-crisis/
11 Zeinab Hijazi and Inka Weissbecker, *Syria Crisis: Addressing Regional Mental Health Needs and Gaps in the Context of the Syria Crisis*, International Medical Corps, Washington, DC, 2015, p. 2, available at: https://internationalmedicalcorps.org/wp-content/uploads/2017/07/Syria-Crisis-Addressing-Mental-Health.pdf
12 O. Karasapan, above note 10.
13 Muhammad Bahaa Aldin Alhaffar, Khattab Mustafa, Samira Sabbagh, Kamal Yabrode, Ghalia Shebib and Chaza Kouchaji, "Seven Years of War in Syria: The Relation between Oral Health and PTSD among Children", *Indian Journal of Oral Health and Research*, Vol. 4, No. 1, 2018.

Table 1. *WHO projections of mental disorders in adult populations affected by emergencies*

	Before the emergency: 12-month prevalence (median across countries and across level of exposure to adversity)	After the emergency: 12-month prevalence (median across countries and across level of exposure to adversity)
Severe mental disorders (for example, psychosis, severe depression, severely disabling forms of anxiety disorder)	2–3%	3–4%
Mild to moderate mental disorders (for example, mild and moderate forms of depression and anxiety disorders, including mild and moderate PTSD)	10%	15–20%
Normal distress/other psychological reactions (no disorder)	No estimate	Large percentage, reduces with time

Source: WHO and United Nations High Commissioner for Refugees, *Assessing Mental Health and Psychosocial Needs and Resources: Toolkit for Humanitarian Settings*, WHO, Geneva, 2012, p. 18, available at: https://tinyurl.com/y3sa7nxq.

Management of psychological effects in recent years

Mental health services in Syria were hit extremely hard during the crisis. The number of psychiatrists declined with extraordinary speed, almost halving from 120 in 2011 to only seventy in 2016. The number of doctors doing a psychiatry residency also fell sharply from forty in 2011 to fewer than ten in 2016.[14] The private hospitals Al-Bisher and the Modern Psychiatry Hospital were completely destroyed. As for the government hospitals, Ibn Khaldoun in Aleppo has been out of operation for several years, and Ibn Sina, which is in a hot spot, has suffered extensive damage.

Despite this, action has been taken at various levels to provide services such as psychological first aid and focused psychosocial support. One of the most

14 Figures courtesy of the Syrian Arab Psychiatric Association, available at: www.psysyr.org/ (in Arabic).

important interventions was the WHO Mental Health Gap Action Programme, which aimed to bridge the gap in the number of psychiatrists by training doctors of all specialties working in health centre and clinics on how to assess and manage ten of the most common mental health disorders (PTSD, depression, psychosis, suicide, alcohol and substance abuse, child behavioural disorders, developmental disorders such as autistic spectrum disorders, epilepsy and dementia).[15] So far, more than 1,500 doctors from 400 health centres have been trained in this programme, and psychiatric medication is now covered by health insurance in the health centres. The pivotal element of the programme was the trainers' ongoing follow-up with the doctors, through field visits to their workplaces and collective follow-up sessions. Social media was also used, with the doctors of each governorate having a group on the instant messaging application WhatsApp Messenger, where they could propose and discuss persistent cases with each other or with the specialist consultant trainer. These groups are still running today.

WHO also trained more than sixty psychologists in cognitive behavioural therapy, using external trainers, and followed up on their field training. Furthermore, it trained sixty psychologists in family therapy and psychological first aid. A mental health programme in schools is currently being developed, in which psychological counsellors and teachers will be trained on how to identify and deal with the major mental disorders in schools. A guide on self-care and stress management and other new projects are being developed to be delivered in areas where there are no doctors. In addition, UNICEF has supported the development of a mental health guide for children in emergencies and the creation of child-friendly spaces,[16] while the International Organization for Migration has worked at the anthropological level and carried out training on non-violent communication, conflict resolution and refuge centre management.[17]

The Greek Orthodox Patriarchate of Antioch and All the East's Department of Ecumenical Relations and Development (GOPA-DERD) has used various methods of psychological support.[18] It selected groups of 70–100 individuals from among the worst affected people and gathered them in a safe and comfortable place for three or four days with a team of specialists and support workers. Surveys were used to establish the severity of the participants' psychological stress at the beginning of the workshop, then a set of activities and treatments were offered, in addition to entertainment. These groups were followed up for two more days, one or two months later. The programme has had excellent results because the whole family unit was included and individuals from

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15 See WHO Mental Health Gap Action Programme, "Mental Health", available at: www.who.int/mental_health/mhgap/en/.
16 See UNICEF, "Syrian Crisis", available at: www.unicef.org/emergencies/syria/.
17 See International Organization for Migration, *IOM Regional Response to the Syria Humanitarian Crisis*, 8–21 July 2014, available at: www.iom.int/files/live/sites/iom/files/Country/docs/IOM-Regional-Response-to-the-Syria-Crisis-Sitrep-8-21-July-2014.pdf; Mazen AboulHosn, "IOM experience of working with national systems (universities) in Turkey and Lebanon in a panel exploring collaborations with local partners", presentation at NLG Positive Pathways Summit, 22–23 November 2017, available at: https://tinyurl.com/y49ow2xq.
18 See GOPA-DERD, "About Us", available at: www.gopaderd.org/about-us/our-programs.

the extended family were given the support they needed.[19] The Syrian Arab Red Crescent (SARC) has played a major role in mental health – it was the first to open polyclinics with a psychiatrist, a psychotherapist and a speech therapist, as well as mobile psychosocial support teams that travelled between the worst affected places and evaluated psychosocial support activities for children.[20] Other bodies have explored different methods, such as interactive theatre, play therapy and dolls, but on a smaller scale. The IMC has also started setting up family and children's centres that provide support for mothers and children, particularly those with disabilities.[21] Most of these international organizations and local associations opened child-friendly spaces after training hundreds of youth volunteers on psychosocial support for children in emergencies, how to design and implement suitable activities for emotional decompression or behaviour modification, and child protection. While this has fostered a real culture of child protection among the target groups at the local level, this culture has unfortunately not spread nationwide.

The nature, culture and customs of Syrian society have had a big impact on how fast the psychological wounds heal. One of the key elements of psychosocial support for traumatized people is that they do not become isolated, which was easily achieved in crowded refuge centres or homes with several families renting together to save money. These environments created spheres of communication and a culture of emotional recognition reinforced by the fact that everyone was living through the crisis together, causing each to recognize the feelings of the other and try to share coping strategies.

Several organizations are currently developing methods to reach victims remotely using social media and modern technology. For example, the Syrian Association of Psychiatrists has developed an application for carrying out audiovisual psychiatric consultations and interviews electronically. As an internet service, it has become available all over the country and benefits from the support of hundreds of Syrian doctors abroad. Other organizations have published self-care guides with images and sound files to reach out to all affected people, including those who are illiterate.

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19 See Mashta Al Helou, "Psycho-social Support Program", GOPA-DERD, 17 August 2016, available at: www.gopaderd.org/news/activity-people-affected-by-bombings-in-jableh%E2%80%99s-garages.

20 See, e.g., SARC, "Following-Up Visit to the Needs of the SARC's Dispensary in Dwailaa", *reliefweb*, 24 June 2014, available at: https://reliefweb.int/report/syrian-arab-republic/following-visit-needs-ofthe-sarc-s-dispensary-dwailaa; H. Zain and H. Said, "Syrian Red Crescent Services Cover 92,000 Families in 2nd Quarter of 2015", *Syrian Arab News Agency*, 5 July 2015, available at: https://sana.sy/en/?p=47260; SARC, "Comprehensive Medical Services Provided by SARC Dispensaries across Aleppo", 22 June 2016, available at: http://sarc.sy/comprehensive-medical-services-provided-sarc-dispensaries-across-aleppo/.

21 See IMC, "Where We Work: Syria", available at: https://internationalmedicalcorps.org/country/syria/. For more on psychological support provided to children, see Wheda Muhammad Murad, "Idtrab maa ba'd al-sadma wa 'alaqatuhu bul-da'm al-nafsy: dirasa 'alaa 'ayyina min al-atfal al-muhajireen fi muhafadhat dimashq [Post-Traumatic Stress Disorder and Its Relationship with Psychological Support: A study on a Sample of Displaced Children in the Governorate of Damascus]", Master's thesis, University of Damascus, 2015, available at: http://mohe.gov.sy/master/Message/Mc/wahida%20mrad.pdf.

Conclusion

Despite the disastrous situation in Syria, there appears to have been significant progress in the field of mental health during the crisis. Possibly the most important achievement is the end, or at least the lessening, of the stigma around mental illness: Syrians have shifted from labelling anyone who attends a psychiatric clinic as "crazy" to recognizing that everyone is under pressure and in need of psychiatric consultation. A large group of graduates from the Damascus University Faculty of Education have received training in psychotherapy, psychology and psychological counselling, which has helped them to gain a better understanding of clinical psychology and encouraged them to seek further experience in this field.

There has been a clear change among medical and pharmacy staff in dealing with psychiatric medication. Previously, most psychiatric medication, including antidepressants, had been treated medically and pharmaceutically as narcotics, increasing the patient's feeling of stigma and discrimination. However, after training a considerable number of non-psychiatric doctors in prescribing these drugs and training pharmacy staff on addiction and how to differentiate between psychiatric medication and addictive drugs, there has been a change of attitude among these healthcare professionals. Likewise, after education professionals had received a substantial amount of training on supportive schools and mental health in schools, there was a noticeable improvement in teachers' and school counsellors' understanding of mental health issues and of methods for dealing with them to improve children's educational opportunities.

Despite this progress, much remains to be done. Interventions related to gender-based violence are still difficult, perhaps because of the strong clash with cultural, religious and sexual taboos and the weakness of programmes in this area. These interventions need to be integrated into other health and educational programmes and psychological support activities, instead of being in an independent programme that many shy away from even mentioning.

Many of the clergy are still grappling with mental health realities and delay patients' access to specialists for years or even permanently. Consequently, there is still a pressing need to communicate contemporary mental health concepts to these groups because of their extensive role in shaping public opinion.

The news media has still not been used to promote mental health effectively, perhaps because of the crisis and its preoccupation with the conflict, but it does need to play a strong role in this area. As for fiction, most writers and producers are still not using real, scientific mental health terminology, believing that they can determine the psychological characteristics of any disorder without consulting a psychiatrist or mental health specialist and without there being any scientific authority to their work. Rather, they often use psychological disorders and psychiatry ironically or for comic effect – like the rest of society – thus reinforcing the stigmatization of these conditions. It would be useful to hold

educational workshops on mental health for those working in entertainment and in the news media.

The legal field remains utterly remote from the contemporary scientific details of mental health. To this day, there is no mental health law in Syria, despite various attempts over many years to make such a law, and terms such as "crazy", "foolish" and "stupid" are used throughout Syrian law to describe people who have mental health disorders. Addressing these misperceptions and other challenges will help Syrians obtain the care they need in the future as the country rebuilds.

Weaponizing monuments

Ross Burns
Ross Burns, a former Australian Ambassador to Syria, is the author of *The Monuments of Syria* (I B Tauris, 1992, 1999 and 2009) and of histories of Syria's two major cities, Damascus and Aleppo (Routledge, 2005, 2016). His website, which catalogues the damage to Syria's monuments, can be found at www.monumentsofsyria.com.

Abstract

The role normally played by monuments in conflict is that of passive and innocent observers, occasionally drawn into the fighting through their locations. In the Syrian conflict, monuments have been more deliberately used as pawns, as ideological weapons and as favoured strongpoints for combatants. The resulting damage to historical sites, particularly to the monumental centres of Aleppo and Palmyra, has been considerable. However, damage to heritage presents a small proportion of the harm compared to the destruction of civilian housing and facilities throughout the country and should not distract us from the irreplaceable loss of innocent life in the fighting. The country's eventual recovery will require the return of refugees to their devastated communities, a precondition for any effort to restore the country's rich monumental heritage.

Keywords: Syria, conflict, monuments, archaeology, Hague Convention, Aleppo, Palmyra.

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The crisis in Syria since 2011 has broken many frontiers in terms of the horrific intensity of the fighting, its unpredictable spread across much of the country, its devastating effect on the civilian population and the indiscriminate use of terror and proscribed weapons. To this list can be added the number of deaths through the use of savagery for sheer shock effect and the vast displacement of the population, both internally and to neighbouring countries, even as far as Europe.

To regret the damage incurred to Syria's archaeological and historical sites is not to suggest that the cultural dimension rivals the human scale of the tragedy. In terms of physical damage to built structure, the loss of civilian housing stock greatly surpasses the extent of damage to historical buildings or archaeological sites.[1] Should we therefore be shocked when structures many hundreds of years old are destroyed? Should we even be surprised if at least two among the parties to the conflict go so far as to select buildings of great historic, religious or universal cultural value as targets in order to amplify the shock value of their mission – to show their determination to go beyond all bounds?

This article seeks to trace the reasons why participants in the Syrian conflict since 2011 have paid little attention to the norms of international law on the protection of heritage and monumental structures in conflict. It notes the main provisions under international law, the peculiar features of the Syrian conflict which have resulted in monuments becoming not simply incidental casualties but propaganda tools in the conflict, and the possible role of heritage reconstruction in a post-conflict context. It also seeks to give a tentative evaluation of the level of destruction of monuments in order to address the impression that the country's heritage has been irretrievably lost.

What we owe to Syria?

There are few countries that can rival Syria in terms of numbers of sites of archaeological and historical interest. It is simply an open book on the history of mankind over the last 10,000 years. While other countries may have brilliant phases of achievements on the scale of Egypt's Theban temples or Italy's Renaissance masterpieces, Syria has a continuous and more complex story to tell, one that draws in a wider catalogue of cultures of both the Mediterranean world and the key Islamic civilizations of the Middle East and beyond. This has been appreciated by a wider audience in recent decades, with over 100 foreign archaeological missions active in the country in any one year before 2011. During this time, the country's official body responsible for monuments and its thirty-four museums, the Directorate-General of Antiquities and Museums (DGAM), was active on an unprecedented scale.

In 1992, this author published *Monuments of Syria*, which was intended as the first comprehensive survey in English of the country's archaeological sites.[2] At the time, the number of foreign tourists was small, and many sites were poorly signposted and difficult to reach. The country was just beginning to feature on the tourist map and

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1   A Syrian urban consultant quoted in an Associated Press article of late 2016 estimated that $25 billion in housing stock was destroyed during the 2012–16 conflict in Aleppo, 70–80 percent of that destruction being to civilian housing in the east. Before the war, Aleppo had a total of 550,000 housing units valued at $50 billion. Reconstruction, including restoration of partly damaged housing, would cost $35 billion. See Karin Laub, "Aleppo Confronts Vast Destruction Left by 4 Years of War", *AP News*, 23 December 2016, available at: https://tinyurl.com/yc3agdv6 (all internet references were accessed in November 2018 unless otherwise stated). The proportion of housing versus historic structures damaged in Aleppo is depicted in Figure 7, below.
2   Ross Burns, *The Monuments of Syria*, 3rd ed., I B Tauris, London, 2009.

most places of archaeological interest were empty of visitors. Within twenty years, that had begun to change. Tourism had become the third-largest foreign exchange earner and an important means of regenerating the economy of many regions. By 2000 there were even many competing guide books available – not only five or six in English but a range in French, German, Italian, Spanish and Arabic.[3]

As Syria began to flourish as a mass tourism destination, the country was particularly valued for the way its sites were presented, for the welcome its people extended to foreign visitors and, most encouraging of all, for the growing interest its own citizens took in the complexities of the country's past. Of course, there was an "agenda" whose subtleties were probably too suffused for most visitors to notice. Syria was presented as a civilization which was the sum of all its cultures, not a monoculture along the lines of the picture that even some European countries are still keen to present. Roman stood alongside Umayyad, Byzantine alongside Ottoman, each one not eliminating but building on the other. Research at Palmyra, for example, began to show that the Roman-era caravan city did not die with Rome's suppression of Zenobia's revolt in the late third century. Once a city of five temples, Palmyra later acquired an equal number of churches and eventually became a flourishing commercial centre of the early Arab period. Elsewhere, "Crusader" castles turned out to have important Mamluk or later phases, and the Crusaders' ideas of a massive fortified enclosure, once the Westerner's prototype for all fairy-tale castles, were matched with a whole string of distinctly Arab fortresses previously only familiar as dots on a map.

So, what was the "agenda" that the monuments presented? It suited the Syrian government's professedly non-sectarian ideology to underline that Syria was not a monoculture – a product solely of one faith or ethnicity – but a rich tapestry built up over numerous migrations, virtually all of which had entered the country and lived alongside their predecessors without ongoing conflict.

The Hague Convention of 1954

It is not the purpose of this article to examine in what ways the parties to the Syria conflict have offended specific provisions of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954 Hague Convention).[4] It is an unfortunate reality that most of the combatants are not

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3   Other surveys include Warwick Ball, *Syria: A Historical and Architectural Guide*, Melisande, London, 2007; Diana Darke, *Syria*, Bradt Travel Guides, London, 2010; Michael Haag, *Syria & Lebanon*, Cadogan Guides, London, 1995; Frank Reiner Scheck and Johannes Odenthal, *Syrien: Hochkulturen zwischen Mittelmeer und Arabischer Wüste*, DuMont Buchverlag, Cologne, 1998; Serge Bathendier, *Guide Bleu: Syrie*, Hachette, Paris, 1999.

4   The 1954 Hague Convention and its two subsequent Protocols are available at: www.unesco.org/new/en/culture/themes/armed-conflict-and-heritage/convention-and-protocols/1954-hague-convention/.   The framework provided by international law for the protection of heritage in armed conflict is explored in Christiane Johannot-Gradis, "Protecting the Past for the Future: How Does Law Protect Tangible and Intangible Cultural Heritage in Armed Conflict?", *International Review of the Red Cross*, Vol. 97, No. 900, 2015, available at: www.icrc.org/en/international-review/article/protecting-past-future-how-does-law-protect-tangible-and-intangible.

conventional States who as signatories might be expected to be aware of their obligations under the provisions of the Convention, though of course ignorance is not an escape clause relieving parties of their obligations. In fact, the Convention provides a clear list of "dos and don'ts" which any party or group that takes up arms is nevertheless expected to observe, especially if it wishes to claim a place in Syria's post-conflict future.[5]

In a conflict as savage as the one that has overwhelmed Syria, especially one which involves numerous outside participants with little stake or even interest in the country, there are many reasons why monuments become caught up in the intensity of war.

First, monuments just simply get in the way. Though international legal instruments such as the 1954 Hague Convention clearly seek to impose a moral obligation to quarantine the use of monuments as vantage points or targets, this author's view is that fighting groups have little interest in such "niceties" – or are not simply ignorant of but actively hostile towards them. The Convention specifically urges all parties to avoid the use of cultural properties for military purposes. However, prominent positions such as minarets or citadels which offer vantage points to fighters, often resistance forces using the mosques as barracks, have made such features particularly vulnerable.

Second, massive use of firepower in the form of intense shelling or area bombing has been a particular feature of this conflict, intended to clean out whole quarters and render them uninhabitable.

Third, particularly since 2014, groups who have joined the fighting have consciously chosen the destruction of heritage structures as a weapon of terror, seeking to reduce highly valued monuments to rubble through the massive use of explosives planted by tunnelling. Such operations profess ideological reasons, notably in the case of Islamist forces bent on the effacement of human or animal images or the elimination of monuments commemorating the dead. The perpetrators also seek to underline that they have no respect for the country's heritage and that they are prepared to go to any ends to convey their seriousness of purpose. The comparison with Pol Pot's return to a "Year Zero" in 1970s Cambodia seems apt.[6]

Fourth, loss of central government control across much of the country before 2017 has lifted any restraints that official measures to protect cultural sites might once have imposed. Likewise, the lack of policing suggests that illegally excavated material can be more readily traded for profit given the increased opportunities for illicit traffic and eventual sale to dealers abroad.

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5   Chapter VI of the Convention, Article 19, does not exclude non-State players. This issue is discussed in Patty Gerstenblith, "Beyond the 1954 Hague Convention", in Robert Albro and Bill Ivey (eds), *Cultural Awareness in the Military: Developments and Implications for Future Humanitarian Cooperation*, Palgrave Pivot, Basingstoke, 2014.

6   The use of "iconoclasm" as a tool in the conflict has been documented, with numerous citations, in Benjamin Isakhan and José Antonio González Zarandona, "Layers of Religious and Political Iconoclasm Under the Islamic State: Symbolic Sectarianism and Pre-Monotheistic Iconoclasm", *International Journal of Heritage Studies*, Vol. 24, No. 1, 2017.

It is also worth recalling that Article 23 of the 1954 Hague Convention stipulates that all States have an obligation to remove transportable cultural property out of harm's way and nominates the United Nations Educational, Scientific and Cultural Organization (UNESCO) as the responsible international body charged with providing "technical assistance in organising the protection of (a nation's) cultural property". All State Parties are also expected to take "all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons, of whatever nationality, who commit or order to be committed a breach of the present Convention".

All of these provisions have been massively flouted in Syria, and all parties to the conflict have offended in one way or another. Moreover, external States (including States party to the Convention themselves) have provided funding or materiel to resistance elements deployed in Syria who have openly adopted some of the most flagrant acts of deliberate destruction as an essential part of their tactical procedures, even making them a centrepiece of the "image" they seek to promote in the outside world.[7]

In the face of this situation, the Syrian heritage authorities (DGAM) have sought to do what they can to protect sites and work through the steps UNESCO has developed over the years to advise States Parties on appropriate protective procedures such as removing smaller items to safekeeping well out of the path of potential conflict. They have also continued to fund the salaries of DGAM staff even in areas beyond government control in the hope that they might still do what they can to secure sites and buildings and prevent illegal digging. In doing so these authorities have, in some areas, been quietly engaging the local villagers to deflect the attention of participants in the fighting away from cultural sites. Little publicity has been given to the DGAM's efforts to do what can be done in a wider environment of chaos to ensure cultural assets are not targets. It may not be an easy job in a war environment to ensure that citizens see monuments not just as pretty ornaments but as investments in their future, but the DGAM seems to have had some success, much of it necessarily away from the glare of publicity.[8]

Assessing the toll

A useful form of outside monitoring which complements the picture of the damage to Syria's heritage is derived from satellite imagery, but there are limits to the scope

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7   Further details are provided in the subsection on Aleppo, below.
8   An interim report on the DGAM's responses has been given in Maamoun Abdulkarim and Lina Kutefian, *Syrian Archaeological Heritage: 5 Years of Crisis 2011–2015*, DGAM, Damascus, 2016. In some regions, civilians have banded together to protect monuments or to deflect attention from them as targets for plunder. In the Northeast Province, the Kurdish Rojava region's Authority for Tourism and Protection of Antiquities carries out work to maintain and restore monuments – see: http://desteya-shunwaran. com. In the Idlib region, efforts to protect monuments have been detailed in a report on the Idlib Antiquities Center, available at: www.syriauntold.com/en/2017/01/idlib-antiquities-looting-destruction-protection/. And see the Center's Facebook page, available at: www.facebook.com/Idleb-Antiquites-Center-1070868956264699/.

of such information if it is assessed in isolation. Resolution of satellite images is improving each decade, but satellite imagery necessarily cannot see what the eye or camera on the ground can perceive. It can, however, show patterns of activity, movements by intrusive forces and disturbances of the landscape, such as looting pits or the use of earth-moving equipment to expose remains below ground. In three revealing articles prepared in 2014–17, Jesse Casana, Mitra Panahipour and Elise Jakoby Laugier summarized the conclusions reached over five years of examination of sites using high-resolution satellite imagery.[9] The authors presented examples of the value of imagery in revealing the level of damage. They also reported on the distribution of sites at risk from looting, vandalism or exploitation for military purposes and the pattern of damage in relation to factional control within Syria. They hoped that this information would be "of value to heritage officials and archaeologists after the war in Syria has subsided, while also providing a model for remote sensing-based monitoring of archaeological sites in conflict situations more broadly".[10]

Casana and Laugier's 2017 summary of the programme's interim findings provided interesting results. Their analysis covered 3,641 sites in Syria, including unexplored sites whose terrain indicated promising features such as *tell*s (archaeological mounds) and other formations indicating built remains. Unlike other studies, the research, funded by the American Schools of Oriental Research (ASOR) with US State Department support, also compared post- with pre-2011 historical imagery, thus overcoming one of the credibility gaps in earlier surveys that did not exclude pre-conflict interventions, including looting pits.

The results can be summarized as follows:[11]

- Of the 3,641 Syrian sites surveyed to 2017, pre-2011 imagery revealed illegal digging at 450 sites, with an additional 355 sites added in the post-2011 era.
- Ninety-nine of the sites already marked by looting pits before 2011 were active again post-2011; the rest were the work of looters exploring previously undisturbed sites.
- The proportion of sites affected by looting was around 17.04% (pre-2011), with an additional 13.44% added in the period 2011–17.
- The number of sites affected directly by military activity steadily increased during the period under review, reaching 103 in 2016, particularly at features used to garrison fighting units, for example through the use of heavy machinery, trenching, tank installations and troop housing.
- The intensity of looting in terms of the rate of interventions per year greatly increased over the years 2011 to 2014. When so-called Islamic State (IS)

9   Jesse Casana and Mitra Panahipour, "Notes on a Disappearing Past: Satellite-Based Monitoring of Looting and Damage to Archaeological Sites in Syria", *Journal of Eastern Mediterranean Archaeology and Heritage Studies*, Vol. 2, No. 2, 2014; Jesse Casana, "Satellite Imagery-Based Analysis of Archaeological Looting in Syria", *Near Eastern Archaeology*, Vol. 78, No. 3, 2015.

10 UNOSAT and UNITAR, *Satellite-Based Damage Assessment to Cultural Heritage Sites in Syria*, Geneva, 2014, available at: http://unosat.web.cern.ch/unosat/unitar/downloads/chs/FINAL_Syria_WHS.pdf.

11 Jesse Casana and Elise Jakoby Laugier, "Satellite Imagery-Based Monitoring of Archaeological Site Damage in the Syrian Civil War", *PLoS One*, Vol. 12, No. 11, 2017, p. 14, Table 2.

appeared on the scene in 2014–15, while the rate of deliberate destruction increased, the incidence of illegal digging decreased in terms of both severity and frequency.

What we don't know, of course, is what the looters found – what they managed to use for money-making ends and what might have been stored away for future sale. The extent of looting for profit (and the role of insurgent groups in encouraging, even licensing, the trade) is only known from a small number of anecdotal reports. Given that most artefacts can readily be traced as a result of the records available over 150 years or more of recording and analyzing pottery and decorative styles or technical data on the origins of stone or clay, the market abroad is possibly simply too "hot" to be exploited at the moment.[12] If most items go no further for the moment than the cellars of contraband handlers, the returns to the impoverished, perhaps even homeless illegal diggers might be minimal, with the trade for the moment relying mainly on fakes.[13]

However, it is the more active intervention of two larger players which saw a marked increase in the intensity of destruction in 2015:

- conventional forces setting up firing positions often on prominent mounds or *tell*s in contested territory,[14] and
- so-called Islamic State (which made an aggressive programme of destruction a central part of its campaign to project itself as a ruthless foe of all but the most basic or literal form of Islam) extending its operations from Iraq into Syria.[15]

While looting may be the most widespread problem resulting from the breakdown of authority, the pattern of destruction among major archaeological sites varies considerably.[16] Some regions (notably those remaining in government hands) were untouched. Others bear the scars of occasional encounters between government and rebel forces. Some areas, however, have consistently been the scenes of major encounters, with fixed lines of battle strung across the historic centres of cities.[17]

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12 Benoit Faucon, Georgi Kantchev and Alistair MacDonald, "The Men Who Trade ISIS Loot", *Wall Street Journal*, 6 August 2017, available at: www.wsj.com/articles/the-men-who-trade-isis-loot-1502017200.
13 Patrick Cockburn, "Fake Antiquities Flood Out of Syria as Smugglers Fail to Steal Masterpieces Amid the Chaos of War", *The Independent*, 6 September 2016, available at: www.independent.co.uk/news/world/middle-east/syria-isis-civil-war-antiquities-fakes-palmyra-a7228336.html.
14 See J. Casana and E. J. Laugier, above note 11, pp. 15–17.
15 José Antonio González Zarandona, César Albarrán-Torres and Benjamin Isakhan, "Digitally Mediated Iconoclasm: The Islamic State and the War on Cultural Heritage", *International Journal of Heritage Studies*, Vol. 24, No. 6, 2018.
16 The issue of looting and smuggling of remains is worthy of serious examination but would take this paper well beyond its intended scope and available space. For a recent examination of the issues as presented by the Syrian government side to a recent Interpol gathering in Amelia, Italy, in June 2017, see: http://dgam.gov.sy/?d=314&id=2296. The international debate is reflected in Leo Doran, "International Art Market Helps Finance Terrorism, Experts Tell Congress", *Inside Sources*, 24 June 2017, available at: www.insidesources.com/international-art-market-helps-finance-terrorism-experts-tell-congress/.
17 The varied pattern of destruction is evident from the "Syria Conflict" tab at www.monumentsofsyria.com and in much greater detail (with illustrations) on the ASOR website, available at: www.asor-syrianheritage.org. Ongoing assessments of satellite imagery have been produced by UNITAR and UNESCO.

Monuments on the battle lines

The examples of Aleppo and Palmyra will perhaps best illustrate the devastating consequences of such persistent combat when modern explosives and weaponry are directed at ancient and medieval buildings, usually of stone. Most fortifications date back to pre-gunpowder eras and still have a robust resistance due to their massive bulk and heavy, well-laid masonry. They have had a good survival rate in this conflict. Most mosques, minarets, churches and historic houses, with their fragile structures and delicate embellishments, are more vulnerable.

The catalogue of monuments damaged or destroyed in the Syria conflict is necessarily still to be compiled. Virtually all sides to the conflict have been responsible for aspects of this destructive trail. At the time of writing, it seems reasonable to divide the pattern of destruction into five different categories.

- Struggles for tactical advantage, especially in urban conflict, touched off from the beginning by the deliberate choice of minarets or mosques/madrasas as vantage or refuge points.
- Operations to widen the margin of security around positions held by combatant forces.
- Application of heavy firepower or area bombing techniques in close urban engagements, particularly in order to force civilian populations to flee rebel-held areas.
- Deliberate adoption of buildings as targets for symbolic or propaganda purposes.
- Tunnelling to plant massive quantities of explosives with the aim of obliterating a building.

Two sites illustrate in different ways how the effect of prolonged conflict and the use of ruthless modern methods of warfare have had devastating consequences: the monumental historic zone in Aleppo and the main ruin field of the central desert caravan city, Palmyra.

Aleppo

The city of Aleppo contains one of the world's richest collections of monuments of the Islamic middle ages. Hundreds of buildings are on the register of the Syrian antiquities authorities, with a high percentage located within the city's medieval walls.

While Aleppo took fifteen months before rising in opposition to the central government, the war quickly settled into a pattern of intensity probably unmatched by any of the historic Syrian cities. The lines of confrontation were shaped by the central position of the Citadel, which consistently remained in government hands. The opposition forces adopted positions along the southern perimeter of the Citadel, spreading west into the main area of souks clustered around the Great Mosque, originally a work of the early Islamic dynasty, the Umayyads. Intense fighting took place, with the opposition forces adopting firing points in

many of the historic mosques and their minarets and the government forces using artillery and tanks to attempt to regain the central area. A fierce blaze swept through the souks after an electricity substation caught fire, gutting many of the historic khans and madrasas and reaching one wing of the Great Mosque and its minaret.[18]

During these months of exchanges, some of the most significant buildings of the Medina area were badly damaged. The minarets chosen as firing positions by opposition forces were particularly badly hit, given their prominence and relatively vulnerable structures. The minaret of the Great Mosque was the worst casualty, possibly felled by conventional artillery or deliberate explosion from within.

Not only was the minaret an emblematic centrepiece of the city, but it was also a monument of incomparable historical value as it was the only building surviving from the period of Seljuk rule in late eleventh-century northern Syria. As such, it gave us our only glimpse of the rich blend of traditions that were present in the area at the time.

While the pattern of historic monuments becoming victims of intense fighting, with each side seeking tactical advantage, is a familiar risk in warfare, the Syrian conflict went on to introduce a new benchmark in mindless destruction. The savage use of explosive power intentionally to topple historic buildings was introduced to the Syrian theatre by Islamic Front, a militia grouping backed by outside Sunni interests, who initiated a series of eleven tunnel bombs around the Citadel and along the approaches from the northwest. Around the southern perimeter of the Citadel, some of the most precious buildings of the Ayyubid and Ottoman eras were destroyed by tunnelling beneath them, filling the excavated spaces with explosives and setting off massive blasts that virtually sucked the remains of once-solid buildings into a crater, leaving little more than piles of dust. The tunnel-bomb explosions are mapped in Figure 1 as blurred red circles. There can be few more telling examples in modern times of the use of explosives deliberately to efface historic buildings for ends which are virtually pointless in military terms. The fact that most of these explosions were claimed by an organization funded to support the cause of Islam is particularly bewildering.[19] Perhaps equally puzzling is the fact that it seems this series of destructive acts attracted nothing like the level of condemnation outside Syria which the campaign of destruction by the Islamic State armed group would soon attract.

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18   The destruction of the minaret was recorded in numerous sources, such as: www.bbc.com/news/world-middle-east-22283746. For an initial appraisal of the conflict in Aleppo, see Thierry Boissière and Jean-Claude David, "Guerre contre l'État, guerre contre la ville: Alep, otage des combats en Syrie", *Moyen-Orient*, No. 24, October–December 2014. A detailed chronology of events can be found at: https://en.wikipedia.org/wiki/Battle_of_Aleppo_(2012-2016).

19   The role of Islamic Front's "Tawhid Brigade" in initiating the series of tunnel bombs was reported as early as May 2014 in an interview with the brigade's members carried out by the Anadolu News Agency during the tunnelling operation. The first explosion (8 May 2014) targeted the Ottoman-era Carlton Hotel, said to have been used by Syrian official forces as a barracks. Islamic Front's role was reported by Martin Chulov in *The Guardian* on 8 May 2014, and the organization later moved on to other key historic buildings in the area – see: Martin Chulov, "Syria Rebels Blow Up Aleppo Hotel Used as Barracks by Government Forces", *The Guardian*, 8 May 2014, available at: www.theguardian.com/world/2014/may/08/syria-rebels-blow-up-aleppo-hotel-barracks-government-forces. See also Dominic Evans and Catherine Evans, "Syrian Rebels Blow Up Aleppo Hotel Used by Army", *Reuters*, 8 May 2014, available at https://tinyurl.com/y8og53bo.

Figure 1. Map of the central historic zone of Aleppo showing locations of intense shelling and tunnel bombs pre-2017. The blue zone indicates control by government forces, red blurred circles indicate tunnel-bombed areas, red flashes show severe rocket damage, and red triangles indicate damaged minarets. Image by Ross Burns, 2017.

Palmyra

In 2015, Islamic State varied the formula for the use of monuments in a "shock and awe"[20] campaign by putting considerable effort into attracting maximum "credit"

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20   "Shock and awe" is a term for a military strategy based on achieving rapid dominance over an adversary by the initial imposition of overwhelming force and firepower. See "Shock and Awe", in *The Oxford Dictionary of Phrase and Fable*, 2nd ed., Oxford University Press, Oxford, 2006, available at: www. oxfordreference.com/view/10.1093/oi/authority.20110803100502693.

Figure 2. The Seljuk-period minaret of the Great Mosque in Aleppo. Photograph by Ross Burns, 2005.

for its destructive achievements using video clips, posted images and even a glossy monthly English-language magazine, *Dabiq*, now defunct. IS heralded its arrival by targeting Islamic sites, then ranging further to explore two apparent objectives: to destroy sites associated with the commemoration of the dead, and to eliminate buildings from pre-Islamic cultures, a choice not confined to those displaying human figures.[21]

After graduating from simple, rural Islamic "saints' tombs", IS perfected the art of gaining the attention of an audience by targeting solid structures of

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21 IS's campaign of destruction was reported in numerous media reports and video clips (summarized in *National Geographic*, 1 September 2015) and denounced by the then director-general of UNESCO, Irina Bokova. See UNESCO, "Irina Bokova Condemns Latest Destruction of Cultural Property from the Site of Palmyra in Syria", 3 July 2015, available at: https://whc.unesco.org/en/news/1313/.
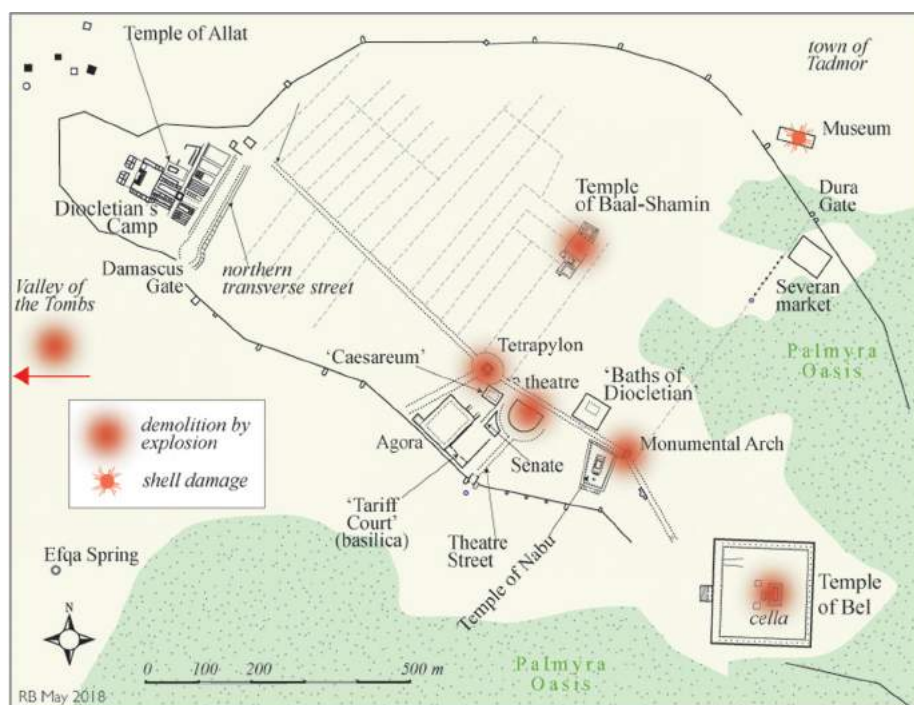
Figure 3. Plan of Palmyra. Red markers indicate monuments destroyed or heavily damaged. Image by Ross Burns, 2017.

immense historical significance, beginning with the detonation of the small but richly decorated Temple of Baalshamin in Palmyra. The more publicity such blasts yielded, the more it seemed to encourage IS to move on to even more impressive targets. The IS blast experts even managed to destroy the towering walls of the central *cella* of the Temple of Bel, largely reducing it to powder and heaps of rubble.[22]

Moving on, IS carefully selected for toppling twelve of the most intact of the Roman-era tower tombs that bordered the oasis on the west, and hammered most of the facial features from the remaining limestone reliefs and busts on the walls of the Palmyra Museum.[23] The relatively open structure of the oasis's famed Monumental Arch required two attempts to topple it and even then most of the outer pylons survived the blasts. During its brief retaking of Palmyra in early 2017, IS took on the city's great Tetrapylon and the Roman-era theatre, both major features along the city's striking colonnaded axis. Also open structures, both were harder

22 Michael Danti *et al.*, *Special Report on the Importance of Palmyra*, ASOR Cultural Heritage Initiatives, 2 June 2015, available at: www.asor-syrianheritage.org/special-report-on-the-importance-of-palmyra/.

23 Patrick Wintour, "Isis Destruction of Palmyra Antiquities Revealed in New Pictures", *The Guardian*, 2 April 2016, available at: www.theguardian.com/world/2016/apr/01/isis-destruction-of-palmyra-antiquities-revealed-in-new-pictures. The tombs destroyed are illustrated at: http://monumentsofsyria.com/places/palmyra-valley-of-the-tombs/attachment/umm-al-qays-tombs-grab-6-sep-2015/.

targets, but IS succeeded in bringing down twelve of the sixteen columns of the Tetrapylon's majestic structure.[24]

Writing off Syria's monuments?

A common set of assumptions, reflected to some extent in Western media coverage of these campaigns of destruction,[25] is that little is left of Syria's ancient and Islamic remains, that most damage is terminal and that few monuments are under effective Syrian care. However, on all three counts, especially the last, nothing could be further from the truth.

Syria is so rich in remains, particularly in the areas west of the country's main north–south transport axis, that it still presents an unrivalled range of treasures. Shortly after the current conflict began, this author sought to counter the impression that Syria's past was a write-off, perhaps best forgotten, and to that end he set up a website, entitled *The Monuments of Syria*, to give a visual complement to the text of his study of Syria's archaeological treasures.[26] The idea was to show people how much was at stake. Increasingly, this author was concerned at the number of media reports (often uncritically re-endorsed through social media)[27] that gave the impression that massive structures such as the great Hospitaller castle, Krak des Chevaliers, might have been "destroyed".

In fact, damage from several bouts of shelling seems confined to a few fairly limited sections – for example, one or two crenellations on top of a tower or a part of a tower wall section, and, most regrettably, some of the fine Gothic-style tracery on the portico of the knights' Great Hall.[28] In general, the overall structure of monuments like the Krak is as capable today of withstanding a few mortar shells

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24 Dan Bilefsky, "ISIS Destroys Part of Roman Theater in Palmyra, Syria", *New York Times*, 20 January 2017, available at: www.nytimes.com/2017/01/20/world/middleeast/palmyra-syria-isis-amphitheater.html? mcubz=0&_r=0. Also see: www.asor-syrianheritage.org/new-damage-in-palmyra-uncovered-by-asor-chi/.

25 Words such as "destroyed" and "wasteland" have become almost common jargon for describing Aleppo or Palmyra, even in articles which subsequently correct the picture by noting that most of a structure is substantially intact. An example is James Harlin, "Race to Save Syria's Archaeological Treasures", *Smithsonian Magazine*, March 2016, available at: www.smithsonianmag.com/history/race-save-syrias-archaeological-treasures-180958097/. This article notes that some of the worst-hit remains are largely intact (except for the collapsed minaret). Unfortunately, the headlines are what remains in most readers' minds, not the subsequent qualifications.

26 Available at: www.monumentsofsyria.com.

27 An example of a surviving building so massive that it might realistically only be annihilated by bunker-busting tactical nuclear weapons is the Krak des Chevaliers. Admittedly, the author of a *Daily Beast* article, Allison McNearney, professes to be canvassing social media reports that the castle has suffered partial destruction and adds her own gloss by opening the article with the suggestion that "the magnificent Crac de Chevaliers in Syria may not survive the war presently engulfing it" and that the castle "has suffered what may be irreparable damage". See Allison McNearney, "Will the Crac des Chevaliers Survive the Syrian Civil War?", *Daily Beast*, 15 January 2017, available at: www. thedailybeast.com/will-the-crac-des-chevaliers-survive-the-syrian-civil-war. The non-structural damage to the castle is already being restored with the help of Hungarian experts.

28 As for most sites under Syrian government control, a survey of damage to the castle structure is given on the DGAM website through the interactive map, under the "Homs" regional dropdown list, with photos of affected areas. See http://dgam.gov.sy.

Fig. 4 - Colour online, Colour in print

Figure 4. Central shrine (*cella*) of the Temple of Bel, 2004. Photograph by Ross Burns.

as when it withstood the mangonels of Baybars in the late thirteenth century (when its Crusader defenders gave up not because they had lost the protection of their fortified walls but because they had run out of manpower and supplies). Often claims of extensive damage were supported by photos that showed the structures to be in the same condition as they had been in prior to 2011, as seen in this author's own photo resources.[29] The wear and tear of the centuries has often been misinterpreted as damage from hostilities in the civil war.

Attempting a damage tally

Two years into the conflict, this author began to produce from his own database a running tally of damage where it could be verified from posted images,[30] accompanied by an assessment (based purely on visual evidence, not verbal descriptions) of the degree of damage as it related to the possibility of restoring the remains. It should be emphasized that these conclusions have been reached only through examination of visual evidence from posted photo material, so they

29 Photos of virtually all of the principal monuments covered in *Monuments of Syria* are posted on the website at www.monumentsofsyria.com. Other photographic resources have been contributed to the *Manar Al-Athar* website, based in Oxford University's Faculty of Classics, available at: www.manar-al-athar.ox.ac.uk.

30 Major sources include the Syrian government's official heritage site (http://dgam.gov.sy), ASOR Cultural Heritage Initiatives (www.asor-syrianheritage.org), the "Aleppo Archaeology" Facebook page (http://www.facebook.com/aleppoarchaeology/), Heritage for Peace (heritageforpeace.org), and the Association for the Protection of Syrian Archaeology (www.facebook.com/apsa2011).

Fig. 5 - Colour online, Colour in print

Figure 5. Southern inner defences of Krak des Chevaliers, 1998. Photograph by Ross Burns.

necessarily represent a selective account of the extent of the damage. While such visual comparison cannot replace an on-the-spot report by a structural engineer, the attempt at a provisional tally in relation to Aleppo and Palmyra is reproduced in Figure 6, with the second column recording the national total of sites or buildings in each category.[31] The figures question to some extent the estimate often given in social media or commentary on the extent of the damage. Though the figures (broken down between national cases and with sub-categories for Aleppo and Palmyra) include a number of high-profile cases of deliberate or large-scale destruction, the last two categories of verified cases involve minor or at least non-structural damage which could be repaired.

It should also be noted that levels of destruction vary greatly from site to site given the sporadic pattern of fighting in many areas and the difficulties all sides have had in retaining territory. In the third and fourth columns of Figure 6, the figures for Palmyra and Aleppo show that the two locations combined account for around 40% of total cases in the national count (ninety-eight out of 250). But between Aleppo and Palmyra, the severity of the damage at the two sites shows different patterns.

Aleppo was exposed to the slow grind of a conflict that continued for over four years across its historic city centre until its fall to government forces in December 2016, with the front lines hardly moving in that time. By contrast, the campaign of destruction at Palmyra by IS was more deliberate and ruthless, and was over more quickly. The Palmyra damage list, at twenty-seven in total, contains many fewer

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31   These figures are much lower than the initial estimates of bodies such as UNESCO and the DGAM. I have restricted my "ballpark" assessment to estimates based on conspicuous visual material, have excluded most cases of looting, have not surveyed modern structures (defined as post-1900) and have not included cases where displaced civilians have understandably resorted to using ruined buildings as shelter.

DEGREE OF DAMAGE (categories 1-5)	NUMBER OF AFFECTED BUILDINGS (Syria)	ALEPPO (% of national cases)	PALMYRA (% of national cases)
1 Structures destroyed or condemned	44	13 (30%)	16 (36%)
2 Major damage but not structurally threatened	48	21 (45%)	6 (12%)
3 Conspicuous material damage	67	20 (29%)	3 (4%)
4 Minor damage	34	11 (32%)	0
5 Unverified or unspecified damage	59	16 (27%)	2 (3%)
TOTAL	250	71	27

Figure 6. Table of damage estimates for March 2017, with breakdown for Aleppo and Palmyra.

buildings than the seventy-one recorded at Aleppo.[32] However, because of the small number of structures there, Palmyra suffered the loss of around the same percentage of its historic remains on the casualty list. The cases of destruction at Palmyra were more numerous in category 1 (near or total loss); the detonations were more thoroughly effective in a short period of time but did not result in extensive secondary damage to other buildings. Aleppo, however, accounts for something like 35% of the cases recorded nationwide in categories 2 and 3 (damage short of structural loss), with military activity spread across a large percentage of the walled city.

An archaeological wasteland?

These two cases, Aleppo and Palmyra, illustrate part of the overall pattern of destruction that has spread across much of the country east of the Orontes Valley, with well over 200 major buildings or sites damaged or destroyed over the past six years of conflict. To many in the outside world, the impression is that Syria's past is a wasteland – ironically this image has been imprinted on people's minds more through the repeated video footage of collapsed modern civilian housing, especially in east Aleppo. As the area of historic monuments was rarely directly accessible by foreign journalists coming via rebel-held areas to the north and east, the impression might have arisen that all of Aleppo resembles the burnt-out wasteland of the eastern suburbs.

If the conflict is ever to wind down to a stable future, the risk of writing off Syria's status as a cultural treasure trove might perhaps be the worst legacy the outside world could provide. Often this is done in the most well-meaning way,

32 Figures are based on: monumentsofsyria.com/syria-conflict/ (accessed in December 2017).

Fig. 7 - Colour online, Colour in print
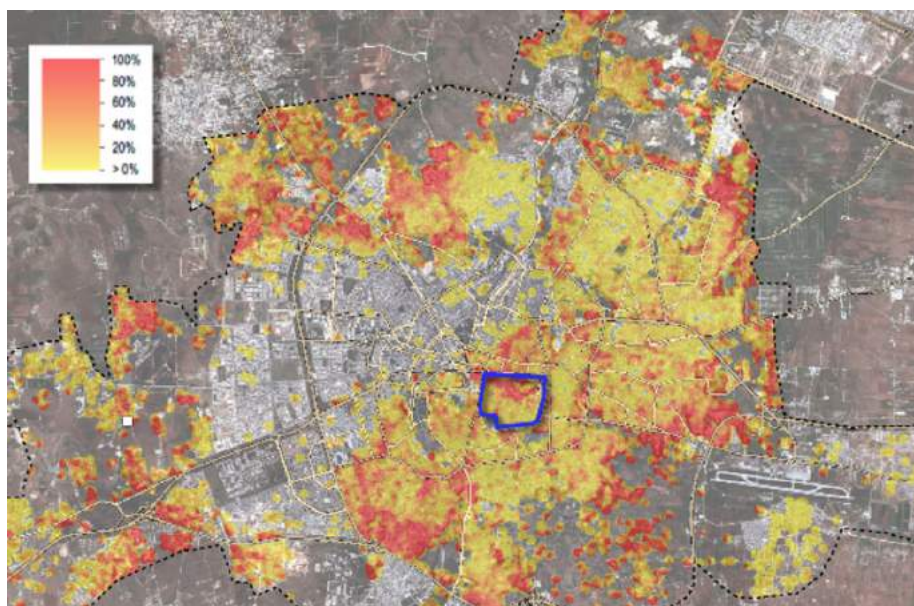
Figure 7. UNOSAT satellite image of Aleppo with walled city in blue box. Scale shows intensity of destruction, mainly in areas of modern housing. Image by Ross Burns, January 2017. Also see: https://tinyurl.com/y8ynexdw.

but it reinforces assumptions that there is little or nothing left to serve as a basis for reconstruction. While this is true of many areas of devastated modern housing more often exposed, for example, to area bombardment (see Figure 7), the conclusion doesn't necessarily apply to the remains of the past that are less often adopted by civilians as refuges.

Moreover, it is somewhat concerning that many well-intentioned outsiders, assuming that much of Syria's past is lost, envisage a future for Syria's heritage in the world of 3D animation or scaled-down reproductions generated by expensive technological processes carried out abroad. Any future for a regenerated tourism industry in a post-conflict Syria must lie with Syrians fully engaged in the process, whether as experts and engineers or as bus drivers, waiters, guides and curators. This means homes must be restored or rebuilt, and refugees encouraged to return and rebuild. The old quarries that once supplied the honeycomb-textured stone of Palmyra or the crystalline columns of Apamea can then be activated again, with Syrian masons and engineers doing what their predecessors have done over 2,000 years. It will take time, and will involve retraining, restoration of services and an environment of security. For Palmyra it will require the bringing back to life of Tadmor, the modern town alongside Palmyra that once supplied all the services and support staff needed. To envisage Syria's reconstruction in any other way – for example, as a new employment opportunity for experts abroad – is not only misguided; it is wrong.

Contributions from outside, however, would make sense if they were to aid in this process of harnessing the skills and commitment of Syrians and were supervised through UNESCO, which itself has no capacity to provide funding. For example, those institutions abroad that have long housed finds from Syrian expeditions, either in museums or in research institutions, could ensure that this material is fully digitized and freely available not only to researchers but to the interested public, including Syrians. The best form of direct assistance for the work to be done in Syria might be in the form of training in modern techniques and materials for restoration, along the lines, for example, of the work that several Italian teams have quietly been doing in the Middle East for some years to restore wall paintings and mosaics. In this respect, computerized modelling of buildings could inform the physical restoration of structures in Syria by enabling engineers and builders to best understand how structures could be rebuilt using as much of the original materials as possible. But 3D imaging is not an end in itself. It is a step on the path to bringing monuments back to life – in Syria, not in Trafalgar Square or downtown Manhattan.[33]

Some foreign experts have preferred to express their opposition to reconstruction altogether, arguing that the phases of damage and even the total collapse of a building are part of its "story".[34] This, too, is misguided. Where buildings can be reassembled from their rubble, they should be made intelligible to a wider audience. We should also recall that a high proportion of Syria's great monuments have been reconstructed, restored or patched up, either over the centuries or more often in the past century. Much of Palmyra, for example, had already been put back together after centuries of earthquakes and destructive interventions. Buildings such as the Temple of Bel were carefully restored to ensure their future stability. It is worth noting that although much of the building's *cella* was virtually turned to dust by the explosive charges laid by IS in 2016, the most heavily restored part, the great towering entrance doorway in the

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33 Emma Cunliffe, "Should We 3D Print a New Palmyra?", *The Conversation*, 31 March 2016, available at: https://theconversation.com/should-we-3d-print-a-new-palmyra-57014. A particularly striking example of wasted resources was a project by the Institute for Digital Archaeology (http://digitalarchaeology.org.uk) that entailed the creation of a one-third scale model of one facet of one section of the great Monumental Arch at Palmyra, which was blown up by IS in 2015. The stripped-down single arch did little beyond leaving us with a frame for selfies of mayoral dignitaries and self-appointed experts. A more sensitive approach to using virtual-reality reconstructions to reinforce memory is taken in Minna Silver, Gabriele Fangi and Ahmed Denker, *Reviving Palmyra in Multiple Dimensions: Images, Ruins and Cultural Memory*, Whittles Publishing, Dunbeath, 2018.

34 The debate over whether Palmyra's reconstruction should be allowed raged particularly strongly after the city's first recovery from the hands of IS in 2016. It merged with arguments that much archaeology has reflected "colonialist" preoccupations privileging selected phases of Syria's past – the Classical period and the Crusades. The range of opinions is too disparate to allow description here; see, for example, Maira Al-Manzali, "Palmyra and the Political History of Archaeology in Syria: From Colonialists to Nationalists", 2 October 2016, available at: www.mangalmedia.net/english//palmyra. Particularly challenging are the views found in Annie Sartre and Maurice Sartre, *Palmyre: Verité et légendes*, Perrin, Paris, 2016, esp. pp. 238–246; and in Andreas Schmidt-Colinet and Andrea Zederbauer, "'We Should Do Nothing!': On the History, Destruction and Rebuilding of Palmyra", *Eurozine*, 22 December 2017.

western colonnade of the central shrine, still stands proud. It was reinforced with steel following the French detailed study of the temple in 1929–32.[35]

The records of researchers of the past can also present significant resources to help us understand how buildings, now toppled, worked structurally. It may be no coincidence that virtually all the Palmyrene tombs, temples and monuments savagely reduced to dust by IS in 2016 were carefully studied by archaeological research teams over recent decades. The teams' publications and their archives have often left us stone-by-stone records of buildings. The way to offer insights into the rich layering of cultures Syria provides is to use this documentary trail to take what stones have survived the destructive urges of the present and use them as a basis to fill in the gaps. It is a painstaking task, requiring years of dedicated work, but it has been done before – for example, with the Dresden Frauenkirche after the bombing raids of 1944.[36] Without reconstruction programmes, too, sites such as the great avenue of columns stretching across Apamea in the Orontes Valley would largely comprise tumbled column drums hidden in the grass. Syrians deserve to know how splendid a past their country presented to the world, just as, for example, one of the first reconstruction projects of post-Civil War Lebanon in the early 1990s was the National Museum, superbly brought back to life and with a high proportion of its exhibits recovered from safe storage locations, many years after they were assumed destroyed or lost.[37]

Other institutions reinforce UNESCO's central role in such efforts to safeguard monuments, particularly those inscribed by member countries on the World Heritage list. The pre-2011 record of organizations such as the Aga Khan Trust for Culture has been remarkable in restoring some of Syria's major Islamic buildings.[38] The International Council on Monuments and Sites (ICOMOS) harnesses non-governmental expertise in the field of reconstruction, respecting the authenticity of a monument, and promotes the application of theory, methodology and scientific techniques to that end. Rules have long been drawn up to guide reconstruction programmes such as the Venice Charter of 1964–2004.[39] In many UNESCO member countries there is an inherent tension between "dirt archaeologists" and experts intent on preserving the integrity of their evidence, on the one hand, and the local authorities responsible for presenting sites to make them more accessible and comprehensible to visitors. Syria has so far managed to avoid the "Disneyfication" of sites that has taken

35 See Figure 5, above, and Henri Seyrig, Robert Amy and Ernest Will, *Le temple de Bel à Palmyre*, 2 vols, Geuthner, Paris, 1975.
36 The process of rebuilding the Dresden Frauenkirche is summarized at: www.frauenkirche-dresden.de/en/reconstruction/.
37 Robin Wright, "Beirut's Museums of War and Memories", *New Yorker*, 12 October 2016, available at: www.newyorker.com/news/news-desk/beiruts-museums-to-war-and-memories; Caroline Sandes, "Remembering Beirut: Lessons for Archaeology and (Post-)Conflict Urban Redevelopment in Aleppo", *Ex Novo Journal of Archaeology*, Vol. 2, December 2017.
38 On the role of the Aga Khan Trust for Culture, see: www.akdn.org/our-agencies/aga-khan-trust-culture.
39 See ICOMOS, ICOMOS Guidance on Post Trauma Recovery and Reconstruction for World Cultural Properties, Paris, 2017, available at: https://tinyurl.com/yaw7896j. The current text of the Venice Charter is available at: www.icomos.org/charters/venice_e.pdf.

Figure 8. Palmyra seen from Qalaat Shirkuh at the approach of sunset. Photograph by Ross Burns, April 2011.

place in other countries, where authenticity has been sacrificed for tourism or commercial ends.

At the time of completing this article, the conflict in Syria has begun to wind down, hopefully reducing the level of risk to the country's population and the monuments which record their great heritage. Some pockets of rebel control remain, parts of the country remain under occupation by foreign forces, and a workable programme for the repatriation of civilians to their homes has yet to be undertaken. It may not, however, be premature to think about reconstruction in areas that are no longer contested, though at the moment the terms for external aid to the reconstruction process remain controversial.[40]

40 The prospects for Syria's reconstruction, admittedly still bleak at present, are examined in a challenging article on the website of IRIN (originally Integrated Regional Information Networks, until 2015 an agency affiliated with the UN): see Aron Lund, "Rebuilding Syria's Rubble as the Cannons Roar", *IRIN News*, 8 March 2017, available at: https://tinyurl.com/yajxzo7d. On the risks of linking reconstruction with population transfers, the case of Homs is examined in PAX and the Syria Institute, *No Return to Homs: A Case Study on Demographic Engineering in Syria*, 2017, available at: www.paxforpeace.nl/publications/all-publications/no-return-to-homs. The debate over terms for international participation in reconstruction is just beginning with the arguments canvassed in Jacques Pecquet, "US Risks Irrelevancy in Syria with Reconstruction Taboos", *Al-Monitor*, 14 March 2018, available at: www.al-monitor.com/pulse/originals/2018/03/us-risks-irrelevancy-syria-reconstruction-taboos.html; and Steven Heydemann, "Syria Reconstruction and the Illusion of Leverage", Atlantic Council, 18 May 2017, available at: www.atlanticcouncil.org/blogs/syriasource/syria-reconstruction-and-the-illusion-of-leverage.

A proper inventory of sites and degree of damage will be a starting point, a project already being undertaken by the DGAM.[41] It will take decades to complete any schedule of regeneration, but a good start could be made by selecting some of the key monuments that could encourage the reawakening of civic pride and eventually of the tourism industry. In many areas, local civic groups or authorities are repairing mosques, and such landmark buildings as the Aleppo Great Mosque's minaret are now being studied and viable remains rescued from the rubble and sorted.[42]

The worst outcome would be the belief that Syria's past is lost. We need to resist such assumptions, and we should also avoid encouraging illusions that the country's monuments can be revived in such "here-today-gone tomorrow" palliatives as 3D printed facsimiles or virtual-reality reconstructions. It was the whole context – the countryside, the people, their openness and generosity, the food and the experience of seeing a site like Palmyra come to life as shadows crept across its tapestry of centuries – that made Syria memorable. We shouldn't settle for less. We owe that to the Syrians.

41 International assistance beyond a basic technical and training level has so far been limited and largely indirect.
42 For a recent examination of the programme for reconstruction of the minaret of the Aleppo Great Mosque (viewed as a possible exercise in "whitewashing" history), see Diana Darke, "Is Reconstruction of Aleppo's Grand Mosque Whitewashing History?", *The National*, 12 May 2018, available at: www.thenational.ae/world/mena/is-reconstruction-of-aleppo-s-grand-mosque-whitewashing-history-1.728715.

Crossing the red line: The use of chemical weapons in Syria and what should happen now

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Abstract

The use of chemical weapons in the armed conflict in Syria has attracted universal and widespread condemnation and has led to unified responses by various international bodies. This article examines the international community's responses to chemical weapons use in Syria from the perspective of international law. It also analyzes the potential options for accountability that are available for chemical weapons-related crimes. The intention is ultimately to make the case that

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*   The views expressed are those of the author alone and do not necessarily reflect the views of the International Residual Mechanism for Criminal Tribunals or the United Nations in general.

the special status the international community has ascribed to chemical weapons crimes could be harnessed to create an accountability mechanism, such as an ad hoc *tribunal, that could help pave the complex road towards a negotiated peace.*

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Introduction

There have been a myriad of international humanitarian law violations committed during the war in Syria. The United Nations (UN) Special Envoy for Syria estimated that 400,000 people had been killed during hostilities by May 2016.[1] Many of these deaths have reportedly been the result of war crimes, such as indiscriminate attacks, disproportionate civilian harm, targeting of medical facilities and murder.[2] Other atrocities such as systematic rape, torture, persecution and inhumane acts have been widely documented and reported.[3] The crisis has led to a humanitarian disaster of massive proportions, with an estimated 13.5 million people in need of humanitarian assistance, more than 5 million refugees, 6 million internally displaced people and 4.5 million people in need trapped in besieged and hard-to-reach areas.[4]

But it is the use of chemical weapons in this armed conflict that has arguably attracted the most universal and widespread condemnation – despite reportedly killing less than 2,000 people[5] – and has led to the only unified

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1   "Syria Death Toll: UN Envoy Estimates 400,000 Killed", *Al Jazeera*, 23 April 2016, available at: www.aljazeera. com/news/2016/04/staffan-de-mistura-400000-killed-syria-civil-war-160423055735629.html (all internet references were accessed in September and October 2017).

2   The UN Independent International Commission of Inquiry on the Syrian Arab Republic (CoI) has documented serious violations of human rights and international humanitarian law committed in Syria since 2011. See the more than twenty reports available at: www.ohchr.org/EN/HRBodies/HRC/ IICISyria/Pages/Documentation.aspx. For detailed analysis of which international crimes may have been committed, see Beth Van Schaak, "Mapping War Crimes in Syria", *International Legal Studies*, Vol. 92, No. 1, 2016, available at: http://stockton.usnwc.edu/ils/vol92/iss1/9/.

3   See, for example, Amnesty International, *Syria: "It Breaks the Human": Torture, Disease and Death in Syria's Prisons*, 18 August 2017, available at: www.amnesty.org/en/documents/mde24/4508/2016/en/.

4   UN Office for the Coordination of Humanitarian Affairs, "About the Crisis", available at: http://www. unocha.org/syrian-arab-republic/syria-country-profile/about-crisis; Office of the UN High Commissioner for Refugees, "Syria Regional Refugee Response", available at: http://data.unhcr.org/ syrianrefugees/regional.php.

5   Colum Lynch, "To Assuage Russia, Obama Administration Backed Off Syria Chemical Weapons Plan", *Foreign Policy*, 19 May 2017, available at: http://foreignpolicy.com/2017/05/19/to-assuage-russia-obama-administration-backed-off-syria-chemical-weapons-plan/ ("Indeed, the number of Syrians killed by chemical weapons – more than nearly 1,500 by the end of 2015, according to the Syrian American Medical Society – amounts to only a fraction of the country's dead.")

responses by international bodies.[6] The international response to the use of chemical weapons in 2013 – the crossing of US president Barack Obama's famous "red line" – led to the removal and destruction of Syria's declared stockpile of chemical weapons, implemented and overseen jointly by the Organisation for the Prohibition of Chemical Weapons (OPCW) and the UN. This operation was widely seen as one of the only "positive" aspects of the deadly war.[7] Continued use of chemical weapons in Syria prompted the OPCW director-general to take the unprecedented step of establishing a Fact-Finding Mission (FFM) to determine the facts surrounding allegations of chemical weapons use in Syria. The UN Security Council took further action in 2015 by creating the OPCW–UN Joint Investigative Mechanism (JIM), mandated with attributing responsibility for those chemical weapons attacks in Syria confirmed by the FFM.[8] This mandate meant that the large-scale attack in Ghouta in 2013, discussed below, was not part of the JIM's investigations. Both the European Union and the United States have issued sanctions against Syrian individuals and government entities alleged to have been directly or indirectly involved in chemical weapons crimes in Syria.[9] The use of chemical weapons in Syria is also the only violation of international humanitarian law committed during the armed conflict that has triggered direct military interventions by the United States and allied States.[10]

This article examines the international community's responses to chemical weapons use in Syria from the perspective of international law.[11] This examination

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6   Other international responses, such as the Human Rights Council-appointed CoI and the General Assembly-appointed International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Those Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011 (IIIM) (UN Doc. A/71.L.48, 19 December 2016), mandated to collect information about international crimes committed in Syria, have not garnered unified support. The resolution establishing the CoI (UN Doc. A/HRC/RES/S-17/1) was adopted by thirty-three votes in favour, four against and nine abstentions, while the IIIM was adopted with 105 votes in favour, fifteen against (including the Russian Federation, China and Iran) and fifty-two abstentions.

7   See, for example, Paul F. Walker, "Syrian Chemical Weapons Destruction: Taking Stock and Looking Ahead", Arms Control Association, December 2014, available at: www.armscontrol.org/ACT/2014_12/Features/Syrian-Chemical-Weapons-Destruction-Taking-Stock-And-Looking-Ahead.

8   UNSC Res. 2235, 7 August 2015.

9   Council of the European Union, "List of Persons and Entities under EU Restrictive Measures over the Situation in Syria", 28 October 2016, available at: http://docplayer.net/51135994-List-of-persons-and-entities-under-eu-restrictive-measures-over-the-situation-in-syria.html; US Department of the Treasury, "Treasury Sanctions Syrian Officials in Connection with OPCW-UN Findings of Regime's Use of Chemical Weapons on Civilians", 12 January 2017, available at: www.treasury.gov/press-center/press-releases/Pages/jl0701.aspx. The sanctions instituted by various countries against Syrian officials are compiled on the International Partnership against Impunity for the Use of Chemical Weapons website, available at: www.noimpunitychemicalweapons.org/-en-.html.

10   Dan Lamothe, Missy Ryan and Thomas Gibbons-Neff, "U.S. Strikes Syrian Military Airfield in First Direct Assault on Bashar al-Assad's Government", Washington Post, 6 April 2017, available at: https://tinyurl.com/ydbet8wg; Helene Cooper, Thomas Gibbons-Neff and Ben Hubbard, "U.S., Britain and France Strike Syria over Suspected Chemical Weapons Attack", The New York Times, 13 April 2018, available at: www.nytimes.com/2018/04/13/world/middleeast/trump-strikes-syria-attack.html.

11   This article focuses on the events that occurred from 2012 to the end of April 2018. For an analysis of the reasons for the disparate international responses to atrocities committed in the crisis in Syria, see Tim McCormack, "Chemical Weapons and Other Atrocities: Contrasting Responses to the Syrian Crisis", International Law Studies, Vol. 92, 2016.

is followed by an analysis of the potential options for accountability that are available for chemical weapons-related crimes. The intention is ultimately to make the case that the special status the international community has ascribed to chemical weapons crimes in Syria could be harnessed to create an accountability mechanism, such as an *ad hoc* tribunal, that could help pave the complex road towards a negotiated peace.

Chemical weapons use in Syria and international responses

Allegations of chemical weapons use in Syria began to surface in 2012.[12] Up to this time, the Syrian government had given mixed information about its chemical weapons capability. In 2005, the Syrian government had reported to the UN Resolution 1540 Committee that it "does not possess any chemical weapons, their means of delivery, or any related material".[13] But in a 2009 interview, President Bashar al-Assad made the following ambiguous statement in response to a question about Syria's intention to produce chemical weapons: "Chemical weapons, that's another thing. But you don't seriously expect me to present our weapons program to you here? We are in a state of war."[14]

In July 2012, the Syrian government implicitly admitted for the first time that it had stocks of chemical weapons, stating that they would never be used "inside Syria" and would only be used against an external attack.[15] On 20 August 2012, in response to a question about whether the US military would become directly involved in the crisis in Syria at a White House press briefing, President Obama famously stated:

> We cannot have a situation where chemical or biological weapons are falling into the hands of the wrong people. We have been very clear to the Assad regime, but also to other players on the ground, that a red line for us is we start seeing a whole bunch of chemical weapons moving around or being utilized. That would change my calculus. That would change my equation.[16]

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12 The UN received reports concerning alleged incidents in Salquin on 17 October 2012 and Homs on 23 December 2012. The UN Mission to Investigate Allegations of the Use of Chemical Weapons in the Syrian Arab Republic (UN Mission) ultimately found that it did not have sufficient evidence to make findings on these alleged incidents. See UN Mission, *Final Report*, UN Doc. A/68/663–S/2013/735, 13 December 2013 (UN Mission Final Report), paras 12–13, 18, 27, 45.

13 "Annex to the *Note Verbale* Dated 7 November 2005 from the Permanent Mission of the Syrian Arab Republic to the United Nations addressed to the Chairman of the Committee", Note No. S/AC.44/2005/DDA/OC.S, 15 June 2005.

14 "*Spiegel* Interview with Syrian President Bashar Assad: 'Peace Without Syria is Unthinkable'", *Spiegel*, 19 January 2009, available at: www.spiegel.de/international/world/spiegel-interview-with-syrian-president-bashar-assad-peace-without-syria-is-unthinkable-a-602110-2.html.

15 "Syria Chemical Weapons Allegations", *BBC News*, 31 October 2013, available at: www.bbc.com/news/world-middle-east-22557347.

16 "Remarks by the President to the White House Press Corps", 20 August 2012, available at: https://obamawhitehouse.archives.gov/the-press-office/2012/08/20/remarks-president-white-house-press-corps.

On 19 March 2013, the Syrian government reported to the UN the alleged use of chemical weapons in the Khan Al-Asal area of the Aleppo Governorate.[17] The following day Syria asked the UN Secretary-General to launch an urgent investigation under the auspices of his Mechanism for Investigation of Alleged Use of Chemical, Biological or Toxin Weapons (Secretary-General's Mechanism).[18] On 21 March 2013, the Secretary-General established the UN Mission to Investigate Allegations of the Use of Chemical Weapons in the Syrian Arab Republic and contacted the OPCW and the World Health Organization (WHO) requesting their cooperation in mounting an investigation. The same day, the governments of France and the United Kingdom requested an investigation into the events that took place in the two locations of Khan Al-Asal and Otaybah in the vicinity of Damascus on 19 March 2013, as well as in Homs on 23 December 2012.

The Secretary-General's Mechanism

The origin of the Secretary-General's Mechanism for Investigation of the Alleged Use of Chemical, Biological or Toxin Weapons may be traced to the authority of the Secretary-General under Article 99 of the UN Charter, on which basis the then UN Secretary-General carried out *ad hoc* investigations of alleged use of chemical weapons in the 1980s.[19] The Mechanism was formalized in 1987.[20]

A year later, the UN Security Council endorsed the Mechanism.[21] The Security Council encouraged the Secretary-General to carry out these

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17 UN Mission Final Report, above note 12, para. 5. The Syrian government informed the UN of its allegation that armed terrorist groups had fired a rocket from the Kfar De'il area towards Khan Al-Asal in the Aleppo governorate, resulting in twenty-five deaths and more than 110 civilians and soldiers injured. France, the UK and the United States all subsequently reported the same incident to the UN, as well as other incidents. In a letter of 14 June 2013, the United States reported to the UN Secretary-General its assessment alleging that Syrian governmental forces had used sarin in the attack in Khan Al-Asal on 19 March 2013. *Ibid.*, paras 7–8.

18 *Ibid.*, para. 6.

19 Article 99 of the UN Charter provides: "The Secretary-General may bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security." Secretary-General Javier Pérez de Cuéllar indirectly justified his independent investigations of Iraqi chemical weapons use in the 1980–88 Iran–Iraq War using the Article 99 authority. See *Report of the Mission Dispatched by the Secretary-General to Investigate Allegations of the Use of Chemical Weapons in the Conflict between the Islamic Republic of Iran and Iraq*, UN Doc. S/17911, 12 March 1986.

20 In 1982, the UN General Assembly adopted a resolution that requested the UN Secretary-General "to investigate, with the assistance of qualified experts, information that may be brought to his attention by any Member State concerning activities that may constitute a violation of the [1925] Protocol or of the relevant rules of customary international law": UN Doc. A/RES/37/98, 13 December 1982, section E, para. 4. However, the resolution was not adopted unanimously, and the UN Secretary-General preferred to conduct such activities under the authority of Article 99 of the UN Charter. In UNGA Res. 42/37, 30 November 1987, the UN General Assembly requested the Secretary-General to "carry out investigations in response to reports … brought to his attention by any Member State concerning the possible use of chemical … weapons that may constitute a violation of the 1925 Geneva Protocol or other relevant rules of customary international law in order to ascertain the facts of the matter, and to report promptly the results of any such investigation to all Member States".

21 The UN Security Council resolution, UNSC Res. 620, was adopted following the Secretary-General's reports in July and August 1988 investigating allegations of the use of chemical weapons in the Iran–Iraq War (including the chemical weapons attack in Halabja in northern Iraq on 16 March 1988, which killed between 3,200 and 5,000 people).

investigations into violations of the 1925 Geneva Protocol[22] or "other relevant rules of customary international law", and to report the results.[23] The Security Council further decided that it would take "appropriate and effective measures in accordance with the Charter of the United Nations, should there be any future use of chemical weapons in violation of international law, wherever and by whomever committed".[24]

The reference to customary international law in the UN resolutions was important because the 1925 Geneva Protocol only applies during "war", which, when the Protocol was drafted in 1925, meant only international armed conflict.[25] Therefore, it could be argued that the Geneva Protocol did not to apply to the use of chemical weapons by Iraq against its own people.[26] This aspect of the Secretary-General's Mechanism was also important for the ability of the Mechanism to apply with regard to Syria, which in early 2013 was party to the 1925 Geneva Protocol but not the 1993 Chemical Weapons Convention (CWC).[27] Since the armed conflict in Syria in 2013 was internal in character,[28] it could be argued that the Geneva Protocol was not applicable. Hence, the prohibitions in relation to chemical weapons derived from customary international law – which applied in both international and non-international armed conflicts – took on enhanced importance.[29]

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22 Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, 94 UNTS 65, 17 June 1925 (entered into force 9 May 1926). The Protocol prohibits "the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices", and extends this prohibition to bacteriological weapons.

23 UNSC Res. 620, 26 August 1988.

24 Ibid.

25 See Masahiko Asada, "A Path to a Comprehensive Prohibition of the Use of Chemical Weapons under International Law: From The Hague to Damascus", *Journal of Conflict & Security Law*, Vol. 21, No. 2, 2016, pp. 163–165, noting that "[i]t is … unthinkable that the Geneva Protocol was intended to prohibit the use of prescribed gases in internal war before the adoption of common Article 3 [of the 1949 Geneva Conventions]".

26 Ibid., pp. 189–192, citing the diverging views of States on this point.

27 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, 1974 UNTS 45, 3 September 1993 (entered into force 19 April 1997).

28 In a statement released on 17 July 2012, the International Committee of the Red Cross (ICRC) expressly described the violence in Syria as constituting a "non-international armed conflict". ICRC, "Syria: ICRC and Syrian Arab Red Crescent Maintain Aid Effort amid Increased Fighting", Operational Update, 17 July 2012, available at: www.icrc.org/eng/resources/documents/update/2012/syria-update-2012-07-17.htm. The CoI concluded in its third report of 15 August 2012 that the intensity and duration of the conflict, combined with the increased organizational capabilities of anti-government armed groups, had met the legal threshold for a non-international armed conflict: UN Doc. A/HRC/21/50, para. 12.

29 See Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), Rule 74, available at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul. Rule 74 finds that "[t]he use of chemical weapons is prohibited" both in international and non-international armed conflicts. The International Criminal Tribunal for the former Yugoslavia (ICTY) had declared in the 1995 *Tadić* case that "there undisputedly emerged a general consensus in the international community on the principle that the use of [chemical] weapons is also prohibited in internal armed conflicts". ICTY, *Prosecutor v. Dusko Tadić aka "Dule"*, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 121.

Although the Mechanism had been almost[30] unused for more than twenty years, until it was triggered in regard to Syria, the legal basis for OPCW resources to be used for such an investigation by the UN had been built into the CWC[31] and into the Relationship Agreement between the UN and the OPCW, along with its Supplementary Arrangement.[32]

The UN team – composed mostly of OPCW and WHO experts – arrived in Damascus on 18 August 2013. Its original task was to investigate the reported allegations of the use of chemical weapons in Khan Al-Asal, Saraqueb and Sheik Maqsood (which were deemed credible), to discuss other allegations and to visit the related sites in parallel.[33] The mandate did not include attributing responsibility for any use of chemical weapons. Just three days after the team arrived in Damascus, on 21 August 2013, a large chemical weapons attack was reported in the Ghouta area of the city. Dozens of requests from UN member States were made to the Secretary-General to investigate, and the team was instructed by the Secretary-General to investigate this incident as a priority.

The team confirmed the large-scale use of chemical weapons (sarin) in the Ghouta area on 21 August 2013.[34] The death toll estimates range from 281 to more than 1,400.[35] The team also concluded that chemical weapons (again, sarin) had also

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30 Apart from the extensive use of the Secretary-General's Mechanism during the Iran–Iraq War, there were two other instances of use: a 1992 investigation in Azerbaijan in relation to alleged weapons use by Armenia (UN Doc. S/24344, 24 July 1992, in which the experts determined that no evidence of the use of chemical weapons had been presented to the team), and a 1992 investigation in Mozambique (UN Doc. S/24065, 12 June 1992, in which the experts concluded that it was not possible to determine whether chemical weapons had been used against the Mozambican government by the non-State group RENAMO).

31 Article 27 of Part XI of the Verification Annex to the CWC provides: "In the case of alleged use of chemical weapons involving a State not Party to this Convention or in territory not controlled by a State Party, the Organization shall closely cooperate with the Secretary-General of the United Nations. If so requested, the Organization shall put its resources at the disposal of the Secretary-General of the United Nations."

32 Agreement Concerning the Relationship between the United Nations and the Organisation for the Prohibition of Chemical Weapons, Annex to OPCW Executive Council Decision EC-MXI/DEC.1, 1 September 2000, Art. II(c), requiring the OPCW to closely cooperate with the Secretary-General in cases of the alleged use of chemical weapons involving a State not party to the Convention or in a territory not controlled by a State party to the Convention and to put its resources at the disposal of the Secretary-General. See Supplementary Arrangement Concerning the Implementation of Article II (2)(c) of the Relationship Agreement between the UN and the OPCW, September 2012.

33 UN Mission Final Report, above note 12, para. 34. Alleged incidents in the following locations had been reported by States to the UN in the preceding months: Salquin, 17 October 2012; Homs, 23 December 2012; Darayya, 13 March 2013; Khan Al-Asal, 19 March 2013; Otaybah, 19 March 2013; Adra, 24 March 2013; Sheik Maqsood, 13 April 2013; Jobar, 12–14 April 2013; Darayya, 25 April 2013; Saraqueb, 29 April 2013; Qasr Abu Samrah, 14 May 2013; and Adra, 23 May 2013.

34 See *Report of the United Nations Mission to Investigate Allegations of the Use of Chemical Weapons in the Syrian Arab Republic on the Alleged Use of Chemical Weapons in the Ghouta Area of Damascus on 21 August 2013*, UN Doc. A/67/997–S/2013/553, 16 September 2013 (UN Mission First Report), para. 27, concluding that chemical weapons (sarin) were used on relatively large scale, resulting in numerous casualties, particularly among civilians, including many children.

35 See "Syria/Syrian Chemical Programme – National Executive Summary of Declassified Intelligence", France Diplomatie – Ministry of Foreign Affairs and International Development, 3 September 2013, available at: www.diplomatie.gouv.fr/IMG/pdf/Syrian_Chemical_Programme.pdf; Joby Warrick, "More than 1,400 Killed in Syrian Chemical Weapons Attack, U.S. Says", *Washington Post*, 30 August 2013, available at: https://tinyurl.com/y78nuuvq.

been used on a smaller scale in Khan Al-Asal, Saraqueb, Jobar and Ashrafiah Sahnaya in March, April and August 2013 respectively.[36]

The OPCW–UN Joint Mission

The issuance of the UN team's report on Ghouta was the first official UN confirmation that the "red line" of using chemical weapons in Syria had been crossed. However, even while the investigation was in progress, the Russian Federation and the United States had been involved in influencing President Assad to accede to the CWC. Since Russia had demonstrated that it would block any UN Security Council authorization of forceful measures against the Syrian government, the United States was moving towards a unilateral military intervention.[37] On 31 August 2013, President Obama announced that he would seek congressional authorization for a use of force.[38] Desirous of avoiding being drawn into the civil war, the White House draft legislative wording to the House and Senate leaders authorized actions designed only to neuter the threat of chemical weapons or to prevent their proliferation. On 9 September, Secretary of State John Kerry made a rhetorical remark in response to questioning at a press conference that to avoid a military attack, President Assad could hand over the entire stock of Syrian chemical weapons within a week, adding: "but he isn't about to do it, and it can't be done".[39] Russia seized upon this as a means to prevent US military action, and pressured Syria into acceding to the CWC. On 12 September, Syria stated that it would accede to the CWC, and it deposited its instrument of accession two days later.[40] The same day, the United States and Russia agreed to the Framework for Elimination of Syrian Chemical Weapons. The Framework – which was provided to the OPCW Executive Council for consideration – set out an accelerated plan for the removal and destruction of the Syrian chemical weapons stockpile under joint OPCW–UN supervision.

On 27 September 2013, the OPCW Executive Council adopted the Decision on the Destruction of Syrian Chemical Weapons (Executive Council Decision), which required Syria to swiftly declare the location and quantity of its stockpile, and established an ambitious timeline for the removal[41] and destruction of the chemical

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36 UN Mission Final Report, above note 12, para. 34.

37 See White House Office of the Press Secretary, "Government Assessment of the Syrian Government's Use of Chemical Weapons on August 21, 2013", 30 August 2013, available at: https://obamawhitehouse.archives. gov/the-press-office/2013/08/30/government-assessment-syrian-government-s-use-chemical-weapons-august-21.

38 See White House, Office of the Press Secretary, "Statement by the President on Syria", 31 August 2013, available at: https://obamawhitehouse.archives.gov/the-press-office/2013/08/31/statement-president-syria.

39 Patrick Wintour, "John Kerry Gives Syria Week to Hand over Chemical Weapons or Face Attack", *The Guardian*, 9 September 2013, available at: www.theguardian.com/world/2013/sep/09/us-syria-chemical-weapons-attack-john-kerry.

40 UN Mission First Report, above note 34, Note by the Secretary-General, para. 3.

41 Significantly, UN Security Council Resolution 2118 authorized the transfer of Syrian chemical weapons across international borders for the purpose of destruction. This was done in consideration of Article 1 of the CWC, which prohibits the transfer of chemical weapons "in any circumstances".

agents, material and equipment by June 2014.[42] Within hours of the adoption of the Executive Council Decision, the UN Security Council unanimously adopted Resolution 2118, endorsing the decision of the OPCW Executive Council and demanding that Syria cooperate fully. In addition, the Security Council determined that any use of chemical weapons constitutes a threat to international peace and security, expressed its strong conviction that those responsible for the use of chemical weapons in Syria should be held accountable, and vowed to impose measures under Chapter VII of the UN Charter in the event of non-compliance with the resolution, including any use of chemical weapons by anyone in Syria.[43]

The implementation of the plan involved a coordinated international effort.[44] By the end of September 2014, just a year later, the OPCW–UN Joint Mission on the elimination of Syrian chemical weapons announced that it had completed its mandate, with 96% of the declared stockpile destroyed.[45] The OPCW announced on 4 January 2016 that all chemical weapons declared by Syria had been destroyed.[46]

The apparent success of the destruction operation – carried out in a complex and difficult security environment – was marred, however, by continuing allegations of the use of chemical weapons, mainly chlorine, in Syria in 2014.[47] Any use of a toxic chemical – such as chlorine – as a weapon is prohibited under Article 1 of the CWC.[48] However, as chlorine (which has many legitimate uses) is not one of the toxic chemicals specifically listed in the Schedules annexed to the CWC, it is not subject to the verification regime established by the Convention.[49] In addition, doubts or ambiguities about the Syrian declaration of its stockpile led the OPCW director-general to establish in 2014 a team of experts (known as the Declaration Assessment Team or DAT) mandated to verify the accuracy or completeness of Syria's declaration. In March 2018, the director-general informed the Executive

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42 OPCW, "Destruction of Syrian Chemical Weapons", Executive Council Decision EC-M-33/DEC.1, 27 September 2017.

43 UNSC Res. 2118, 27 September 2013.

44 Cargo ships were supplied by Norway and Denmark, naval escorts came from China, Denmark, Norway, Russia and the UK, and a Field Deployable Hydrolysis System (FDHS) on board a US naval ship destroyed toxic chemicals. Other chemicals were destroyed in the UK and United States, and effluent from the FDHS was destroyed in Germany and Finland.

45 OPCW, "Closure of the OPCW-UN Joint Mission", available at: https://opcw.unmissions.org/. On 1 October 2014, the OPCW, in partnership with the UN Office for Project Services, continued the plan with respect to destroying the twelve remaining chemical weapons production facilities.

46 OPCW, "Destruction of Syrian Chemical Weapons Completed", press release, 4 January 2016, available at: www.opcw.org/news/article/destruction-of-syrian-chemical-weapons-completed/.

47 See CoI, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, UN Doc. A/HRC/27/60, 13 August 2014, paras 115–118, finding that "[r]easonable grounds exist to believe that chemical agents, likely chlorine, were used on Kafr Zeita, Al-Tamana'a and Tal Minnis in eight incidents within a 10-day period in April … [and] that those agents were dropped in barrel bombs from government helicopters flying overhead".

48 CWC, Art. I(b). See also Art. II(1)(a), defining chemical weapons as "[t]oxic chemicals and their precursors, except where intended for purposes not prohibited under this Convention, as long as the types and quantities are consistent with such purposes".

49 See CWC, Art. VI(2), providing that "each State Party shall subject toxic chemicals and their precursors listed in Schedules 1, 2 and 3 of the Annex on Chemicals, facilities related to such chemicals, and other facilities as specified in the Verification Annex, that are located on its territory or in any other place under its jurisdiction or control, to verification measures as provided in the Verification Annex".

Council that the DAT was still not able to resolve all identified gaps, inconsistencies and discrepancies in Syria's declaration and therefore could not fully verify that Syria had submitted a declaration which could be considered accurate and complete.[50]

The OPCW Fact-Finding Mission

Once Syria became a party to the CWC, the Secretary-General's Mechanism no longer had a mandate to investigate allegations of chemical weapons use on Syrian government-controlled territory.[51] Under the CWC, there are essentially two ways in which allegations of the use of chemical weapons may be investigated, although these have never been used. Under Article IX, a challenge inspection can be requested by a State Party if it suspects another State Party of non-compliance through the use of chemical weapons.[52] Under Article X, the director-general must initiate an investigation if a State Party has requested assistance and protection against the use or threat of use of chemical weapons.[53] The OPCW Technical Secretariat may also assist a national investigation into chemical weapons use pursuant to its mandate to provide technical assistance to States Parties in the implementation of the provisions of the CWC.[54]

When further allegations of chemical weapons use (chlorine) in Syria began to be reported in 2014, neither an Article IX or Article X investigation was requested. Instead, the director-general of the OPCW established the FFM, which was tasked with establishing the facts surrounding allegations of the use of toxic chemicals, particularly chlorine, for hostile purposes in Syria.[55]

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50 OPCW Executive Council, "Note by the Director-General: Progress in the Elimination of the Syrian Chemical Weapons Programme", EC/88/DG.1, 23 March 2018, para. 10.

51 As noted above, pursuant to Article 27 of Part XI of the Verification Annex to the CWC, the Secretary-General's Mechanism only applies in a "State not Party to this Convention or in territory not controlled by a State Party".

52 The Executive Council may, not later than twelve hours after having received the inspection request, decide by a three-quarter majority of all its members against carrying out the challenge inspection, if it considers the inspection request to be frivolous, abusive or clearly beyond the scope of this Convention. CWC, Art. IX.

53 *Ibid.*, Art. X(8)(a).

54 *Ibid.*, Art. VIII(38)(e). On this basis, the OPCW Technical Secretariat has assisted the Iraqi government with its investigation of the use of chemical weapons on its territory. See OPCW, "Director-General Expresses Concern over Alleged Recent Chemical Attacks in Iraq", press release, 23 March 2016, available at: www.opcw.org/news/article/director-general-expresses-concern-over-alleged-recent-chemical-attacks-in-iraq/.

55 OPCW, "OPCW to Undertake Fact-Finding Mission in Syria on Alleged Chlorine Gas Attacks", press release, 29 April 2014, available at: www.opcw.org/news/article/opcw-to-undertake-fact-finding-mission-in-syria-on-alleged-chlorine-gas-attacks/. The first report of the FFM explained that its establishment was based on the general authority of the OPCW director-general to seek to uphold at all times the object and purpose of the CWC, as reinforced by the relevant decisions of the OPCW Executive Council and UNSC Res. 2118, the general endorsement by the Executive Council of the FFM, and its acceptance by Syria through an exchange of letters on the subject between the director-general and the government of the Syrian Arab Republic, dated 1 and 10 May 2014. See OPCW, *Summary Report of the Work of the OPCW Fact-Finding Mission in Syria Covering the Period from 3 to 31 May 2014*, S/1191/2014, 16 June 2014, available at: www.opcw.org/fileadmin/OPCW/Fact_Finding_Mission/s-1191-2014_e_.pdf. UNSC Res. 2118 required that OPCW personnel have "immediate and unfettered access to and the right to inspect, in discharging their functions, any and all sites, and … immediate and unfettered access to individuals that the OPCW has grounds to believe to be of importance for the purpose of its mandate."

Access of the FFM to the affected sites, as well as hospitals and other places of interest, was guaranteed through an exchange of letters between the OPCW director-general and the Syrian government, as well as UN Security Council Resolution 2118.[56]

Like the Secretary-General's Mechanism, the FFM does not have a mandate to attribute responsibility.[57] However, in its third report of December 2014, the FFM concluded with "a high degree of confidence that chlorine ha[d] been used as a weapon" in the villages of Talmenes, Al Tamanah and Kafr Zita.[58] It was the first time that there had been a confirmed use of chemical weapons on the territory of a State party to the CWC. The OPCW Executive Council responded by adopting a decision in February 2015 which condemned the use of chemical weapons as a violation of international law, expressed the conviction that those responsible should be held accountable, and supported the continuation of the work of the FFM, in particular the study of all available information relating to allegations of the use of chemical weapons (i.e. not just chlorine, but also allegations related to sarin and mustard gas) in Syria.[59] The UN Security Council subsequently adopted a resolution that endorsed the OPCW Executive Council's decision, demanded that those responsible be held accountable, and reiterated that it would use measures under Chapter VII of the UN Charter in the event of non-compliance.[60]

Despite these decisions, chemical weapons attacks continued to take place in the ensuing months, most notably in the Idlib Governorate.[61] This prompted further UN Security Council action, discussed below. From 1 December 2015 to 20 November 2016, the FFM recorded sixty-five potential incidents of the use of chemical weapons reported in open sources, and actively investigated six of these incidents.[62] In

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56 UNSC Res. 2118, para. 7.
57 EC-M-48/DEC.1, preambular para. 5; EC-M-50/DEC.1, preambular para. 6; UNSC Res. 2235, preambular para. 8.
58 OPCW, *Third Report of the OPCW Fact-Finding Mission in Syria*, S/1230/2014, 18 December 2014, available at: www.opcw.org/fileadmin/OPCW/Fact_Finding_Mission/s-1230-2014_e_.pdf.
59 OPCW, "Reports of the OPCW Fact-Finding Mission in Syria", Executive Council Decision EC-M-48/DEC.1, 4 February 2015, available at: www.opcw.org/fileadmin/OPCW/EC/M-48/ecm48dec01_e_.pdf. The OPCW Executive Council reiterated its support for the continuation of the FFM in its decision entitled "Further Reports of the OPCW Fact-Finding Mission in Syria", EC-M-50/DEC.1, 23 November 2016, available at: www.opcw.org/fileadmin/OPCW/EC/M-50/en/ecm50dec01_e_.pdf.
60 UNSC Res. 2209, 6 March 2015.
61 OPCW, *Report of the OPCW Fact-Finding Mission in Syria Regarding Alleged Incidents in the Idlib Governorate of the Syrian Arab Republic between 16 March and 20 May 2015*, S/1319/2015, 29 October 2015, available at: www.opcw.org/fileadmin/OPCW/Fact_Finding_Mission/s-1319-2015_e_.pdf.
62 OPCW, *Summary Update of the Activities Carried Out by the OPCW Fact-Finding Mission in Syria in 2016*, S/1445/2016, 27 December 2016, available at: www.opcw.org/fileadmin/OPCW/Fact_Finding_Mission/s-1445-2016_e_.pdf.

addition, the FFM investigated a number of alleged incidents reported by the Syrian government to the OPCW.[63]

The FFM investigated the widely reported large-scale use of chemical weapons in the Khan Shaykhun area of southern Idlib in April 2017 and concluded that "a large number of people, some of whom died, were exposed to sarin or a sarin-like substance".[64] This incident – which reportedly resulted in over eighty deaths and 300 wounded, including many children – prompted US president Donald Trump to authorize a military strike on 7 April on Shayrat Airbase, based on US intelligence which determined that it was the base for the aircraft which carried out the chemical attack.[65] This was the first time that the United States had taken unilateral action and the first intentional strike against the Syrian government.

Responsibility for the Khan Shaykhun attack was strenuously denied both by the Syrian government and by Russia; both countries suggested that the chemical gas may have been released through an air strike by Syrian aircraft on a warehouse containing ammunition and equipment belonging to rebels near Khan Shaykhun,[66] or was staged by anti-Assad forces to look like a chemical weapons attack.[67] In an interview on 13 April, President Assad said the attack was "100 per cent fabrication" by the United States "working hand-in-glove with the terrorists", intended to provide a pretext for the air strike on Shayrat Airbase.[68] He added: "You have a lot of fake videos now… We don't know whether those dead children were killed in Khan Sheikhun. Were they dead at all?"

Unlike with the Ghouta attack in August 2013, since the FFM investigated the Khan Shaykhun incident, the JIM had a mandate to determine responsibility for the attack, which, at the time of writing, is the second-largest known use of chemical

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63 With regard to an incident reported in the area of Al-Awamid in Aleppo on 2 August 2016, the FFM concluded that it could not confidently determine whether or not a specific chemical was used as a weapon in the incident. OPCW, *Report of the OPCW Fact-Finding Mission in Syria regarding the Incident of 2 August 2016 as Reported in the* Note Verbale *of the Syrian Arab Republic Number 69 Dated 16 August 2016*, S/1444/2016, 21 December 2016, available at: www.opcw.org/fileadmin/OPCW/Fact_Finding_Mission/s-1444-2016_e_.pdf. In another reported incident, the FFM confirmed that two female casualties were exposed to sulphur mustard in Um-Housh, Aleppo, on 16 September 2016, and that a recovered 217-mm mortar contained sulphur mustard. OPCW, *Report of the OPCW Fact-Finding Mission in Syria regarding the Incident of 16 September 2016 as Reported in the Note Verbale of the Syrian Arab Republic Number 113 Dated 29 November 2016*, S/1491/2017, 1 May 2017, available at: www.opcw.org/fileadmin/OPCW/Fact_Finding_Mission/s-1491-2017_e_.pdf.

64 OPCW, *Report of the OPCW Fact-Finding Mission in Syria Regarding an Alleged Incident in Khan Shaykhun, Syrian Arab Republic, April 2017*, S/1510/2017, 29 June 2017, available at: www.opcw.org/fileadmin/OPCW/Fact_Finding_Mission/s-1510-2017_e_.pdf.

65 "Syria War: US Launches Missile Strikes Following Chemical 'Attack'", *BBC News*, 7 April 2017, available at: www.bbc.co.uk/news/world-us-canada-39523654.

66 "'Chemical Weapons': The Pipedream Excuse Used in Syria by Two US Administrations", *Sputnik News*, 9 April 2017, available at: https://sputniknews.com/politics/201704091052469244-us-syria-chemical-weapons-war-pretext/.

67 Ben Kamisar, "Russia: Syrian Chemical Weapons Attack Could Be 'Staged'", *The Hill*, 14 April 2017, available at: http://thehill.com/policy/international/328808-russia-questions-whether-syria-chemical-attack-was-staged.

68 Josie Ensor, "'Were the Children Dead at All?' Assad Says Syria Chemical Attack '100 Per Cent Fabrication'", *The Telegraph*, 13 April 2017, available at: www.telegraph.co.uk/news/2017/04/13/chemical-weapons-experts-sent-turkey-investigate-alleged-syrian/?WT.mc_id=tmgoff_fb_tmg.

weapons in Syria after the 2013 Ghouta incident. The JIM's conclusion – that Assad's forces were responsible for the attack – is discussed further below. Syria and Russia put pressure on the FFM to visit the town as part of its investigation, but the security conditions (the town was not under Syrian government control), together with other available credible evidence, weighed against an on-site visit.[69] The decision not to carry out an on-site inspection was used by certain pro-Russian media elements to put the FFM's findings in doubt.[70] A draft decision of the OPCW Executive Council proposed by Russia and Iran in November 2017 suggested that the OPCW should withhold "findings that are not based on the results of on-site investigations".[71] For its part, the JIM carried out an on-site inspection of Shayrat Airbase.[72]

Another large-scale use of chemical weapons was widely reported to have taken place on 7 April 2018 in the town of Douma in the Eastern Ghouta region.[73] More than forty persons were reported to have died in the attack. The FFM immediately began to investigate the attack, and this time it conducted two site visits. At the time of writing, it had not yet concluded what chemical agent, if any, was used.[74] Since the JIM's mandate had ended by the time of the Douma attack, the FFM's findings will not form the basis of a JIM conclusion on responsibility.

The OPCW–UN Joint Investigative Mechanism

In the wake of the FFM's reports of 2014 determining that chemical weapons (chlorine) had been used repeatedly in Syria, as well as graphic reports in the news media and human rights groups depicting the aftermath of such attacks (including video footage shown during a meeting of the Security Council[75]), the Security Council on 7 August 2015 adopted Resolution 2235 establishing the JIM. The JIM had the mandate to identify "to the greatest extent feasible" individuals,

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69   OPCW, above note 64, para. 7.
70   "Khan Shaykhun: We Must Establish the Truth", *RT*, 27 July 2017, available at: www.rt.com/op-edge/397696-khan-shaykhun-syria-incident-investigation/.
71   Anthony Deutsch, "After U.N. Veto, Russia Moves against Chemical Weapons Watchdog", *Reuters*, 21 November 2017, available at: www.reuters.com/article/us-mideast-crisis-chemicalweapons/after-u-n-veto-russia-moves-against-chemical-weapons-watchdog-idUSKBN1DL1UF. See "Statement by H. E. Ambassador A. V. Shulgin Permanent Representative of the Russian Federation to the OPCW at the Fifty-Sixth Meeting of the Executive Council Under Agenda Item 4", EC-M-56/NAT.7, 9 November 2017 (Russian Statement), p. 1, stating that "when conducting investigations, inspectors must visit the sites of the incidents. Otherwise, all material evidence finds its way to the FFM via 'third parties'. And that means a lack of compliance with the basic chain-of-custody principle for safeguarding evidence."
72   "U.N. and OPCW Investigators to Visit Syria Air Base in Gas Attack Probe", *NRT*, 13 October 2017.
73   "Syria War: What We Know about Douma 'Chemical Attack'", *BBC News*, 16 April 2018, available at: www.bbc.com/news/world-middle-east-43697084.
74   OPCW, "Update by the Director-General on the Deployment of the OPCW Fact-Finding Mission to Douma, Syrian Arab Republic, to the Executive Council at its Fifty-Ninth Meeting", EC-M-59/DG.2, 18 April 2018.
75   "Syria War: 'Chlorine' Attack Video Moves UN to Tears", *BBC News*, 17 April 2015, available at: www.bbc.co.uk/news/world-middle-east-32346790.

entities, groups or governments perpetrating, organizing, sponsoring or otherwise involved in incidents involving the use of chemicals as weapons in Syria that have been the subject of findings by the FFM.[76] The Security Council reaffirmed that it would impose measures under Chapter VII of the UN Charter. The mandate of the JIM, initially created for just one year, was extended by the Security Council in Resolution 2319 until November 2017.[77] The new resolution required the JIM to place more emphasis on the use of chemical weapons by non-State actors by, *inter alia*, consulting with and briefing UN counterterrorism and non-proliferation bodies.[78]

In its reports of August and October 2016, the JIM found that Syrian armed forces used chemical weapons on 21 April 2014 at Talmenes (chlorine), on 16 March 2015 at Sarmin (chlorine) and on 16 March 2015 at Qmenas (chlorine).[79] It also found that Islamic State had used sulphur mustard in one incident on 21 August 2015, in the town of Marea.[80]

As noted above, the JIM concluded that the Syrian Air Force was responsible for the Khan Shaykhun sarin attack.[81] The JIM also found that Islamic State militants had carried out an attack using sulphur mustard in Um-Housh in Aleppo Province on 16 September 2016.[82] These findings came with high political stakes. The British foreign secretary, Boris Johnson, accused Russia of trying to cover up the use of sarin by the Syrian government, which he stated "can only undermine the global consensus against the use of chemical weapons".[83] The US ambassador to the UN, Nikki Haley, stated that the report further "confirms what we have long known to be true".[84] The day before the JIM report was released, the US secretary of State, Rex Tillerson, commented that the "reign of the Assad family" in Syria was coming to an end, and that the "only

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76 UNSC Res. 2235, 7 August 2015, para. 5.

77 UNSC Res. 2319, 17 November 2016.

78 The Security Council encourages the JIM to consult appropriate UN counterterrorism and non-proliferation bodies, in particular the 1540 Committee and the ISIL (Da'esh) and Al-Qaida Sanctions Committee, in order to exchange information on non-State actor perpetration, organization, sponsorship or other involvement in use of chemicals as weapons in Syria, and requests the JIM to brief these bodies on relevant results of its work. UNSC Res. 2319, paras 4, 9.

79 *Third Report of the Organization for the Prohibition of Chemical Weapons–United Nations Joint Investigative Mechanism*, UN Doc. S/2016/738, 21 August 2016 (JIM Third Report), paras 54, 56; *Fourth Report of the Organization for the Prohibition of Chemical Weapons–United Nations Joint Investigative Mechanism*, UN Doc. S/2016/888, 21 October 2016, para. 19.

80 JIM Third Report, above note 79, para. 58.

81 According to media reports, the JIM report states that the JIM "is confident that the Syrian Arab Republic is responsible for the release of sarin at Khan Shaykhun". "UN-OPCW Investigators 'Confident' Damascus Is to Blame for April Sarin Attack", *RT*, 28 October 2017, available at: www.rt.com/news/407901-opcw-jim-syria-chemical-attack/.

82 Rick Gladstone, "U.N. Panel Points Finger at Syria in Chemical Attack on Village", *The New York Times*, 26 October 2017, available at: www.nytimes.com/2017/10/26/world/middleeast/syria-chemical-khan-shekhoun.html.

83 "Russia Undermining Action against Chemical Weapons, Says UK, Citing Syria 'Cover Up'", *Reuters*, 27 October 2017, available at: https://uk.reuters.com/article/uk-mideast-crisis-syria-un-britain/russia-undermining-action-against-chemical-weapons-says-uk-citing-syria-cover-up-idUKKBN1CW1AN.

84 "UN-OPCW Investigators 'Confident' Damascus Is to Blame for April Sarin Attack", above note 81.

issue is how that can be brought about".[85] Russia, for its part, stated that it had "started a thorough study of this paper, which is of very complex technical nature. Such work should be conducted with the involvement of relevant specialists from various departments."[86]

On 24 October and 16 November 2017, Russia used its veto, for the ninth and tenth times respectively in relation to Syria, to block resolutions that would have extended the mandate of the JIM.[87] In explanation, the Russian ambassador stated that "[w]e need a robust, professional mechanism that will help to prevent the proliferation of the threat of chemical terrorism in the region and [the United States] need[s] a puppet-like structure to manipulate public opinion", while the US ambassador commented that "Russia has killed the Joint Investigative Mechanism".[88]

The end of the JIM meant that there was no international body – apart from the OPCW[89] – mandated to determine responsibility for the alleged chemical weapons attack that took place in Douma in April 2018. The United States, the United Kingdom, France and other governments quickly attributed the attack on the rebel-held town to the Syrian government, an accusation that was vehemently denied by Syria and its allies, leading to fractious exchanges at the UN Security Council and the OPCW. Each side voted against the other's proposals to establish a new body mandated to investigate chemical attacks in Syria.[90] The United States, the United Kingdom and France launched punitive air strikes on 13 April 2018 against three Syrian research, storage and military targets.[91]

It remains to be seen whether the Security Council will make good on its pledge to take action under Chapter VII of the UN Charter, should chemical weapons be used in Syria in violation of Resolution 2118.[92] This is undoubtedly a question of politics, not law. As noted by the UN Secretary-General in his remarks on the subject:

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85 "Tillerson: Assad Family Reign Coming to End, Only Issue Is How to Bring It About", *RT*, 26 October 2017, available at: www.rt.com/news/407855-tillerson-syria-assad-russia/.

86 "UN-OPCW Investigators 'Confident' Damascus Is to Blame for April Sarin Attack", above note 81.

87 Rodrigo Campos, "Russia Vetoes UN Resolution to Find Out Who Carried Out Chemical Weapons Attacks in Syria", *The Independent*, 24 October 2017, available at: www.independent.co.uk/news/world/europe/russia-syria-chemical-weapons-attack-sarin-un-resolution-china-moscow-assad-rebels-war-latest-a8017511.html; "Syria: Russia Blocks Extension of Chemical Attacks Probe", *BBC News*, 16 November 2016.

88 Michelle Nichols, "Russia Casts 10th U.N. Veto on Syria Action, Blocking Inquiry Renewal", *Reuters*, 16 November 2017, available at: https://ca.reuters.com/article/topNews/idCAKBN1DG31I-OCATP.

89 Pursuant to the CWC, the Conference of States Parties is required to "review compliance with the Convention" and to "[t]ake the necessary measures to ensure compliance with this Convention and to redress and remedy any situation which contravenes the provisions of the Convention, in accordance with Article XII": CWC, Art. VIII, paras 20, 21(k). See also Article VIII(35–36), requiring the Executive Council to consider concerns regarding compliance", and Article XII.

90 Julian Borger, "Syria Chemical Attack: US and Russia Fail to Reach UN Agreement as Tensions Rise", *The Guardian*, 20 April 2018, available at: www.theguardian.com/world/2018/apr/10/russia-hits-back-over-syria-chemical-attack-with-call-for-un-inquiry.

91 H. Cooper, T. Gibbons-Neff and B. Hubbard, above note 10.

92 UNSC Res. 2118, para. 21; UNSC Res. 2235, para. 15. Notably, this statement was not reaffirmed in UNSC Res. 2319 extending the duration of the JIM.

As previously determined by the Security Council, the use of chemical weapons anywhere constitutes a threat to international peace and security and a serious violation of international law. I hope that the Security Council will now be able to come together and use the tools available to it to take concrete steps to ensure that those who have used chemical weapons are held accountable, in order to deter and put an end to those inhumane acts. There can be no impunity for such abhorrent attacks.[93]

The measures available under Chapter VII include a referral of the situation of Syria to the International Criminal Court (ICC)[94] and the establishment of an *ad hoc* international or hybrid tribunal to investigate and prosecute persons allegedly responsible for chemical weapons crimes.[95] In the event that the Security Council should fail to reach agreement on these types of measures, it could signal its clear recognition that the use of chemical weapons in any circumstances, by anyone, is an international crime, opening up further possibilities for national prosecutions. At the time of writing, despite the reports of the JIM assigning responsibility to both State and non-State actors for chemical weapons attacks in six separate incidents, any such action by the Security Council remains stymied by the likely use of the veto by Russia.

OPCW Technical Secretariat additional inspections in Syria

With the Security Council gridlocked on Syria, the OPCW cautiously responded to the JIM's 2016 reports with the adoption by the Executive Council of a decision mandating further inspections by the Technical Secretariat at sites identified in the JIM's third and fourth reports as being involved in the weaponization, storage, delivery and use of toxic chemicals as weapons.[96] The decision further requires the Secretariat to "retain and promptly analyse any information or materials, including samples from the Syrian chemical weapons programme, that it considers relevant to existing or future allegations of chemical weapons possession or use".[97] In addition, the Secretariat is required to conduct inspections, including

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93 "Letter Dated 28 April 2017 from the Secretary-General Addressed to the President of the Security Council – Progress in the Elimination of the Syrian Chemical Weapons Programme", S/2017/373, 28 April 2017.

94 Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, 17 July 1998 (entered into force 1 July 2002) (Rome Statute), Art. 13(b). A draft resolution that would have had the Security Council refer the situation of Syria to the ICC, proposed by France in 2014, was vetoed by two permanent members of the Security Council: the Russian Federation and China. "Referral of Syria to International Criminal Court Fails as Negative Votes Prevent Security Council from Adopting Draft Resolution", UN Doc. SC/11407, 22 May 2014.

95 The Security Council has established two *ad hoc* international criminal tribunals using its Chapter VII powers, the ICTY and the International Criminal Tribunal for Rwanda. The UN has also been instrumental in the establishment of hybrid courts such as the Extraordinary Chambers in the Courts of Cambodia, the Special Court for Sierra Leone, the Special Tribunal for Lebanon, and the Special Panels in East Timor.

96 OPCW, "OPCW-United Nations Joint Investigative Mechanism Reports on Chemical Weapons Use in the Syrian Arab Republic", Executive Council Decision EC-83/DEC.5, 11 November 2016, para. 10.

97 *Ibid.*

sampling and analysis, twice a year at the Barzah and Jamrayah facilities of the Syrian Scientific Studies and Research Centre (SSRC).[98]

The Executive Council decision – a result of political compromise in an (unsuccessful) effort to find consensus – stops short of any findings or measures on accountability.[99] The additional inspections of sites identified by the JIM as being involved in the use of chemical weapons only relate to those incidents mentioned in the third and fourth reports (three incidents involving chlorine and one involving sulphur mustard). Since the FFM has already investigated the facts surrounding these incidents, the additional inspections would appear to be intended to inspect the point of origin of the weapons used. At the time of writing, the security situation has prevented any inspections at sites identified in the JIM's third and fourth reports from taking place.[100] A further Executive Council decision may be required to mandate the Secretariat to inspect sites connected to the other findings of the JIM, including in relation to the Khan Shaykhun incident, which involved sarin.

Inspections of the Barzah and Jamrayah SSRC facilities were conducted in February and March 2017 and February 2018.[101] The objective of these inspections was to determine whether activities at the facilities were consistent with the obligations of the Syrian Arab Republic under the CWC.[102] The SSRC has long been suspected by Western intelligence to have played a central role in the development of the Syrian chemical weapons programme. However, contrary to expectations, Syria did not declare the SSRC in its initial declaration or

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98   *Ibid.*, para. 11.
99   The Executive Council decision was adopted by vote – a rare exception from the practice of consensus decision-making at the OPCW. A previous version of the decision advanced by the United States had contained stronger language based on the OPCW's prerogative to take action: see "Statement By H. E. Ambassador Kenneth D. Ward, Permanent Representative of the United States of America to the OPCW at the Eighty-Third Session of the Executive Council", EC-83/NAT.5, 11 October 2016, available at: www.opcw.org/fileadmin/OPCW/EC/83/en/United_States_of_America_Statement_at_the_83nd_session_of_the_Executive_Council.pdf. Russia had counter-proposed a decision that would have required Syria to undertake a national investigation into the allegations. See "Russian Federation Statement by H. E. Ambassador A. V. Shulgin Permanent Representative of The Russian Federation to the OPCW at the Eighty-Third Session of the Executive Council (on the Results of the Vote on the draft Decision of the Executive Council on Syria)", EC-83/NAT.20, 11 November 2016 (Statement of Russian Ambassador), available at: https://www.opcw.org/fileadmin/OPCW/EC/83/en/ec83nat20_e_.pdf. Spain proposed the compromise decision, which was eventually adopted by a narrow majority.
100 OPCW, *Report by the Director-General: Status of Implementation of Executive Council Decision EC-83/DEC.5 (Dated 11 November 2016)*, EC-84/DG.25, 6 March 2017, para. 3, available at: www.opcw.org/fileadmin/OPCW/EC/84/en/ec84dg25_e_.pdf.
101 OPCW, *Report by the Director-General: First Inspections at the Barzah and Jamrayah Syrian Scientific Studies and Research Centre Facilities in the Syrian Arab Republic in Accordance with Decision EC-83/DEC.5 (Dated 11 November 2016)*, EC-85/DG.16, 2 June 2017 (First Inspections Report), para. 3, available at: www.opcw.org/fileadmin/OPCW/EC/85/en/ec85dg16_e_.pdf; OPCW, "Note by the Director-General: Progress in the Elimination of the Syrian Chemical Weapons Programme", EC-88/DG.1, 23 March 2018 (Director-General's Note), para. 11.
102 First Inspections Report, above note 101, para. 4; Director-General's Note, above note 101, para. 11.

subsequent submissions to the Secretariat.[103] During the inspections of the Barzah and Jamrayah SSRC facilities, the inspection team did not observe any activities inconsistent with Syria's obligations under the CWC.[104] It was reported that, on 7 September 2017, Israel[105] launched a military strike against another facility of the SSRC located at Masyaf, suspected by Western intelligence of producing chemical munitions, and a military camp nearby used to store short-range surface-to-surface missiles.[106] This facility is not covered by the Executive Council's decision. One of the targets of the air strikes conducted by the United States in concert with the United Kingdom and France following the alleged chemical weapons attack in Douma in April 2018 was the Barzah SSRC facility. The Pentagon stated that the site is now "nothing but rubble".[107]

The reference to "future allegations" in the Executive Council's decision suggests an ongoing need for the Secretariat to retain and analyze materials that it collects in the course of its activities, including those of the FFM and DAT. Should the results of the Secretariat's work indicate a violation of the CWC, this might provide a basis for further Executive Council action, as required by the CWC.[108] However, any such results would need to be clear and incontrovertible, in view of the heavily contested political context within which the Executive Council decision was adopted.

Most recently, the OPCW Conference of States Parties created a new mechanism within the Technical Secretariat that can identify "the perpetrators" of the use of chemical weapons in those instances in which the FFM determines or has determined that use or likely use occurred, and cases for which the JIM has not issued a report.[109] The mechanism is required to "preserve and provide information" to the mechanism created by the General Assembly in Resolution

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103 Article III(1)(d) of the CWC requires States Parties to "specify the precise location, nature and general scope of activities of any facility … that has been designed, constructed or used since 1 January 1946 primarily for development of chemical weapons … [including] laboratories". In addition, para. 1(a)(iii) of Executive Council Decision EC-M/33/DEC.1 requires Syria to submit information to the Secretariat on its chemical weapons research and development facilities.

104 First Inspections Report, above note 101, para. 10; Director-General's Note, above note 101, para. 11.

105 Israel is one of only four States not party to the CWC, although it is a signatory. The other non-party States are Egypt, North Korea and South Sudan.

106 "'Israeli Jets Hit Syria's Masyaf Chemical Site' – Reports", *BBC News*, 7 September 2017, available at: www.bbc.co.uk/news/world-middle-east-41184867.

107 Keith Collins, Joe Ward and Karen Yourish, "What We Know About the Three Sites Targeted in Syria", *The New York Times*, 14 April 2018, available at: https://www.nytimes.com/interactive/2018/04/14/world/middleeast/syria-airstrikes-chemical-weapons-sites.html. The other two air strikes were reportedly directed at the Him Shinshar chemical weapons storage site and bunker.

108 Article VIII(35) of the CWC requires the Executive Council to consider any concerns regarding compliance, and cases of non-compliance, and, as appropriate, inform States Parties and bring the issue or matter to the attention of the Conference of States Parties. The Executive Council is further required to make recommendations to the Conference regarding measures to redress the situation and to ensure compliance. In cases of particular gravity and urgency, the Executive Council must bring the issue or matter, including relevant information and conclusions, directly to the attention of the UN General Assembly and Security Council (Art. VIII(36)).

109 OPCW Conference of States Parties, "Decision – Addressing the Threat from Chemical Weapons Use", C-SS-4/DEC.3, 27 June 2018, para. 10.

71/248, discussed below, as well as "any relevant investigatory entities established under the auspices of the United Nations".[110]

The International, Impartial and Independent Mechanism

The UN General Assembly has also been active – although not unanimously – in regard to the issue of chemical weapons use in Syria. A number of resolutions from 2014 to 2016 repeatedly condemned the use of chemical weapons in Syria and called for those responsible to be held accountable.[111]

On 21 December 2016, the UN General Assembly established by a majority vote the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Those Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011 (IIIM). In the resolution, the General Assembly expressed its appreciation to the JIM and recalled the JIM's reports and the conclusions contained therein.[112] This suggests that one of the crimes in the mandate of the IIIM – which is tasked with collecting and analyzing evidence of violations of international humanitarian law and human rights law – is the use of chemical weapons.[113] This is confirmed in the report of the Secretary-General on the establishment of the IIIM, which notes that the three chemical weapons attacks on which the JIM made findings "may, depending on the circumstances, amount to war crimes and crimes against humanity".[114] The JIM is specifically mentioned as a source from which the IIIM will collect evidence and relevant information.[115]

An emphasis on chemical weapons crimes committed in Syria would seem to be reflected in the recent work of the Human Rights Council-appointed Independent International Commission of Inquiry on the Syrian Arab Republic (CoI), which is a primary source of information for the IIIM. In its report of 8 August 2017, the CoI focused in large part on the chemical weapons attack on Khan Shaykhun, and – basing its position on the FFM report as well as interviews with survivors, medical personnel and others – concluded that the Syrian government was responsible for

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110 *Ibid.*, para. 12.
111 UNGA Res. A/RES/69/67, 11 December 2014, preambular para. 8; UNGA Res. A/RES/70/41, 11 December 2015, preambular para. 6; UNGA Res. A/RES/71/69, 14 December 2016, op. para. 1; UNGA Res. A/RES/71/203, 19 December 2016, op. paras 3–9, 13, and preambular paras 8, 13 30. See also *ibid*, op. para. 42, encouraging the Security Council to take "appropriate action to ensure accountability, noting the important role that the International Criminal Court may play in this regard".
112 UNGA Res. A/RES/71/248, 21 December 2016, preambular para. 5.
113 *Ibid.*, op. para. 4.
114 *Report of the Secretary-General: Implementation of the Resolution Establishing the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011*, UN Doc. A/71/755, 19 January 2017, para. 6.
115 *Ibid.*, para. 12. See also Annex, "Terms of Reference of the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011", para. 5(a).

the attack.[116] The CoI also published a map of Syria with recorded chemical weapons attacks.[117] In its report, the CoI makes no mention of the JIM or the fact that the latter body is specifically tasked with determining responsibility for chemical weapons attacks confirmed by the FFM in Syria. This raises some questions about the risks of having overlapping mandates of independent UN bodies and the need for coordination. If the JIM had produced findings that were different to the CoI about responsibility for the Khan Shaykhun attack or other attacks, this may have also raised doubts about the credibility of both the CoI and the JIM. It may also have complicated the job of the IIIM and any courts seeking to rely on the evidence adduced by that body. As it turned out, both the CoI and the JIM concluded that the Syrian government was responsible for the Khan Shaykhun attack.

This was not the first time that the CoI had attributed responsibility for chemical weapons attacks in Syria. In its report of 13 August 2014, the CoI found that "[r]easonable grounds exist to believe that chemical agents, likely chlorine, were used on Kafr Zeita, Al-Tamana'a and Tal Minnis in eight incidents within a 10-day period in April [2014]", and that "[t]here are also reasonable grounds to believe that those agents were dropped in barrel bombs from government helicopters flying overhead".[118] The CoI had previously reported on 12 February 2014 that the chemical agents used in the Khan-al-Assal attack bore "the same unique hallmarks as those used in Al-Ghouta". The report also indicated that the perpetrators of the Ghouta attack "likely had access to the chemical weapons stockpile of the Syrian military as well as the expertise and equipment necessary to manipulate safely large amount of chemical agents". The CoI nonetheless found that its "evidentiary threshold" was not met in regard to identifying the perpetrators of the Ghouta chemical attacks.[119]

The International Partnership against Impunity

On 23 January 2018, the International Partnership against Impunity for the Use of Chemical Weapons, a proposal of France, was endorsed by 29 States. The Partnership is an intergovernmental initiative "to supplement the international mechanisms to combat the proliferation of chemical weapons" and deals "exclusively with the issue of impunity for the perpetrators of chemical attacks worldwide".[120]

116 See CoI, *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, UN Doc. A/HRC/36/55, 8 August 2017, para. 77, finding that "there are reasonable grounds to believe that Syrian forces attacked Khan Shaykhun with a sarin bomb at approximately 6.45 a.m. on 4 April, constituting the war crimes of using chemical weapons and indiscriminate attacks in a civilian inhabited area. The use of sarin by Syrian forces also violates the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction and Security Council resolution 2118 (2013)".

117 See the infographic available at: www.ohchr.org/SiteCollectionImages/Bodies/HRCouncil/IICISyria/COISyria_ChemicalWeapons.jpg.

118 CoI, *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, UN Doc. A/HRC/27/60, 13 August 2014, para. 118.

119 CoI, *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, UN Doc. A/HRC/25/65, 12 February 2014, paras 127–129.

120 International Partnership against Impunity for the Use of Chemical Weapons website, available at: www.noimpunitychemicalweapons.org/-en-.html.

Participating States have committed to collecting, compiling and facilitating the sharing of information in order to hold perpetrators to account, and to helping States in need to build the capacity to prosecute perpetrators.[121] While the Partnership is not solely concerned with Syria, its mandate appears to overlap somewhat with that of the IIIM, discussed above, in respect of chemical weapons attacks in Syria. If the Partnership works in concert with the IIIM, it may prove to be a useful platform for information-sharing, and may provide a boost to the IIIM's capacity to fulfil its mandate with respect to chemical weapons crimes in Syria.

Options for accountability

The UN and OPCW's investigations have confirmed that chemical weapons have been used during the armed conflict in Syria, yet accountability remains elusive, and responsibility contested. Every party in this armed conflict has accused others of using chemical weapons, and no party has admitted to using them. The JIM's findings on responsibility – which should have been authoritative – have not been unanimously accepted, with Damascus and Russia expressing criticism of its methodology and conclusions.[122] As a result, the Security Council, which created the JIM, has yet to take any action on the JIM's conclusions, despite repeatedly undertaking to do so in its own resolutions. A draft Security Council resolution that would have imposed sanctions on a number of Syrian military officials and entities for the incidents involving chlorine as found by the JIM was vetoed by Russia and China on 28 February 2017.[123] In explanation of the veto, Russian president Vladimir Putin stated: "As for sanctions against the Syrian leadership, I think the move is totally inappropriate now. It does not help, would not help the negotiation process. It would only hurt or undermine confidence during the process."[124] As noted above, on 24 October and 16 November 2017, Russia again used its veto to block resolutions that would have extended the mandate of the JIM.[125]

Meanwhile, an information war about who is responsible for using chemical weapons in Syria continues to play out in the international news media, sowing further doubt and confusion in the general public's minds about each claim and counter-claim on the issue.[126] One article in *Foreign Policy* recently

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121 "Launch of the International Partnership against Impunity for the Use of Chemical Weapons (23 January 2018)", France Diplomatie – Ministry of Foreign Affairs and International Development, available at: www.diplomatie.gouv.fr/en/french-foreign-policy/disarmament-and-non-proliferation/events/article/chemical-weapons-ending-impunity-23-01-18.

122 The Russian ambassador to the OPCW said of the JIM's reports: "These conclusions are not convincing, they are superficial, and they were produced by dubious methodology." See Statement of Russian Ambassador, above note 99. See also Russian Statement, above note 71.

123 Somini Sengupta, "Russia and U.S. Clash Over Syria in Security Council Vote", *The New York Times*, 28 February 2017, available at: www.nytimes.com/2017/02/28/world/middleeast/united-nations-security-council-syria-sanctions-russia-trump.html.

124 *Ibid.*

125 See above notes 86–88.

126 See, for example, Seymour M. Hersh, "Whose Sarin?", *London Review of Books*, Vol. 35, No. 24, 19 December 2013, available at: www.lrb.co.uk/v35/n24/seymour-m-hersh/whose-sarin.

described in detail and set out an organigram of those allegedly responsible in the Syrian government for the use of chemical weapons in Syria.[127] Another recent article in *RT* recalled Moscow's warning that the FFM report "had many flaws and could not be deemed conclusive" and underlined that the "JIM mission never actually visited the site of the alleged attack, … relied on evidence collected by the militant groups controlling the area …[and] also failed to properly inspect the Shayrat Airbase …[by not] collect[ing] ground samples there".[128] Countering the claim that the Syrian government is responsible for the chemical weapons attacks against anti-governmental forces and supporting civilian populations using chlorine stocks that were never declared or verified, or sarin from an undeclared stockpile, is an alternative narrative that chemical weapons were smuggled into Syria, possibly from Turkey, by forces seeking to depose Assad, in order to stage the use of a weapon that would be blamed on the Syrian government and would trigger international intervention in the war against Assad's forces.[129]

With conflicting information and significant political and legal ramifications emanating from this lack of an internationally accepted truth, what should be done? From an international law perspective, it is clear what the response to these allegations should be. The use of chemical weapons in armed conflict is a war crime, and war crimes must be investigated; those suspected to be responsible must be prosecuted and, if found guilty, punished.[130] The hyper-political context of Syria and the controversial issue of chemical weapons use, together with the groundwork already laid by the existing international mechanisms, strongly suggest that an independent international criminal tribunal would be the most appropriate forum for properly investigating and prosecuting the perpetrators.

The International Criminal Court

One option would be for the Security Council to refer the situation of Syria to the ICC, in exercise of its Chapter VII powers.[131] Under Article 13(b) of the Rome

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127 Gregory Koblentz, "Syria's Chemical Weapons Kill Chain", *Foreign Policy*, 7 April 2017, available at: http://foreignpolicy.com/2017/04/07/syrias-chemical-weapons-kill-chain-assad-sarin/.
128 "Russia Vetoes UNSC Resolution on Renewing Syria Chemical Weapons Probe", *RT*, 24 October 2017, available at: www.rt.com/news/407641-russia-veto-chemical-un-resolution/.
129 See, for example, S. M. Hersh, above note 126.
130 Rule 74 of the ICRC Customary International Law Study, above note 29, states that "[t]he use of chemical weapons is prohibited" both in international and non-international armed conflicts. Rule 156 states that "[s]erious violations of international humanitarian law constitute war crimes". Article 3(a) of the Statute of the ICTY provided jurisdiction over "employment of poisonous weapons or other weapons calculated to cause unnecessary suffering". "Employing poison or poisoned weapons" and "[e]mploying asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices" constitutes a war crime in international and non-international armed conflicts under the Rome Statute, Articles 8(2)(b)(xvii–xviii) and 8(2)(e)(xiii–xiv) respectively.
131 Syria is not a party to the Rome Statute. If Syria had been a party to the Statute, the ICC may have been able to exercise jurisdiction if Syria had been found to be unable or unwilling to prosecute the crimes under the Statute. See Rome Statute, Arts 12(2), 13, 17.

Statute of the ICC, the Security Council may refer to the Prosecutor a situation in which one or more of the crimes within the jurisdiction of the ICC appears to have been committed, acting under Chapter VII of the UN Charter. While in some ways the ICC would appear to be the obvious forum for adjudication of these war crimes, there are two main problems with this option. The first problem is political. A Security Council resolution referring the situation of Syria to the ICC would almost certainly be vetoed by Russia, and possibly China. This was already tested in 2014, when a draft resolution backed by thirteen members of the Security Council that would have referred the situation in Syria to the ICC was vetoed by Russia and China.[132]

The second problem is legal. The use of chemical weapons is not specifically listed as a crime under the jurisdiction of the ICC. As noted above, the ICC has jurisdiction over the war crime of using "poison or poisoned weapons" or "asphyxiating, poisonous or other gases" committed in international and non-international armed conflicts.[133] While at first glance it would appear that most uses of chemical weapons would fall within these categories, the drafting history of the Rome Statute suggests that chemical weapons were deliberately excluded from the jurisdiction of the ICC.[134] During the Rome Conference, the inclusion of chemical weapons within Article 8 was debated.[135] A prior draft of Article 8 included a specific reference to "[c]hemical weapons as defined in and prohibited by the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction". Despite the deliberate exclusion of any reference to chemical weapons as defined in the CWC, it has been persuasively argued that "poison or poisoned weapons" and "asphyxiating, poisonous or other gases, and … all analogous liquids materials or devices" – language which derives directly from the 1925 Geneva Protocol – functionally includes all chemical weapons.[136]

The draft Statute also contained a broad prohibition on weapons that cause unnecessary suffering and superfluous harm and that are inherently indiscriminate. The nuclear weapons possessor States objected to this clause, since it would also prohibit the use of nuclear weapons. In a compromise move to appease some non-nuclear States which viewed biological and chemical weapons as the "poor

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132 "Russia, China Block Security Council Referral of Syria to International Criminal Court", *UN News Centre*, 22 May 2014.
133 Rome Statute, Arts 8(2)(b)(xvii–xviii), 8(2)(e)(xiii–xiv).
134 See Dapo Akande, "Can the ICC Prosecute for Use of Chemical Weapons in Syria", *EJIL: Talk!*, 23 August 2013, available at: www.ejiltalk.org/can-the-icc-prosecute-for-use-of-chemical-weapons-in-syria/.
135 For a discussion, see Amal Alamuddin and Philippa Webb, "Expanding Jurisdiction over War Crimes under Article 8 of the ICC Statute", *Journal of International Criminal Justice*, Vol. 8, No. 5, 1 November 2010, pp. 1227–1228.
136 See, for example, Ralf Trapp, "The Investigation into the Islamic State and Chemical Weapons, *Just Security*, 27 October 215, available at: www.justsecurity.org/27116/investigation-islamic-state-chemical-weapons/; Alex Whiting, "The International Criminal Court, the Islamic State, and Chemical Weapons", *Just Security*, 4 November 2015, available at: www.justsecurity.org/27359/icc-islamic-state-chemical-weapons/. See, *contra*, Kevin Jon Heller, "The Rome Statute Does Not Criminalise Chemical and Biological Weapons", *Opinio Juris*, 5 November 2015, available at: http://opiniojuris.org/2015/11/05/why-the-rome-statute-does-not-criminalise-chemical-and-biological-weapons/.

man's" weapons of mass destruction, the clauses on biological and chemical weapons were removed, alongside the removal of the broad general provision capable of covering nuclear weapons.[137] Instead, a placeholder was inserted that might allow for these weapons to be later added separately. Article 8(2)(b)(xx) provides jurisdiction over the war crime of using "weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict". This provision will only become enforceable once an annex listing such weapons is agreed upon. No agreement has yet been reached. Even were such an annex listing chemical weapons agreed to, the provision only appears in the list of war crimes for international armed conflicts, and therefore might not be applicable to instances of the use of chemical weapons in Syria.

Should the ICC decide that the use of chemical weapons does contravene the prohibition against using "poison or poisoned weapons" or "asphyxiating, poisonous or other gases" in Article 8(2)(e)(xiii–xiv) of the Rome Statute, a further jurisdictional issue arises. These provisions were added to the list of war crimes committed in non-international armed conflict in the Rome Statute at the Kampala Review Conference in 2010, pursuant to Article 121(5) of the Statute. This provision states that the amendment will come into force for each State Party that ratifies it. For States Parties that have not ratified the amendment, "the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory". Syria is not a party to the Rome Statute, and it is not clear from the text of the Statute whether the Security Council's referral of a situation would cover crimes added by an Article 121(5) amendment. An argument can be made that since Article 121(5) seeks to provide jurisdiction based on State consent, and Security Council referrals are not based on State consent, Article 121(5) cannot logically apply to Security Council referrals.[138] This interpretation would best comport with the functionality of Security Council referrals in the Rome Statute. However, it remains to be seen how the ICC would determine this matter.[139]

The use of chemical weapons in Syria could theoretically be prosecuted as "violence to life and person" against persons taking no active part in hostilities or those members of the armed forces who are *hors de combat*, or "intentionally directing attacks against the civilian population as such, or against individual civilians not taking direct part in hostilities" in Article 8(2)(c)(i) or 8(2)(e)(i) of the Statute. But to establish guilt for these charges, it would have to be proven that the attacks were directed against civilians or those not participating directly in hostilities. Such elements do not capture the full criminality of using chemical weapons, which are banned even when directed against members of the armed forces.

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137 See William Schabas, "Chemical Weapons: Is It a Crime?", *PhD Studies in Human Rights*, 23 April 2013, available at: http://humanrightsdoctorate.blogspot.nl/2013/04/chemical-weapons-is-it-crime.html.
138 See D. Akande, above note 134.
139 *Ibid.*

An alternative to prosecuting the use of chemical weapons as a war crime under the Rome Statute would be to prosecute the use of chemical weapons as a crime against humanity under Article 7 of the Statute. This would be possible where such usage results in one of the proscribed acts, such as murder, extermination, persecution[140] or other inhumane acts of a similar character intentionally causing great suffering or serious injury to body or to mental or physical health, and the act is perpetrated as part of a widespread or systematic attack upon a civilian population. One instance of the use of chemical weapons that is perpetrated in the context of multiple acts of violence against a civilian population in furtherance of an organizational policy to commit the attack could amount to a crime against humanity.[141] A series of usages of chemical weapons might also amount to a crime against humanity. Given the repeated use of chemical weapons in Syria as confirmed by the reports of the FFM and the JIM, as well as reports of its use in combination with other attacks on the civilian population,[142] prosecuting chemical weapons use as a crime against humanity might be a viable prosecutorial option, provided all the elements of the crime could be proven.

The use of chemical weapons could also theoretically be prosecuted as a crime of genocide under Article 8 of the Rome Statute, where such an act constituted one of the proscribed acts, such as killing members of the targeted group or causing serious bodily harm, and was accompanied with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such. The use of chemical weapons has been prosecuted in other courts as a means of carrying out genocidal acts.[143] However, the facts surrounding the use of chemical weapons in Syria do not appear to evidence an intent on the side of any party to the conflict to destroy a national, ethnical, racial or religious group as such. Rather, the attacks would appear to be targeting political opponents, enemy combatants, or civilians living in rebel-held territory. It is doubtful, therefore, that genocide could be proven in relation to the use of chemical weapons in Syria.

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140 Persecution could be proved if the person or persons are targeted by chemical weapons by reason of the identity of a group or collectivity or targeted as the group or collectivity as such. ICC, *Elements of Crimes*, Art. 7(1)(h)(2).

141 Ban Ki-moon, as former Secretary-General of the UN, stated that the use of any chemical weapons in Syria would amount to a "crime against humanity" and there would be "serious consequences" for the perpetrators. "Use of Chemical Weapons in Syria Would Be 'Crime against Humanity' – Ban", *UN News Centre*, 23 August 2013. Similarly, President Obama stated that the use of chemical weapons would constitute a crime against humanity. White House Office of the Press Secretary, "Remarks by the President in Address to the Nation on Syria", 10 September 2013, available at: www.whitehouse. gov/the-press-office/2013/09/10/remarks-president-address-nation-syria.

142 See Human Rights Watch, "Syria: Coordinated Chemical Attacks on Aleppo", 13 February 2017, available at: www.hrw.org/news/2017/02/13/syria-coordinated-chemical-attacks-aleppo.

143 In the *Anfal* case, the Iraqi Special Tribunal found Ali Hassan al-Majid, the secretary-general of the Northern Bureau of the Ba'ath Party responsible for commanding all State agencies in the Kurdish-populated region of the country in 1987–88, guilty of committing genocide against the Kurds using chemical weapons. Iraqi High Tribunal, *Farhan Mutlak Al Jibouri, Sultan Hashim Ahmad Al Tae'e, Hussein Rashid Mohammed and Ali Hasan Al Majid v. the General Prosecutor*, Appeals Commission, 4 September 2007, available at: www.worldcourts.com/ist/eng/decisions/2007.09.04_Prosecutor_v_al_Majid_et_al.pdf.

Ad hoc international criminal tribunal

Another option would be for the Security Council to adopt a resolution under its Chapter VII powers creating an *ad hoc* international criminal tribunal for chemical weapons in Syria. Creating a tribunal dealing with chemical weapons use in Syria would be a logical next step for the Security Council following the JIM's reports, which make findings on accountability. The Security Council has repeatedly affirmed "that the use of chemical weapons constitutes a serious violation of international law", determined "that the use of chemical weapons anywhere constitutes a threat to international peace and security",[144] stressed "that those individuals responsible for any use of chemical weapons must be held accountable",[145] and threatened to use its Chapter VII powers in case of the use of chemical weapons.[146] Just as the Security Council did in the case of the former Yugoslavia and Rwanda, the Security Council could establish an *ad hoc* international criminal tribunal for Syria in exercise of its Chapter VII powers. Such a tribunal could be focused on determining accountability for the use of chemical weapons, building upon the previous relevant resolutions, particularly Resolution 2235 establishing the JIM.

The JIM's findings arguably provide at least reasonable grounds to believe who is responsible for the chemical weapons attacks in Syria, sufficient for the issuance of an arrest warrant. If the JIM's conclusions are flawed, as the Syrian and Russian governments have claimed, a properly constituted investigation and trial is arguably the best way to collect and assess the evidence, allowing arguments to be canvassed in a transparent, fair and legal process. Without such a judicial follow-up process, the JIM's reports will be the last official word on the matter – which is presumably not the best outcome for Damascus, Russia or other Syrian allies.

However, for the Security Council to pass such a resolution, there would still need to be unanimity from the five permanent members. Should Russia or China fail to be convinced of the need or advantage of establishing an *ad hoc* international criminal tribunal on chemical weapons crimes, such a resolution will never be adopted.

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144 UNSC Res. 2118, 27 September 2013.

145 *Ibid.*, preambular para. 8 and op. paras 1, 5, 15 (notably, the language changes slightly to "should be held accountable" in op. para. 15); UNSC Res. 2209, 6 March 2015, preambular para. 8. See also operative para. 6 of UNSC Res. 2209, in which the UN Security Council stressed again "that those individuals responsible for any use of chemicals as weapons, including chlorine or any other toxic chemical, must be held accountable". In addition, see UNSC Res. 2235, op. para. 4 (reiterating that "those individuals, entities, groups, or governments responsible for any use of chemicals as weapons, including chlorine or any other toxic chemical, must be held accountable") and UNSC Res. 2319, preambular para. 4 ("*reaffirming* that the use of chemical weapons constitutes a serious violation of international law and *reiterating* that those individuals, entities, groups or Governments responsible for any use of chemical weapons must be held accountable").

146 UNSC Res. 2118, op. para. 21; UNSC Res. 2209, op. para. 7; UNSC Res. 2235, para. 15.

National prosecutions

National courts can also carry out prosecutions, but national jurisdictions are dependent on having applicable and relevant legislation in place, as well as the ability and will to investigate a complex crime that may require extradition and judicial assistance agreements. An international criminal tribunal would likely be better placed in terms of resources and legitimacy required to establish the "truth" with regard to the use of chemical weapons in Syria. Nonetheless, national prosecutions may present a viable option if jurisdiction is founded.

There is near-universal adoption of the CWC,[147] Article VII of which requires criminalization of the use of chemical weapons at the national level. As of 31 July 2016, 145 States Parties (76%) had prohibitions in place, while 143 (74%) had specific penalties. 127 States Parties (66%) had provisions for extraterritorial jurisdiction (for crimes committed by nationals).[148] Moreover, the most comprehensive prohibition against using chemical weapons is found in Article I(1)(b) of the CWC. The CWC prohibits States Parties from using chemical weapons in all circumstances, as well as developing, producing, otherwise acquiring, stockpiling and retaining or transferring them (directly or indirectly) to anyone, or assisting, encouraging or inducing, in any way, anyone to engage in any of those activities.[149] This broad category of possible criminal activity covers a range of direct and indirect perpetrators. However, the CWC only requires national legislation to cover crimes that are committed on a State Party's territory or by its nationals. Therefore, in regard to the use of chemical weapons in Syria, this means that basically only Syria could investigate and prosecute these crimes (a point made by the Russian ambassador in his statement to the 83rd session of the OPCW Executive Council).[150] If foreign fighters were involved in the use of chemical weapons in Syria, the States of nationality of the offenders would have jurisdiction pursuant to Article VII of the CWC. However, it is likely that the majority of those involved in these crimes are Syrian nationals and only a small number of CWC States Parties have legislated to allow for the exercise of universal jurisdiction over chemical weapons crimes, regardless of the location of the offence or the nationality of the offender.[151]

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147 OPCW, *Note by the Technical Secretariat: Status of Participation In The Chemical Weapons Convention as at 17 October 2015*, S/1315/2015, 19 October 2015, available at: www.opcw.org/fileadmin/OPCW/S_series/2015/en/s-1315-2015_e_.pdf. There are only four non-party States: Egypt, Israel (a signatory), North Korea and South Sudan (which has indicated an intention to accede to the CWC).

148 OPCW, *Report by the Director-General: Overview of the Status of Implementation of Article VII of the Chemical Weapons Convention as at 31 July 2016*, EC-83/DG.11, C-21/DG.11, 11 September 2016, paras 19–21.

149 CWC, Art. I(1)(a–b).

150 See above note 122.

151 The following States have legislation that would appear to support a prosecution for chemical weapons crimes under universal jurisdiction: Sweden (Amended Criminal Code, Chap. 2(3)); Belarus (Penal Code of Belarus, Art. 6); Finland (Penal Code Extract 39/1889, Section 7); Greece (Law No. 2991, Section 5, Art. 4); Indonesia (Law No. 9 of 2008, Art. 3, Chap. I and Art. 28, Chap. V); Liberia (Chemical Weapons Act of 2008); Republic of Serbia (Criminal Code 85/2005, Arts 7–9).

A higher proportion of national courts may be able to exercise universal jurisdiction over chemical weapons crimes in Syria by prosecuting these acts as a war crime, crime against humanity or genocide. In particular, States that are party to the Rome Statute, and which have ratified the Kampala Amendment, may have legislation in place that would allow them to prosecute those suspected of using chemical weapons in Syria, regardless of their nationality.[152] But other States may also have applicable legislation that allows them to prosecute persons suspected of serious violations of international humanitarian law, such as attacks on civilians, indiscriminate attacks and murder.

National prosecutions are supported by the practice of the OPCW policy-making organs, the Conference of States Parties and the Executive Council, which have consistently "underlined that the use of chemical weapons by anyone in any circumstances would be reprehensible and completely contrary to the legal norms and standards of the international community".[153] In the Ieper Declaration adopted on 21 April 2015, the States party to the CWC unanimously determined that "any use of chemical weapons anywhere, at any time, by anyone, under any circumstances is unacceptable and would violate the legal norms and standards of the international community", and expressed the "strong conviction that those individuals responsible for the use of chemical weapons should be held accountable".[154] This pronouncement has been repeated in a number of operative decisions of the Executive Council.[155] Regional statements and national statements by States Parties at meetings of the policy-making organs have reiterated these sentiments.[156] Sixty-one States Parties made a joint statement at the 2016 Conference of States Parties that expressed the "strong conviction that every actor involved in these chemical weapons attacks must be held accountable".[157] In 2017,

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152 As of October 2017, thirty-four States Parties have ratified the document. See: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10-a&chapter=18&clang=_en. The amendment comes into force one year after the State Party has accepted the amendment.

153 *Report of the Third Review Conference of the CWC*, RC-3/3*, 19 April 2013.

154 Ieper Declaration, 21 April 2015, available at: https://ieper100.org/commemoration/ieper-declaration/.

155 See OPCW, "Destruction of Syrian Chemical Weapons", Executive Council Decision EC-M-33/DEC.1, 27 September 2013, preambular para. 1; OPCW, "Reports of the OPCW Fact-Finding Mission in Syria", Executive Council Decision EC-M-48/DEC.1, 4 February 2015, preambular para. 1, op. paras 2–4; OPCW, "Further Reports of the OPCW Fact-Finding Mission in Syria", Executive Council Decision EC-M-50/DEC.1, 23 November 2015, preambular para. 1, op. paras 3–5; OPCW, "OPCW-United Nations Joint Investigative Mechanism Reports on Chemical Weapons Use in the Syrian Arab Republic", Executive Council Decision EC-83/DEC.5, 11 November 2016, paras 3–4; OPCW, "Decision Addressing the Threat Posed by the Use of Chemical Weapons by Non-State Actors", Executive Council Decision EC-86/DEC.9, 13 October 2017, preambular para. 3, op. paras 3, 5–8.

156 See, for example, "Statement on Behalf of the European Union: Statement Delivered by Mr Jacek Bylica, Special Envoy for Non-Proliferation and Disarmament", C-21/NAT.5, 28 November 2016: "The EU reiterates its strong belief that the use of chemical weapons by anyone, including non-State actors, anywhere and under any circumstances is abhorrent and must be rigorously condemned and that those responsible for such acts must be held accountable. The use of chemical weapons constitutes a violation of international law, a war crime, and a crime against humanity." Similar statements were made by Finland, Germany, India, Ireland, Singapore and Switzerland.

157 C-21/NAT.17, 30 November 2016.

one State Party unequivocally declared that the "use of chemical weapons by anyone, anywhere at any time constitutes an international crime".[158]

There have been a number of cases at the national level prosecuting non-State actors for the use or possession of chemical weapons. Many of these cases relied on the implementing legislation of the CWC, often in conjunction with terrorism charges.[159] The use of chemical weapons has also been prosecuted at the national level as a war crime, genocide or crime against humanity. In the *Zyklon B* case before the British Military Court at Hamburg, the owner and second-in-command of the firm which arranged the supply of the poison gas to the SS were convicted of the war crime of supplying "poison gas used for the extermination of allied nationals interned in concentration camps well knowing that the said gas was to be so used".[160] 4.5 million persons were exterminated through the use of Zyklon B in Auschwitz/Birkenau alone.[161] The case is instructive as to how the use of a chemical weapon as a tool for the "wholesale extermination of human beings"[162] can be prosecuted as an international crime.[163]

The use of chemical and biological weapons by Japan during World War II, through Units 731 and 100 in China,[164] was prosecuted domestically in the Soviet

158 Statement by Sweden, 54th meeting of the Executive Council of the OPCW, 13 April 2017. See also Statement by the Permanent Representative to the OPCW of Switzerland at the Conference of States Parties, 2016: "It is of utmost importance that the perpetrators of these grave violations of international law, which can constitute war crimes and crimes against humanity, be held accountable."

159 See, for example, United Kingdom, *R v. Davison* (Unreported, Newcastle Crown Court, 14 May 2010) (defendant linked to a white supremacist group produced a quantity of ricin sufficient to kill nine persons in violation of Section 2(1)(b) of the Chemical Weapons Act 1996 (United Kingdom)); United States, *United States v. Levenderis*, 806 F.3d 390 (2015) (defendant produced a quantity of ricin – although there was no link to a terrorist group, the Court found that the high lethality of the chemical weapon justified the prosecution under the Chemical Weapons Implementation Act 1998 (United States)); United States, *Bond v. United States*, 572 US (2014); United States, *United States v. Fries aka Burns*, 781 F.3d 1137 (2015) (concerning the production and use of a chemical weapon in violation of the Chemical Weapons Implementation Act 1998 (United States) related to the home-made production and use of a chlorine chemical device which produced a huge cloud that required the evacuation of the neighbourhood); United States, *United States v. Ghane*, 673 F.3d 771 (8th Cir.2012) (defendant possessed enough potassium cyanide to kill 450 people); United States, *United States v. Crocker*, 260 F. App'x 794 (6th Cir.2008) (defendant attempted to acquire VX nerve gas and chlorine gas as part of a plot to attack a federal courthouse); United States, *United States v. Krar*, 134 F. App'x 662 (5th Cir.2005) (*per curiam*) (defendant possessed sodium cyanide); United Kingdom, *United Kingdom v. Ali* (Unreported, Central Criminal Court (Old Bailey), 18 September 2015 (defendant attempted to acquire ricin on the "dark web" in contravention of the Chemical Weapons Act 1996 (United Kingdom)).

160 British Military Court, *The Zyklon B Case*, Case No. 9, Hamburg, 8 March 1946, in *Law Reports of Trials of War Criminals*, UN War Crimes Commission, Vol. 1, 1947, p. 94.

161 Jonathan B. Tucker, *War of Nerves: Chemical Warfare from World War I to Al-Qaeda*, Pantheon Books, New York, 2006.

162 British Military Court, *Zyklon B*, above note 160.

163 The acts were prosecuted as war crimes since genocide was not yet codified as an international crime at the time of these trials (the Genocide Convention was adopted in 1948). In addition, by reason of the application of the laws of war at the time by the military tribunals, the case was focused on the murder of interned Allied civilians, rather than on the murder of the Jews, despite the fact that the Jews were the primary victims of the gas.

164 Sheldon H. Harris, *Factories of Death: Japanese Biological Warfare, 1932–45 and the American Cover-Up*, Routledge, Abingdon, 1994; Shirley Tourinsky (ed.), *Medical Aspects of Chemical and Biological Warfare*, Office of the Surgeon General, US Department of the Army, 2008, p. 418.

Union as a crime against humanity.[165] The use of chemical weapons and of biological weapons were characterized in the submissions of different parties during the trial as "deeds that in every civilized country are regarded as heinous crimes".[166] Individuals involved in Units 731 and 100 were also prosecuted by the Chinese authorities, but there are no reliable records of those trials. In *Van Anraat*, a Dutch chemical dealer who sold the component chemicals that were used to make mustard gas to Saddam Hussein's government was tried in the Netherlands for complicity in genocide and war crimes. Ultimately, he was acquitted of the genocide charge but convicted on the war crimes charge.[167] The conviction was upheld by the Court of Appeals,[168] the Supreme Court of the Netherlands[169] and the European Court of Human Rights (ECtHR).[170]

In the *Anfal* case, the Iraqi Special Tribunal found Ali Hassan al-Majid, the secretary-general of the Northern Bureau of the Ba'ath Party responsible for commanding all State agencies in the Kurdish-populated region of the country in 1987–88, guilty of committing genocide against the Kurds using chemical weapons. The Iraqi High Tribunal found that there was a "clear plan" to target the Kurdish population with sarin and mustard gas by al-Majid, who was responsible for the implementation of a policy to exterminate the Kurdish population, in a joint criminal enterprise with Saddam Hussein.[171] Evidence in the case included a number of audio tapes recording meetings of al-Majid with senior Ba'ath officials in 1988 and 1989, in which al-Majid stated: "I will kill them all with chemical weapons! Who is going to say anything? The international community? Fuck them! The international community and those who listen to them."[172]

Measures available under the Chemical Weapons Convention

A further possible option for establishing an international criminal tribunal for chemical weapons use in Syria emanates from the OPCW. Unlike the Security

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165 Russell Working, "The Trial of Unit 731", *Japan Times*, 5 June 2001, available at: https://tinyurl.com/ycmefuem; Philip R. Piccigallo, *The Japanese on Trial: Allied War Crimes Operations in the East, 1945–1951*, University of Texas Press, Austin, TX, 1979; Otozo Yamada, *Materials on the Trial of Former Servicemen of the Japanese Army Charged with Manufacturing and Employing Bacteriological Weapons*, Foreign Languages Publishing House, Moscow, 1950.

166 O. Yamada, above note 165, p. 490.

167 District Court of The Hague, *Public Prosecutor v. Frans Cornelius van Anraat*, Case No. 09/751003-04, 23 December 2005, available at: www.haguejusticeportal.net/index.php?id=4497.

168 Court of Appeal of The Hague, *Public Prosecutor v. Frans Cornelis van Anraat*, Case No. 2200050906-2, Appeal Judgment, 9 May 2007.

169 Supreme Court of the Netherlands, *Public Prosecutor v. Frans Cornelis van Anraat*, Case No. 07/10742, Judgment, 30 June 2009.

170 ECtHR, *Frans Cornelis van Anraat v. The Netherlands*, Appl. No. 65389/09, 6 July 2010.

171 Iraqi High Tribunal, *Al Majid et al.*, above note 143.

172 Iraqi High Tribunal, *Special Verdict Pertaining to Case No 1/C Second/2006: Al Anfal*, Second Criminal Court, Ref. No. 1/C Second/2006, 24 June 2007, p. 294, available at: www.worldcourts.com/ist/eng/decisions/2007.06.24_Prosecutor_v_al_Majid_et_al.pdf. See also Human Rights Watch, "Chemical Ali in His Own Words: The Ali Hassan Al-Majid Tapes", available at: http://pantheon.hrw.org/legacy/campaigns/iraq/chemicalali.htm (audio file available at: http://pantheon.hrw.org/legacy/campaigns/iraq/chemali.mp3).

Council, the policy-making organs of the OPCW are not subject to a veto power of any particular members. While decisions are in practice usually taken by consensus, they may be taken by a majority vote.[173] Hence, in response to the JIM's reports in 2016, the OPCW Executive Council adopted a decision by majority vote, which, *inter alia*, instructed the Technical Secretariat to inspect the sites identified by the JIM as having been involved in the chemical weapons attacks.[174] Similarly, in a Special Session in 2018, the Conference of States Parties adopted a decision by majority vote which established the so-called "attribution mechanism" that may identify the perpetrators of the use of chemical weapons.[175]

The CWC requires the Conference of States Parties to take the "necessary measures" to redress and remedy "any situation which contravenes the provisions of the Convention", and sets out certain options of redress, including the possibility of recommending collective measures to States Parties.[176] Given that the appropriate response to the use of war crimes is prosecution and punishment of offenders, a case may be made that a "measure" which is "necessary" to redress the use of chemical weapons in Syria is the setting up of an *ad hoc* international or hybrid tribunal to try the alleged perpetrators.[177] This may be particularly necessary where other national or international fora of accountability are unable or unwilling to perform these judicial functions. It could also allow the OPCW States Parties to institute a judicial procedure that may determine individual responsibility without having to first determine State responsibility based on the JIM's reports, which have not been accepted by all States Parties. This would not preclude the OPCW policy-making organs from later making determinations as to State responsibility and adopting necessary measures under Article XII in that context. Insofar as accountability measures are concerned, it could also be considered necessary for the OPCW policy-making organs to recognize or

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173 Rule 36 of the OPCW Executive Council Rules of Procedure provides that "decisions of the Council on matters of substance shall be made by a two-thirds majority of all its members". Rule 69 of the OPCW Rules of Procedure of the Conference of States Parties provides that "[d]ecisions on matters of substance should be taken as far as possible by consensus. If consensus is not attainable when an issue comes up for decision, the presiding officer shall defer any vote for 24 hours and during this period of deferment shall make every effort to facilitate achievement of consensus, and shall report to the Conference before the end of this period. If consensus is not possible at the end of 24 hours, the Conference shall take the decision by a two-thirds majority of the Members present and voting unless specified otherwise in the Convention."

174 OPCW, "OPCW-United Nations Joint Investigative Mechanism Reports on Chemical Weapons Use in the Syrian Arab Republic", Executive Council Decision EC-83/DEC.5, 11 November 2016, para. 10. The decision was adopted with twenty-eight States Parties in favour, four against, and nine abstentions. OPCW, *Report of the Eighty-Third Session of the Executive Council*, EC-83/5, 11 November 2016, para. 6.27.

175 OPCW Conference of States Parties, above note 109, para. 10. The decision was adopted with eighty-four States Parties in favour and twenty-four against. OPCW, *Report of the Fourth Special Session of the Conference of States Parties*, C-SS-4/3, 27 June 2018, para. 3.15.

176 CWC, Arts VIII(21)(k), XII.

177 Article VIII(f) of the CWC provides that the Conference may establish "such subsidiary organs as it finds necessary for the exercise of its functions in accordance with the Convention". Other international organizations have established *ad hoc* international criminal courts; for example, the Extraordinary African Chambers were established under an agreement between the African Union and Senegal to try international crimes committed in Chad from 7 June 1982 to 1 December 1990.

establish a duty of States Parties to investigate, prosecute and punish offenders regardless of the nationality of the offender or place where the crime took place, as a means to redress the situation.

The 2018 decision of the Conference of States Parties establishing the attribution mechanism clearly demonstrates the potential of the OPCW in this regard. The decision cites as its legal basis the general mandate of the Conference of States Parties to take decisions on matters raised by States Parties or brought to its attention by the Executive Council, and to review compliance with the CWC.[178] The only reference to Article XII in the decision is in respect of the obligation to bring cases of particular gravity to the attention of the UN General Assembly and Security Council.[179] Nonetheless, the work of the mechanism could lead to criminal prosecutions. The mechanism is required to "preserve and provide information" to the IIIM, as well as "any relevant investigatory entities established under the auspices of the United Nations".[180] The Technical Secretariat has concluded an arrangement with the IIIM for this purpose.[181]

Where the Security Council is blocked from taking action, the role of the OPCW policy-making organs in establishing measures of redress for violations of the CWC takes on renewed significance. As guardians of the CWC, with its objective of eliminating the possibility of the use of chemical weapons, the OPCW policy-making organs are singularly well placed to contribute to setting up an accountability mechanism for chemical weapons use in Syria. If such a mechanism were part of a comprehensive peace plan or negotiation with international backing, this would undoubtedly solidify the support for such a decision by the OPCW policy-making organs.

Conclusion – the potential to move forward

The truth is that international humanitarian law sets all kinds of red lines, and a great number of them have been crossed in the war in Syria. But the difference with crossing the red line of using chemical weapons is the universal condemnation by the international community and the total absence of legal defences. No party to the armed conflict in Syria has admitted to using chemical weapons or has defended their use as justified. There are good reasons for that. The prohibition against using chemical weapons is absolute. There is no justification, no military necessity that can be raised in defence of their use. Chemical weapons are banned because their use violates the fundamental rule

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178 OPCW Conference of States Parties, above note 109, preambular para. 6 (CWC, Art. VIII(19)). The decision also refers to the functions of the Technical Secretariat to carry out verification measures (CWC, Art. VIII(37)) and to inform the Executive Council of doubts about compliance with the Convention that have come to its notice in the performance of verification activities (CWC, Art. VIII(40)).
179 OPCW Conference of States Parties, above note 109, preambular para. 10 (CWC, Art. XII(4)).
180 OPCW Conference of States Parties, above note 109, para. 12.
181 OPCW Executive Council, "Opening Statement by the Director-General to the Executive Council at its Eighty-Ninth Session", EC-89/DG.31, 9 October 2018, para. 6.

against means and methods of war that cause unnecessary suffering and superfluous injury.[182] This rule refers to the effect of a weapon on combatants. The use of chemical weapons also breaches the rule prohibiting indiscriminate attacks and using indiscriminate weapons.[183] Therefore, the use of chemical weapons is unlawful whether the targets or victims are civilians or members of the armed forces or armed groups. The prohibition applies whether there is one victim or one hundred victims. Therefore, once responsibility for the use of chemical weapons is established beyond doubt, there ends the legal dispute.

This does not mean that the war crime of using a chemical weapon is any more grave or deserving of condemnation than other war crimes. But in the context of the armed conflict in Syria, the world's unified stance on chemical weapons crimes may present an opportunity for progress on accountability within the complex context of a potential transition to peace. Despite the fact that the "red line" of chemical weapons use has been crossed multiple times during the war, the prohibition on using chemical weapons remains intact. Syria has maintained its position that "the military will never use such weapons against its own people or even terrorists".[184] Syrian allies the Russian Federation and Iran (itself a victim of chemical weapons use during the Iran–Iraq War and usually a staunch advocate for the victims of chemical weapons) have strenuously defended Syria against such accusations. Even Islamic State – which has openly admitted to committing atrocities such as sexual slavery, murder and cruel treatment – has not claimed any use of chemical weapons, despite the JIM's findings that it used sulphur mustard on two occasions.[185] Unlike the cases of other banned weapons under international law, the use of chemical weapons in Syria has been the subject of two specific accountability measures established by the international

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182 See the Brussels Declaration of 1874 (prohibiting the use of poison or poisoned weapons, and the employment of arms, projectiles and material causing unnecessary suffering); the Hague Declaration Concerning Asphyxiating Gases of 1899 (prohibiting the use of projectiles the sole purpose of which is the diffusion of asphyxiating or deleterious gases); the Hague Regulation of 1907 (prohibiting the use of arms, projectiles or material calculated to cause unnecessary suffering); the 1925 Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare; and the Preamble and Article I of the CWC. The ICRC Customary Law Study notes that the prohibition on the use of chemical weapons in the 1925 Protocol was originally motivated by the rule prohibiting means and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering. See ICRC Customary Law Study, above note 29, Rule 70.

183 Ibid., Rules 12, 71.

184 "Syria Denies & Condemns Use of Chemical Weapons – Foreign Minister", RT, 7 April 2017, available at: www.rt.com/news/383677-syria-bomb-checmical-depot-terrorists/.

185 On the use of chemical weapons by Islamic State, see Eric Schmitt, "ISIS Used Chemical Arms at Least 52 Times in Syria and Iraq, Report Says", The New York Times, 21 November 2016, available at: www.nytimes.com/2016/11/21/world/middleeast/isis-chemical-weapons-syria-iraq-mosul.html. While not directly addressed by Islamic law which predates the creation of chemical weapons, a good case may be made that the use of chemical weapons would also be prohibited by those tenets, such as the non-use of poison, the prohibition on polluting the environment, the principle of separation and the prohibition against causing unnecessary suffering. See Katariina Simonen, "Chemical Weapons, Ayatollah Khomeini and Islamic Law", Global Security: Health, Science and Policy, Vol. 2, No. 1, 2017. Khalil al-Maliki's book on jihad states that combatants are forbidden to employ weapons that cause unnecessary injury to the enemy, except under dire circumstances; hence, the use of poisonous spears is forbidden, since it inflicts unnecessary pain. Sayyid Mustafa Muhaqqiq Dāmād et al., Islamic Views on Human Rights, Center for Cultural-International Studies, Tehran, 2003, p. 266.

community: the Secretary-General's Mechanism and the JIM. This practice is remarkable in view of the typically high political sensitivity that weapons-use regulations carry in the international arena. It attests to the singularly unified stance of the international community on the prohibition of chemical weapons in international law and the need for accountability.

With the issuance of the JIM's reports identifying the perpetrators of chemical weapons attacks in Syria, the international community stands at a crossroads in terms of whether States are willing to take the necessary measures to deliver on accountability. It has been aptly noted by commentators that "[a]n *ad hoc* tribunal dedicated to Syria offers the most promising avenue for war crimes accountability, if only the political will existed for its creation".[186] As demonstrated by the international community's responses to the use of chemical weapons in Syria, the key difference between chemical weapons crimes and other international crimes committed during the war in Syria is that there is political will to establish responsibility for chemical weapons crimes. This political will is evident in the US–Russia Framework for Elimination of Syrian Chemical Weapons, the decisions of the OPCW Executive Council on the destruction of Syrian chemical weapons, the endorsement of the FFM, the decision of the Conference of States Parties to establish an attribution mechanism, the resolutions of the UN Security Council and General Assembly setting up accountability mechanisms and demanding accountability for chemical weapons crimes, the sanctions imposed by certain governments on those considered to be involved, the US unilateral military strike on Shayrat Airbase, and the joint air strikes of the United States, UK and France following the Douma incident.

This political will could be harnessed to create an *ad hoc* tribunal to try the alleged perpetrators of these crimes. The inclusion or endorsement of international tribunals in peace agreements can play an important role in the credibility of the peace process. The 1995 General Framework Agreement for Peace in Bosnia and Herzegovina contained a reference (in an annex) to the International Criminal Tribunal for the former Yugoslavia and established the parties' duty to cooperate with it. The 1945 London Agreement[187] established the International Military Tribunal at Nuremberg. An *ad hoc* tribunal may serve as a tool to facilitate the transition to peace. In this area of startlingly contested versions of events, an international trial may be the most accepted and legitimate means to establish the truth about the use of chemical weapons in Syria. Given the central position that chemical weapons use has been accorded by the international community in this war, the truth at least about this aspect of the war can provide an accepted basis on which to begin to build a lasting transition to peace. Moreover, incorporating an *ad hoc* tribunal for chemical weapons crimes into the peace negotiation may provide a crucial means of encouraging international acceptance of the process. A peace agreement on Syria that is entirely devoid of accountability mechanisms is

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186 B. Van Schaak, above note 2, p. 339.
187 Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, London, 8 August 1945.

likely to founder and fail to gain the broad regional or international support that would allow it to succeed. Moreover, an *ad hoc* tribunal would provide an added incentive to end the use of chemical weapons in Syria. The fact that chemical weapons have continued to be used even after the creation of the JIM and the IIIM suggests that these mechanisms – which, unlike a court, do not make findings beyond a reasonable doubt and cannot impose punishment – fail to serve as a deterrent to perpetrators. The possibility of actual criminal proceedings is likely to be more effective. Establishing an *ad hoc* tribunal may be a more politically viable option than a Security Council referral to the ICC, and can be crafted in a manner that achieves the objectives of the sponsoring States while remaining independent and impartial. Unlike national trials, an *ad hoc* tribunal would function through State cooperation and would be based on international law rather than extradition agreements and national law, which may prove difficult to apply to crimes committed in Syria. Most importantly, an *ad hoc* tribunal could be built into the peace agreement, signalling a commitment to justice by the involved parties.

A mechanism to try the alleged perpetrators of chemical weapons crimes would be in every major player's interest. It would provide a needed boost to the Security Council's credibility or to that of the OPCW, if created by that body. A tribunal would allow the evidence about chemical weapons use and responsibility to be presented and debated in a fair and legal process. A tribunal is the best opportunity for Syrian officials accused of involvement in these crimes and subject to sanctions by the United States and European Union to clear their names, or for responsibility to be appropriately apportioned in a fair, legal and public process.

The case made here for an *ad hoc* tribunal on chemical weapons crimes does not mean to suggest that there should be impunity for all other international crimes committed during the Syrian crisis – at least not in the long run. But injecting a modicum of justice and the rule of law, on which all sides can agree, into a negotiated peace deal may allow some progress to be made in an otherwise bleak legal and political outlook.

Islamic law and international humanitarian law: An introduction to the main principles

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Abstract

This article gives an overview of the principles regulating the use of force under the Islamic law of war in the four Sunni schools of Islamic law. By way of introducing the topic, it briefly discusses the origins, sources and characteristics of the Islamic law of war. The discussion reveals the degree of compatibility between these Islamic principles and the modern principles of international humanitarian law, and offers insights into how these Islamic principles can help in limiting the devastation and suffering caused by contemporary armed conflicts in Muslim contexts, particularly those conflicts in which Islamic law is invoked as the source of reference.

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Introduction

The effects of armed conflicts such as those currently raging in Syria and Yemen have been shown to spread beyond the Middle East region and reach over to the West. Moreover, their impact can in fact be greater on countries outside the region where the conflict is taking place than on those within it. What this shows, first of all, is that the impact of armed conflicts, including non-international armed conflicts (NIACs), is no longer local or regional, but global. Moreover, NIACs, especially those in the Middle East, can signal the outbreak of war on a regional or global scale, or at the very least cause severe damage to the world economy. In that regard, a reported 80% of the humanitarian crises currently afflicting mankind are attributable to armed conflicts.[1] On that basis, greater efforts are needed not only to enforce the provisions of international humanitarian law (IHL) but also to do everything possible to prevent the occurrence of armed conflicts in the first place, and then, once conflicts have ended, to take the necessary measures to ensure that post-conflict justice is carried out in order to prevent conflicts from re-igniting.

Respect for IHL in Muslim countries is one of the most pressing issues faced by our world today. This is because the majority of conflicts take place in Muslim countries, for reasons including historical and colonial factors and a deficit of good governance, which lead, among other consequences, to a lack of democracy and respect for human rights. It is widely acknowledged that respect for IHL is important because of its capacity to reduce the scale of destruction or to introduce a degree of humanity into situations of armed conflict, where acts of brutality, barbarity and destruction occur.

In addition, the vast majority of ongoing conflicts fall into the category of NIACs. Furthermore, in many of the conflicts that we are currently witnessing, parties to the conflict, usually non-State armed groups, justify their acts of hostility by referring to certain rules of the Islamic law of war developed by the Muslim jurists of the second and third centuries of the Islamic calendar (roughly equivalent to the eighth and ninth centuries AD) and certain opinions of Qur'anic exegetes and Hadith scholars. This is why it is especially important – as this article attempts – to study the primary sources on the Islamic law of war, because of the significant and tangible role it plays in influencing the behaviour of the warring parties who use its provisions to justify their acts of hostility. From an academic perspective, it can also be an interesting topic in its own right to

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1   United Nations, "Secretary-General's Opening Remarks at World Humanitarian Summit", 23 May 2016, available at: www.un.org/sg/en/content/sg/statement/2016-05-23/secretary-general%E2%80%99s-opening-remarks-world-humanitarian-summit (all internet references were accessed in May 2018) .

research how the Islamic legal system can help to limit the devastation caused by armed conflicts and reduce the plight of victims, by comparing its provisions with those of contemporary IHL. On this topic, Loukas Petridis, head of the International Committee of the Red Cross (ICRC) delegation in Niger, said on 25 November 2015:

> Given the increase in armed conflicts and violence, dialogue on these issues is more necessary than ever. We need to make more people aware of international humanitarian law and how it ties in with other standards, such as Islamic law and jurisprudence. This is about making sure that people have the widest possible protection.[2]

Moreover, in a meeting between Dr Ahmed al-Tayyeb (the Grand Imam of Al-Azhar, the highest religious authority in the Sunni world), Ronald Ofteringer (head of the ICRC delegation in Cairo) and the present author, Dr al-Tayyeb affirmed the role that Islamic institutions can play in enhancing protection for victims of armed conflict.[3] To that end, this article sets out a brief overview of the principles regulating the use of force in armed conflict under Islamic law and discusses both the challenges in applying them and the extent to which they align with the modern principles of IHL, with a view to identifying how effective these Islamic principles can be in limiting the devastation and suffering caused by armed conflict.

Origins of the Islamic law of war

Over the course of history, most legal systems have devised rules to govern the use of armed force, stipulating both the legitimate reasons for war and the rules governing the conduct of hostilities. IHL does not specifically address the former of these two areas, regarding the justifications for resorting to armed force. This matter is covered by public international law under the Charter of the United Nations (UN), which prohibits the use of armed force except in self-defence or with authorization from the UN Security Council, as set out in Article 42 of the Charter. The function of IHL is to set rules and restrictions on the behaviour of combatants in both international and non-international armed conflicts, with a view to preventing or limiting the effects of armed conflict, minimizing the suffering of victims and protecting individuals who are either not taking part or have ceased their participation in the hostilities, as well as protecting movable and immovable property not being used in military operations. This branch of law is also known as the law of war or the law of armed conflict, but over recent decades it has

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2 ICRC, "Niger: Seminar on Islamic Law and Humanitarianism", news release, 25 November 2015, available at: www.icrc.org/en/document/niger-seminar-islamic-law-humanitarianism.
3 ICRC, "Egypt: Continuous Humanitarian Dialogue between the ICRC and Al-Azhar", news release, 24 October 2017, available at: www.icrc.org/en/document/egypt-grand-imam-dr-ahmed-al-tayyeb-al-azhar-willing-support-humanitarians.

become more commonly known as international humanitarian law, emphasizing the humanitarian motives that underpin this newly developed branch of law.

The question is, has the Islamic legal system incorporated this comparatively recent branch of law? What is certain is that the classical Muslim jurists did not use this term to refer to armed conflict situations, nor did they use other modern-day terminology associated with IHL. Nonetheless, the provisions of Islamic law – as developed and documented by Muslim jurists since at least the second Islamic century (eighth century AD) – show unequivocally that many of the issues covered by IHL were addressed by the Muslim jurists in order to achieve some of the same objectives as those of IHL, namely alleviating the suffering of the victims of armed conflict and protecting certain persons and objects. Before moving on to illustrate this point, at this stage it is worth referring to the sources and characteristics of the Islamic law of war before discussing the core principles regulating the use of force under Islamic law.

Sources of Islamic law

The sources of Islamic law are divided into two main groups: primary sources and secondary sources. Primary sources (also known as "agreed-upon" sources) include the Qur'an, the Sunnah (tradition) of the Prophet, *ijmā'* (legal literature representing consensus of opinion) and *qiyās* (rules of analogy developed via deductive reasoning). Secondary sources (also known as "disputed" sources) are a number of jurisprudential methods for developing Islamic laws which come in varying order of authority, including *istiḥsān* (juristic/public preference), *maṣlaḥah mursalah* (public interest), *'urf* (custom), *shar' man qablanā* (sharī'ahs of religions before Islam), *madhhab al-ṣaḥabī* (the opinions of the Companions of the Prophet), *sadd al-dharā'i'* ("blocking the means" – i.e., preventing the occurrence of something evil, though it also extends to include facilitating the occurrence of something good) and *istiṣḥāb* (the continuation of the applicability of a rule that was accepted in the past, unless new evidence supports a change in its applicability).

The defining factor that differentiates Islamic law from most other legal systems is the fact that it includes rules on worship, beliefs and morality, as well as rules governing numerous other areas of life such as family law, financial transactions, criminal law, governance, and international relations in peacetime and wartime. Based on the religious aspects of Islamic law, some people mistakenly conclude that all provisions of Islamic law are unchangeable. In reality, however, while it is true that the rules on worship, creed and morality or unanimously agreed-upon rules are fixed and unchangeable, there are other provisions which may be changed, as long as this is done to achieve the objective of the legislator. As described by Ibn Qayyim al-Jawziyyah (d. 1350), serving the public interest is the objective of every single rule in Islam, because

> sharī'ah is founded on the divine command and the public good of the people in this world and the next. It is all justice, all compassion, all public good, and all

wisdom. If any ruling changes justice into injustice, or mercy into its opposite, or the public good into corruption, or wisdom into folly, then it cannot be part of the sharīʿah, even if an interpretation of the sharīʿah is invoked, for sharīʿah is God's justice among His worshippers, and His mercy amongst His creation, and His shadow on his earth.[4]

This definitive statement by Ibn Qayyim al-Jawziyyah shows that the fundamental objective of Islamic law is to achieve justice and serve the public interest, always and everywhere.

Most Islamic law regulations on the use of force are derived from the Holy Qur'an and Sunnah, as well as the early historical precedents of the Islamic state[5] since the seventh and eighth centuries, or what are known in the Ḥanafī school of law as the *siyar* (approach) – i.e., the ways and methods followed by the Islamic state in its dealings with non-Muslims in times of peace and war, specifically in the era of the Prophet Muhammad and the Rightly Guided Caliphs. The term *siyar* is also used by some Ḥanafī jurists to refer to the rules governing certain types of NIAC that occurred in the first half of the first Islamic century, such as what are known in Islamic jurisprudence as *qitāl al-bughāh* (fighting against rebels or secessionists) and *ḥurūb al-riddah* (wars of apostasy).[6] Muslim jurists established legal limits on the use of force using those sources and their own *ijtihād* (reasoning or judgment in making laws), based on both the sources themselves and the above-mentioned tools such as *qiyās*, *maṣlaḥah mursalah* and *madhhab al-ṣaḥabī*. We can therefore conclude that these regulations were developed under a different model of international relations and in a specific context during the lifetime of the Prophet between 624 and 634 AD, in which military engagements were less brutal and deadly than those seen today.[7]

Characteristics of the Islamic law of war

Therefore, because of the uniqueness of its sources and contexts, the Islamic law of war is defined by the following characteristics: its religious dimension, the instinct of Muslims to comply with it out of a desire to obey God, its lack of consistent codification, and the specificity of its context and sources.

There is a religious dimension to the Islamic law of war in the sense that compliance with the Islamic regulations on the use of force is an act of worship which brings a Muslim soldier closer to God. This classical juristic endeavour for humanizing armed conflicts led to contradictory rulings because in deliberating these rulings individual jurists sometimes prioritized humanitarian concerns and

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4   See Ṣubḥī al-Ṣāliḥ, *Maʿālim al-Sharīʿah al-Islāmiyyah*, Dār al-ʿIlm lil-Malāyīn, Beirut, 1975, p. 62.
5   Editor's note: For the purposes of this article, the term "the Islamic state" refers to the State founded by the Muslims during the seventh century.
6   See Muḥammad ibn Aḥmad al-Sarakhsī, *Kitāb al-Mabsūt*, Vol. 10, Dār al-Maʿrifah, Beirut, p. 2.
7   See Ahmed Al-Dawoody, *The Islamic Law of War: Justifications and Regulations*, Palgrave Macmillan, New York, 2011, pp. 11–41.

at other times prioritized the military necessity of winning the war, even if this was in contravention of humanitarian principles.[8]

Respect for the Islamic regulations on the use of force was something that a Muslim instinctively complied with and imposed on himself through his desire to obey God, regardless of whether or not his enemy adhered to the same rules, rather than stemming from the obligation to comply with international conventions, as is the case in the modern age. This characteristic forms a strong basis for the argument that Islamic law has a great power to influence the conduct of the Muslim parties to conflicts that are currently under way, especially in the case of non-governmental combatants who claim to follow Islamic rules of armed conflict as their source of reference. Most of the attention of the Muslim jurists was directed towards drawing a distinction between those acts that were permissible and those that were non-permissible for a Muslim during a war, and as any scholar of Islamic law will find, the jurists painstakingly drew up jurisprudence governing the mandatory conduct of a Muslim soldier, taking into account both the need to comply with the above-mentioned sources and the necessity of winning the war. Many Western academics and experts in the Islamic just war theory have therefore noted that the classical Muslim jurists focused in great detail on the Islamic *jus in bello*, while neglecting the Islamic *jus ad bellum*.[9]

Given that the task of establishing these rules was carried out by independent, individual classical Muslim jurists, and the fact that the rules were neither codified by the Islamic state nor enshrined in signed agreements between the warring parties, it is only natural that many contradictory rules should arise, firstly as a result of varying interpretations of the texts from which the rules are derived, and secondly because of the variation in the priorities of the jurists, some of whom emphasized humanitarian concerns and compliance with the rules contained in the sources of Islamic law, and others for whom the need to win the war outweighed those concerns. This feature of Islamic law forms one of the main obstacles when it comes to humanizing armed conflicts in the modern era, as will be explained in greater depth later.

The philosophy and principles of IHL were not only developed in recent times; on the contrary, these concepts are as old as human civilization itself, having been recognized long ago by ancient cultures and religions. In his book *The Contemporary Law of Armed Conflict*, L. C. Green shows that Judaism and ancient Chinese, Indian and Greek civilizations developed some restraints that

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8   As discussed below, the jurists gave conflicting rulings regarding the permissibility of, for example, targeting women, children or the aged if they engage in hostilities, and the use of certain means and methods of warfare.

9   Rudolph Peters, *Jihad in Classical and Modern Islam*, Markus Wiener, Princeton, NJ, 1996, p. 119; Khaled Abou El Fadl, "The Rules of Killing at War: An Inquiry into Classical Sources", *The Muslim World*, Vol. 89, No. 2, 1999, p. 150; Khaled Abou El Fadl, "Islam and the Theology of Power", *Middle East Report*, No. 221, Winter 2001, p. 30; Ann Elizabeth Mayer, "War and Peace in the Islamic Tradition and International Law", in John Kelsay and James Turner Johnson (eds), *Just War and Jihad: Historical and Theoretical Perspectives on War and Peace in Western and Islamic Traditions*, Greenwood Press, Westport, CT, 1991, p. 197; Sohail H. Hashmi, "Saving and Taking Life in War: Three Modern Muslim Views", *The Muslim World*, Vol. 89, No. 2, 1999, p. 158.

should be observed during armed conflict. The Old Testament states that it is prohibited to destroy trees (Deuteronomy 20:19–20) or kill captives, and that food and water should be provided to captives until they are set free. In ancient Chinese civilization, the general and military strategist Sun Tzu (d. 496 BC) stressed that only enemy armies are to be attacked and that cities are to be attacked only where there is no alternative. In ancient India, the list of prohibitions during armed conflict includes attacking a sleeping enemy, desecration of corpses, killing those who are physically or mentally incapacitated and, similar to the Greek civilization, the use of poisoned weapons.[10]

Obviously, the sources of the Islamic law of war relate to a war context in which the weapons and tactics, and consequently the destructive capacity of wars, were very different from those of modern armed conflicts. The application of the Islamic law of war in the modern era therefore presents another challenge, given that some armed groups employ military tactics and weapons that are prohibited under IHL and justify their actions by measuring them against the opinions of some classical Muslim jurists who endorsed the use of similar weapons and military tactics in the context of their own primitive wars, as will be illustrated later in this article. With this in mind, rules such as these inevitably need to be reviewed and reconsidered in order to take account of ongoing developments in military weapons and tactics over time.

Principles of the Islamic rules of war

Classical Muslim jurists discussed a set of issues that, in essence, reflect the philosophy and principles of IHL, but are set in a different context to that of the wars we are currently witnessing. It is worth noting that specific rules were established on each of these issues in relation to the wars waged between Muslims and their non-Muslim enemies during the lifetime of the Prophet Muhammad, and consequently the teachings of the Prophet form the basis of much of the regulations developed by the jurists. Islamic law also drew a distinction between international and non-international conflicts, despite not using the same terms. According to Islam, international armed conflicts are generally called jihād, a term which refers to wars between the Islamic state and non-Muslim belligerents. NIACs are divided into four categories according to the Muslim jurists: *ḥurūb al-riddah* (wars of apostasy), *qitāl al-bughāh* (fighting against rebels or secessionists), *ḥirābah* (fighting against bandits, highway robbers, terrorists or pirates) and *qitāl al-khawārij* (fighting against violent religious fanatics). In Islamic law, the distinction between these types of war is important because the rules of war differ from one category to another. [11]

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10 See L. C. Green, *The Contemporary Law of Armed Conflict*, Manchester University Press, Manchester, 1993, pp. 18 ff.
11 For further information see, A. Al-Dawoody, above note 7, pp. 149–183; Ahmed Al-Dawoody, "Al-Sarakhsī's Contribution to the Islamic Law of War", *UCLA Journal of Islamic and Near Eastern Law*, Vol. 14, No. 1, 2015, pp. 37–43.

When developing the Islamic law of war in international armed conflicts, the Muslim jurists paid the greater part of their attention to the following eight issues.

Protection of civilians and non-combatants

The sources of Islamic law guarantee protection of civilians and non-combatants, stating that fighting on the battlefield must be directed solely against enemy combatants. Civilians and non-combatants must not be deliberately harmed during the course of hostilities. This principle is clearly set out in the verse that states: "And fight in the way of God those who fight against you and do not transgress, indeed God does not like transgressors."[12] According to Qur'anic interpreters, this verse commands that non-combatant enemies should not be fought, and that an attack on non-combatants such as women and children is an act of aggression which angers God. Al-Rāzī (d. 1209) defines *al-muqātilīn* (combatants), as understood by him from this verse, as follows: "They must be taking part in the fighting; anyone who is willing or prepared to fight cannot be described as a combatant, except in metaphor, until they enter into combat."[13] Thus, based on many reports attributed to the Prophet Muhammad, Islamic law protects civilians and non-combatants against military attack. Moreover, if an enemy withdraws from combat or enters Muslim territory and requests protection, whether explicitly or implicitly, they may not be targeted, as will be shown later in the discussion of *amān* (protection, safety).

A number of the Prophet's Hadiths specifically prohibit the targeting of women, children, the elderly, *'usafā'* and *aṣḥāb al-ṣawāmi'* (monks or religious hermits). The word *'usafā'* is the plural of the word *'asīf*, which means hired man or employee, and in the context of war it refers to anyone who works for, or is paid by, the enemy to perform services on the battlefield, as was common practice in wars in the past. These individuals would perform tasks such as minding belongings and animals, but would not engage in the fighting and therefore could not be classified as combatants. By drawing a parallel with the prohibition on attacking *'usafā'* on the battlefield, it follows that attacking medical personnel (both civilian and military) accompanying enemy armies is also prohibited, as are attacks on military reporters or anyone else who provides services to enemy armies, as long as these individuals do not take part in military operations. This principle is conveyed by various Hadiths of the Prophet, including: "Do not kill an aged person, a young child or a woman",[14] "Do not kill children or the clergy"[15] and "Do not kill children or *'usafā'*".[16] On that

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12 Qur'an 2:190.

13 Muḥammad ibn 'Umar al-Rāzī, *Tafsīr al-Fakhr al-Rāzī: Al-Mushtahar bi-al-Tafsīr al-Kabīr wa-Mafātīh al-Ghayb*, Vol. 5, Dār al-Fikr, 1981, p. 138.

14 Aḥmad 'Abd al-Raḥmān al-Bannā al-Sā'atī, *Badā'i' al-Manan fi Jami' wa Tartīb Musannad al-Shafi'i wa al-Sanan: Mudhayla bi-al-Qawl al-Ḥasan Sharaḥ Badā'i' al-Manan*, 2nd ed., Vol. 2, Maktabah al-Furqān, Cairo, 1983, p. 12.

15 Sadīq ibn Ḥasan ibn 'Ali al-Ḥusseini al-Qannūji al-Bukhārī Abū al-Ṭayyib, *Al-Rawḍah al-Nadiyyah Sharaḥ al-Durar al-Munīryyah*, Vol. 2, Idārah al-Ṭibā'ah al-Munīrīyah, Cairo, p. 339.

16 *Ibid.*

basis, when it came to protecting non-combatants, the Companions followed the Prophet's example; for instance, the first caliph Abū Bakr (d. 634) instructed his army commander thusly: "Do not kill a child or a woman; or an aged person; do not cut down fruit-bearing trees or destroy buildings; do not slaughter a sheep or a camel except for food; do not burn or drown palm trees; do not loot; and do not be cowardly."[17] In addition, 'Umar ibn al-Khaṭṭāb issued written instructions to his soldiers ordering them to fear God and not to kill farmers: "Fear God in farmers; do not kill them unless they fight against you."[18] This warning to fear God reaffirms the religious imperative to respect the Islamic law of war.

The jurists also specified various other types of non-combatants who must not be targeted in a war, including the blind, the incapacitated and the insane, as well as craftsmen and traders. Ibn Qayyim al-Jawziyyah concisely indicated the Islamic position regarding those who can be targeted during war as follows: "Muslims must fight those who attack them, but not those who do not attack them."[19] This brief statement unequivocally affirms the principle of non-combatant immunity in Islam,[20] and thus aligns with article 48 of Additional Protocol I (AP I), which stipulates:

> In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.[21]

This does not mean, however, that this protection is absolute; beneficiaries forfeit the right to non-combatant immunity if they engage in combat. Islamic legal scholars studied these issues in depth, specifying the cases in which the aforementioned non-combatant parties can forfeit the protection afforded to them by Islam against military attack. For example, jurists discussed the permissibility of killing a woman if she kills Muslim soldiers, throws stones at them to kill them or stands guard over enemy armies or strongholds, or if she is queen of her country or a wealthy woman and spends her money to incite the army to fight on the battlefield, and similarly if a child is king or queen of his or her country and does the same. On this issue the jurists disagreed, with some authorizing the targeting of women and children in the aforementioned cases,

17 'Abdullah ibn Abī Shaybah, *Al-Kitāb al-Muṣannaf fī al-Aḥādīth wa al-Āthār*, Vol. 6, Dār al-Kutub al-'Ilmiyyah, Beirut, 1995, p. 478.
18 Aḥmed ibn al-Ḥussein ibn 'Ali al-Bayhaqī, *Al-Sunan al-Kubrā*, 2nd ed., Vol. 9, Dār al-Kutub al-'Ilmiyyah, Beirut, 2003, p. 155.
19 See Wahbah al-Zuḥaylī, *Mawsū'ah al-Fiqh al-Islāmī wa al-Qaḍāyā al-Mu'āṣirah*, Vol. 7, Dār al-Fikr, Damascus, 2010, p. 511.
20 For further information on the principle of distinction between combatants and non-combatants, see Ameur Zemmali, *Islam and International Humanitarian Law: Principles on the Conduct of Military Operations*, 4th ed., ICRC, 2010, pp. 162–163.
21 Protocol Additional (I) to the Geneva Conventions of 12 August 1949, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978), Art. 48, available at: https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?action=openDocument&documentId=D9E6B6264D7723C3C12563CD002D6CE4.

and others classifying it as undesirable.[22] They also disagreed on whether or not an aged person could be targeted if they entered the battlefield to support the enemy in planning war operations.[23]

In summary, Islamic law advocates the principle of distinction between combatants and non-combatants, meaning protection of civilians and non-combatants from being targeted during military operations, provided that they do not participate in military operations.

Permissible weapons in war

Although the weapons and military tactics used by Muslims in the early Islamic period – and therefore those addressed by Islamic law – were extremely primitive in terms of their simplicity and limited capacity to inflict severe damage on enemy individuals and property as compared to those available today, the establishment of rules on weapons demonstrates that the Muslim jurists were dedicated to two objectives: firstly, not to endanger the lives of civilians and non-combatants, and secondly, to spare the property of the enemy unless otherwise dictated by military necessity. The rules developed by classical Muslim jurists show that at the time, "war" was made up of two scenarios. The first of these was direct or one-to-one combat with enemy fighters, in which case the most commonly used weapon was the sword (a weapon of high status in Arab culture and heritage), followed to a lesser extent by the lance, bow and spear. In cases where civilians and non-combatants are present among enemy combatants, sword fighting does not endanger the lives of bystanders or risk incidentally destroying their property. It should be noted here that the jurists, in particular those of the Mālikī school, discussed the permissibility of shooting the enemy with poison-tipped arrows. On this issue, as on many others, the jurists disagreed; some prohibited the use of poison-tipped arrows, while others merely disliked the idea of it, on the basis that the enemy could shoot the arrows back at the Muslims and also because there was no precedent for this action in the age of

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22 See Aḥmad al-Dardīr, *Al-Sharḥ al-Kabīr*, ed. Muḥammad 'Allīsh, Vol. 2, Dār al-Fikr, Beirut, p. 176; Aḥmad ibn Idrīs al-Qarāfī, *Al-Dhakhīrah*, ed. Muḥammad Būkhubzah, Vol. 3, Dār al-Gharb al-Islāmī, Beirut, 1994, p. 399; Muḥammad ibn Jarīr al-Ṭabarī, *Kitāb al-Jihād wa Kitāb al-Jizyah wa Aḥkām al-Muḥāribīn min Kitāb Ikhtilāf al-Fuqahā' li-Abī Ja'far Muḥammad Ibn Jarīr al-Ṭabarī*, ed. Joseph Schacht, Brill, Leiden, 1933, p. 9; 'Alā' al-Dīn al-Samarqandī, *Tuḥfah al-Fuqahā'*, Vol. 3, Dār al-Kutub al-'Ilmiyyah, Beirut, 1984, p. 295; 'Abd al-'Azīz Ṣaqr, *'Al-'Alāqāt al-Dawliyyah fī al-Islām Waqt al-Ḥarb: Dirāsah lil-Qawā'id al-Munaẓẓimah li-Sayr al-Qitāl*, Mashrū' al-'Alāqāt al-Dawliyyah fī al-Islām, No. 6, Al-Ma'had al-'Ālamī lil-Fikr al-Islāmī, Cairo, 1996, pp. 46–48; al-Shaykh Niẓām al-Dīn al-Balkhī *et al.*, *Al-Fatāwā al-Hindiyyah: Fī Madhhab al-Imām al-A'ẓam Abī Ḥanīfah al-Nu'mān*, Vol. 2, Dār al-Fikr, 1991, p. 194.

23 See Muḥammad ibn Ismā'īl al-Ṣana'ānī, *Subul al-Salām: Sharḥ Bulūgh al-Marām min Adillah al-Aḥkām*, ed. Muḥammad 'Abd al-'Azīz al-Khūlī, 4th ed., Vol. 4, Iḥyā' al-Turāth al-'Arabī, Beirut, 1959, p. 50; Ibrāhīm ibn 'Alī ibn Yūsuf al-Shirāzī, *Al-Muhadhdhab: Fī Fiqh al-Imām al-Shāfi'ī*, ed. Zakariyyā 'Imīrat, Vol. 3, Dār al-Kutub al-'Ilmiyyah, Beirut, 1995, pp. 277 ff.; Muḥyī al-Dīn ibn Sharaf al-Nawawī, *Al-Majmū': Sharḥ al-Muhadhdhab*, ed. Maḥmūd Maṭrajī, Vol. 21, Dār al-Fikr, Beirut, 2000, p. 55; Wahbah al-Zuḥaylī, *Al-'Alāqāt al-Dawliyyah fī al-Islam: Muqāranah bi-al-Qānūn al-Dawlī al-Ḥadīth*, Mu'assasah al-Risālah, Beirut, 1981, p. 71; A. Al-Dawoody, above note 7, pp. 112–114.

the Prophet.[24] However, the great Ḥanafī jurist al-Shaybānī (d. 805) permitted the use of poison-tipped arrows because they were more effective in defeating the enemy.[25]

The second type of war scenario is one in which the enemy retreats inside fortifications and one-to-one combat is not an option. In regard to such cases, the jurists discussed the use of mangonels (a weapon for catapulting large stones), fire, flooding and even siege as weapons to force the enemy to surrender.[26] In the pre-Islamic period, the ancient Greeks and Persians used mangonels to attack enemies sheltering in citadels or fortresses, by loading the weapons with fire or large rocks and bombarding the enemy with them. Moreover, during the battle of al-Ṭā'if in the eighth year of the Islamic calendar (630 AD), Salmān al-Fārisī introduced the mangonel to the Prophet Muhammad. Regardless of whether or not the mangonel was actually used in that battle, this serves as evidence that attacks by Muslims against their enemies using mangonels had the potential not only to damage the enemy's military and civilian property but also to cause incidental casualties among civilians. It should nonetheless be taken into account that, at that time, when an enemy retreated inside fortifications it was impossible to distinguish between military and civilian property. The jurists unanimously permitted the use of mangonels against an enemy fortress if required by military necessity, but opinions differed on whether it was permissible to use fire as a weapon against the enemy: some prohibited it, some disapproved of it, and others permitted it either as a military necessity or in reciprocity.

The Muslim jurists' deliberations and discussions over the use of these weapons show that indiscriminate attacks or excessive use of military force beyond that required by military necessity were inconceivable, even in the context of the detailed discussions over which types of weapons and tactics were permissible and which were prohibited. Nonetheless, the aforementioned differences of opinion among jurists once again illustrate the challenges that arise when applying the provisions of the Islamic law of war both historically and in the modern era, firstly because the rules that permitted the use of those primitive forms of indiscriminate attack in that specific era and war context are now exploited to justify attacks against civilians, and secondly because some people draw parallels with those primitive weapons to justify the use of chemical weapons and other weapons of mass destruction.

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24 Sohail Hashmi, "Islamic Ethics and Weapons of Mass Destruction: An Argument for Nonproliferation", in Sohail H. Hashmi and Steven P. Lee (eds), *Ethics and Weapons of Mass Destruction: Religious and Secular Perspectives*, Cambridge University Press, Cambridge, 2004, p. 329; Khalīl ibn Isḥāq ibn Musā al-Jundī, *Mukhtaṣar Khalīl fī Fiqh Imām Dār al-Hijrah*, ed. Aḥmad ʿAlī Ḥarakāt, Dār al-Fikr, Beirut, 1994, p. 102; A. al-Dardīr, above note 22, p. 178; Muḥammad ibn Muḥammad ibn ʿAbd al-Raḥman al-Ḥaṭṭāb, *Mawāhib al-Jalīl li-Sharḥ Mukhtaṣar Khalīl*, 2nd ed., Vol. 3, Dār al-Fikr, Beirut, 1977, p. 352.
25 Muḥammad ibn al-Ḥassan al-Shaybānī, *Sharḥ Kitāb al-Siyar al-Kabīr*, commentary by Muḥammad ibn Aḥmad al-Sarakhsī, ed. Abī Abdullah Muḥammad Ḥassan Muḥammad Hassan Ismāʿil al-Shafiʿī, Vol. 4, Dār al-Kutub al-ʿIlmiyyah, Beirut, 1997, p. 277.
26 See Muḥammad ibn Idrīs al-Shāfiʿī, *Al-Umm*, 2nd ed., Vol. 4, Dār al-Maʿrifah, Beirut, 1973, pp. 243, 257; S. Hashmi, above note 24, p. 328; A. al-Qarāfī, above note 22, pp. 208 ff.; M. al-Shaybānī, above note 25, Vol. 4, p. 154; A. Al-Dawoody, above note 7, pp. 122–126.

Human shields and night attacks

Based on the distinction between combatants and non-combatants, Islamic law jurists set out detailed provisions on two key methods of warfare that were used in the primitive wars described above: these are *al-tatarrus* (human shields) and *al-bayāt* (night attacks), both of which were first deliberated during the time of the Prophet. In their discussion of human shields, most jurists distinguished between two cases: first, if enemy combatants take women, children, the aged, etc., as human shields in order to force Muslims to cease fighting; and second, if the enemy takes any Muslim individuals in general, or individuals from *ahl al-dhimmah* (non-Muslim citizens of the *dār al-Islām* (the Islamic state)), as human shields for the same purpose. The difficulty here is that attacking a human shield carries the risk of killing these non-combatants, Muslims or *ahl al-dhimmah* through the use of indiscriminate weapons such as mangonels. Broadly speaking, all of the jurists permit shooting at the human shields in these two cases if required by military necessity, provided that Muslims aim to direct their attack at the combatants and avoid hitting non-combatants as far as possible,[27] although this does seem impossible from a practical point of view. The jurists strongly disagree over what exactly constitutes the military necessity that would justify an attack on human shields in this context. For al-Māwardī and al-Shirāzī, the military necessity in this case would arise from the risk of a Muslim defeat.[28] On this point, certain jurists add that attacking human shields in this case is a matter of protecting the rest of the Muslims, because if Muslims did not attack the shield and the Muslim army was defeated as a result, many Muslims would be killed. In the view of al-Qurtubī, military necessity in this instance meant avoiding "the collapse of the entire Muslim nation into the hands of the enemy".[29] As for the second case, a minority of the jurists prohibit attacks against human shields based on the following verse: "had they [believing Muslim men and women] been separated, We would have inflicted a severe chastisement on those who disbelieved from among them [the Meccans]".[30]

With respect to *bayāt*, fighting at night meant that the two armies were unable to fight hand to hand because they could not see one another in the darkness, which rendered it necessary in such cases to target the enemy using mangonels or other types of indiscriminate weapon. On that basis, according to the Hadith narrated by Anas ibn Mālik, the Prophet avoided attacking the enemy at night. Moreover, according to another Hadith narrated by al-Ṣaʿb ibn Jaththāmah, when the Prophet was questioned about the permissibility of

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27 M. al-Nawawī, above note 23, p. 59; I. al-Shirāzī, above note 23, p. 278; Najīb al-Armanāzī, *Al-Sharʿ al-Dawlī fī al-Islām*, 2nd ed., Riad El-Rayyes Books, London, 1990 (first published 1930), p. 124.
28 ʿAlī ibn Muḥammad ibn Ḥabīb al-Māwardī, *Kitāb al-Aḥkām al-Sulṭāniyyah wa al-Wilāyāt al-Dīniyyah*, ed. Aḥmad Mubārak al-Baghdādī, Maktabah Dār ibn Qutaybah, Kuwait, 1989, p. 57; I. al-Shirāzī, above note 23, p. 278.
29 Muḥammad ibn Aḥmad al-Anṣārī al-Qurṭubī, *Al-Jāmiʿ li-Aḥkām al-Qurʾān*, Vol. 16, Dār al-Shaʿb, Cairo, pp. 287 ff.
30 Qurʾan 48:25. See N. al-Armanāzī, above note 27, p. 124; A. Al-Dawoody, above note 7, pp. 116–118.

attacking the enemy at night, which could result in casualties among women and children, he did not declare it prohibited.[31] Jurists therefore took varying stances, with some permitting night attack on enemies, and others disapproving of it. Nonetheless, the jurists justified any casualties that might occur among women and children in such cases as collateral damage.[32]

With that in mind, it must be underlined at this point that Islamic law places strong emphasis on the sanctity of the life of non-combatants and the importance of avoiding endangering the lives and property of non-combatants except in cases of military necessity. It should also be noted that the provisions established by the Muslim jurists were designed to regulate the conduct of the army during fighting on the battlefield in the context of the primitive wars waged between the Muslim army and its enemies in the time of the Prophet. These provisions also impose restrictions on military operations, in spite of the fact that enemy armies were not bound by the same rules and had not signed any form of agreement to be so.

Protection of property

Through the study of the wars that took place between Muslims and their enemies during the lifetime of the Prophet and the permissible weapons and methods of warfare as discussed above, it is clear that in Islam, war is not an indiscriminate free-for-all in which anyone and anything can be targeted. The use of military force is only permissible if required by military necessity, and the wanton destruction of enemy property is not covered by this condition; such acts instead constitute a crime of "al-fasād (destruction, damage) in the land". This position was advocated by Imām al-Awzāʿī (d. 774), who said that "it is prohibited for Muslims to commit any sort of takhrīb, wanton destruction, [during the course of hostilities] in enemy territories because that is fasād and God does not like fasād", and referred to the following Qurʾanic verse: "when he turns his back, he hastens about the earth, to do corruption there and to destroy the tillage and the stock".[33] This is because according to the Islamic worldview, everything in this world belongs to God, and human beings – as His vicegerents on earth – are entrusted with the responsibility of protecting His property and contributing to human civilization.

Moreover, not only does Islamic law require protection of civilian property during military operations, it also states that even when targeting military property, the objective is merely to force the enemy to surrender or cease fighting, not to destroy or sabotage enemy property. On that basis, Most Muslim jurists permit

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31 See, for example, Hadith 1745 in Muslim ibn al-Ḥajjāj al-Qushayrī, Ṣaḥīḥ Muslim, ed. Muḥammad Fūʾād ʿAbd al-Bāqī, Vol. 3, Dār Iḥyāʾ al-Turāth al-ʿArabī, Beirut, pp. 1364 ff.
32 Muḥammad ibn ʿAlī ibn Muḥammad al-Shawkānī, Nayl al-Awṭār: Min Aḥādīth Sayyid al-Khyār Sharḥ Muntaqā al-Akhbār, Vol. 8, Dār al-Jīl, Beirut, 1973, p. 71; A. Al-Dawoody, above note 7, pp. 118–119.
33 Qurʾan 2:205; M. al-Shaybānī, above note 25, Vol. 1, pp. 32–33.

the destruction of enemy property if required by military necessity.[34] It should also be noted that some jurists such as al-Shāfiʿī (d. 820) and Ibn Ḥazm (d. 1064) drew a distinction between inanimate objects and living property such as horses, cattle and bees, and ruled that inflicting damage on living property such as livestock for any reason other than for food was tantamount to torture, which is prohibited in Islam.[35] Notwithstanding, the jurists did permit the targeting of enemy horses when enemy warriors were fighting on horseback, because in this case the horse was being used as military equipment.[36] All of these provisions are in line with Article 51(4) of AP I, which prohibits indiscriminate attacks, defined as:

> (a) those which are not directed at a specific military objective; (b) those which employ a method or means of combat which cannot be directed at a specific military objective; or (c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.[37]

Article 52(2) defines military objectives as "those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage".[38]

Prohibition of mutilation of the enemy

Among the many Prophetic Hadiths that prohibit mutilation of the enemy is the following: "Do not loot, do not be treacherous and do not mutilate" ["lā taghlū wa lā taghdurū wa lā tumathilū"].[39] The prohibition of those three acts illustrates the principle of humanity during armed conflicts. The first of them, *ghulūl* (looting), refers to when a combatant takes or steals an item from the war booty before it is divided up, or allocates part of the war booty to themselves without handing it over to be distributed by the army chief. The establishment of such

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34 Muwaffaq al-Dīn ʿAbd Allah ibn Aḥmad ibn Muḥammad ibn Qudāmah, *Al-Mughnī*, eds. ʿAbd Allah ibn ʿAbd al-Muḥsin al-Turkī and ʿAbd al-Fattaḥ Muḥammad al-Ḥilu, 3rd ed., Vol. 9, Dār ʿĀlam al-Kutub, Riyadh, 1997, pp. 233 ff.; Muḥammad al-Ghazālī, *Al-Waṣīṭ fī al-Madhhab*, ed. Aḥmad Maḥmūd Ibrāhīm and Muḥammad Muḥammad Tāmir, Vol. 7, Dār al-Salām, Cairo, 1997, p. 31; M. al-Shawkānī, above note 32, p. 74; I. al-Shirāzī, above note 23, p. 279; ʿA. al-Māwardī, above note 28, p. 71; Muḥammad ibn Abī Bakr ibn Qayyim al-Jawziyyah, *Jāmiʿ al-Fiqh*, ed. Yusrī al-Sayyid Muḥammad, Vol. 4, Dār al-Wafāʾ, Al-Manṣūrah, 2000, p. 97; M. al-Nawawī, above note 23, pp. 60 ff.
35 M. al-Shāfiʿī, above note 26, pp. 257, 259, 287; ʿAlī ibn Aḥmad ibn Saʿīd ibn Ḥazm, *Al-Muḥallā*, Vol. 7, Dār al-Āfāq al-Jadīdah, Beirut, p. 294.
36 On protection of property in general, see A. Al-Dawoody, above note 7, pp. 126–129.
37 AP I, Art. 51(4). See also Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) (GC I), Art. 50; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950) (GC II), Art. 51.
38 AP I, Art. 52(2).
39 Mālik ibn Anas, *Al-Muwaṭṭaʾ*, ed. Muḥammad Fūʾād ʿAbd al-Bāqī, Vol. 2, Dār Iḥyāʾ al-Turāth al-ʿArabī, Beirut, 1985, p. 448.

rules and restrictions on dealing with enemy property indicate that it was not simply free for the taking. Even food and animal feed were regulated. In cases where battles drew on for a long time and it was both impractical to carry sufficient food to the battlefield and difficult to buy supplies from the enemy, the jurists determined that, in cases of military necessity, soldiers may take as much of the enemy's supplies as they require to feed themselves and their animals, provided that no more than the required quantity is taken.[40] Although at the time it was customary practice for enemy possessions to be distributed among the members of the winning side of the battle, these strict rules on the treatment of enemy possessions prohibit the theft of movable enemy property, especially in the case of Muslim soldiers of religious compunction in the present day.

While the Islamic prohibition of *ghadr* (perfidy, treachery) obliges Muslims to respect their contracts and agreements, this does not mean that ruses are prohibited in war, as the Prophet held that "war is ruse".[41] The same sentiment is reaffirmed in Article 37 of AP I, which prohibits perfidy but permits military ruses such as "the use of camouflage, decoys, mock operations and misinformation".[42]

As for the provisions of Islamic law prohibiting the mutilation of enemy corpses, these demonstrate respect for dignity and humanity, given that even though the two sides are at war and attempting to kill each other, the enemy is nonetheless a human being honoured by God, as stated in the Qur'an: "We have honoured the Children of Adam."[43] The Prophet also instructed the Muslims to avoid injuring the enemy's face during fighting,[44] out of respect for human beings and in order to preserve the dignity bestowed upon them by God in the aforementioned verse. In addition, Islam prohibits the torture and mutilation of animals, on the basis that the Prophet forbade mutilation even of the body of *al-kalb al-'aqūr* (a rabid dog).[45]

The principle of human dignity requires respect for human bodies, not only during life but also after death. For that reason, Islam forbids the mutilation of enemy corpses and instead requires them to be returned to the enemy people, or buried if this is not possible. At the Battle of Badr in 624 AD, the first battle in Islamic history, the Muslims buried the corpses of all enemies killed.[46] According to the narration of Ya'lā ibn Murrah:

> I travelled with the Prophet (peace be upon him) on more than one occasion, and I did not see him leave a human corpse behind; whenever he came

40 M. al-Nawawī, above note 23, p. 109; M. al-Shawkānī, above note 32, p. 131.
41 Muḥammad bin Ismaʿil al-Bukhārī, *Saḥīḥ al-Bukhārī*, Bayt al-Afkār al-Dawliyyah lil-Nashr, Riyadh, 1998, p. 579.
42 AP I, Art. 37.
43 Qur'an 17:70.
44 See Hadith 2458 in Muḥammad ibn Fattūḥ al-Ḥumaydī, *Al-Jamʿ bayn al-Saḥīḥayn al-Bukhārī wa Muslim*, ed. ʿAlī Ḥusayn al-Bawwāb, 2nd ed., Vol. 3, Dār ibn Ḥazm, Beirut, 2002, pp. 210 ff.; Sobhi Mahmassani, "The Principles of International Law in the Light of Islamic Doctrine", *Recueil des Cours*, Vol. 117, 1966, p. 303; A. Al-Dawoody, above note 7, p. 120.
45 M. al-Sarakhsī, above note 6, Vol. 9, pp. 135, 196; Vol. 10, pp. 129, 131; Vol. 16, p. 145; Vol. 26, p. 145.
46 W. al-Zuḥaylī, above note 19, p. 495.

across one, he ordered its burial, without asking whether the person was a Muslim or an unbeliever.[47]

Furthermore, at the Battle of the Trench in 627 AD, when the enemies of the Muslims requested the return of the corpse of Nawfal ibn 'Abd Allah ibn al-Mughīrah in exchange for 10,000 dirhams, the Prophet ordered for the body to be returned and refused to accept the money.[48] As well as respect for humanity and preservation of the dignity of the dead, another reason why Muslims ensured the burial of enemy corpses was to prevent them from decomposing in the open.[49] On that basis, Ibn Ḥazm (d. 1064) instructed Muslims to bury the bodies of their deceased enemies because if they did not, the bodies would end up rotting and could be eaten by predatory animals; this would be tantamount to mutilation, which is forbidden in Islam.[50] Article 17 of Geneva Convention I (GC I) also stipulates that the parties to a conflict must first carry out a medical examination of corpses to verify the identity of the deceased, then bury the body according to the applicable religious rites if possible.

It is also worth noting that in wars between the Persians and the Romans, it was common practice to carry the heads of enemy army commanders on the tips of spears to celebrate and boast of victory over the enemy.[51] According to books of Islamic jurisprudence, when the head of the commander of the Levantine army Yannāq al-Biṭrīq was brought to Abū Bakr (d. 634), he became enraged and condemned this as an abominable act, calling it a *sunnah al-'ajam* (a practice followed among the non-Muslims, literally foreigners). When he was told that it was an act of reciprocity because the enemy had done the same to Muslims, Caliph Abū Bakr replied disapprovingly, "Are we going to follow the Persians and the Romans? We have what is enough: the book [the Qur'an] and the reports [i.e., tradition of the Prophet]."[52] In this statement, he reaffirms the aforementioned notion that the laws of Islam are binding, regardless of the conduct of the enemy, and that reciprocity does not justify criminal acts.

Treatment of prisoners

The Islamic approach to the issue of prisoners of war reflects many typical features of the Islamic legal system and shows the vital need to reinterpret certain legal provisions in order to respond to the requirements of the modern age. Most of the rules on prisoners of war (PoWs) according to Islamic law were based on the treatment of prisoners in the battle of Badr in the second year of the Islamic calendar (624 AD). In addition, the term "prisoners of war" was only used to

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47 'Alī ibn 'Umar al-Dāraqutnī, *Sunan al-Dāraqutnī*, eds Sha'īb al-Arnu'ūd, Ḥassan 'Abd al-Muna'm Shalabī and Sa'id al-Laḥām, Vol. 5, Mu'assasah al-Risālah, Beirut, 2004, p. 204.
48 Aḥmad ibn 'Alī ibn Hajar al-'Asqalānī, *Fatḥ al-Bārī Sharḥ Ṣaḥīḥ al-Bukhārī*, ed. Muḥyī al-Dīn al-Khatīb, Vol. 6, Dār al-Ma'rifah, Beirut, p. 283.
49 W. al-Zuḥaylī, above note 19, p. 495.
50 'A. Ibn Ḥazm, above note 35, Vol. 5, p. 117.
51 M. al-Shaybānī, above note 25, Vol. 1, p. 79.
52 *Ibid.*, Vol. 1, p. 79.

refer to male combatants, since the custom at the time was for women or children who were captured to be enslaved or exchanged for Muslim prisoners. At the battle of Badr, the Muslims managed to capture seventy enemy combatant men; this posed a challenge for the nascent Islamic state, which had yet to establish legislation on the legal status of PoWs. The Prophet therefore consulted his Companions on the issue. To solve the additional challenge of providing shelter for the seventy prisoners, since nowhere specific had been prepared for this purpose, some of the prisoners were held in the mosque and the rest were divided up to be housed with the Companions of the Prophet. The Prophet instructed for the prisoners to be treated well, saying: "Observe good treatment towards the prisoners."[53]

To establish the Islamic law on prisoners in Islam, the jurists referred to the following two verses of the Qur'an, as well as the Sunnah of the Prophet. The first of these verses is: "When you meet the disbelievers in battle, strike them in the neck, and once they are defeated, bind any captives firmly – later you can release them by grace or by ransom – until the toils of war have ended."[54] The second is: "When the Sacred Months have passed, kill the polytheists wherever you find them and capture them and besiege them and await for them in every place of ambush."[55] Given that the second of these two texts does not specifically relate to the issue of prisoners, the jurists were split into three camps over the law on PoWs in Islam. In the first camp was Ibn 'Abbās (d. 668), 'Abd Allah ibn 'Umar (d. 693), al-Ḥasan al-Baṣrī (d. 728) and Saʿīd ibn Jubayr (d. 714), who argued that the law on prisoners in Islam required them to be freed by "grace" or "ransom" according to the first of these texts.[56] The second camp, made up of some of the Ḥanafī jurists, advocated that the head of State was entitled to either execute the prisoners or enslave them, according to what best served the public interest, while Al-Shaybānī, one of the great Ḥanafī jurists, deemed it permissible to exchange enemy prisoners. The remaining Ḥanafī jurists advocated that the head of State was entitled to release prisoners as long as they remained in the Islamic state and paid the jizyah (tax levied to exempt eligible males from conscription). According to the Ḥanafī jurists, prisoners should not be allowed to return to their country because they would strengthen the enemy.[57] The third camp, comprised of the majority of Muslim jurists, including the Shāfi'īs, the Mālikīs and the Ḥanbalīs, as well as al-Awzā'ī (d. 774) and Sufyān al-Thawrī (d. 778), advocated that the head of State

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53 Muḥammad ibn Jarīr al-Ṭabarī, *Tārīkh al-Ṭabarī: Tārīkh al-Umam wa al-Mulūk*, Vol. 2, Dār al-Kutub al-'Ilmiyyah, Beirut, 2001, p. 39.

54 Qur'an 47:4.

55 Qur'an 9:5.

56 Yūsuf al-Qaraḍāwī, *Fiqh al-Jihād: Dirāsah Muqāranah li-Aḥkāmih wa Falsafatih fī Ḍaw' al-Qur'ān wa al-Sunnah*, Vol. 2, Maktabah Wahbah, Cairo, 2009, pp. 854 ff.; Muḥammad Ḥammīdullāh, *Muslim Conduct of State: Being a Treatise on Siyar, That is Islamic Notion of Public International Law, Consisting of the Laws of Peace, War and Neutrality, Together with Precedents from Orthodox Practice and Preceded by a Historical and General Introduction*, rev. and enl. 5th ed., Sh. Muhammad Ashraf, Lahore, 1968, p. 214; Lena Salaymeh, "Early Islamic Legal-Historical Precedents: Prisoners of War", *Law and History Review*, Vol. 26, No. 3, 2008, p. 528.

57 See 'Abd Allah ibn Maḥmūd ibn Mawdūd, *Al-Ikhtiyār li-Taʿlīl al-Mukhtār*, ed. 'Abd al-Laṭīf Muḥammad 'Abd al-Raḥman, 3rd ed., Vol. 4, Dār al-Kutub al-'Ilmiyyah, Beirut, 2005, p. 133; S. Mahmassani, above note 44, p. 307.

was entitled to choose one of the following four options, depending on what he deemed to best serve the public interest: to execute some or all of the prisoners, to enslave them, to set them free, or to exchange them for Muslim prisoners. The Mālikīs also added the argument of some of the Ḥanafīs that the prisoners could remain in the Islamic state as long as they paid the *jizyah*.[58]

Here it should be noted that the permissibility of the execution of prisoners in principle, as advocated by some jurists in cases where it serves the Muslim interest, is based on the instances of the execution of just three enemy PoWs during the lifetime of the Prophet: these were al-Naḍir ibn al-Ḥārith and 'Uqbah ibn Mu'ayṭ at the battle of Badr in March 624 AD,[59] and Abū 'Azzah al-Jumaḥī at the battle of Uḥud in March 625 AD. According to Islamic history books, Abū 'Azzah was first taken captive at the battle of Badr, then in response to his request to be freed because he was a poor man with a large family, the Prophet released him on condition that he would never fight against the Muslims again – but when he was captured a second time the following year at the battle of Uḥud, he was executed.[60] Regardless of the authenticity of these accounts, and whether these prisoners were killed during hostilities or after their capture, it is clear that these three individuals were singled out from among the other prisoners for crimes they had committed against Muslims in Mecca before fleeing to Medina, and not simply because they were PoWs, otherwise the rest of the prisoners captured at this battle and others would have also been killed.[61]

These contradictory rules on the treatment of prisoners obviously pose a challenge for anyone wishing to apply them in the modern age, because the simple question is, which of these laws represents the true Islam? In other words, which of these provisions best serves the *maṣlaḥah* (public interest) that forms the basic criterion for the other provisions established by the jurists?

Islamic law guarantees the humane treatment of prisoners, as clearly illustrated by the fact that prisoners were distributed among the homes of the Companions of the Prophet and their instructions to treat the prisoners well.[62] Prisons or camps had not yet been built to shelter prisoners, and it would not have been an option, for example, to tie up the prisoners and leave them outside, as this could have exposed them to harm. The biography (*sīrah*) of the Prophet provides evidence of the humane treatment of prisoners at the Battle of Badr,[63] which went on to form the general basis for the rules on PoWs in Islam; these

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58 See A. al-Qarāfī, above note 22, p. 414; A. Al-Dawoody, above note 7, pp. 136–138.

59 See Muḥammad ibn 'Umar al-Wāqidī, *Kitāb al-Maghāzī*, ed. Muḥammad 'Abd al-Qādir 'Aṭā, Vol. 1, Dār al-Kutub al-'Ilmiyyah, Beirut, 2004, pp. 135, 263.

60 M. al-Nawawī, above note 23, p. 83.

61 Y. al-Qaraḍāwī, above note 56, pp. 858-860; L. Salaymeh, above note 56, pp. 524 ff.; Muḥammad Ḥusayn Haykal, *The Life of Muḥammad*, trans. from the 8th ed. by Isma'īl Rāgī A. al-Fārūqī, North American Trust Publication, 1976, pp. 233, 239; Troy S. Thomas, "Jihad's Captives: Prisoners of War in Islam", *U.S. Air Force Academy Journal of Legal Studies*, Vol. 12, 2002–03, pp. 94 ff.; Troy S. Thomas, "Prisoners of War in Islam: A Legal Inquiry", *The Muslim World*, Vol. 87, No. 1, 1997, p. 49.

62 M. al-Ṭabarī, above note 53, p. 39; M. Ḥammīdullāh, above note 56, p. 214; Aḥmad Abū al-Wafā, *Al-Naz`ariyyah al-'Āmmah lil-Qānūn al-Dawlī al-Insānī fī al-Qānūn al-Dawlī wa fī al-Sharī'ah al-Islāmiyyah*, Dār al-Nahḍah al-'Arabiyyah, Cairo, 2006, p. 179.

63 See the references cited in note 62 above.

are also in line with the requirements of Geneva Convention III (GC III), such as the requirement to provide prisoners with shelter, food and clothing and to maintain family links, and the prohibition against torturing prisoners to obtain military information.

The fact that the prisoners of the battle of Badr were housed in the mosque and at the homes of the Companions indicates the necessity of protecting them from harm. With regard to food, some of the prisoners from the Battle of Badr recounted how the Muslims had given them the best food available in the circumstances, even giving the prisoners priority over themselves, in order to comply with the instructions of the Prophet to treat the prisoners well. According to the narration of Abū ʿAzīz ibn ʿUmayr, as translated by A. Guillaume:

> I was with a number of the Anṣār when they [the Muslim captors] brought me from Badr, and when they ate their morning and evening meals they gave me the bread and ate the dates themselves in accordance with the orders that the apostle had given about us. If anyone had a morsel of bread he gave it to me. I felt ashamed and returned it to one of them but he returned it to me untouched.[64]

This altruistic treatment of enemy PoWs, by feeding them good food despite the captors' own hunger, is described in the Qur'an as follows: "And they feed the needy, the orphans and the captives [from their own] food, despite their love for it [also interpreted as "because of their love for God]".[65] According to the history books, when Ṣalāḥ al-Dīn al-Ayyūbī (d. 1193) was unable to feed the large number of prisoners who had fallen under his control when he reclaimed Al-Aqsā Mosque, he had no choice but to release them.[66] With regard to clothing, Jābir ibn ʿAbdullah quotes the following passage from *Ṣaḥīḥ al-Bukhārī*:

> When it was the day (of the battle) of Badr, prisoners of war were brought including Al-ʿAbbās, who was undressed. The Prophet looked for a shirt for him. It was found that the shirt of ʿAbdullah ibn Ubaī would do, so the Prophet let him wear it.[67]

On the issue of maintaining the contact prisoners have with their families, Islam prohibits the separation of members of the same family, which is classified as parents, grandparents and children.[68]

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64 A. Guillaume (trans.), *The Life of Muhammad: A Translation of Isḥāq's Sīrat Rasūl Allāh*, Oxford University Press, Oxford, 1955, p. 309. See also ʿAbd al-Mālik ibn Hishām ibn Ayyūb al-Ḥimyarī, *Al-Sīrah al-Nabawīyyah*, ed. ʿUmar ʿAbd al-Salām Tadmurī, Vol. 2, Dār al-Kutub al-ʿArabī, Beirut, 1990, p.287.
65 Qur'an 76:8.
66 Dalīlah Mubārikī, "Ḍawābiṭ al-ʿAlāqāt al-Dawliyyah fī al-Islām Zaman al-Ḥarb", *Majallat Kulliyyat al-ʿUlūm*, 4th year, 9th ed., 2004, p. 206.
67 Muḥammad ibn Ismāʿīl al-Bukhārī, *Mukhtaṣar Ṣaḥīḥ al-Imām al-Bukhārī*, ed. Muḥammad Nāṣr al-Albānī, Vol. 2, Maktabah al-Maʿarif, Riyadh, 2002, p. 318.
68 See ʿAbd al-Ghanī Maḥmūd, *Ḥimāyat Ḍaḥāyā al-Nizāʿāt al-Musallaḥah fī al-Qānūn al-Dawlī al-Insānī wa al-Sharīʿah al-Islāmiyyah*, ICRC, Cairo, 2000, p. 39; Zayd ibn ʿAbd al-Karīm al-Zayd, *Muqaddimah fī al-Qānūn al-Dawlī al-Insānī fī al-Islām*, ICRC, 2004, pp. 39, 77.

It should also be noted that Islam prohibits the torture of prisoners to obtain military intelligence about the enemy. When Imām Mālik (d. 795) was asked, "Is it possible to torture a prisoner of war in order to obtain military intelligence about the enemy?", he replied, "I have not heard of that."[69] His succinct response clearly illustrates how peculiar this question was, showing that the very idea of discussing the permissibility of torturing prisoners, even to obtain military intelligence, did not even occur to the Muslims and had never before been discussed by Islamic law jurists. Article 17 of GC III stipulates:

> No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind.[70]

Quarter and safe conduct

The Islamic system of *amān* (literally, protection, safety) encompasses two main forms of protection. The first of these is safe conduct, which refers to a contract of protection granted to any non-Muslim citizen of an enemy State to enter the historic Islamic state on a temporary basis for peaceful purposes such as business, education or tourism. In this respect, the system of *amān* is similar to the system of entry visas and temporary residence permits in foreign countries, in that it allows the holder to enter a foreign country legitimately, with the authorization of the competent authorities, and comes with certain corresponding rights. In summary, however, what matters here is that an individual in possession of this form of *amān* may not be targeted in an attack. Not only that, but they may not be prosecuted for any crime committed outside the Islamic state, even for the crime of killing a Muslim. This is because the Islamic state does not have jurisdiction over crimes committed by non-Muslims outside its boundaries.[71] It is worth noting here that ambassadors and envoys from foreign States are automatically entitled to the *amān* system by virtue of the nature of their mission. This system of *amān*, which had been practised even in the pre-Islamic period and was preserved by Islam, is a binding contract and cannot be revoked by the Islamic state. Nonetheless, the jurists disagreed over whether *amān* could be revoked if the *musta'min* (person in possession of *amān*) were proven to be a spy; in either case, however, the individual cannot be attacked but must instead be escorted to their own country.[72]

The second type of *amān* – and the topic of focus here, namely quarter – is individual or collective protection granted to enemy combatants during operations

69 Wahbah al-Zuhaylī, *Āthār al-Ḥarb fī al-Islām: Dīrāsah Muqāranah*, 3rd ed., Dār al-Fikr, Damascus, 1998, p. 415.
70 Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) (GC III), Art. 17.
71 See Muḥammad ibn al-Ḥassan al-Shaybānī, *Al-Siyar*, ed. Majīd Khadūrī, Dār al-Fikr, Beirut, 1985, p.179; N. al-Armanāzī, above note 27, pp. 88, 164; 'A. Ṣaqr, above note 22, p. 89.
72 See 'A. Ṣaqr, above note 22, p. 88; 'Abbās Shūmān, *Al-'Alāqāt al-Dawliyyah fī al-Sharī'ah al-Islāmiyyah*, Silsilah al-Dirāsāt al-Fiqhīyyah, No. 1, Al-Dār al-Thaqāfiyyah lil-Nashr, Cairo, 1999, p. 106.

on the battlefield and requires Muslims to stop fighting against the individual or group and protect them and their property until they return to their country. In this case, they are not considered PoWs and may not be arrested. Quarter is granted if the individual in any way expresses an intention to stop fighting and the desire to claim safety, whether this request is written or verbal, whether in Arabic or in any other language, and whether explicit or implicit, or even by gesture.[73] This concept is somewhat similar to enemies who "clearly express an intention to surrender" and are therefore granted *hors de combat* status in IHL under Article 41 of AP I.[74] Moreover, the jurists extended the application of this type of *amān* to the point where the expression of an intention to surrender is not even required as a condition because the objective of *amān* is *ḥaqn al-dam* (prevention of bloodshed, protection of life).[75] For example, the jurists were unanimous that if an enemy mistakenly assumes that a Muslim has granted him *amān*, then the *amān* is valid, even if the Muslim had no intention of granting it.[76] The jurists disagreed over whether it was permissible to grant *amān* after, or only before, the capture of enemy belligerents. Therefore, the very fact that the jurists disagreed on this point demonstrates that *amān* could be extended to apply to enemy combatants even after their capture. Furthermore, Ibn Qudāmah advocates that the mere fact of an enemy belligerent's attempt to enter Muslim territory by non-violent means entitles him to *amān*.[77] This example is similar to the modern practice of an enemy carrying a white flag during a battle to demonstrate non-violence, in which case the individual may not be targeted in an attack. In practice, what this means is that an enemy belligerent who has laid down their weapons and entered Muslim territory cannot be harmed but must instead be protected until they return to their own country. This small sample of the numerous cases discussed by the jurists unequivocally demonstrates the sanctity of enemy blood and property and demonstrates not only that Islam does not allow attacks against enemies except during combat, but also that if an enemy combatant ceases fighting and expresses a wish for protection under the system of *amān*, Islamic law stipulates that he must be protected in order to prevent bloodshed and limit the suffering and devastation of war.

Management of dead bodies

Human dignity is a right bestowed by God,[78] and this dignity must be protected whether a person is alive or dead. The Prophet Muhammad's instructions, referred to above, to avoid deliberately injuring enemy combatants in the face is a

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73   See Muḥammad al-Khatīb al-Shirbīnī, *Mughnī al-Muḥtāj ilā Maʿrifah Maʿānī Alfāẓ al-Minhāj*, Vol. 4, Dār al-Fikr, Beirut, p. 237; ʿA. Ṣaqr, above note 22, p. 83; Y. al-Qaraḍāwī, above note 56, p. 1178.

74   AP I, Art. 41(2)(b).

75   M. al-Shirbīnī, above note 73, p. 237

76   See *ibid.*, p. 237; A. Al-Dawoody, above note 7, p. 132.

77   Muwaffaq al-Dīn ʿAbd Allah ibn Aḥmad ibn Qudāmah, *Al-Kāfī fī Fiqh al-Imām Aḥmad Ibn Ḥanbal*, ed. Muḥammad Fāris and Musʿad ʿAbd al-Ḥamīd al-Saʿdanī, Vol. 4, Dār al-Kutub al-ʿIlmiyyah, Beirut, 2004, p. 163.

78   Qur'an 17:70.

sign of respecting human dignity. Classical Islamic law regulated the management of dead bodies of Muslims for obvious religious reasons, whether in normal circumstances or during armed conflicts or natural disasters. There are different regulations for Muslims who die in normal circumstances and martyrs who are killed in armed conflicts: in the Islamic tradition, because of their status, martyrs are to be buried without ritual washing, shrouding or even funeral prayer to glorify their sacrifices. Graveyards must be respected; questions related to exhumation of graves, collective graves in cases of necessity (namely, in cases of natural disasters or armed conflicts), and burial at sea were regulated by classical Muslim jurists. In Islam, each body is to be buried in an individual grave except in cases of necessity like natural disasters or armed conflicts. Based on the tradition of the Prophet Muhammad, Muslims must return the dead bodies of the adverse party, and if that party does not take them and/or bury them, it becomes an obligation of the Muslim army to do so. That is because, as shown above, if Muslims do not bury the dead bodies of their enemy, the bodies will decompose or be eaten by beasts, which would be tantamount to mutilation, as affirmed by the Andalusian jurist Ibn Ḥazm (d. 1064). Therefore, in accordance with Article 17 of GC I and Rule 112 of the ICRC Customary Law Study,[79] it is reported that the Prophet Muhammad used to bury dead bodies without adverse distinction.[80]

The Islamic law of war between theory and practice

Gross violations of IHL and Islamic law being committed in Muslim contexts necessitate examination of the causes underlying the perpetrators' behaviour and that a series of adequate measures must be taken by all concerned parties, including Muslim scholars, governments and civil society organizations. The following constitute some of the main reasons for these violations.

The first reason is the wide gap between theory and practice. This arises because the Islamic law of war was a type of jurisprudence developed by classical Muslim jurists and was not codified by the Islamic state over the course of history in the same way as many other areas of Islamic law. Although compliance with Islamic law is rooted first and foremost in a Muslim's own desire to obey God, no rules for its implementation or punishments for transgressions have been established.

The second reason is a lack of research by modern Muslim scholars into the areas of Islamic law that govern State affairs, especially with regard to governance systems, war and international relations. This has to do with cultural and political factors relating to the structure of the modern State in Muslim countries, which

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79   Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005, Rule 112, available at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule112.

80   Z. al-Zayd, above note 68, pp. 49, 78; A. Abū al-Wafā, above note 62, pp. 206–209.

has moved away from relying on the legal tradition of the classical Muslim jurists and has replaced it with Western legal systems.

The third reason is the existence in many Muslim countries of weak civil society institutions that do not contribute to solving the problems of their societies. The reason for this is that these tasks have become the sole preserve of the State, and this is illustrated by the fact that the academic contributions and scientific achievements of many Muslim countries are very few compared to other regions of the world.

Conclusion

The Islamic regulations on the eight issues discussed above demonstrate that the attention of the classical Muslim jurists was primarily directed towards two considerations: firstly, not to endanger the lives of non-combatants; and secondly, not to destroy enemy property except as a military necessity or as a reprisal. These concerns are of course on top of the primary goal of winning the war. The importance of the sanctity and humanity of the human soul in the Islamic tradition is illustrated in the rules that prohibit attacking non-combatants, using weapons that do not discriminate between combatants and non-combatants, attacking human shields, or attacking the enemy at night. In addition, the humane treatment of prisoners, as ordered by the Prophet Muhammad and mentioned in the Qur'an, underlines the requirement to preserve human dignity in wartime, a concept which is also illustrated by the rules against attacking an enemy in the face or mutilating their body after death. Respect for the enemy also includes the requirement not to destroy enemy property during hostilities except in cases of military necessity, a principle which is also demonstrated by jurists' deliberations over the permissibility of Muslims' animals to eat the fodder of the enemy.

In view of the great gap between theory and practice, the following recommendations are some of most effective methods for promoting respect for IHL in Muslim countries:

1. Conducting research and academic study in the field of IHL and its corresponding topics in Islamic law. This should include, for example, encouraging the teaching of IHL at law schools and military and police academies in the Arab world, at both undergraduate and post-graduate level.
2. Addressing contemporary situations of contemporary armed conflict and the current challenges in this area rather than focusing mainly on the historical challenges treated in classical Muslim legal scholarship. This should be done by religious scholars, researchers, academics and think tanks alike.
3. Raising public awareness in society of the need for reform, and promoting a culture of equality and respect for human rights, while also combating and sanctioning racist and extremist sectarian and ideological beliefs, and opinions that incite xenophobia. These efforts must be initiated across all

facets of society, including through primary education, religious institutions and the media.

In conclusion, many violations of IHL would no longer occur if people lived by the words of Imām ʿAlī ibn Abī Ṭālib, who said: "There are two types of people: your brothers in religion or your peers in humanity."[81]

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81 ʿAlī ibn Abī Ṭālib, *Nahj al-Balāghah*, ed. Ṣobḥī Ṣāliḥ, 4th ed., Dār al-Kitāb al-Maṣrī, Cairo, and Dār al-Kitāb al-Lubnānī, Beirut, 2004, p. 427.

OPINION NOTE

From a model of peace to a model of conflict: The effect of architectural modernization on the Syrian urban and social make-up

Marwa Al-Sabouni

Marwa Al-Sabouni is a Syrian architect based in Homs. She holds a PhD in architectural design and is the author of the critically acclaimed book *The Battle for Home*. Her work has been published in many prestigious international outlets and journals, and she was listed by *Architectural Digest* as one of the top contenders for the 2018 Pritzker Prize. She is a Prince Claus Laureate, and has also taken part as a speaker in various distinguished international platforms around the world.

Abstract

From a land called the "Cradle of Civilizations" to one that is now described as "apocalyptic" and "one of the most dangerous places on Earth", Syria may have no more critical moment than the current crisis to reflect on what is taking it down this terrifyingly dark path. We resort to history in order to decipher the mysteries of the present, and there is no more honest and direct history than that of the built environment: a concrete object that tells the narratives not only of the winners, the wealthy and the powerful, but also of those who were brushed aside, cut apart and walked over.

This Opinion Note argues that reversing the process which led to the loss of home and the loss of urban fabric is the foundation of reclaiming these as essential elements of recovery after war and destruction. It examines four areas of transformation where

modern urban planning and architecture have left their marks on the Levantine city, to give a clearer understanding of the role of architecture and where to begin in the rebuilding.

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Introduction: Architecture as a register

Syria is a place with a very long history of sequenced civilizations which have been layered architecturally within the heart of almost every town and city (see Figure 1). Over time these multi-layered cores have developed new parts, resulting in two different characters (and mostly two city centres) in each city: one is new and modern, while in the other, history has been interrupted and the area has been transformed into what is now called the Old City. These Old Cities are accumulations of many different civilizations that date back to Hellenistic and Roman times, where the most recent layer, the layer manifested in shape of houses, monuments and souks, generally belongs to a mix of the Ottoman, Mamluk and Ayyubid Islamic architectural styles, containing the remnants of past archaic architectures within its newest built iteration.

Before the war in Syria erupted, the Old Cities were silently wearing out as they were subject to many wrongful acts of urban vandalism and destruction, mostly performed by city authorities seeking instant profit and easy solutions. Replacing the old, viable model with a new one tailored solely for individual gains and control of those authorities created an urban decline which came hand in hand with a general moral and social one, as the cycle of replacing the valuable with the profitable set a bad example beyond the level of the street. I tell the story of this multi-layered decline in my book *The Battle for Home*,[1] where I introduce architecture as a vital factor in sparking the war that has been raging for seven years now in my country. The book presents the case of architecture as a unifying agent to all of the other factors that enflamed the conflict – not only as a stage upon which the conflict played out, but also as a director.

Indeed, architecture offers a register of what has worked for the inhabitants of a certain place and what has not in their built environment, the most evident aspect of human life. By tracking this built register, evidence of what have proven to be successful models of living will be found. People tend to keep and maintain those successful models for their functionality, beauty, sustainability and so on. In this manner they form a relationship with their surroundings that exceeds the mere practicality offered by modern social housing projects and slum shelters.

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1   Marwa Al-Sabouni, *The Battle for Home*, Thames & Hudson, London, 2016.

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Fig. 1 - Colour online, Colour in print

Figure 1. Layers of Old Homs. Photo © Marwa Al-Sabouni.

It is no overstatement to say that the Syrian Old Cities had cultivated a life of tolerance, peace and coexistence. Looking at their architectural history, the proof of that statement is found everywhere, from the closely knit neighbourhoods to the mosques and churches built back to back and face to face, down to the small details such as the well-proportioned front doors nestling amidst the welcoming aromas of the jasmine and lemon trees dotting the shady alleyways.

This sense of neighbourliness was cultivated by urban connections, beautiful surroundings and sustainable economic cycles. The architecture of those old neighbourhoods allowed for a complex network of people and businesses, through its configuration, property sizes, heights, proportions and aesthetic details, which created not only a pleasant place for living but also sustainable micro-systems of local production and thriving economies that interconnected the whole city. This last point, the economic impact, will be tackled in more detail later on in this Opinion Note when the work of Jane Jacobs is discussed, but for the time being the alternative model of architecture that has taken over the Old City with the rise of modernization should first be considered. Like many cities after World War II, the cities of what was at the time the Levant were introduced to the imported "modern world" mainly through the urban policies imposed by French colonization. Within a very short time, newly built neighbourhoods were created, first to enable the rich to come out from the modest alleyways and live in separate, upscale areas, and then, as socialist ideologies took over in the 1960s, to allow the masses from the countryside to settle around the city, closer to work in factories and institutions. In that sense, the city was dissected into "territories" instead of neighbourhoods.

With the new housing demand on the city, old models of slow building and harmonious aesthetics no longer worked. The featureless block building that was

built so fast dominated, wide roads for vehicles replaced nature, and segregated zones for each "group" replaced the mixed neighbourhoods. Each new neighbourhood has become an alternative city on its own. These neighbourhoods have surrounded the old cores, then continued to sprawl far out. Segregated and ugly, the "modern" neighbourhoods managed to destroy the values which were shared and lived in the Old Cities and to cut the ties which used to bind their communities to each other and to the city (see Figure 2).

It is no surprise to learn that 40% of the Syrian population, before the current war, were living in slums[2] – namely, neighbourhoods that were built "informally", mostly as bare blocks of cement boxes, with bad infrastructure and poor amenities. People were forced to create their own "models" in the face of their unmet demand by the city's "modern" buildings, not because there was not enough space for them – many vacant "units" pierce the skyline of Syrian cities – but because, unlike the old houses, the new ones had no feature of *living* in their make-up. In architectural terminology, when people build their own structures organically without the help of professional builders or architects, the result is known as "vernacular architecture" – that is, a structure which holds the character of local solutions to building and living problems, using local means and local materials. However, those newly built slums are far from "vernacular", and they answered only one problem: shelter. Moreover, their urban location in peripheral areas around the city turned them into isolated compartments which divided people based on labels such as religion, origin and social class. This has resulted in parallel lives within the life of the city, where disconnected communities practice their daily life within the imaginary boundaries created by urbanism, alien from the city as a cooperative place and from the so-called "other" who resides on the other side of that imaginary wall.

It was only a matter of time before things reached an explosive critical mass. It could be argued that there is not much difference in this story from the story of almost every city around the world after the World Wars, industrialization, and subsequent developments in technology. This inevitable process of change is simply called "progress", and this is partly accurate, if it is taken only as a simple measure of junctures in time: important events that have marked recent history. But these junctures shouldn't be taken as events without consequences. The way we are building collectively around the world is creating a global threat, which is accumulating as it did in Syria. It has led to war in Syria – why has it not led to war all over the world? The reasons are multifold: the first is the geographical location, where different international interests are involved and where the spark of war can easily find winds to flame it; the second is corruption, which exacerbates the problems; and finally there is colonization, which leaves behind it a heavy burden, especially with its imposed models of architecture and urban planning. This article will explore the process of this built transformation on

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2   Duraid Durgham, "The Economic and Social Dimensions of the Housing Problem", lecture, Economic Science Association, Damascus, 2001, available at: www.mafhoum.com/syr/articles_01/dergham/dergham.htm (all internet references were accessed in January 2019).

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Figure 2. Vacant blocks due to failing urban sprawl. Photo © Marwa Al-Sabouni.

Syrian cites and the background of their creation, and will discuss the effects of this process on the social fabric and how the damage sustained by that fabric has led inevitably to the unravelling of a country.

The urban fabric

Urbanism can dictate the degree to which people encounter and communicate with each other as a basis for social relationships, and can consequently affect the nature of social structure in a given context. It also contributes to shaping the economic activity within urban localities. This important aspect has been explored in the work of various scholars and architects, perhaps most influentially and coherently in the work of Jane Jacobs, the American urban activist who wrote the 1961 book *The Death and Life of Great American Cities*. In her book, she explains the hazards of blind urbanism, which is embodied in modern approaches. The monotonous order of such approaches, as shown through Jacobs's argument, blocks economic activity in the locality by hindering its diversity. This is exactly how the Syrian government's ill-thought-out social housing projects and policies became the reason why the informal urban sprawls in Syria were created. Jacobs warns: "Slums and their populations are the victims (and the perpetuators) of

seemingly endless troubles that reinforce each other. Slums operate as vicious circles. In time, these vicious circles enmesh the whole operations of cities."[3]

Nonetheless, it could be argued that such consequences can only be related to urban planning (and not architecture) – namely, the larger-scale design by which urban planners look at different "zones" of the city and design the city's main networks, connections, land uses, and so on. I would argue that urban planning (which is sometimes considered a separate speciality from architecture) should only be done by thinking architecturally. If we examine the job of an architect, we find that his or her main mission is to find a *creative* solution to a group of "problems" posed by both the nature of the location and the user(s) of the location. This means taking a wide variety of different kinds of data into consideration: numerical, aesthetic, historical, social, psychological, economic, political, and so on. This is why architecture is described as creative, since architects must find one answer that can address many questions. Therefore, in that problem-solving sense, architecture (which is the act of designing) can and should encompass different ranges of scale, from what we call "urban" down to the very small scale of furniture and utilities.

Moreover, successful urban design can only be accomplished by moving away from the map perspective of modern urban planning (objected to by Jacobs[4]) and into the street-level perspective where additional (and much more important) factors must also be considered, such as the angles by which light hits a surface or the air flows and the smells they may carry. After all, this is what the people who occupy or use the place will be affected by. Such an approach is nowadays termed as "place-making", but it has always been considered in serious works of art and architecture; it is, as Roger Scruton describes it in his *Aesthetics of Architecture*, "the architectural experience".[5] Indeed, "experience" is the key word, as every planner and architect should aim at creating a pleasant experience through his or her building design.

Beauty matters

People need to experience their buildings, and those experiences must be pleasant ones; otherwise, there is no point in creating the building. On the exterior, people are affected by the shape of their buildings both at the street level and at the horizon level. The shape of a building is modelled by the combination of aesthetic choices made regarding its materials, colours, proportions, details, and so on.

Architects aspire to design beautiful buildings, and people wish to live and be surrounded by such buildings. However, since Mies van der Rohe's "less is more"

3   Jane Jacobs, *The Death and Life of Great American Cities*, Vintage Books Edition, Random House, New York, 1992 (first published 1961), p. 270.
4   "From beginning to end, from Howard and Burnham to the latest amendment on urban-renewal law, the entire connection is irrelevant to the workings of cities. Unstudied, unrespected, cities have served as sacrificial victims." *Ibid.*, p. 25.
5   Roger Scruton, *The Aesthetics of Architecture*, Princeton University Press, Princeton, NJ, 1979, p. 84.

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and Le Corbusier's "the house as a machine", beauty in modernism has become undervalued and a subject of dispute.

From the definitions of beauty postulated by Plato, Aristotle and Longinus, until the revival of the discussion in the eighteenth century and beyond, there have been differences in the definition of beauty, but beauty has been considered an essential value to our understanding of the world. Whether it is considered as "leading to the thought of God"[6] or merely to "cause love in humans",[7] it is commonly agreed that beauty satisfies an essential psychological need and is capable of providing moral inspiration.[8] Nonetheless, with the functionality of modernism and the nihilism of its age, architects have neglected this core part of their profession and have surrendered the job of aesthetics to the money-driven developers.

So what effect does beauty have on the relationships between people and their surroundings? In his book *A Pattern Language*, the architect Christopher Alexander describes the effect as a resolving of "inner forces" (in other places he calls them "conflicts"[9]), while Alain de Botton, the Swiss philosopher, refers to it as the "architecture of happiness".[10] What we can make of this is that it is very important to recognize the pivotal role of *beautiful* built environments in our lives. I believe that the Syrian devastation of the current war can tell us something: that when people are surrounded by an ugly environment, they tend to care less about its destruction.

Achieving the sense of home

Alternatively, when a sense of home is achieved, partly through providing a collective accomplishment, in the form of great buildings, attractive cities, historic sites which have managed to survive throughout history (i.e. lineage civilizations) and so on, and when people can take pride in this environment and identify with it, and when they identify with the values embodied in this accomplishment and

6   Roger Scruton, *Beauty: A Very Short Introduction*, Oxford University Press, New York, 2011, p. 3.
7   *Ibid.*, p. 34.
8   R. Scruton, above note 5, p. 236. "The sense of the appropriate exists as an embodiment of moral thought, as a perception in the immediate here and now, of aims and values that lie buried in distant and barely accessible regions of existence. In a very real sense, the cultivation of 'visual decorum' – is part of a process of bringing order to the otherwise nebulous choices of individual life." *Ibid.*, p. 230.
9   Christopher Alexander, *The Timeless Way of Building*, Oxford University Press, New York, 1979, p. 120: "The situation is self-destroying, not only because it will change as soon as the law which upholds it disappears, but also in the more subtle sense that it is continuously creating just those inner conflicts, just those reservoirs of stress I spoke of earlier which will, unsatisfied, soon well up like a gigantic boil and leak out in some other form of destruction or refusal to cooperate with the situation."
10 Alain De Botton, *The Architecture of Happiness*, Penguin Books, London, 2007, p. 25: "[A]rchitecture asks us to imagine that happiness might often have an unostentatious, unheroic character to it, that it might be found in a run of old floorboards or in a wash of morning light over a plaster wall – in undramatic, frangible scenes of beauty that move us because we are aware of the darker backdrop against which they are set."

the success it represents, they tend to preserve and try to maintain their environment.[11]

In order to become a *home*, our built environment should offer two main relationships: *belonging* and *sharing*. To belong to place means to feel that "I care about this place and am willing to share it with others, which means I must care about them too." This can only be reached through creating a caring built environment that is capable of acting like a womb for all its inhabitants; an environment that can surround them with beauty and remind them of what matters to them, and that can encourage their daily paths to cross, make their encounters a pleasant experience, and embrace their shared living. In such a place, we love *our* place and we care about our *neighbour*. To belong and share is a physical experience that largely depends on proximity, size and aesthetics. However, this world of physical appearances can be overwhelmingly broad and general, and consequently difficult to analyze and to diagnose faultiness in when it occurs. This state of puzzlement in comprehending the phenomena of collapse is evident in the Syrian situation today.

Almost all of those who have lived in or visited the Levant tend to confirm that such a place has existed once in that part of the world, and more specifically in Syria. So what has changed?

Four transformations

I believe the answer can be reached by examining the transformations which have occurred in four components of the city: the religious sites, the commercial spaces, housing, and the natural environment.

Religious sites

A good example of such transformations of religious sites is the Great Mosque of al-Nuri in Old Homs, which has gone through a process of metamorphosis (a case that could be made in general for most major locations in Syria). Natural disasters, fire and wars have been the causes of the changes to buildings like al-Nuri. The mosque owes its final shape to Nour al-Din al-Zenki in the Mamluk Islamic era. It sits at the heart of the Old City of today's Homs (see Figure 3). Its location was part of the ancient Temple of the Sun, while in more recent times it has become adjacent to the city's protecting wall at one end, and to the souk at the other. Parts of its structure were built incorporating pillars from the remnants of the Temple of the Sun, which became visible after being exposed by damage caused by recent battles (see Figure 4). In such a structure, the relationship with its surroundings and the people can be read by looking at the embodiment of certain values, manifested aesthetically in the building's simplicity and use of local, durable materials, and

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11   For further information on the subject, see M. Al-Sabouni, above note 1.

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Fig. 3 - Colour online, Colour in print

Figure 3. Interior courtyard of the Great Mosque of al-Nuri, Homs. Photo © Marwa Al-Sabouni.

morally in the creation of a sense of "no waste" and harmonious incorporation of detail without compromising character.

About 200 metres from al-Nuri lies another religious site: the Saint Mary Church of the Holy Belt. The church dates back to 59 BC, with a Roman cellar beneath. It was rebuilt in 1852 using the same building material as the mosque – black basalt – and displaying the same austerity and serenity along with the same sense of incorporation of all the different layers of styles and building. On an urban scale, examination of such examples indicates that the Islamic architecture which followed and which has shown itself to us through the architectural record was not given to destroying cities; on the whole, it allowed them to grow organically, with respect for the religious sites and for the principle that the mosque minaret and church tower should stand higher than their surroundings without overwhelming them.

In this sense, architecture played a role in reconciling (and later alienating) communities. Mosques and churches grew side by side, with humane streets and alleyways connecting them, never set apart, isolated or imposed from above. They were connected to the life of the street, living among people as the lemon and olive trees did.

Nonetheless, the presence of buildings representing multiple religious faiths is not always seen as a sign of harmony and reconciliation. Work by the

Figure 4. Old pillars from the Temple of the Sun revealed by battle damage in the Great Mosque of al-Nuri, Homs. Photo © Marwa Al-Sabouni.

anthropologist Robert Hayden argues that the presence of multiple religious structures can also be read through the lens of antagonism and competition. However, I believe that homogeneity leads to more isolation and lack of natural interactions between people of different convictions, which in turn enhances antagonism – in most cases, on the basis of supposition rather than reality. Variety should be tempered with justice in order to create the example of peaceful coexistence that was practiced in Islamic cities in places like Syria for centuries.

Unfortunately, this did not continue to be the case as modern mosques and churches in Syria were built later on. Originally interwoven within the existing urban fabric, they now stand separated from their surroundings, cost a fortune to build (or rebuild), and are alienated from people's lives and difficult to attend, with their extravagant look and closed, guarded doors. They are not protected as those old ones were; they are not embraced and rooted in everyday life, either structurally or logistically. They are not situated to bring people together in the same way as those which used to cause people's paths to cross and create pleasant encounters. They do not lead by example in their location, structure or details. Rather, they promote isolation as they stand proudly, mere labels or flags to mark out territories, where instead of seeing faces, all you see are the backs of departing cars.

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Commercial spaces

This leads to the next urban component of the city, which has played an equally important role in people's lives: the marketplace, or souk. The souk's importance stems from the fact that it is a *productive* public space – a place that should ideally be for conversation and polite commerce. In order to understand the architecture of these places in our Old Cities, Edmund Burke, the eighteenth-century Irish philosopher and politician, may offer some guidance. He describes the quality of "fitting in" as a quality of beauty:

> The mind of man has naturally a far greater alacrity and satisfaction in tracing resemblances, than in searching for differences; because by making resemblances, we produce new images; we unite, we create, we enlarge our stock; but in making distinctions we offer no food at all to the imagination; the task itself is more severe and irksome, and what pleasure we derive from it, is something of a negative and indirect nature.[12]

This is brought home today by the philosopher Roger Scruton, who offers an expression that eloquently summarizes Burke's words: "Things that *fit in*, instead of *standing out*." In the souk, "fitting in" was done both aesthetically, in the architectural details, and morally, in the manners and attitudes of the people. In all major Old Cities such as Homs, Aleppo and Damascus, the souk grew as an artery that connected the residential neighbourhoods. Within and around its winding alleyways, it had spaces for leisure and culture such as the hammams (public baths), schools, religious places and workshops. Each alley embraced a certain speciality: one for goldsmithing, one for blacksmithing, another for copper works, others for fabric and textile production, and so on. Thanks to the nature of this architecture, production took place in parallel with retail businesses, with the right balance between the local and the imported. At the souk, people used to be able to come to shop, or to gather at the hammam, to go to the mosque or church nearby, or just to pass through to get to their house at the end of this or that route. People could greet each other on the way; they passed by each other on their bicycles or on foot with their children. They saw each other's faces and heard each other's voices. There were times when they all came together for the help and protection of their neighbours.

In order to understand the effect of the wrongs that modern renovation and new additions visited upon such urban constructions, clear evidence may be found in comparison with the reconstructed souks of Beirut, another city that was devastated by civil war and once had similar structural and historical features in its Ottoman central souk. The new reconstruction changed not only the nature of the place, but also its entire economic activity, social classes and social interaction.

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12 Edmund. Burke, *A Philosophical Inquiry into the Sublime and Beautiful*, Oxford University Press, Oxford, 2015 (originally published in 1757), p. 19.

An excellent study of this was published online in an article for the Architectural Association School of Architecture Projective Cities programme,[13] which explained how the new design demanded a change in the size and configuration of the shops and spaces of the souk. By changing the size of the expropriated properties, the souk was turned into a shopping mall, owners became tenants, producers became vendors, the relationship between the central market and the port city ceased to exist, and the relationship between the merchants and the city's inhabitants also died out, all to be replaced by elites, brands and multi-level parking lots.

Housing

In our Old Cities, people maintained their privacy along with the livelihood of their cities. The sense of security was not imposed within those alleyways; rather, it grew organically as a fruit of community-sustaining architecture. Due to this, we loved our cities, with their public spaces, sacred places and self-maintaining houses, which were the result of cooperation and consensus. People built those places not in order to "stand out", but in order to "fit in", as Burke and Scruton remind us. Fitting in meant fitting in socially and civically, as well as architecturally. Different social classes and different religions were neighbours, with a shared language of harmony that left little room for distinctions in appearance. But love for these cities was not a thing built by experts in urban planning; it was natural and unexpressed. As a result, it did not defend itself as vigorously as it should have against colonial regimentation and the vandalism wrought by modernist architecture. And in this we find the answer to the following question: how has the Levantine city gone so wrong?

After the fall of the Ottoman Empire, the French–British agreement on the region put Syria under the French Mandate, during which time many changes occurred (see Figure 5). The French sought control over what they saw as a chaotic built environment. They started making aggressive clearances around the interwoven monuments, some of which didn't "stand out" enough for them, so they took them apart and reconstructed them in other positions. They cleared out large chunks of the fabric of the Old City and encouraged the rich to "stand out" too, by moving outside the walls of the shamed Old City and living in newly built boulevards planned according to Haussmann principles.[14]

This radically changed the model of housing that was part of an urban fabric in which rich and poor, Muslim and Christian, were woven together in unostentatious, closely knit houses; now these communities were segregated in terms of both location and the architectural appearance of their environment. But how was this process carried out?

13 Yasmina El Chami, *Beirut: From Multipli-City to Corporate City in Beirut Central District*, Architectural Association School of Architecture, 26 April 2012, available at: http://projectivecities.aaschool.ac.uk/portfolio/yasmina-el-chami-from-multipli-city-to-corporate-city/.

14 Daniel Stockhammer and Nicola Wild, *The French Mandate City: A Footprint in Damascus*, ETH Studio Basel Contemporary City Institute, Middle East Studio, 2009.

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New Damascus   Old Damascus

Figure 5. The French urban effect. Source: Daniel Stockhammer and Nicola Wild, *The French Mandate City: A Footprint in Damascus*, ETH Studio Basel Contemporary City Institute, Middle East Studio, 2009, pp. 95, 98.

The obsession with comprehensive plans and modernization seen in the colonial period was carried out by the Mandate's designated French architect Michel Ecochard, to whom, ironically, the Syrian independent government in the 1960s reassigned the mission to continue drawing up the city's general plan.[15] Both events opened the door wide for the continuous decline we still suffer today. The boulevard housing didn't look bad, with its elegant details and proportions and its imported street furniture; it was built to look just as beautiful as the housing on any Parisian boulevard, as the French were convinced they were staying for far longer than they actually did.

By the time of Syrian independence in 1946, Syria had already shifted from its natural trajectory of growth and formation. The socialists' ideals were adopted and the eager desire to join the modern world continued, but this time in the fashion of progressive communism. With the help of expropriation acts and industrialization, the shock of the high-rise concrete block was introduced into the Levantine city. Labour from the countryside was called upon, but there was a failure, mainly on the part of city authorities, to provide for the new arrivals. People came to cities only to be entombed in the ready-made block boxes or heaped in the derelict informal settlements where they were divided into sections according to their community and religious affiliation. This created tensions that were ripe to explode as soon as civil war broke out.

Our cities started to look like a Frankenstein hybrid of lost identity, with upscale centres surrounded by derelict informal settlements. And even when

15 Ecochard's plan and the French-led modernization are reminiscent of similar processes in Beirut or Istanbul. For the latter, see, *inter alia*, Murat Gül, *Emergence of Modern Istanbul: Transformation and Modernisation of a City*, Vol. 83, I. B. Tauris, London, 2009; Charles King, *Midnight at the Pera Palace: The Birth of Modern Istanbul*, W. W. Norton, New York, 2014; Cânâ Bilsel and Halûk Zelef, "Mega Events in Istanbul from Henri Prost's Master Plan of 1937 to the Twenty-First-Century Olympic Bids", *Planning Perspectives*, Vol. 26, No. 4, 2011.

Fig. 5 - B/W online, B/W in print

people managed to establish a measure of peaceful living, huge investment projects came to attack that very way of life. This has been exemplified in many places all over Syria, most recently in 2015 in the locality of South Mazza in Damascus, which is referred to as "the Orchards" for the agricultural land it occupies. It is an "informal settlement", where people have built over time their own small residential blocks, with mixed-use properties, and where they have opened small shops and workshops, and have mainly farmed the surrounding agricultural land. The area is definitely not a beautiful place; it is an improvised solution to the problems created by blind urbanism. Indeed, the government has issued Decree 66, a measure intended to "regulate" the master plan of the area, ordering the demolition of the informal buildings and the complete evacuation of the residents, to whom shares in the yet-to-be-built planned city will be granted as compensation.[16]

Unfortunately, this approach of moving forward from bad to worse, which creates poor solutions and dead ends, has repeatedly proven to be a fatal one, as seen most evidently in the Syrian war. Pushing people further and further away from the life of the city, as if sweeping them under the carpet, and forcing them to adopt alien solutions and means of living away from the land and their small, sustainable businesses, will never have positive outcomes.

Nature

The natural environment has suffered because of the destruction caused by the comprehensive modern approach to building and planning. The industrial orientation of the modern age, whether in factory building or in the use of cars, has led to the sacrifice of "unprofitable" resources such as riverfronts.

Major cities in Syria were all built upon rivers, which in addition to their natural use provided vitality and complemented their appearance. The river as an element of nature was incorporated into traditional architecture just as the old pillars were in the al-Nuri mosque and other old structures, which used to pick up from where previous civilizations had finished.

The al-Asi or Orontes river – the river of my city, Homs – used to run in full force to water the orchards and flow into the city through irrigation canals. The river had productive structures built upon it, such as mills, and was also used for free, collective leisure pursuits in the lush orchards surrounding its banks. Over time, the mills have been demolished, the free picnics have been curtailed by the construction of new restaurants which occupy parts of the orchards and block the view, and the canals have been damaged and in many places smothered by roads and pavements.

This happened not only in Homs but also in other places such as Damascus, where the river Barada runs through the capital and was used by people in much the same way. In the 1960s the river was buried, covered by roads for cars to pass over, and the rest became a filthy stream of rubbish. The costs of such ill-considered

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16   See the Marotta City website, available at: http://marotacity.sy/.

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actions have been enormous; not only is the road network, which is the reason such natural treasures are attacked, suffering from traffic congestion and pollution (part of the problem created by conjunction points with the Old City's network), but clean drinking water has also been lost, along with the irrigation needed for agriculture. More critically, people have lost yet another thread that used to connect them with each other and with their cities and settlements.

Rebuilding

It has become an unfortunate fact that big cities all around the world, and not only in Syria, are now "up for sale". We all suffer the consequences of the arrogance of those architects and planners, in collaboration with developers and decision-makers who collectively believe that they alone own the places where they build and are in charge of reorganizing the entire community. In much commercial business, even the role of the architect has become dispensable unless he or she is a "trademark" to sell. Without the services of socially responsible and aesthetically trained architects, our cities have lost face both literally and figuratively. On the other hand, people cannot build upon their environment as the low-rise small town used to allow. Today, we have automobiles and multi-storey buildings which cannot be subject to the vernacular norms. So where does this leave us?

Without identity, without home, we are left in the dark. In panic, some try to look back and hold onto the past's disappearing images, while others run after the latest advances as a cover-up for what is really missing.

Heritage, for example, has become a tool instead of a resource. Take a place like al-Takkia al-Sulaimanya, which is a Damascus mosque complex built by the Ottoman sultan Suleiman the Magnificent in the sixteenth century, designed by his architect Mimar Sinan. The complex was built on the riverbank of the Barada to host travellers on their way to the Hajj (pilgrimage) to Mecca, and also as a residence for foreign students seeking knowledge. It is a compound of two major buildings, a mosque and a school, including arcaded cells with amenities. In 1974, these former functions ceased and the complex became a national war museum and a market for traditional crafts and Syrian antiques. Today, the latest development is being completed by the Syrian Trust for Development in collaboration with the Syrian Company for Traditional Artefacts, in order to "modernize" the character of the complex and "preserve" its tangible and intangible heritage.

In order to fulfil those goals, the small shops of the original craftsmen were evacuated and replaced with refurbished shops and modernized "products" in the same spirit as Beirut's central district. Unfortunately, al-Takkia today is braced with iron as if wearing orthopaedic devices (see Figure 6). The place that represented, in every architectural detail and purpose, the values for which it was built has turned into a platform for "modernized heritage", which represents the absence of real identity and the embodiment of fakeness. The old structures, along with the masters' wisdom behind their creation, are vanishing under the

Figure 6. Al-Takkia al-Sulaimanya, Damascus. Photo © Marwa Al-Sabouni.

economic pressure of the "new", evident in the facades of luxurious five-star hotels. Syrian city planners, long before the war, had adopted a firm approach of creating "modern cities". In such areas, modest workshops have no place as they do not represent the "civilized" face of the modern city.

This penchant for modernizing and being placed on the world map has affected not only the old, but also the new. In 2007, the trend of modernization attracted a group of "star architects" to create a landmark for Damascus. The Danish architectural firm Henning Larsen Architects was chosen to design a discovery centre for children, called Masar (which means "trajectory"), to be located next to the Takkia, on the land previously occupied by the National Expo.

As with most of the major projects in Syria, the project has experienced many delays and has not been completed, first due to corruption and bureaucracy, followed by war. The design is supposed to be inspired by the atmosphere of the old alleyways, with a symbolic embodiment of the Damascene rose shape. In order to fulfil this vision, the land originally expropriated was left empty around the centre to be landscaped, with an area of 16 hectares (almost the size of twenty-five football pitches) as a public space. With the help of a good pair of binoculars and a scooter, you will be able to find a face you can talk to.

Aside from the state of the confiscated land and the project's enormous budget, the urban scars caused by the whole development are problematic. If you

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left the children the nature and the river, they could have explored far more than they will be able to when navigating this artificial mega-rose.

So, what kind of architecture should we be supporting?

The need to integrate the present and the past could not be more pertinent – not in the current mainstream fashion of superficial "borrowing", but through preserving the wisdom of the past and learning its lessons. We need the balance of the historical use of human scales and of sustainable and beautiful materials. The Islamic tradition in our cities has much to offer in this regard, with its Levantine idiom, in which people built side by side, following basic rules concerning height, alignment and materials, productivity, and spirituality. We can return from colonial-style planning, with its symmetrical boulevards and squares, and rebuild in another way, respecting heritage, repairing what we can, and finding an architectural language that will speak of a shared home. We can move away from concrete bunkers and crude modernized metaphors, and turn towards the architecture of place, which will welcome people back through its embracing streets and doorways, with all the beautiful little things that open the door for negotiation between people as it inspires them with its built forms. If we were to learn this lesson, we would be able build settlements and not ugly capsules and tourist destinations.

A shining example of how to build in this way can be found by examining a view from inside the Great Umayyad Mosque in Damascus, one of Syria's most treasured landmarks. The axis of the main door, framed by its beautiful ceiling, leads to another view centred on the Roman remnants of the Temple of Jupiter; built originally in Aramaean times, that view in turn frames the main axis of the old covered Ottoman souk. This harmonious planning and meticulous architecture bring to mind the famous definition of beauty coined by Leon Battista Alberti (1404–1472): "Beauty: the adjustment of all parts proportionately, so that one cannot add, or subtract, or change, without impairing the harmony of the whole. A man can do all things if he but wills them."

Planning is now ongoing for the rebuilding of Syria. Questions of when and how much are strongly present on the international agendas; however, this is hardly good news. In Syria the approach towards rebuilding does not differ much from what preceded the war, though there is one notable addition: aggressive investment. Foreign investment is likely to be strongly present, which means more imported solutions – the kind of solutions which are taking over globally, with much focus on function, sustainability, saving energy, and the use of passive design techniques, but mostly as an isolated layer, separate from architectural thinking where aesthetics lie at the core. When it comes to rebuilding massively destroyed areas like my country, many may argue that beauty is a luxury. However, contrary to this kind of argument, creating beautiful buildings does not necessarily have to be costly, and definitely not artificial or contrived. In order to create beautiful architecture and not mere buildings, beauty must lie at the heart of function, at the heart of sustainability, and at the heart of durability and efficiency. It becomes the common thread which unites all of these qualities in one coherent tapestry. Those who make sense of Alberti's definition of beauty

will notice that beautiful buildings indeed have something in common. There is no isolation of one function or one quality at the expense of the whole; the parts make up one whole in the same way that our historical cities were harmonized.

Hence, beautiful old structures should not be revered as a "lost glory" or viewed in a spirit of nostalgia. Rather, they should be cherished for their use of local materials and their expressions of culture, their elegant proportions, their accord with nature and harmony with their surroundings in every detail and dimension. They should be valued for taking into consideration what is next to them and what is above, who is passing by and who is residing within, how everyone involved is going to be affected, and what kind of relationships they are going to build.

If we rebuild in this way, our country might have a chance. A chance at restoring its worn-out urban fabric and reclaiming its lost identity. A chance to recreate its roots for people and their place, where love for one's neighbour, labour and land was part of a unified whole called home.

Protecting cultural property in Syria: New opportunities for States to enhance compliance with international law?

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Abstract

The war in Syria has lasted for six years and has led to massive destruction and loss of life. Stymieing international peace efforts from the outset, there is increasing doubt that the conflict will reach a resolution or political settlement in the near future. This frustration has triggered an appetite among States, civil society and the international community for finite and concrete measures that can contribute to greater protection and compliance with international law. A recent constellation of events around the protection of cultural property appears to herald a shift in the response of the international community toward prescribing practical and actionable measures for third-party States. Drawing on the responsibility of third States "to respect and ensure respect for" international humanitarian law, this article examines the legal framework protecting cultural property and recent innovative protection responses that contribute to ensuring compliance with international law in Syria, short of military assistance and intervention.

Keywords: Syria, cultural property, cultural heritage, compliance, common Article 1, 1954 Hague Convention, innovation, protection.

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"A nation stays alive when its culture stays alive."

The motto of the National Museum of Afghanistan, where some 2,750 pieces were destroyed by the Taliban in 2001.

Introduction

With political negotiations yielding no results, international humanitarian law (IHL) routinely ignored and international humanitarian agencies severely restricted, the crisis in Syria has led to fatigue and frustration across the international community. The human cost of the conflict is widely considered to be without historical precedent among civil wars[1] and a threat to international peace and security.[2] However, political channels remain blocked, there is no appetite for military intervention, and the binding and instructive decisions of the United Nations (UN) Security Council prescribing respect for IHL have gone unheeded.[3] Since so few avenues to peace seem to exist at present, there is an interest in any concrete, practical measures that could improve compliance with IHL in Syria. To this end, this article examines the innovative protection responses that have emerged to protect cultural heritage in the conflict which has engulfed Syria and spread to Iraq.[4] These responses illustrate how an international legal framework can provide a roadmap for States to develop a toolbox of positive measures for respecting and ensuring respect for IHL.[5]

This article starts by presenting an overview of the legal regimes, both in IHL and other bodies of law, that are relevant to the protection of cultural property in the Syrian conflict. It then examines why the protection of cultural property is important, even in a war that has been characterized by such levels of brutality and human suffering. Through assessing the international protection

1 Max Fischer, "Syria's Paradox: Why the War Only Ever Seems to Get Worse", *New York Times*, 26 August 2016.
2 UN News Centre, "Syria's Brutal War Threatens International Peace and Security, Says UN Rights Panel", 27 August 2014.
3 UNSC Res. 2139, 22 February 2014, para. 6, demanding that all parties, in particular the Syrian authorities, promptly allow rapid, safe and unhindered humanitarian access for UN humanitarian agencies and their implementing partners across conflict lines and across borders; UNSC Res. 2268, 26 February 2016, para. 1, endorsing a cessation of hostilities agreement aimed at ending five years of conflict; UNSC Res. 2401, 24 February 2018, para. 1, demanding the cessation of hostilities without delay by all parties for a durable humanitarian pause for at least thirty consecutive days throughout Syria.
4 Helga Turku, *The Destruction of Cultural Property as a Weapon of War: ISIS in Syria and Iraq*, Palgrave Macmillan, Cham, 2018.
5 In seeking to generate respect for IHL, there have been efforts to clarify the extent to which States are bound by the customary obligation to "respect and ensure respect" for their provisions "in all circumstances", as articulated in Article 1 common to the four Geneva Conventions and echoed in other IHL treaties including the 1954 Hague Convention, as obligations *erga omnes partes*, and to what extent this imposes an obligation on third States not involved in a given armed conflict to influence the parties to the conflict. See Knut Dörmann and Jose Serralvo, "Common Article 1 to the Geneva Conventions and the Obligation to Prevent International Humanitarian Law Violations", *International Review of the Red Cross*, Vol. 96, No. 895/896, 2015. A toolbox of practical measures – rather than obligations that States may find onerous – remains elusive, however.

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response and surveying innovations in protection that have emerged in response to the destruction of cultural property in Syria, the author seeks to identify some concrete measures that could be considered as part of a compliance toolbox and used as a model for future action. Finally, the article identifies gaps in that protection response and proposes possible measures to fill them.

The legal framework protecting cultural property in Syria

Syrian cultural property is protected under a broad legal framework made up of IHL, international treaties on transnational law enforcement, human rights law, and binding UN Security Council resolutions.

International humanitarian law

The ongoing armed conflict in Syria is governed by treaty and customary IHL. Beyond the protections contained in Article 3 common to the four Geneva Conventions of 1949, as Syria is not party to Additional Protocol II (AP II) of 1977, the conduct of hostilities in Syria is subject to the rules of IHL that are today accepted as having attained customary status.[6] Cultural property has long been widely recognized as being protected in armed conflict as a matter of custom. In 1946, the Nuremburg International Military Tribunal declared that the entire Hague Convention (IV) respecting the Laws and Customs of War on Land was "recognized by all civilized nations and … regarded as being declaratory of the laws and customs of war", including its paragraphs protecting cultural property.[7] The 27th session of the General Conference of the UN Educational, Scientific and Cultural Organisation (UNESCO) adopted a resolution on the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954 (1954 Hague Convention), which reaffirmed that "the fundamental principles of protecting and preserving cultural property in the event of armed conflict could be considered part of international customary law".[8] In its decision on the defence motion interlocutory appeal on jurisdiction in the *Tadić* case, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) included Article 19 of the 1954 Hague Convention along with the core of AP II as being part of customary law.[9] The Appeals Chamber also emphasized that customary rules

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6   Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study).

7   International Military Tribunal of Nuremberg, Trial Part 22 (22 August–1 October 1946), Judgment, 1 October 1946, p. 497; also appearing in *Annual Digest of Public International Law*, 1946, pp. 253–254. The International Military Tribunal judgment cites the Regulations annexed to Hague Convention (IV) respecting the Laws and Customs of War on Land of 18 October 1907 (1907 Hague Regulations).

8   UNESCO, *Records of the General Conference*, 27th Session, Paris, October–November 1993, available at: http://unesdoc.unesco.org/images/0009/000956/095621E.pdf (all internet references were accessed in May 2018). Reaffirming that the rules contained in Articles 3 and 4 of the 1954 Hague Convention could be considered part of international customary law.

9   ICTY, *The Prosecutor v. Dusko Tadić*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber), 2 October 1995, para 98.

applicable to non-international armed conflict cover the protection of civilian objects, and "in particular cultural property".[10] These rules, which prescribe respect for cultural property[11] and include a prohibition against "acts of deliberate destruction of cultural heritage of major value for humanity",[12] also apply to the conduct of non-State armed groups fighting in Syria.[13]

This body of law extends protections to cultural property through rules obliging each party to the conflict to respect cultural property by setting out four basic obligations: (1) prohibition of the use of cultural property and its immediate surroundings or of the appliances in use for its protection for purposes which are likely to expose it to destruction or damage in the event of armed conflict (except in cases of imperative military necessity); (2) prohibition of acts of hostility directed against cultural property (this obligation may also be waived where required by imperative military necessity); (3) the obligation "to prohibit, prevent and, if necessary, put a stop to any form of theft, pillage or misappropriation of, and any acts of vandalism directed against cultural property"; and (4) the absolute prohibition of acts of reprisal directed against cultural property.[14]

These core protections stem from the 1954 Hague Convention and its two protocols, which together make up the only treaties explicitly addressing the protection of cultural heritage in wartime. While Syria ratified the 1954 Hague Convention and its First Protocol in 1958, it has not ratified its Second Protocol, which expands protections to cultural property. Other States involved in the Syrian conflict have also ratified the 1954 Convention, including the Russian Federation and the United States. Most recently, the United Kingdom ratified both the 1954 Convention and its Second Protocol, and France acceded to the Second Protocol.[15] Adopted in 1999 in response to concerns about the effectiveness of the 1954 Hague Convention during the Second Gulf War and the Balkan Wars that led to massive targeting and destruction of cultural property, the Second Protocol contains a number of provisions that significantly improve the protection of cultural heritage during conflict.[16] The 1954 Hague Convention, however, as the paramount international

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10 *Ibid.*, para 127.

11 Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention, The Hague, 14 May 1954 (entered into force 7 August 1956) (1954 Hague Convention), Arts 4, 19.

12 Francesco Francioni and Federico Lanzerini (eds), *The 1972 World Heritage Convention: A Commentary*, Oxford University Press, Oxford, 2008, p. 635.

13 The International Criminal Court (ICC) has prosecuted Ahmad al Faqi al Mahdi, a member of the Ansar Al Dine armed group who presided over a morality tribunal known as the Hisbah and played a crucial role in implementing the decision to destroy shrines and mausoleums in Timbuktu, which were classified by UNESCO as World Heritage Sites. ICC, *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, Case No. ICC-01/12-01/15, Judgment (Trial Chamber), 27 September 2016.

14 1954 Hague Convention, Art. 19; *ibid.*, Arts 4 and 19.

15 See the International Committee of the Red Cross (ICRC) "Treaties, States Parties and Commentaries" database for list of States Parties and State signatories to the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 26 March 1999, available at: https://ihl-databases.icrc.org/ihl.

16 See Serge Brammertz, Kevin C. Hughes, Alison Kipp and William B. Tomljanovich, "Attacks against Cultural Heritage as a Weapon of War: Prosecutions at the ICTY", *Journal of Criminal Justice*, Vol. 14, No. 5, 2016.

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instrument for the protection of cultural property in peacetime and armed conflict including occupation, provides substantial protection as a standalone instrument. Drafted in the aftermath of the Second World War, which saw the devastation of entire cities full of monuments and cultural heritage, the 1954 Convention sought to limit such destructive practices.[17] As such, it bears striking relevance to the Syrian conflict, which has been characterized by the ruin of urban areas and their historical cores, such as the Old City of Aleppo and the historic area of Homs.[18]

The 1954 Hague Convention defines the single term "cultural property" to include three categories: immovable and movable items of intrinsic artistic, historic, scientific or other cultural value such as historic monuments, works of art or scientific collections; premises used for the housing of movable cultural property, such as museums, libraries, archive premises and temporary wartime shelters; and "centres containing monuments" such as important historic cities or archaeological zones.[19] Limited protection is also offered to authorized means of emergency transport in times of hostilities and to authorized specialist personnel, in a restricted set of circumstances.[20] These concepts follow a logic similar to the protection for civilian air-raid shelters, hospitals and ambulances in the Geneva Conventions,[21] and are necessary for the comprehensive protection of cultural property.[22]

Since military use and targeting are two of the main causes of damage to cultural property sites in Syria,[23] the relevant provisions of the 1954 Hague Convention deserve particular attention. The 1954 Hague Convention requires the parties to protect cultural property, which comprises the safeguarding of and respect for such property.[24] Safeguarding cultural property demands that States take preparations in peacetime against the foreseeable effects of armed conflict.[25]

17 Jean-Marie Henckaerts, "New Rules for the Protection of Cultural Property in Armed Conflict", *International Review of the Red Cross*, Vol. 81, No. 835, 1999.

18 See ICRC, "Syria: Aleppo 'One of the Most Devastating Urban Conflicts in Modern Times'", 15 August 2016, available at: www.icrc.org/en/document/syria-news-cities-aleppo-one-most-devastating-urban-conflicts; Associated Press, "4 Years On, Ancient Heart of Homs Still Abandoned Ruins", 17 January 2018, available at: www.voanews.com/a/ancient-heart-of-homs-still-abandoned-ruins/4211616.html.

19 1954 Hague Convention, Art. 2.

20 The prohibition on any act of hostilities against transports, and the immunity of transports from seizure, capture and placing in prize, only extends to those transports that are under special protection (*ibid.*, Arts 12(3), 14) as indicated by the distinctive red cross or red crescent emblem. Personnel engaged in the protection of cultural property are to be respected, as is consistent with the interests of security and in the interests of such property, if they fall into the hands of the opposing party, and should be allowed to continue their duties (*ibid.*, Art. 15).

21 ICC, *Al Mahdi*, above note 13, para. 14.

22 Patrick J. Boylan, "The Concept of Cultural Protection in Times of Armed Conflict: From the Crusades to the New Millennium", in Neil Brodie and Kathryn Walker Tubb (eds), *Illicit Antiquities: The Theft of Culture and the Extinction of Archaeology*, Routledge, London, 2012, p. 66.

23 UN Institute for Training and Research (UNITAR), *Satellite-Based Damage Assessment to Cultural Heritage Sites in Syria*, 22 December 2014. This report notes that military activity, including hostilities and construction of fortified fighting positions, can lead to damage to cultural heritage locations (p. 13).

24 1954 Hague Convention, Art. 2.

25 *Ibid.*, Art. 3.

Once armed conflict has broken out, to "protect" cultural property means taking active measures to prevent it from being damaged or harmed.[26] This includes, under Article 4, the negative obligation to refrain from using cultural property, its immediate surroundings, or the appliances in use for its protection, for purposes that are likely to expose it to destruction or damage in the event of armed conflict, whether in a State's own territory or within the territory of other parties.[27] It also includes positive obligations to "respect" cultural property, including to refrain from attacking it or carrying out "any act of hostility directed against such property";[28] to prohibit, prevent and, if necessary, put a stop to any form of theft, pillage or misappropriation of, and any acts of vandalism directed against cultural property; and not to carry out acts of reprisal directed against cultural property.[29]

Under the 1954 Hague Convention, cultural property loses its protection against military use and acts of hostility in "cases where military necessity imperatively requires such a waiver".[30] The obligations against theft, pillage, misappropriation, vandalism and reprisals are absolute and cannot be waived. There is extensive debate about the nature of the "military necessity" waiver, and whether it makes the "scope for invoking [imperative military necessity] quite large"[31] or whether it provides a stringent legal standard anchored in the general obligation to protect cultural property.[32] Article 11 of the 1954 Convention establishes a special protection regime, adding that for registered cultural property, immunity may be withdrawn "only in exceptional cases of unavoidable military necessity, and only for such time as that necessity continues", provided that such necessity is established at a high level of command.

As Jiří Toman's Commentary to the 1954 Hague Convention Second Protocol has pointed out, the 1954 Convention was adopted well before the 1977 Additional Protocols to the Geneva Conventions codified developments in international humanitarian law defining the notion of a "military objective".[33] The 1999 Second Protocol to the 1954 Hague Convention, which Syria has signed but not ratified, integrates the Additional Protocol I (AP I) definition of "military objective" into the rules protecting cultural property. It does this through setting

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26 See ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 2nd ed., Geneva, 2016 (ICRC Commentary on GC I), Art. 19, para. 1799; Art. 24, paras 1982–1994. Although not applicable to cultural property (or non-international armed conflict) as such, Geneva Convention I (GC I) provides useful guidance on the meaning of terms and interpretation of principles that appear throughout IHL.

27 1954 Hague Convention, Art. 4.

28 See ICRC Commentary on GC I, above note 26, Art. 19, para. 1799; Art. 24, paras 1982–1994.

29 1954 Hague Convention, Art. 19; *ibid.*, Arts 4, 19.

30 *Ibid.*, Art. 4(2).

31 Jan Hladik, "The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and the Notion of Military Necessity", *International Review of the Red Cross*, Vol. 81, No. 835, 1999.

32 Marina Lostal, "The Meaning and Protection of 'Cultural Objects and Places of Worship' under the 1977 Additional Protocols ", *Netherlands International Law Review*, Vol. 59, No. 3, 2012.

33 Jiří Toman, *Cultural Property in War: Improvement in Protection – Commentary on the 1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict*, UNESCO Publishing, Paris, 2009, p. 177.

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out that a waiver on the basis of imperative military necessity under Article 4 of the 1954 Hague Convention can only be invoked when (i) that cultural property has, by its function, been made into a military objective (meaning an object which by its nature, location, purpose or use makes an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage);[34] and (ii) there is no feasible alternative available to obtain a similar military advantage to that offered by directing an act of hostility against that objective.[35] This implies that where there is a choice among several objectives, the attack should be directed against the target(s) that are not cultural property, even if their damage or destruction would yield less of a military advantage. Thus, the Second Protocol to the 1954 Convention introduced more explicit conditions, clarifying the notion of "military necessity" to include the principle of distinction that was codified in the 1977 Additional Protocols to the Geneva Conventions. The result is a further affirmation of cultural property deserving treatment sitting "above and beyond" that of other civilian objects.[36]

Even though the specific rules set out in the Second Protocol to the 1954 Hague Convention may not apply to Syria, it is notable that cultural property is protected by a particularly robust and developed area of IHL. The specific treaty provisions addressing cultural property in armed conflict are further complemented by the prohibitions on attacking cultural property contained in Article 53(1) of AP I and Article 16 of AP II, which do not provide for a waiver in case of imperative military necessity.[37] The extent to which any of these aspects of the Second Protocol to the 1954 Hague Convention, AP I or AP II are customary and therefore applicable to Syria is beyond the scope of this article.

It is worthwhile to note, however, that the ICTY Statute[38] and the Rome Statute of the International Criminal Court (ICC)[39] echo the approach found in earlier instruments, such as the 1907 Regulations Respecting the Laws and

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34 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, 26 March 1999 (Second Protocol to the 1954 Hague Convention), Arts 1(f), 6(i); Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978) (AP I), Art. 52(2).

35 Second Protocol to the 1954 Hague Convention, Art. 6.

36 Micaela Frulli, "The Criminalization of Offences against Cultural Heritage in Times of Armed Conflict: The Quest for Consistency", *European Journal of International Law*, Vol. 22, No. 1, 2011, pp. 203, 205.

37 AP I, Art. 53(1); Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609, 8 June 1977 (entered into force 7 December 1978), Art. 16.

38 Article 3(d–e) of the ICTY Statute lists "seizure of, destruction or willful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science" and "plunder of public or private property". Other provisions of the ICTY Statute which were used to prosecute acts against cultural property but were not specifically aimed at this objective are Article 3(b), "wanton destruction of cities, towns or villages, or devastation not justified by military necessity", and Article 3(c), "attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings". Article 3(d) is inspired by Articles 27 and 56 of the 1907 Hague Regulations.

39 Rome Statute of the International Criminal Court, 17 July 1998 (entered into force 1 July 2002) (Rome Statute).

Customs of War on Land.[40] The Rome Statute criminalizes "[i]ntentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives", in both international and non-international armed conflict, and the "destruction and appropriation of property" that is protected under the Geneva Conventions of 1949 in international armed conflict.[41] These two crimes stem from the two provisions of the 1907 Hague Regulations that mention cultural property,[42] one in the context of the conduct of hostilities or "sieges and bombardments",[43] and the other in situations where a belligerent exercises military authority over a territory and is prohibited from seizing, destroying or wilfully damaging cultural property.[44] While some have criticized these provisions as being insufficiently specific and failing to address the concern that cultural property deserves protection beyond its material dimension due to its cultural value for the local community and for humanity as a whole,[45] this is reflective of custom. According to the International Committee of the Red Cross's (ICRC) articulation of customary law, in the context of hostilities, each party to a conflict must respect cultural property, with special care taken in military operations "to avoid damage to buildings dedicated to religion, art, science, education or charitable purposes and historic monuments unless they are military objectives"; and "property of great importance to the cultural heritage of every people must not be the object of attack unless imperatively required by military necessity".[46] While there have not been many international criminal cases that have adjudicated "military necessity" in the context of attacks on cultural property, at the ICTY the reversal of the Trial Chamber finding on the destruction of the Old Mostar Bridge by the Appeals Chamber in the *Prlić et al.* case hinged on whether "military necessity" is defined by the absence of an alternative to the destruction of the cultural property in question.[47]

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40 1907 Hague Regulations.
41 Rome Statute, Art. 8(2)(a)(iv).
42 For a discussion on how these provisions were applied (or misapplied) by the Trial Chamber of the ICC in the *Al Mahdi* case, see William Shabas, "Al Mahdi Has Been Convicted of a Crime He Did Not Commit", *Case Western Reserve Journal of International Law*, Vol. 49, No. 1, 2017.
43 Convention (IV) respecting the Laws and Customs of War on Land and Its Annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 18 October 1907 (Hague Convention IV), Art. 27.
44 *Ibid.*, Art. 56.
45 M. Frulli, above note 36.
46 ICRC Customary Law Study, above note 6, Rule 38.
47 See ICTY, *Prosecutor v. Prlić et al.*, Case No. IT-04-74-A, Appeal Judgment (Appeals Chamber), 29 November 2017, in which the Appeals Chamber found, by majority, that the "Trial Chamber erred in finding that the destruction of the Old Bridge of Mostar constituted the crime of wanton destruction not justified by military necessity as a violation of the laws or customs of war". In his Dissenting Opinion, Judge Fausto Pocar (para. 7) disagreed with the majority with respect to: (i) it erroneously conflating the notion of a military target with that of military necessity; (ii) its failure to discuss the fact that the attack on the Old Bridge of Mostar was disproportionate and the consequences thereof; (iii) its failure to account for the fact that the Old Bridge of Mostar constitutes cultural property protected under the general principles of international humanitarian law; and (iv) the consequences of the above errors with respect to persecutions on political, racial, and religious grounds as crimes against humanity.

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The *Strugar* case has also demonstrated the challenges that the concept poses in international criminal law.[48]

As mentioned above, the 1954 Hague Convention establishes a system of special protection. This system deserves brief consideration as Syria hosts six World Heritage Sites,[49] all of which are in danger, and eleven other sites of outstanding universal cultural value that are set to be considered for inscription on the World Heritage List.[50] The special protection system has several pillars, including advance warning, listing, and the requirement that any attack against cultural property be ordered at a high level of operational command. The listing system was initially designed for a limited number of refuges intended to shelter movable cultural property, centres containing monuments and other immovable cultural property of great importance. Special protection is granted by entry in the International Register of Cultural Property under Special Protection. This system – and the subsequent List of Cultural Property under Enhanced Protection established under the Second Protocol to the 1954 Hague Convention – have been used to little success. While the International Register was updated in 2015 to include a number of cultural sites in Mexico, prior to that, the last time a State entered a site into the register was in 1978, with the result that the special protection mechanism never reached its full potential.[51] The subsequent enhanced protection system, which combined aspects of special protection from the 1954 Hague Convention and the criteria for listing cultural property under the 1972 UNESCO Convention concerning the Protection of World Cultural and Natural Heritage, has only twelve sites listed as being under enhanced protection.[52] All twelve have also been listed as UNESCO World Heritage Sites. *De facto*, UNESCO's World Heritage List[53] has taken the place of both the special protection and enhanced protection lists when it comes to criminal sanctions for violations, as evidenced by the *Jokić* case at the ICTY[54] and the *Al Mahdi* case at the ICC.[55] The essence of the current protection system is that it entails some form of "registered" or "certified protection", whose holder registers or certifies that the property will never be used for military purposes. If this is complied with, the property could thus never become the object

48 See ICTY, *Prosecutor v. Strugar*, Case No. IT-01-42, Judgment (Trial Chamber), 31 January 2005, paras 328–330.

49 UNESCO World Heritage Centre, Syrian Arab Republic. The six properties inscribed on the World Heritage List are the Ancient City of Aleppo (1986), the Ancient City of Bosra (1980), the Ancient City of Damascus (1979), the Ancient Villages of Northern Syria (2011), Crac des Chevaliers and Qal'at Salah El-Din (2006), and Palmyra (1980).

50 UNESCO World Heritage Centre, Syrian Arab Republic, Tentative List.

51 J.-M. Henckaerts, above note 17. For an updated International Register list, see: www.unesco.org/new/en/culture/themes/armed-conflict-and-heritage/protection/enhanced-protection/.

52 Secretariat of the 1954 Hague Convention, "List of Cultural Property under Enhanced Protection", UNESCO, 2017.

53 Established by the Convention concerning the Protection of the World Cultural and Natural Heritage, 16 November 1972 (entered into force 17 December 1975) (1972 UNESCO Convention).

54 The *Jokić* case involved the shelling of the Old Town of Dubrovnik. The Trial Chamber noted that the Old Town's belonging to the World Heritage List granted it a special status that had "been taken into consideration in the definition and evaluation of the gravity of the crime", and thus also in the sentencing of the defendant.

55 ICC, *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, Judgment and Sentence, 27 September 2016, para. 80.

of a lawful attack. Thus, the advantage of listing property is that an adversary will be made aware of it and any attack on the property would thus incur serious consequences for the perpetrator.

While the 1954 Hague Convention did not contain a duty to give effective advance warning for cultural property under general protection, it did envision this for cultural property under special protection, meaning that the loss of immunity from attack is not immediate. Special protection may cease "only in exceptional cases of unavoidable military necessity, and only for such time as that necessity continues", and "whenever circumstances permit", the opposing party must be notified, a reasonable time in advance, of the decision to withdraw immunity.[56] In addition, an attack can only be ordered at a high level of operational command, as only "an officer commanding a force the equivalent of a division in size or larger" can establish whether an attack on cultural property under special protection is militarily necessary and unavoidable.[57] The Second Protocol to the 1954 Hague Convention tightened these conditions with respect to cultural property under enhanced protection by imposing an obligation that an attack be ordered at the highest operational level of command.[58]

In situations where special protection has been lost, the general protections of Article 4 of the 1954 Hague Convention continue to hold. For example, when special immunity is lost due to a violation by the opposing party under Article 11 (1), the protection standard of "imperative military necessity" contained in Article 4(2) will apply instead of the "unavoidable military necessity" standard in Article 11(2), acting as a safety net. And indeed, even when general protection ceases, the rules of IHL continue to apply, with customary international law supplementing the rules set out in the 1954 Convention.

In customary law there is an obligation by parties to an armed conflict to respect and ensure respect for IHL. This is established through State practice as a norm of customary international law applicable in both international and non-international armed conflicts.[59] Moreover, the High Contracting Parties to the Geneva Conventions undertake, "whether or not they are themselves party to an armed conflict, to ensure respect for the Conventions by other High Contracting Parties and non-State Parties to an armed conflict".[60] This obligation contains both an external and internal prong. Both States involved and States not involved in the conflict in Syria have a legal interest in the observance of IHL through doing everything reasonably in their power to ensure that the rules are respected by all the parties to the armed conflict, and to stop violations from happening.[61] The obligations of IHL, as articulated in the Geneva Conventions and other

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56 1954 Hague Convention, Art. 11(2).
57 *Ibid.*
58 Second Protocol to the 1954 Hague Convention, Art. 13(i).
59 ICRC Customary Law Study, above note 6, Rule 139.
60 ICRC Commentary on GC I, above note 26, paras. 119–120.
61 See ICRC Customary Law Study, above note 6, Rule 144. This rule, on "Ensuring Respect for International Humanitarian Law", stipulates that States may not encourage violations of IHL by parties to an armed conflict. They must exert their influence, to the degree possible, to stop violations of international humanitarian law.

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instruments, are thus *erga omnes partes*, obligations toward all other States Parties.[62] This supplements the internal obligation, as articulated in Articles 4(1) and 7(1) of the 1954 Hague Convention, which stipulates that the High Contracting Parties undertake to respect cultural property in their own territory and in the territory of other High Contracting Parties where they exercise control. Considering the potential scope of the external prong of this obligation for States not party to the conflict in Syria, it is important to examine what it practically entails.

The ICRC study on customary rules of IHL identifies diplomatic protest and collective measures as the two most often used measures employed by States to try and stop violations of international law.[63] For violations against cultural property, the Second Protocol to the 1954 Hague Convention explicitly addresses the *erga omnes* obligation to ensure respect for its rules. Article 31 of the Second Protocol states that "in situations of serious violations of this Protocol, the Parties undertake to act, jointly through the Committee, or individually, in cooperation with UNESCO and the United Nations and in conformity with the Charter of the United Nations".[64] This supplements the possibility, envisioned in the 1972 World Heritage Convention, of a State submitting a request for international assistance to protect cultural property at risk.[65] The Second Protocol now has about seventy States Parties,[66] for whom it also establishes an obligation to extradite or prosecute individuals responsible for violations of the Second Protocol, and for States to afford one another mutual legal assistance toward this end.[67] Beyond this, there has been little articulation of the type of measures States not involved in an armed conflict could undertake in line with their obligation to "ensure respect for the [rules of IHL] in all circumstances" under customary law,[68] contained in Article 1 common to the four Geneva Conventions and echoed in the 1954 Hague Convention[69].

Transnational law enforcement

In addition to obligations imposed on the parties to the conflict, Syrian cultural property is protected under the 1970 Convention on the Means of Prohibiting

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62   ICRC Commentary on GC I, above note 26, Art. 1, para. 119, citing International Court of Justice (ICJ), *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004, para. 157 ("In the Court's view, these rules [of humanitarian law applicable in armed conflict] incorporate obligations which are essentially of an *erga omnes* character"); ICTY, *Prosecutor v. Zoran Kupreškić et al.*, Case No. IT-95-16-T, Trial Judgment, 14 January 2000, para. 519 ("norms of international humanitarian law do not pose synallagmatic obligations, i.e. obligations of a State *vis-à-vis* another State. Rather … they lay down obligations towards the international community as a whole"); and Jean Pictet (ed.), *Commentary on the First Geneva Convention*, ICRC, Geneva, 1952, p. 25 ("[Geneva Convention I] is not an engagement concluded on a basis of reciprocity, binding each party to the contract only in so far as the other party observes its obligations. It is rather a series of unilateral engagements solemnly contracted before the world as represented by the other Contracting Parties").
63   ICRC Customary Law Study, above note 6, Rule 144.
64   Second Protocol to the 1954 Hague Convention, Art. 31.
65   1972 UNESCO Convention, Arts 19–21.
66   M. Frulli, above note 36, pp. 203, 205.
67   Second Protocol to the 1954 Hague Convention, Ch. 4.
68   ICRC Customary Law Study, above note 6, Rule 144.
69   1954 Hague Convention, Art. 7(1).

and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970 UNESCO Convention). This is a key instrument that allows States to share in the responsibility of protecting cultural property. Syria has ratified the 1970 UNESCO Convention, but has not implemented it in national legislation.[70] The Convention focuses primarily on conduct during times of peace[71] and envisions preventative measures (such as the taking of inventories and monitoring of trade), restitution provisions and a framework for international cooperation necessary to give the Convention's provisions their effect. In cases where cultural property is in jeopardy from pillage, Article 9 of the Convention provides for more specific action such as a call for import and export controls.[72] It further solidifies the rule against pillage of cultural property, anchored in the prohibitions contained in the 1907 Hague Regulations (which have reached customary status) and in the 1954 Convention, by creating an actionable mechanism for protection against such acts.[73]

The 1970 UNESCO Convention appears at first glance to be particularly well suited to protecting Syrian cultural property, considering the scale of looting of museums and illegal excavations of archaeological sites taking place in that country.[74] Given the organized approach that the armed group Islamic State of Iraq and Syria (ISIS) has taken to looting archaeological sites in Syria and Iraq through its "Antiquities Division", the Convention's provisions take on an added significance in stemming the flow of financial support to terrorism.[75] Through exercising vigilance and undertaking positive measures within their own jurisdictions, third-party States not involved in the Syrian conflict can contribute to the protection of cultural property and ensure compliance with the rules of international law. With Syria, Iraq and neighbouring States Jordan, Turkey and Lebanon all States party to the Convention, third-party State involvement could form a solid basis for preventing the transnational transfer of looted cultural property from Syria.

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70 The Syrian Arab Republic deposited its instrument of acceptance for the 1970 UNESCO Convention on 21 February 1975.

71 Zsuzsanna Veres, "The Fight Against Illicit Trafficking of Cultural Property: The 1970 UNESCO Convention and the 1995 UNIDROIT Convention", *Santa Clara Journal of International Law*, Vol. 12, No. 2, 2014.

72 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 1970 (1970 UNESCO Convention), Art. 9.

73 Hague Convention IV, Arts 28, 47; Emma Cunliffe, Nibal Muhesen and Marina Lostal, "The Destruction of Cultural Property in the Syrian Conflict: Legal Implications and Obligations", *International Journal of Cultural Property*, Vol. 23, No. 1, 2016, p. 7.

74 UNITAR, above note 23.

75 US Government Accountability Office (GAO), *Cultural Property: Protection of Iraqi and Syrian Antiquities*, Doc. GAO-16-673, Report to Congressional Requesters, August 2016, p. 9, available at: www.gao.gov/products/GAO-16-673. For the relevance of this finding to further international efforts, see the statement of Ambassador Michele J. Sison, who, when explaining the US vote in favour of Resolution 2347 at the UN Security Council, singled out Abu Sayyaf, a now deceased high-ranking ISIS official, for illicitly trading in antiquities to finance terrorism. Ambassador Michele J. Sison, US Deputy Permanent Representative to the UN, US Mission to the UN, "Explanation of Vote at the Adoption of UN Security Council Resolution 2347 on the Destruction and Trafficking of Cultural Heritage by Terrorist Groups and in Situations of Armed Conflict", New York, 24 March 2017, available at: https://usun.state.gov/remarks/7721.

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The UNESCO Convention was drafted against the backdrop of increasing thefts from museums and archaeological sites in the global South in the late 1960s and early 1970s, with objects often fraudulently imported with unidentified provenance and ending up in private collections and official institutions in Western countries.[76] The Convention is based on the idea that all States must participate in the fight against illicit trafficking, both through increased monitoring of what comes into their countries and by helping to return stolen objects. In the case of Syria, however, there are a number of obstacles to the Convention reaching its full potential. As some commentators have highlighted, it will be extremely difficult to trace illicitly exported objects since many have been illegally excavated from sites and were thus previously unknown, while others come from museums whose collections have not been properly inventoried. Furthermore, broken diplomatic relations between Syria and countries such as the United States and United Kingdom will make any international cooperation in this field that much more unlikely.[77] While these efforts were bolstered with the adoption of UN Security Council Resolution 2199 in February 2015, as will be discussed below, many obstacles remain to stemming the trafficking of Syrian artefacts.

Neither Syria nor any of its neighbours are party to the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, which strengthens the provisions of the 1970 UNESCO Convention and complements them with minimal rules on restitution and return which aim at harmonizing various existing pieces of legislation. It is nonetheless of interest since it could apply in importation States and could be utilized in the future. The UNIDROIT Convention provides direct tools to make a claim for recovery of stolen property and illegally exported cultural objects, and is self-executing into national law. A recent effort by Council of Europe States to stem the antiquities black market has resulted in the Nicosia Convention on Offences relating to Cultural Property (also known as the "Blood Antiquities Convention"), recently negotiated and opened for signature to States worldwide.[78] Seeking to facilitate better prevention, investigation and prosecution of cultural property crimes, it addresses the complex web of smugglers, handlers, restorers and sellers who aid the destruction and trafficking of cultural property. The new Nicosia Convention seeks to close the existing gaps in the system, which were identified by the UN Security Council in its repeated calls for States to introduce effective national measures to prevent and combat trafficking in cultural property and related offences in Resolutions 2199 (12 February 2015), 2253 (17 December 2015), 2322 (12 December 2016) and 2347 (24 March 2017). These resolutions are explored in more detail below.

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76 UNESCO, "Illicit Trafficking of Cultural Property: Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property – 1970", available at: www.unesco.org/new/en/culture/themes/illicit-trafficking-of-cultural-property/1970-convention/.

77 E. Cunliffe, N. Muhesen and M. Lostal, above note 73.

78 Council of Europe Convention on Offences relating to Cultural Property, 2017, available at: www.coe.int/en/web/conventions/full-list/-/conventions/rms/0900001680710435.

International human rights law

The protection of cultural heritage is firmly underpinned by international human rights law, which sets out the right of access to and enjoyment of cultural heritage, the right to take part in cultural life, the right of members of minorities to enjoy their own culture, and the right of indigenous peoples to self-determination and to maintain, control, protect and develop cultural heritage in peacetime and in war.[79] The Special Rapporteur in the field of cultural rights has stated that this also includes the

> right of individuals and collectivities to *inter alia* know, understand, enter, visit, make use of, maintain, exchange and develop cultural heritage, as well as to benefit from the cultural heritage and the creation of others. It also includes the right to participate in the identification, interpretation and development of cultural heritage, as well as in the design and implementation of preservation and safeguard policies and programmes.[80]

The Special Rapporteur argues that cultural heritage is fundamentally linked to other human rights as well, as a resource for the rights to freedom of opinion and expression, freedom of thought, conscience and religion, as well as economic rights, the right to education and the right to development. This perspective imbues cultural property with a "human dimension", emphasizing its significance for individuals and groups and their identity.[81]

International human rights law, in taking this perspective, sets out clear protections for cultural property. In its General Comment No. 21, the Committee on Economic, Social and Cultural Rights recalled that States' obligation to ensure the right to participate in cultural life under Article 15 of the International Covenant on Economic, Social and Cultural Rights includes the obligation to respect and protect cultural heritage in all its forms and of all groups.[82] Specifying that this obligation applies in times of armed conflict, General Comment No. 21 outlines that the obligation to respect and protect cultural heritage includes "the care, preservation and restoration of historical sites, monuments, works of art and literary works, among others",[83] and notes that "the obligations to respect and to protect freedoms, cultural heritage and cultural diversity are interconnected", making it impossible to separate a people's cultural heritage from the people

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79 *Report of the Independent Expert in the Field of Cultural Rights*, UN. Doc. A/HRC/17/38 and Corr.1, 21 March 2011, para. 79.

80 *Ibid.*

81 *Report of the Special Rapporteur in the Field of Cultural Rights*, UN Doc. A/HRC/31/59, 3 February 2016, para. 47; *Report of the Independent Expert in the Field of Cultural Rights*, above note 79, para. 77. For example, in 2012, the independent expert in the field of cultural rights, Ms Shaheed, noted that "the destruction of tombs of ancient Muslim saints in Timbuktu, a common heritage of humanity, is a loss for us all, but for the local population it also means the denial of their identity, their beliefs, their history and their dignity".

82 UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 21, "Right of Everyone to Take Part in Cultural Life (Art. 15, Para. 1a of the Covenant on Economic, Social and Cultural Rights), E/C.12/GC/21, 21 December 2009, para. 50."

83 *Ibid.*, para. 50(a).

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themselves and their rights.[84] Beyond preserving and safeguarding an object or a cultural manifestation in itself, the human rights approach to cultural heritage "obliges one to take into account the rights of individuals and communities in relation to such object or manifestation and, in particular, to connect cultural heritage with its source of production".[85]

The Special Rapporteur in the Field of Cultural Rights takes the view that the human rights and human dimension-focused protections of cultural heritage have influenced the international treaties that protect cultural property as such. Noting the widespread support for the Convention concerning the Protection of the World Cultural and Natural Heritage (1972) and the Convention for the Safeguarding of the Intangible Cultural Heritage (2003), the Special Rapporteur has observed that in recent years a shift has taken place from the preservation and safeguarding of cultural heritage as such to the protection of cultural heritage as being of crucial value for human beings in relation to their cultural identity.[86]

Applicable UN Security Council resolutions

Four UN Security Council resolutions address the cultural property crisis in Syria and Iraq, across whose territories ISIS carried out its campaign of cultural property destruction[87] and where years of armed conflict have endangered a rich cultural heritage. In May 2003, following the US-led invasion of Iraq and public condemnation of its failure to protect Iraq's museums and cultural institutions from looting in the early days of the occupation, the UN Security Council adopted Resolution 1483. It called on member States to take a number of measures to assist in the post-conflict reconstruction in Iraq, including "appropriate steps to facilitate the safe return of Iraqi cultural property" such as by "establishing a prohibition on trade in or transfer of such items".[88] In many ways, this resolution has laid the foundation for the Security Council's response to the decimation of Iraq's cultural property over the span of almost fifteen years since. Critically, with the Security Council finding that the situation in Iraq in 2003 still constituted a threat to international peace and security, the resolution was adopted under Chapter VII of the UN Charter, making it binding on all UN member States. It also positioned the return of Iraqi cultural property and prohibition on further transfers as part of the post-conflict reconstruction of Iraq, and connected to the maintenance of international peace and security.

Resolution 2139, primarily calling on all parties to the conflict in Syria to permit access to humanitarian aid and adopted unanimously in February 2014,

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84   *Ibid.*, para. 50.
85   *Report of the Independent Expert in the Field of Cultural Rights*, above note 79, para. 2.
86   *Report of the Special Rapporteur in the Field of Cultural Rights*, above note 81, para. 53.
87   For further analysis of ISIS' destruction of cultural heritage, see Ömür Harmanşah, "ISIS, Heritage, and the Spectacles of Destruction in the Global Media", *Near Eastern Archaeology*, Vol. 78, No. 3, 2015; Sofya Shahab and Benjamin Isakhan, "The Ritualization of Heritage Destruction under the Islamic State", *Journal of Social Archaeology*, Vol. 18, No. 2, 2018.
88   UNSC Res. 1483, 22 May 2003, para. 7.

also called on the parties to "save Syria's rich societal mosaic and cultural heritage, and take appropriate steps to ensure the protection of Syria's World Heritage Sites".[89] While not adopted under Chapter VII, this resolution positioned the protection of cultural property as a concern linked to the violence and deterioration of the humanitarian situation in Syria.

A year later, in February 2015, the Security Council unanimously passed Resolution 2199 under Chapter VII of the UN Charter, particularly addressing ISIS' destruction of cultural property. It "condemn[ed] the destruction of cultural heritage in Iraq and Syria" by ISIS and required that all UN member States "take appropriate steps to prevent the trade in [illegally obtained] Iraqi and Syrian cultural property and other items of archaeological, historical, rare scientific, and religious importance",[90] echoing the language of Resolution 1483. Resolution 2199 sets out concrete steps including "prohibiting cross-border trade in such items", and mandates UNESCO, Interpol and other organizations to assist in the implementation of such steps.[91]

Resolution 2199 marked a turning point for the international community in addressing the destruction of cultural property. By 2015, ongoing conflicts in the Middle East, notably in Iraq and Syria, as well as Mali, had brought considerable attention to the issue of the destruction of cultural heritage by armed groups. After several years of pressure, the UN Security Council condemned the destruction of Syria's heritage and reaffirmed the significance of preventing the illicit trafficking of Syrian artefacts, as it did in Iraq in 2003 through Resolution 1483. Addressing the linkage with counterterrorism and trafficking of cultural property by terrorist organizations, the Security Council adopted the resolution aiming to disrupt financing of terrorist organizations, notably ISIS and the Al-Nusra Front, whose operational capacities benefited from the illegal trafficking of cultural heritage.[92]

It is important to note that a similar prohibition targeting the assault on Iraq's cultural heritage in 2003 was effective in reducing the amount of illicit objects on the international market.[93] Resolution 2199 laid the foundation for strengthening the protection response to cultural property destruction.

Both States and international organizations have since built upon Resolution 2199 to put cultural protection onto the Security Council agenda. For instance, on 27 April 2016, as a follow-up to Resolution 2199, France and then-Security Council

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89   UNSC Res. 2139, 22 February 2014, Preamble.
90   UNSC Res. 2199, UN Doc S/RES/2199, 12 February 2015, para. 15. On this resolution and, more generally, on cultural heritage in prior resolutions and the link between cultural heritage and terrorism, see Vincent Négri, "Legal Study on the Protection of Cultural Heritage through the Resolutions of the Security Council of the United Nations", UNESCO, 2015, available at: http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/Study_Negri_RES2199_01.pdf.
91   UNSC Res. 2199, 12 February 2015.
92   UNSC Res. 2199, 12 February 2015, Preamble.
93   Neil Brodie, "The Market Background to the April 2003 Plunder of the Iraq National Museum", in Peter G. Stone and Joanne Farchakh Bajjaly (eds), *The Destruction of Cultural Heritage in Iraq*, Boydell Press, Woodbridge, 2008; compare Sam Hardy, "Syria/Lebanon: Syrian-Lebanese Antiquities-for-Arms Trade", *Conflict Antiquities Blog*, 12 May 2013, cited in E. Cunliffe, N. Muhesen and M. Lostal, above note 73.

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member Jordan organized an Arria-formula meeting, a confidential and informal session on combating the destruction, smuggling and theft of cultural heritage as well as accountability for these actions. On 20 January 2017, the Security Council adopted a press statement on the destruction of cultural heritage and executions in Palmyra, Syria.[94] Following the adoption of Resolution 2199, UNESCO developed a strategy to strengthen its capacity to respond urgently to cultural emergencies. This strategy explicitly refers to human rights and cultural rights and develops actions to be taken to reduce the vulnerability of cultural heritage before, during and after conflict. It also includes rehabilitation of cultural heritage, recognizing its role in strengthening intercultural dialogue, humanitarian action, security strategies and peacebuilding.[95] The strategy was followed up with the adoption of Operational Guidelines for the Implementation of the UNESCO Convention, which strives to improve existing efforts at repatriating illicitly trafficked objects to Syria.[96]

All these efforts culminated in the unanimous adoption of Resolution 2347 in March 2017, as the first ever Security Council resolution to focus on cultural heritage. While it was not adopted under Chapter VII, UNESCO heralded the unanimous support for the resolution as reflecting a new recognition of the importance of heritage protection for peace and security.[97]

The negotiations around Resolution 2347 are instructive, in that they reveal a range of diverging views on how to address specific aspects of protecting cultural heritage in armed conflict. The initial draft text drew on elements from several prior Security Council outcomes pertaining to counterterrorism, most notably Resolution 2199. In addition, the penholders – France and Italy – incorporated relevant language used in the outcomes of other UN bodies and agencies as well as international conventions and other sources of international law. At its basis, Resolution 2347 aimed to take Resolution 2199 and expand it beyond dealing exclusively with the threat to cultural property posed by terrorism to include the protection of cultural heritage internationally in the event of armed conflict more generally. Some Security Council members, most notably Russia and Egypt, were uncomfortable with this wider scope, arguing that the draft would be too diffuse and vague as a result.[98]

The initial draft text also included references to the two main outcomes of the 2016 Abu Dhabi Conference on Safeguarding Endangered Cultural Heritage,

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94 UN Security Council, "Press Statement on Destruction of Cultural Heritage, Executions in Palmyra", UN Doc. SC/12690, 20 January 2017.

95 UNESCO, *Reinforcement of UNESCO's Action for the Protection of Culture and the Promotion of Cultural Pluralism in the Event of Armed Conflict*, UNESCO Docs 38 C/49 and 197/EX/10, 2 November 2015 and 17 August 2015.

96 UNESCO, *Operational Guidelines for the Implementation of the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, Paris, 1970, cited in E. Cunliffe, N. Muhesen and M. Lostal, above note 73, 2016.

97 UNESCO, "UN Security Council Adopts Historic Resolution for the Protection of Heritage", 24 March 2017.

98 "Briefing and Draft Resolution on Protection of Cultural Heritage in Armed Conflict", *What's in Blue*, 23 March 2017, available at: http://www.whatsinblue.org/2017/03/briefing-and-draft-resolution-on-protection-of-cultural-heritage-in-armed-conflicts.php; UN Security Council, *Protection of Cultural Heritage in Armed Conflict*, 31 October 2017.

welcoming the intention to create an international fund for the protection of cultural heritage, as well as encouraging the creation of a network of safe havens in the country of origin and, as a last resort, in another country.[99] The concept of the creation of a network of safe havens for cultural heritage outside the country of origin was particularly troubling for members who place emphasis on the importance of respecting sovereignty and who questioned the concept's universal applicability, as only two countries in the world, France and Switzerland, have enacted legislation that allows for the creation of such safe havens. Other States opposed reference to the creation of an international fund for the protection of endangered cultural heritage, and as a compromise, the draft emphasized that member States have the primary responsibility for protecting their cultural heritage, and if appropriate can create safe havens in their own territory rather than internationally.[100]

Aside from these more contentious issues, Security Council members seem to have been in broad agreement on the proposed list of measures to be implemented by member States. These include creating and improving national inventory lists of cultural heritage and sharing this data with relevant authorities; adopting regulations on export/import of cultural property in line with international standards; information sharing with Interpol, UNESCO, the UN Office on Drugs and Crime and other agencies; and taking steps to ensure safe return of cultural property that has been displaced or removed due to armed conflict. Resolution 2347 also recognized that UN peacekeeping operations could encompass the protection of cultural heritage.[101] While it remains to be seen whether the relevant authorities on the ground will request such assistance, as stipulated in the resolution, this signals that the UN Security Council is building on the experience of the Multidimensional Integrated Stabilization Mission in Mali (MINUSMA). MINUSMA assists the transitional authorities in Mali with the protection of cultural and historic sites in collaboration with UNESCO, and is currently the only active UN peacekeeping mission that has this provision in its mandate.[102]

The principles established in these resolutions have also been anchored into more recent decisions of the Security Council, such as Resolution 2379, which creates an independent team to assist in holding ISIS accountable for its crimes in Iraq. This resolution, in condemning the crimes committed by ISIS, explicitly refers to the destruction of cultural heritage, including archaeological sites, and trafficking of cultural property.[103] This demonstrates that the

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99 Note that France reported having designated a safe haven on its territory not only for its own cultural objects but also for those from other countries "upon request": see *Report of the Secretary-General on the Implementation of Security Council Resolution 2347 (2017)*, UN Doc. S/2017/969, 17 November 2017, para. 84.

100 UNSC Res. 2347, 24 March 2017, para. 5, taking note of the Abu Dhabi outcomes in paras 15 and 16.

101 *Ibid.*, para. 19.

102 UNSC Res. 2100, 25 April 2013, para. 16(f): "Support for cultural preservation – To assist the transitional authorities of Mali, as necessary and feasible, in protecting from attack the cultural and historical sites in Mali, in collaboration with UNESCO."

103 UNSC Res. 2379, 21 September 2017, Preamble, fourth recital.

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protection of cultural property, in the eyes of the Security Council, includes accountability measures.

Cultural property as a battleground in Syria

The damage caused to cultural property in Syria is reflective of the manner in which the war has been fought. A large number of heritage sites and museums have had their infrastructure damaged as a result of being caught in the middle of hostilities, such as the Ancient Cities of Bosra and Aleppo.[104] Sites such as Krak des Chevaliers and the Aleppo Citadel have been used for military purposes.[105] Looting and illegal trafficking have emerged as sources of funding that contribute to the proliferation of arms, with groups that are well-organized and often armed systematically targeting numerous archaeological sites in Syria for clandestine excavations.[106] Museums in Syria are also a cause for concern, and there have been many instances of looting of valuable cultural property. Armed groups, including ISIS, have deliberately targeted cultural property such as the sites at Palmyra.[107]

The destruction of heritage in Syria has also been politicized, with the government army and armed groups exchanging accusations about the destruction of Syria's heritage sites and using these accusations for propaganda purposes. The government blames armed Islamist groups for looting, while the armed groups emphasize the government's indiscriminate use of heavy artillery against historic sites.[108] Both sides have been accused of embedding military positions in heritage sites.[109] Control over cultural property has also become highly politicized, notably with Palmyra's Roman Theatre being used as a site for a concert by the Mariinsky Symphony Orchestra from St. Petersburg, Russia[110] and subsequently severely damaged through a deliberate detonation by ISIS.[111]

Cultural property is thus at the front lines of the war in Syria. It is the battleground and target for new actors in the conflict and is being destroyed for propaganda purposes. All of this has put existing international law rules to the test.

104 Directorate-General of Antiquities and Museums (DGAM), *State Party Report: On the State of Conservation of the Syrian Cultural Heritage Sites (Syrian Arab Republic)*, Ministry of Culture, Syrian Arab Republic, 1 February 2017.
105 *Oral Update of the Independent International Commission of Inquiry on the Syrian Arab Republic*, UN Doc. A/HRC/29/CRP.3, 23 June 2015.
106 US GAO, above note 75.
107 UNESCO, "UNESCO Director-General Condemns the Destruction of the Arch of Triumph in Palmyra – 'Extremists are Terrified of History'", 5 October 2015; UNESCO, "Director-General Irina Bokova Expresses Consternation at the Destruction of the Temple of Bel in Palmyra", 1 September 2015; UNESCO, "Director-General of UNESCO Irina Bokova Firmly Condemns the Destruction of Palmyra's Ancient Temple of Baalshamin, Syria", 24 August 2015.
108 "Syria Urges International Community to Work to Stop Looting Syrian Cultural Heritage", *SANA*, 9 March 2016, available at: https://sana.sy/en/?p=71579.
109 Oral Update, above note 105.
110 "Russia's Valery Gergiev Conducts Concert in Palmyra Ruins", *BBC News*, 5 May 2016, available at: www.bbc.co.uk/news/world-middle-east-36211449.
111 UNESCO, "UNESCO Director-General Condemns Destruction of the Tetrapylon and Severe Damage to the Theatre in Palmyra, a UNESCO World Heritage Site", UNESCO, 20 January 2017.

Some commentators have warned that the vocal condemnation of the destruction of cultural property in Syria in the media is considered by many ordinary Syrians as indifference to the losses of thousands of lives, and that the destruction of ancient sites and artefacts cannot compare to the degree of human suffering.[112]

This is a concern that deserves attention. It is also a concern that has found its way into the deliberations of judges at the ICC. In the *Al Mahdi* case, judges made it clear that "[i]n the view of the Chamber, even if inherently grave, crimes against property are generally of lesser gravity than crimes against persons".[113]

This division – between crimes against property and crimes against persons – may, however, be an artificial one. The Special Rapporteur in the field of cultural rights, in reflecting on many of the submissions she has received, argues that the tangible and intangible dimensions of cultural heritage are closely interconnected. She posits that the protection of cultural heritage is part of the protection of human life. The destruction of tangible cultural property – broadly defined by the 1954 Hague Convention as including movable or immovable property[114] – leads to the destruction of the intangible, such as religious and cultural practices, traditions, customs, forms of artistic expression and folklore, a sense of history and memory, and the identity of a society or community. The Special Rapporteur highlights that "combined attacks on cultural heritage and people and their cultural rights", as have been the case in Syria and Iraq, "spread terror, fear, and despair".[115]

An alternate perspective positions cultural heritage as an "international public good" that inherently deserves the attention and concern of the international community. Cultural internationalism and the opposing approach of cultural nationalism have both left their imprint on international legal instruments regarding cultural property.[116] Cultural internationalism sees cultural property as belonging to the cultural heritage of all people and creates a global interest in cultural property. This idea can be traced back to the Napoleonic era's notion of a "common heritage of mankind",[117] which was for the first time formally reflected in the Preamble to the 1954 Hague Convention, stating that "damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the

112 Sir Derek Plumbly, "Cultural Heritage in Times of War and the Present Crisis in the Middle East", Gresham College, 19 May 2016.

113 ICC, *Al Mahdi*, above note 13, para. 77. See also ICC, *The Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07-3484-tENG, Sentencing Decision (Trial Chamber), 23 May 2014, paras 42, 43; ICC, *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, Case No. ICC-01/12-01/15-141-Corr-Red, Defence Sentencing Observations, 20 September 2016, paras 121–123, 127–128.

114 1954 Hague Convention, Art. 1.

115 *Report of the Special Rapporteur in the Field of Cultural Rights*, UN Doc. A/71/317, 9 August 2016, para. 7, referencing the submission of Patrice Meyer-Bisch.

116 Jane Warring, "Underground Debates: The Fundamental Differences of Opinion that Thwart UNESCO's Progress in Fighting the Illicit Trade in Cultural Property", *Emory International Law Review*, Vol. 19, No. 1, 2005, pp. 246–247.

117 ICC, *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, Case No. ICC-01/12-01/15, Annex II, Confidential Expert Report – Reparations Phase (Dr Marina Lostal), 28 April 2017 (amended 3 May 2017).

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culture of the world".[118] Cultural nationalism, in contrast, is focused on the notion that cultural property should remain in its country of origin, accessible to the society and community to which it belongs. Rooted in the principle of State sovereignty, cultural nationalism emphasizes that a people's cultural heritage is linked to cultural objects and thus demands their repatriation. This idea lies at the core of the 1970 UNESCO Convention. But the UNESCO Convention also demonstrates that these two notions are not incompatible. Cultural internationalism can encompass cultural nationalism.[119] Cultural objects can "belong" to humanity at large – and their destruction concern the entirety of mankind – but still be best preserved and appreciated within their own place, history, origin and setting.[120] This idea is upheld by the UNESCO Convention, which considers that "cultural property constitutes one of the basic elements of civilization and national culture".[121]

From this perspective, there are striking parallels between the way in which the protection of cultural property and heritage has been conceptualized in international law, and the thinking behind the concept of crimes against humanity. The concept of crimes against humanity is generally seen as having two broad features. First, that the crime is so heinous that it is viewed as an attack on the very quality of being human.[122] Second, that the crime is so grave that it is an attack not just upon the immediate victims but also against all humanity, meaning that the entire community of humankind has an interest in its punishment. It has been noted that while rules proscribing war crimes address the criminal conduct of a perpetrator towards an immediate protected object, rules proscribing crimes against humanity address the perpetrator's conduct not only towards the immediate victim but also towards the whole of humankind, as they constitute egregious attacks on human dignity and on the very notion of humaneness. They consequently affect, or should affect, each and every member of mankind, whatever his or her nationality, ethnic group and location.[123] It is this second element that bears striking similarity to the idea that an attack on the cultural property of any one people harms the cultural heritage of all humankind.

This idea has been upheld in international jurisprudence. At the ICTY, in assessing the seriousness of the offence of damage to cultural property in the *Strugar*

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118 1954 Hague Convention, Preamble.
119 Zsuzsanna Veres, "The Fight Against Illicit Trafficking of Cultural Property: The 1970 UNESCO Convention and the 1995 UNIDROIT Convention", *Santa Clara Journal of International Law*, Vol. 12, No. 2, 2014.
120 David N. Chang, "Stealing Beauty: Stopping the Madness of Illicit Art Trafficking", *Houston Journal of International Law*, Vol. 28, No. 3, 2006, p. 847.
121 1970 UNESCO Convention, Preamble, third recital.
122 Hannah Arendt characterized the Holocaust as a "new crime, the crime against humanity – in the sense of a crime 'against human status,' or against the very nature of mankind". Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil*, Viking Press, New York, 1965, p. 268.
123 ICTY, *The Prosecutor v. Erdemović*, Case No. IT-96-22-A, Judgment (Appeals Chamber), Joint Separate Opinion of Judges McDonald and Judge Vohrah, 7 October 1997, para. 21. See also David Luban, "A Theory of Crimes against Humanity", *Yale Journal of International Law*, Vol. 29, No. 1, 2004, para. 90; Richard Vernon, "What is Crime against Humanity?", *Journal of Political Philosophy*, Vol. 10, No. 3, 2002; Christopher Macleod, "Towards a Philosophical Account of Crimes against Humanity", *European Journal of International Law*, Vol. 21, No. 2, 2010.

case, the Trial Chamber observed that such property is, by definition, of "great importance to the cultural heritage of every people".[124] The consequence of such an approach is that the victim of the offence of damage to cultural property is thus broadly understood as a "people" rather than any particular individual. And despite this abstraction, the Chamber held that the offence involves grave consequences for the victim, meeting the same criteria of gravity as other grave breaches prosecuted at the ICTY.[125] In the *Jokić* case, for instance, the Trial Chamber noted that the destruction and damage inflicted on the Old Town of Dubrovnik were very serious crimes, finding that "since it is a serious violation of international humanitarian law to attack civilian buildings, it is a crime of even greater seriousness to direct an attack on an especially protected site, such as the Old Town".[126] In the *Kordic and Cerkez* case, the Trial Chamber described attacks on ancient mosques in Bosnia and Herzegovina as "an attack on the very religious identity of a people" and stated that as such, the attacks "manifest[ed] a nearly pure expression of the notion of 'crimes against humanity', for all of humanity is indeed injured by the destruction of a unique religious culture and its concomitant cultural objects".[127] As Judge Cançado Trindade explained in his opinion related to the 2011 order of the International Court of Justice (ICJ) regarding the case of the Temple of Preah Vihear in Cambodia, "the ultimate *titulaires* of the right to the safeguard and preservation of their cultural and spiritual heritage are the collectivities of human beings concerned, or else humankind as a whole".[128]

And indeed, underlying the *Al Mahdi* conviction is the prosecution's emphasis on the human impact of his crimes, arguing that human suffering is an essential part of the destruction of cultural property. At the reparations stage of proceedings, judges identified the "international community" as among the victims of the crimes committed.[129] In the judgment, the Trial Chamber noted that due to the UNESCO World Heritage status of the sites, "their attack appears to be of particular gravity as their destruction does not only affect the direct victims of the crimes, namely the faithful and inhabitants of Timbuktu, but also people throughout Mali and the international community".[130] In support, the judges refer to the testimony of a witness who described how the entire international community, in the belief that heritage is part of cultural life, is suffering as a result of the destruction of the protected sites.[131] While clearly building on the jurisprudence of the ICTY, the *Al Mahdi* case at the ICC marks

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124 ICTY, *Strugar*, above note 48, para. 232, citing the 1954 Hague Convention, Art. 1(a).

125 *Ibid.*, paras 218, 232.

126 ICTY, *The Prosecutor v. Miodrag Jokić*, Case No. IT-01-42/1-S, Judgment (Trial Chamber), 18 March 2004, paras 45, 53.

127 ICTY, *The Prosecutor v. Dario Kordic and Mario Cerkez*, Case No. IT-95-14/2-T, Judgment (Trial Chamber), 26 February 2001, para. 207.

128 ICJ, *Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, Request for Interpretation of the Judgment of 15 June 1962, Separate Opinion of Judge Cançado Trindade, *ICJ Reports 2013*, 11 November 2013, p. 606, para. 114.

129 ICC, *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, Case No. ICC-01/12-01/15, First Transmission and Report on Applications for Reparations (Trial Chamber), 16 December 2016, para. 9.

130 ICC, *Al Mahdi* (Judgment and Sentence), above note 55, para. 80.

131 *Ibid.*

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the first time that the international community as such has been identified as a victim during reparations proceedings. This extends the right to reparations to the international community at large. This is a bold and notable move, as traditionally the prohibition against attacking cultural property has not been associated with any human impact – and none of the articles of the cultural heritage conventions establish a link between damage to cultural property and harm caused to human beings, their social structure or religious practices. While they are founded on the idea that "damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind",[132] it is the human rights movement and international criminal jurisprudence that have made the link between monuments and human identity explicit.

Another approach argues that crimes against property and crimes against people should not compete for our attention; that these are not issues subject to prioritization, as the protection of cultural property should be an integral element of any humanitarian effort. In August 2013, then-UNESCO director-general Irina Bokova emphasized:

> I am keenly aware that in the context of a tragic humanitarian crisis, the state of Syria's cultural heritage may seem secondary. However, I am convinced that each dimension of this crisis must be addressed on its own terms and in its own right. There is no choice between protecting human lives and safeguarding the dignity of a people through its culture. Both must be protected, as the one and same thing. There is no culture without people and no society without culture.[133]

This approach strongly echoes that of the Special Rapporteur in the field of cultural rights, equating the protection of cultural property with the protection of a fundamental tenet of human life.[134]

In practice, this has meant that the protection of cultural heritage has acquired a role in humanitarian response. The November 2015 strategy for the reinforcement of UNESCO's actions for the protection of culture and the promotion of cultural pluralism,[135] adopted by the organization's 38th General Conference, identifies one objective as being to "[i]ncorporate the protection of culture into humanitarian action, security strategies and peacebuilding processes by engaging with relevant stakeholders outside the culture domain", citing "humanitarian, security and peace-building actors" in particular.[136] In February 2016, UNESCO signed a Memorandum of Understanding with the ICRC that envisions the sharing of information on cultural property at risk in situations of

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132 1954 Hague Convention, Preamble.
133 UNESCO, "Discours de la Directrice générale de l'UNESCO Irina Bokova, à l'occasion de la Réunion de haut niveau pour la protection du patrimoine culturel syrien", 29 August 2013.
134 *Report of the Special Rapporteur in the Field of Cultural Rights*, above note 115, para 7, referencing the submission of Patrice Meyer-Bisch.
135 UNESCO, *Reinforcement of UNESCO's Action for the Protection of Culture and the Promotion of Cultural Pluralism in the Event of Armed Conflict*, UN Doc. 197 EX/10, 17 August 2015.
136 *Ibid.*, paras 32, 48.

armed conflict, and the ICRC assisting in rescuing, evacuating or undertaking emergency safeguarding measures to protect specific cultural property at imminent risk.[137] Then-UNESCO director-general Irina Bokova presented the partnership as testimony to the "growing global awareness that protecting cultural heritage is not just a cultural emergency but indeed a humanitarian imperative".[138] A discussion has branched out from this view as to whether the destruction of cultural property should trigger early-warning alarms as an indicator in the prevention of atrocities, and whether it can in and of itself trigger the "responsibility to protect". In 2014, the UN Office on Genocide Prevention and the Responsibility to Protect developed a new Framework of Analysis for Atrocity Crimes, a tool for assessing the risk of genocide, war crimes and crimes against humanity, in which destruction of property of cultural and religious significance is considered a significant indicator in the prevention of atrocity crimes.[139] This is upheld by historical example, with the restoration of cultural property contributing to the restoration of social and economic life. For instance, following the Spanish Civil War and, later, the Balkan Wars, "refugees and displaced people did not return to their former towns and villages until rebuilding of significant heritage sites occurred, even if this was many years later".[140]

In 2015, UNESCO convened a group of experts to explore whether the notion of the "responsibility to protect", as found in paragraphs 138–140 of Resolution 60/1 (in which the UN General Assembly adopted the 2005 World Summit Outcome), could be applied in the context of cultural heritage. The expert group recognized that the intentional destruction and misappropriation of cultural heritage can constitute war crimes and crimes against humanity and can indicate genocidal intent, and thus may fall within the scope of the "responsibility to protect".[141] As Raphael Lemkin, the jurist responsible for articulating the crime of genocide, recognized: "Burning books is not the same as burning bodies … but when one intervenes … against mass destruction of churches and books, one arrives just in time to prevent the burning of bodies."[142]

In many ways, the responsibility to protect is already part of the framework protecting cultural property and heritage. This is a testament to cultural property being an integral element of human life, an international public good and a humanitarian imperative, as set out above. For instance, the 1972 World Heritage Convention establishes a mechanism by which States can trigger international protective measures that can prevent damage to cultural property at risk, in the form of assistance in securing sensitive areas with fences, establishing surveillance

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137 Memorandum of Understanding between UNESCO and the ICRC, 29 February 2016, Art. 1(v–vi).
138 UNESCO, "UNESCO and ICRC Partner on the Protection of Culture Heritage in the Event of Armed Conflict", 29 February 2016.
139 UN, *Framework of Analysis for Atrocity Crimes: A Tool for Prevention*, July 2014.
140 Marina Lostal and Emma Cunliffe, "Cultural Heritage that Heals: Factoring in Cultural Heritage Discourses in the Syrian Peacebuilding Process", *The Historic Environment: Policy and Practice*, Vol. 7, No. 2–3, 2016, p. 250.
141 International Expert Meeting on the Responsibility to Protect as Applied to the Protection of Cultural Heritage, Recommendations, Paris, 26–27 November 2015.
142 Robert Bevan, *The Destruction of Memory: Architecture at War*, Reaktion Books, London, 2016, Preface.

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and patrols, and issuing of warnings.[143] The transnational nature of the legal obligations on trafficking of cultural property, as set out in the 1970 UNESCO Convention, involves all States Parties in protection activities. This means that should enforcement fail at the national level, there are mechanisms available that can assist the return of illicitly exported cultural property to a country like Syria.[144] In a practical and concrete way, the UNESCO Convention obliges third States to undertake positive steps to protect cultural property at risk, in line with the common Article 1 obligation to "respect and ensure respect" for the provisions of the Geneva Conventions "in all circumstances".[145] This is an example of a practical measure that States can undertake within their own jurisdictions and in their relationships with the forces they support, in order to provide real and tangible protection in the context of the armed conflict in Syria; it demonstrates the unique nature of the international legal protections afforded to cultural property, and positions cultural property protections as a true international law enforcement effort.

Innovations in protection that have emerged in response to the destruction of cultural property in Syria

The protection of cultural heritage has emerged as one of the few areas in which the international community has galvanized and come up with innovative responses in Syria. The response has not been comprehensive or uniformly effective, but it has broadened horizons at a time and in a conflict marked by a lack of compliance with, and a general disregard for, international law. Starting from the ground, individuals and cultural institutions have taken on the role of first responders and filled the vacuum through mounting an effective civil society response. States have, perhaps most significantly, adopted concrete measures that have contributed to the protection of Syrian cultural property – and have laid the foundation for further protective interventions. Finally, international organizations have expanded their own actions to prevent the destruction of cultural heritage, stretching their mandates in response.

Non-State actors such as local volunteers and cultural institutions, both in affected countries and foreign States, have been the first to respond to threats to cultural property. Volunteer networks in local communities in Syria provide security and protect archaeological sites from illegal excavations, and safeguard museums from looters. They have also helped to recover looted items of cultural significance and collect information about objects at risk.[146] Museums in foreign

143 Marina Lostal, *International Cultural Heritage Law in Armed Conflict: Case Studies of Syria, Libya, Mali, the Invasion of Iraq and the Buddhas of Bamiyan*, Cambridge University Press, Cambridge, 2017, p. 110.
144 Marina Lostal, "Syria's World Cultural Heritage and Individual Criminal Responsibility", *International Review of Law*, Vol. 2015, No. 3, 2015.
145 Knut Dörmann and Jose Serralvo, "Common Article 1 to the Geneva Conventions and the Obligation to Prevent International Humanitarian Law Violations", *International Review of the Red Cross*, Vol. 96, No. 895–896, 2015, p. 707.
146 UNESCO, "Syrian Citizens Protect Their Cultural Heritage", available at: www.unesco.org/new/en/safeguarding-syrian-cultural-heritage/national-initiatives/syrians-protect-their-heritage/.

States, including in the United States and United Kingdom,[147] have established capacity-building programmes to train Syrian and Iraqi antiquities professionals to protect museum collections against the effects of explosives, looting and other threats. For instance, the Smithsonian Institution's Cultural Rescue Initiative, through its Safeguarding the Heritage of Syria and Iraq Project,[148] has trained Syrian museum workers on the use of sandbags and other materials and techniques that they employed to protect immovable ancient mosaics in Ma'arra Museum in Idlib.[149] While these actions are commendable, it should be noted that they have been largely responsive and could have been avoided through better preventative action. For instance, under the 1972 World Heritage Convention, to which Syria is a party, Syria could have submitted a request for international assistance to protect cultural property at risk.[150] Such assistance, in the form of securing sensitive areas with fences, establishing surveillance and patrols, and the issuing of warnings, could have been used as "preventative measures against looting … as soon as the outbreak of an armed conflict [became] inevitable, while the major channels of communication such as airports and roads remain[ed] open or safe".[151]

Most notably, third-party States have adopted measures that have demonstrated their ability to take on responsibility for the protection of cultural property in Syria. Through these measures, States – whether or not they are themselves party to the armed conflict in Syria – have contributed to ensuring respect for international law in Syria in line with their obligations under Articles 4(1) and 7(1) of the 1954 Hague Convention and common Article 1 of the Geneva Conventions. They have also developed innovative and effective protection mechanisms that have broadened the horizon beyond military assistance and intervention for States seeking to contribute to improving compliance with international law in Syria. While none of these measures protecting cultural property has been proclaimed as fulfilling States' obligations to ensure respect for IHL, some of them have been articulated as a response to the widespread assault on cultural heritage in contemporary conflicts and as an imperative for peace. For instance, when presenting the new European Union (EU) policy on cultural heritage protection to the UN General Assembly in September 2017, EU high representative Federica Mogherini emphasized that the protection of cultural heritage is "a security and foreign policy matter".[152] In adopting a revised Act to Protect Cultural Property, which implements the 1970 UNESCO Convention, Germany's federal government commissioner for culture and the media, Monika Grutters, said that the new piece of legislation

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147 British Museum, "The Iraqi Archaeologists Saving Their Heritage", 3 March 2017.
148 Smithsonian Global, "Safeguarding Cultural Heritage in Syria and Iraq", available at: https://global.si.edu/success-stories/safeguarding-cultural-heritage-syria-and-iraq.
149 US GAO, above note 75.
150 1972 UNESCO Convention, Arts 19–21.
151 M. Lostal, above note 143, p. 110.
152 Remarks by High Representative/Vice-President Federica Mogherini at the Event on "Protecting Cultural Heritage from Terrorism and Mass Atrocities: Links and Common Responsibilities", New York, 21 September 2017.

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would help "protect [the] cultural property … of other States more effectively against clandestine excavations and illicit trafficking … especially [in] crisis-ridden or war-torn countries, such as Syria and Iraq".[153] Such statements highlight these measures as a model for future action.

States, including the US, have adopted the practice of taking information from lists of cultural property sites in Iraq and Syria into consideration when planning military action.[154] The UK has followed suit, by giving cultural institutions a role in engaging with arms bearers on their IHL obligations.[155] The EU, in turn, has developed its first (and indeed the world's first) policy on international cultural relations, integrating cultural property protection experts into all fifteen EU military and civilian missions.[156] Announced in September 2017 at the UN General Assembly, the new EU policy also commits to restoring damaged and destroyed cultural sites, and prohibits the import of all illicit cultural goods. This builds on several similar initiatives, such as the Victoria & Albert Museum Culture in Crisis Programme, through which the museum works closely to support law enforcement, nationally and internationally, and the British armed forces to develop strategies to prevent the illicit trade of cultural goods.[157] Such developments appear to be part of a broader trend: in 2013, UNESCO developed a plan of action stemming from a regional training on Syrian cultural heritage, which proposed that the Syrian Directorate-General of Antiquities and Museums (DGAM) address the issue of illicit trafficking in Syria through "advocat[ing] with the military, in line with the 1954 Hague Convention, to avoid using major heritage sites for military purposes, based on the information collected on the ground on those sites".[158]

Other States, with no military involvement in the region, have taken other measures. These measures include steps to preserve digital copies of documents that have become endangered due to the war; Finland has become one of the first countries in the world to serve as a haven for endangered documents from Syria, carrying out extensive digitization efforts in Damascus and storing the archives in Helsinki. This measure stemmed from a recommendation adopted by the 38th General Conference of UNESCO in 2015 that urged member States to take digitized cultural property into safekeeping. Only a few member States have so far seized the opportunity to participate in such safeguarding, but Finland serves as an encouraging example.[159]

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153 Federal Government Commissioner for Culture and Media, "Key Aspects of the New Act on the Protection of Cultural Property in Germany", Berlin, September 2016.
154 Peter Stone, "War and Heritage: Using Inventories to Protect Cultural Property", *Heritage Inventories*, Getty Conversation Institute, Summer 2013.
155 Mark Brown, "British Museum and Army Team Up in Move to Rescue Iraq's Heritage", *The Guardian*, 26 February 2008.
156 Remarks Federica Mogherini, above note 152.
157 Victoria & Albert Museum, "The V&A's Culture in Crisis Programme", available at: www.vam.ac.uk/content/articles/v/the-v-and-as-culture-in-crisis-programme/.
158 UNESCO, *Regional Training on Syrian Cultural Heritage: Addressing the Issue of Illicit Trafficking*, Final Report and Recommendations, Amman, 10–13 February 2013.
159 Ministry of Education and Culture, "Endangered Syrian Documents Taken into Safekeeping at the National Archives of Finland", Finland, 2 December 2016.

Several other States have begun to operationalize Article 3 of the 1954 Hague Convention, which obliges States parties to safeguard cultural property. They have done this both through passing national legislation restricting the transfer of cultural property, such as in Germany,[160] and through echoing the notion contained in Article 8 of the Convention, which envisions specially protected movable cultural property being placed in "a limited number of refuges intended to shelter movable cultural property in the event of armed conflict", away from any military objectives and removed from any risk of damage. This operationalizing of the concept of refuges is one of the most exciting innovations in the area of cultural property protection.[161]

The establishment of "safe havens" and "refuges" as an effective way to safeguard movable cultural property in time of conflict also builds on Switzerland's experience organizing the "Afghanistan Museum-in-Exile". The Museum-in-Exile opened in 2001 and constituted a depository for the protection of Afghan cultural artefacts during the conflict in Afghanistan. The museum received more than 1,400 Afghan cultural objects from private donors and established a complete inventory created by dedicated volunteer specialists. The success of this initiative was secured by the successful restitution of the 1,400 objects to the National Museum of Afghanistan in Kabul in 2006, under the umbrella of UNESCO.[162] This notion of cultural property "safe havens" and "refuges", while having long been envisioned under the 1954 Hague Convention, is now being revisited and is enjoying widespread support from States and cultural institutions. The Association of Art Museum Directors, representing the leadership of major art museums in the United States, Canada and Mexico, has even issued protocols for safe havens for works of cultural significance from countries in crisis.[163]

Building on this momentum, France and the United Arab Emirates have laid the groundwork for the creation of other similar "safe havens" for cultural property, to be responsible for the safekeeping and preserving of entrusted cultural heritage, for its inventorying, and for returning it to its owner or established source when requested. These broad principles were put down on paper in December 2016 in the Abu Dhabi Declaration[164] as an outcome from a conference on "Safeguarding Endangered Cultural Heritage" attended by forty countries. The declaration set out to pursue two ambitious, long term, goals to guarantee the further mobilization of the international community for the safeguarding of heritage:

> The creation of an international fund for the protection of endangered cultural heritage in armed conflict, which would help finance preventive

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160 Federal Government Commissioner for Culture and Media, above note 153.
161 1954 Hague Convention, Art. 8.
162 UNESCO, "Museum-in-Exile: Swiss Foundation Safeguards over 1,400 Afghan Artefacts", 7 October 2000.
163 Association of Art Museum Directors, *Protocols for Safe Havens for Works of Cultural Significance from Countries in Crisis*, 28 September 2015.
164 International Council on Monuments and Sites (ICOMOS), "Abu Dhabi Declaration on Heritage at Risk in the Context of Armed Conflicts", 3 December 2016, available at: https://tinyurl.com/ybodfemx.

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and emergency operations, fight against the illicit trafficking of cultural artefacts, as well as contribute to the restoration of damaged cultural property; and

The creation of an international network of safe havens to temporarily safeguard cultural property endangered by armed conflicts or terrorism on their own territory, or if they cannot be secured at a national level, in a neighbouring country, or as a last resort, in another country, in accordance with international law at the request of the governments concerned, and taking into account the national and regional characteristics and contexts of cultural property to be protected.

In addition to emphasizing the role of UN institutions, particularly UNESCO, the declaration called for the support of the Security Council in achieving the aforementioned objectives. Following the Abu Dhabi Declaration, France, together with the United Arab Emirates, launched a fund, the International Alliance for the Protection of Cultural Heritage in Conflict Areas (ALIPH), based in Geneva, that will take urgent action in emergency cases and contribute to the evacuation and reconstruction of endangered or damaged cultural heritage.[165] Seven countries – France, Saudi Arabia, Kuwait, the United Arab Emirates, Luxembourg, Morocco and Switzerland – have pledged contributions, and six others – Italy, the UK, Germany, China, the Republic of Korea and Mexico – have expressed political support for the initiative.[166] With UNESCO acting as a member of the ALIPH board, this effort demonstrates the widespread interest among States in taking active measures to safeguard cultural property and ensure its protection from damage and destruction in armed conflict.

In turn, international organizations have stepped up their own efforts, stretching their activities, programmes and mandates to respond to the destruction of cultural property in armed conflict. The UNESCO 2013 Plan of Action addressed the issue of illicit trafficking by recommending to "train the Red Cross and Red Crescent staff in Syria, as well as the UN personnel in Syria to use site and monument evaluation forms, so that they could report on the condition of cultural heritage to DGAM and UNESCO when possible".[167] This suggests that humanitarian actors could take on the role of monitoring and documenting the destruction of cultural property, which would further integrate the protection of cultural property into the humanitarian response, beyond the potential role for the ICRC in assisting in rescuing, evacuating or undertaking emergency safeguarding measures to protect specific cultural property at imminent risk, as envisioned in the February 2016 UNESCO–ICRC Memorandum of Understanding.[168] In 2014,

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165 Embassy of France in Abu Dhabi, "UAE–French International Conference on Endangered Cultural Heritage to Take Place on December 2nd and 3rd 2016", 1 December 2016.
166 UNESCO, "UNESCO, France and the Emirates Launch an International Alliance for the Protection of Heritage", 20 March 2017.
167 UNESCO, above note 158, p. 18.
168 Memorandum of Understanding, above note 137, Art. 1(v–vi).

UNESCO created an Observatory for the Safeguarding of Syria's Cultural Heritage, to monitor the state of buildings, artefacts and intangible cultural heritage, to combat illicit trafficking and to collect information in order to restore the country's cultural heritage once the fighting is over.[169] The UNESCO director-general has called for the creation of "protected cultural zones" around heritage sites in Syria and Iraq; while this idea has so far not gained any traction, as a proposal it echoes the concept of neutralized, hospital and safety zones in IHL, marking a further potential innovation in the field of cultural property protection.[170]

Remaining gaps

Despite these innovations, significant gaps in cultural property protection response persist, leaving Syrian cultural heritage at risk from the acts of negligence, recklessness and deliberate targeting that have marked the waging of the war. Broadly speaking, these gaps fall into two categories – gaps in the normative framework and in implementation.

The most fundamental normative gap in the protection of cultural property stems from the 1954 Hague Convention and its Second Protocol, both of which endorse the concept of military necessity, which permits favouring military advantage over the protection of cultural property. While both the 1954 Hague Convention and its Second Protocol limit the circumstances in which cultural property can be lawfully targeted, restricting exceptions and misuse, this fundamental gap remains.[171] The Special Rapporteur in the field of cultural rights has taken aim at this gap, calling attention to the fact that the prohibitions on theft, pillage, vandalism, and misappropriation and requisition of cultural property are not subject to a military necessity exception and are absolute, and stating that "the military necessity exception is undoubtedly subject to abuse", advocating for States to adopt the narrowest possible interpretation that would make any targeting or military use of cultural property "highly exceptional".[172] Indeed, emerging norms reveal a move to a more protective approach in practice, signalling an increased desire on the part of States to preserve, for posterity, the cultural heritage of mankind, despite the possible exigencies of war.[173] There are several indicative and encouraging examples. When the United States announced its intent to take whatever steps necessary to stop Axis traffic through Rome in 1943, there was a concerted effort

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169 UNESCO, "UNESCO to Create an Observatory for the Safeguarding of Syria's Cultural Heritage", 28 May 2014.
170 UNESCO, "UNESCO Conference Calls for Protected Cultural Zones to be Established in Syria and Iraq", 3 December 2014.
171 Lostal notes that the "gist of all cultural property regulation is that these objects deserve a treatment sitting over and above that of civilian objects." Despite this being widely accepted, the language of the 1907 Hague Regulations, which includes historic monuments together with hospitals and places where the sick and wounded are collected and does not require a threshold of importance for the cultural site in question, was deemed "over-inclusive" by the end of the Second World War. M. Lostal, above note 144.
172 *Report of the Special Rapporteur in the Field of Cultural Rights*, above note 115, paras. 63-64.
173 For further discussion on this, see J. Toman, above note 33, p. 177.

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to avoid sites of religious and cultural value. Airfields located in the suburbs were bombed, but the Axis military headquarters – undeniably a legitimate target – was left untouched as it was situated in the historic city centre.[174] During the First Gulf War, Saddam Hussein had placed Iraqi aircraft next to invaluable archaeological monuments at the ancient Sumerian site of Ur. Yet, despite the legitimacy of this as a military target, the United States refrained from ordering its destruction.[175] These examples are encouraging in that they reveal the ability and willingness of States to calibrate their targeting decisions in the course of hostilities to prioritize the protection of cultural property, even in cases where such targeting would be lawful under the existing legal framework.

Another gap in the normative framework protecting cultural property stems from its State-centric approach, which some have argued is ineffective. Cultural property protection, for instance as implemented in Syria since 2011, has been structured around the standards and practices enshrined within the 1954 Hague Convention and the 1970 UNESCO Convention. The policy emphasis of both is on the *in situ* protection of cultural sites and the recovery and return of stolen or looted cultural objects. Both have failed to stop the plunder and illegal trade of cultural objects from Syria. Thus, some have argued that instead of policy initiatives aimed at site protection and object recovery, a market-reduction approach could succeed by subduing demand.[176] Representatives from auction houses have also argued, from the perspective of the art market, that there has been insufficient engagement with the art market on the part of stakeholders, and that auction houses should be seen not as adversaries but as partners in the fight against the illicit trafficking of cultural property.[177]

Finally, there is a lack of effective special protection under IHL for the employees or defenders of cultural property, and limited protection for transports and appliances used for cultural property.[178] This problem is particularly stark in Syria, where by mid-2015, the Directorate-General of Antiquities and Museums had lost fourteen staff members who were protecting the country's heritage.[179] Some were killed during shelling of the buildings they worked in, others by snipers on their way to work. Some were threatened to get them to cease their activities, and when they refused, they were killed. The case of Khaled al-Assad, a retired member of the DGAM and world expert on the site of Palmyra, who was killed by ISIS in August 2015, gained worldwide attention.[180] DGAM field

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174 Roger O'Keefe, *The Protection of Cultural Property in Armed Conflict*, Cambridge University Press, Cambridge, 2006, pp. 70–73.
175 Mary Ellen O'Connell, *Occupation Failures and the Legality of Armed Conflict: The Case of Iraqi Cultural Property*, Working Paper No. 6, Ohio State University Moritz College of Law, 2004.
176 Neil Brodie, "Syria and Its Regional Neighbors: A Case of Cultural Property Protection Policy Failure?", *International Journal of Cultural Property*, Vol. 22, No. 2–3, 2015.
177 UNESCO, above note 158.
178 The lack of protection under IHL for transports and appliances used for cultural property is particularly notable in comparison to that attached to the medical function.
179 DGAM, "The French Parliament Delegation: Offering Solidarity and Support to DGAM Is One Important Reason for Our Visit to Syria", Ministry of Culture, Syrian Arab Republic, 29 September 2015.
180 Jeremy Bowen, "The Men Saving Syria's Treasures from Isis", *New Statesman*, 22 September 2015.

personnel regularly risk their lives to protect their cultural heritage by collecting and passing on information on archaeological sites, yet they enjoy no additional protection beyond their civilian status under international law. The Special Rapporteur in the field of cultural rights has highlighted the protection of the defenders of cultural heritage who are at risk as a "critical" question, citing the example of employees of the National Museum of Afghanistan, ordinary people in Northern Mali who hid manuscripts beneath the floorboards of their homes to protect them during the 2012 assault by Islamist armed groups, or those who peacefully protested the destruction of Sufi sites in Libya.[181] A human rights perspective on the protection of cultural heritage should emphasize the human rights of cultural first responders – those on the front lines in the struggle to protect it. They are the guardians of the cultural heritage of local groups, and indeed of all humankind, and thus critical players in the defence of cultural rights. The Special Rapporteur recommends that States respect their rights and ensure their safety and security, but also provide them, including through international cooperation, with the conditions necessary to complete their work, including all needed material and technical assistance, and offer them asylum when that work becomes too dangerous. In many circumstances, defenders of cultural heritage should be recognized as cultural rights defenders and therefore as human rights defenders. As human rights defenders, defenders of cultural heritage should be afforded the rights and protections that status entails, including protection by the State, legal assistance and effective remedy.[182] As the Office of the UN High Commissioner for Human Rights (OHCHR) has noted, a human rights defender is a person who acts to address any human right (or rights) on behalf of individuals or groups, including cultural rights.[183]

In the area of implementation, most critically, there has been a lack of compliance with legal protections for cultural property by armed groups. This has been aggravated by a lack of engagement with armed groups on this issue. Beyond appeals and statements of condemnation since the start of the Syrian conflict, organizations like UNESCO, the International Council on Monuments and Sites, and the International Council of Museums have held several meetings and organized training for employees of the DGAM, but no reported efforts have been made by international organizations to reach out to areas beyond government control, where the DGAM no longer has any operations or reach. Regions under the control of armed groups contain a great number of significant heritage sites and museums, which are at particular and increasing risk for looting and destruction. Indeed, the 1954 Hague Convention envisages that UNESCO should offer its services to all parties to a non-international armed conflict, including armed groups (and that any such contact "shall not affect the[ir]

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181 "'When Cultural Heritage Is Under Attack, Human Rights Are Under Attack' – UN Expert", *UN News*, 4 March 2016.
182 Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, 1998.
183 See OHCHR, "Who Is a Defender", available at: www.ohchr.org/EN/Issues/SRHRDefenders/Pages/Defender.aspx.

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legal status").[184] Moreover, while the Convention only provides that States Parties, and not armed groups, can call on UNESCO "for technical assistance in organizing the protection of their cultural property",[185] the Secretariat to the 1954 Hague Convention developed an action plan that entails the possibility of establishing "contacts with the warring parties (including States and [armed] non-State actors as applicable) and send[ing] letters to them signed by the Director-General regarding the protection of cultural property in the event of armed conflict".[186] Nonetheless, UNESCO is prohibited by its Constitution from intervening in the internal affairs of member States,[187] and there is no information available to suggest that UNESCO has taken steps to reach out to any of the armed groups operating in Syria or Iraq in order to further cultural property protection.[188]

There is also no publicly available information about the engagement of the ICRC, UN humanitarian agencies, or the UN Special Representative for Syria with any actors – whether armed group representatives in the context of political processes, or influential States – on the issue of cultural property protection. Some commentators have pointed out that any political opposition should develop a "cultural property protection" plan.[189] Others have suggested using the few UN mechanisms granted access to both government- and armed group-controlled areas of Syria – for instance, expanding the UN chemical weapons mission (OPCW-UN Joint Investigative Mechanism in Syria) to include a small group of cultural experts, in order to put into effect the obligation of Syrian armed groups to abide by international treaty and customary law and protect cultural property.[190] Another route could entail neutral non-governmental organizations such as Geneva Call, through its Deeds of Commitment mechanism, addressing the protection of cultural property as a standalone issue of focus. UNESCO has noted that "the nature of contemporary conflicts … presents a challenge, as they often involve armed non-State actors, with whom intergovernmental organizations cannot establish relations", and has acknowledged that it has sought to close this gap through cooperating with Geneva Call.[191] In turn, Geneva Call has conducted

184 1954 Hague Convention, Art. 19(3–4).
185 *Ibid.*, Art. 23.
186 UNESCO, Standard Plan of Action to Protect Cultural Property in the Event of Armed Conflict, UNESCO Doc. CLT-11-CONF-209-INF1, 2011, Annex. The plan was revised in 2013 to reflect developments in Syria and Mali (see UNESCO Doc. CLT-13/10HCP/CONF.201/INF.3).
187 UNESCO Constitution, Art. 1(3).
188 Geneva Call has undertaken a scoping study to understand the existing dynamics between armed non-state actors and cultural heritage in Syria, Iraq, and Mali, including through interviews with armed group members. The study issued recommendations to enhance respect for cultural heritage by armed groups in non-international armed conflicts, and its findings are presented in Marina Lostal, Kristin Hausler and Pascal Bongard, "Armed Non-State Actors and Cultural Heritage in Armed Conflict", *International Journal of Cultural Property*, Vol. 24, No. 4, 2017.
189 Salam Al Quntar, "Syrian Cultural Property in the Crossfire: Reality and Effectiveness of Protection Efforts", *Journal of Eastern Mediterranean Archaeology & Heritage Studies*, Vol. 1, No. 4, 2013.
190 Joris D. Kila, "Inactive, Reactive, or Pro-Active? Cultural Property Crimes in the Context of Contemporary Armed Conflicts", *Journal of Eastern Mediterranean Archaeology and Heritage Studies*, Vol. 1, No. 4, 2013.
191 ICC, *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, Case No. ICC-01/12-01/15, UNESCO Amicus Curiae Observations, 2 December 2016.

specialized trainings on the protection of cultural heritage for top military commanders from the Free Syrian Army.[192]

Any protection response, and particularly one that involves the deployment of peacekeeping forces, could cover cultural property. The mandate of MINUSMA, since it was established in 2013, has included assisting the transitional authorities in the country with the protection of cultural and historic sites in collaboration with UNESCO. While Security Council Resolution 2347 goes a long way in recognizing that UN peacekeeping operations may encompass the protection of cultural heritage from destruction, illicit excavation, looting and smuggling in the context of armed conflicts, it remains to be seen whether the relevant authorities on the ground will request such assistance, as stipulated in the resolution.[193] The EU's policy integrating cultural property protection experts into all of its military and civilian missions further bolsters this approach.[194]

It is important to note that the protection response has not yet entailed accountability efforts. In general, cultural property destruction has been rarely prosecuted, especially at the national level. The Special Rapporteur in the field of cultural rights highlighted this fact in her most recent report, expressing dismay at learning from cultural heritage professionals that, despite the many examples of destruction of cultural heritage contrary to international treaties, there have reportedly not been any national prosecutions on the basis of the 1954 Hague Convention.[195]

Concluding remarks and ways forward

To ensure effective protection of cultural property in times of armed conflict, States, civil society and international organizations must have a comprehensive toolkit at their disposal. Recent developments, culminating in UN Security Council Resolution 2347, go a long way in expanding the horizon of the types of measures that such a toolkit could contain.

As elaborated above, a variety of legal instruments, normative advances, jurisprudence and recent practice have added the following measures into the toolkit that can be used by third-party States to ensure the protection of cultural property, beyond the diplomatic protest and collective measures most commonly seen in State practice: the prosecution of perpetrators and support through

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192 Geneva Call, "Syria: Top Military Commanders from eight Free Syrian Army Brigades Receive Training on Humanitarian Norms in Geneva", 10 February 2016.

193 UNSC Res. 2347, 24 March 2017, para. 19: "… *Affirms* that the mandate of United Nations peacekeeping operations, when specifically mandated by the Security Council and in accordance with their rules of engagement, may encompass, as appropriate, assisting relevant authorities, upon their request, in the protection of cultural heritage from destruction, illicit excavation, looting and smuggling in the context of armed conflicts, in collaboration with UNESCO, and that such operations should operate carefully when in the vicinity of cultural and historical sites."

194 Remarks by Federica Mogherini, above note 152. For more information on the integration of cultural property protection into military missions, see Major Yvette Foliant, "Cultural Property Protection Makes Sense: A Way to Improve Your Mission", Civil–Military Cooperation Centre of Excellence, 2015.

195 *Report of the Special Rapporteur in the Field of Cultural Rights*, above note 81, para. 58.

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mutual legal assistance; the identification of and return of illegally exported cultural objects; where the situation on the ground does not permit their return, the temporary storage of at-risk cultural objects in refuges; the evacuation of movable cultural property by humanitarian actors and dedicated institutions; international assistance in securing areas, surveillance and patrols, and issuing warnings; the taking of emergency safeguarding measures by international humanitarian actors; monitoring by on-the-ground humanitarian and other international presences; building the capacity of local first responders; the protection of cultural property defenders; embedding cultural property protection into multilateral peacekeeping, civilian and military missions; integrating cultural property protection into targeting and operational procedures; and the safeguarding of archives and documents through digitization. These measures are all, in part, both preventative and protective. As will be discussed below, the toolkit also contains remedial measures that States can take following the damage or destruction of cultural property, including repair, restoration and memorialization, as part of post-conflict reconstruction and peacebuilding efforts.

Prior to engaging in a protection response, however, it is crucial to understand why deliberate destruction of cultural heritage takes place. It is sometimes difficult to distinguish between ideological destruction and looting for economic reasons. Both overlapping sets of practices must be tackled, including in countries where the markets for looted artefacts are located. Deliberate destruction may happen for a variety of reasons, including as a strategy to destroy the morale of the enemy and terrorize local populations or as a means to eradicate other cultures, in particular of the vanquished so as to facilitate conquest.[196] In some cases, the destruction of cultural heritage can indicate more devastating motives, including genocidal intent. The ICJ, in examining the case of *Bosnia and Herzegovina v. Serbia and Montenegro*, noted that "where there is physical or biological destruction, there are often simultaneous attacks on cultural and religious property and symbols of the targeted group as well, attacks which may legitimately be considered as evidence of an intent to physically destroy the group",[197] even though the destruction of historical, cultural and religious heritage does not, as such, fall within the definition of the crime as set out in the Genocide Convention.[198]

In many recent examples, including in Syria, Iraq and Mali, destruction is part of the "cultural engineering" or "cultural cleansing" sought by diverse extremist armed groups who, rather than preserving tradition as some claim, seek to radically transform it, erasing what does not concur with their vision. They seek to end traditions and erase memory, in order to create new historical narratives affording no alternative vision to their own. Ending these forms of destruction requires tackling the fundamentalist ideology motivating them, in accordance

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196 Patty Gerstenblith, "Protecting Cultural Heritage in Armed Conflict: Looking Back, Looking Forward", *Cardozo Public Law, Policy and Ethics Journal*, Vol. 7, No. 3, 2009.
197 See ICTY, *The Prosecutor v. Radislav Krstić*, Case No. IT-98-33-T, Judgment (Trial Chamber), 2 April 2001, para. 580.
198 ICJ, *Case Concerning Application of The Convention on the Prevention and Punishment of the Crime of Genocide – Bosnia and Herzegovina v. Serbia and Montenegro*, Judgment, 26 February 2007, para. 344.

with international standards, in particular through education about cultural rights, cultural diversity and heritage. As journalist Mustapha Hammouche, in assessing recent extremist attacks on cultural spaces, has noted: "In this global war, it is not our differences which motivate … hatred, but what we share: humanity and humanism itself."[199]

Indeed, the notion of the relationship between cultural property and identity is of particular importance because the destruction of cultural objects and sites during wartime may have a severe impact on the identity of those people, communities and societies that survive. International criminal jurisprudence has reflected this notion, finding that acts committed against property which is part of the cultural heritage of a community attain an "especially qualified degree of gravity", transcending the physical and economic value assigned to civilian property and emphasizing the symbolic and spiritual significance of cultural property. This makes the wilful destruction or damage of cultural property particularly serious, as it mutilates the very cultural and spiritual identity of the group that finds its expression through that cultural property. This approach, applied by the ICTY with respect to the shelling of the Old Town of Dubrovnik (a site included in the World Heritage List set up under the 1972 UNESCO World Heritage Convention), resulted in finding the destruction of institutions dedicated to religion, charity, education or the arts and sciences, as well as historic monuments and works of art and science, to affect the "existence of [the Old Town's] population", which "was intimately intertwined with its ancient heritage".[200] In the *Strugar* case, the Chamber transcended the traditional vision of human rights as enforceable and justiciable only when their breach affects one or more individuals specifically, and found that the right to preserve and enjoy one's own culture exists also to the extent that it is exercised in community with other members of one's group, resulting in a collective right. It is the exercise of this collective right that affects the identity of the group – and the protection of cultural property must have this notion at its core.[201] Echoing this perspective, in welcoming Al Mahdi's transfer to The Hague, the prosecutor, Fatou Bensouda, said that the people of Mali "deserve justice for the attacks against their cities, their beliefs and their communities", explaining:

> The charges we have brought against Ahmad al-Faqi al-Mahdi involve most serious crimes. They are about the destruction of irreplaceable historic monuments, and they are about a callous assault on the dignity and identity of entire populations, and their religious and historical roots.[202]

In the historical consciousness of Syrians, close relationships between all the various ethnic and religious groups are embedded in the communality of religious and

199 Mustapha Hammouche, "Guerre contre l'humanité", *Liberté*, 15 November 2015.
200 ICTY, *Jokić*, above note 126, para. 51.
201 ICTY, *Strugar*, above note 48, paras 218, 232.
202 Fatou Bensouda, "Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, at the Opening of the Confirmation of Charges Hearing in the Case against Mr Ahmad Al-Faqi Al Mahdi", ICC, 1 March 2016.

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historic buildings, the sharing of material culture, and social ethics.[203] Cultural identity is associated with monuments and artefacts of ancestors from different periods of history. Among the starkest examples is the Umayyad Mosque in Damascus, which has been shared and identified as a place of worship by more than one religious group.[204]

As discussed above, acts of deliberate destruction of cultural property are often accompanied by other large-scale or grave assaults on human dignity and human rights. As such, they have to be addressed in tandem, as part of the promotion of human rights and peacebuilding. The right to access and enjoy cultural heritage is critical in post-conflict situations; being denied such access can deepen wounds and divisions between communities.[205] Thus, peacemaking and peacebuilding processes should include the protection, repair and memorialization of cultural heritage. This must include the participation of those concerned, and the promotion of intercultural dialogue regarding cultural heritage,[206] to allow the memorialization of the past as places of memory or *lieux de memoires*,[207] or so-called "traumascapes"[208] (such as Ground Zero in New York). Intangible heritage that includes traditions or living expressions inherited from our ancestors and passed on to our descendants, such as oral traditions, performing arts, social practices, rituals, festive events, and skills for producing traditional crafts, must also be protected, restored, and if lost, memorialized. [209] There is some indication that international criminal justice recognizes this issue and has proposed a way forward. In the *Katanga* case, the judges of the ICC explained that symbolic reparations can offer a collective benefit in allowing the transmission of a larger memory.[210] The judges issuing the reparations order in the *Al Mahdi* case followed suit and awarded collective reparations to the victims in Timbuktu, noting that "cultural heritage plays a central role in the way communities define themselves and bond together, and how they identify with their past and contemplate their future".[211] The decision further quoted UNESCO, emphasizing that "the loss of heritage during times of conflict can deprive a community of its identity and memory, as

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203 Kanishk Tharoor, "Life Among the Ruins", *New York Times Sunday Review*, 19 March 2016.
204 Rafi Grafman and Myriam Rosen-Ayalon, "The Two Great Syrian Umayyad Mosques: Jerusalem and Damascus", *Muqarnas*, Vol. 16, 1999.
205 *Report of the Special Rapporteur in the Field of Cultural Rights*, "Addendum: Mission to Bosnia and Herzegovina (13–24 May 2013)", UN Doc. A/HRC/25/49/Add.1, 3 March 2014.
206 Report of the Independent Expert in the Field of Cultural Rights, above note 79, para. 12.
207 Pierre Nora, *Les lieux de mémoire*, 7 vols, Gallimard, Paris, 1984–1992.
208 Maria Tumarkin, *Traumascapes? The Power and Fate of Places Transformed by Tragedy*, Melbourne University Publishing, Carlton, 2005.
209 UNESCO, "What Is Intangible Cultural Heritage?", 2012, available at: www.unesco.org/culture/ich/index. php?lg=en&pg=00002. For more information on intangible cultural heritage, see: Christiane Johannot-Gradis, "Protecting the past for the future: How does law protect tangible and intangible cultural heritage in armed conflict?", *International Review of the Red Cross*, Vol. 97, No. 900, 2015, available at: www.icrc.org/en/international-review/article/protecting-past-future-how-does-law-protect-tangible-and-intangible.
210 ICC, *The Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07, Reparations Order, 24 March 2017, para. 279.
211 ICC, *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, Case No. ICC-01/12-01/15-236, Reparations Order, 17 August 2017, para. 14.

well as the physical testimony of its past", and that the "destruction of international cultural heritage … carries a message of terror and helplessness; it destroys part of humanity's shared memory and collective consciousness; and it renders humanity unable to transmit its values and knowledge to future generations".[212]

Understanding this impact is critical, for it reveals a more varied and complex relationship between communities and their cultural heritage. The efforts of Syria's DGAM, archaeologists and local volunteers to protect cultural property from the Syrian military and armed groups, including ISIS, are indicative of the value that Syrians place on the monuments to their history. Monuments that international law views as belonging to humankind are part of the daily lives and realities of people living in Syria and part of the memories of those who have left. A Syrian archaeologist currently based in the United States, Salam Al Kuntar, told the *New York Times*: "I have a special love for Palmyra because the Temple of Baal is where my mother was born."[213] This tangible connection between people and their cultural heritage is what makes its damage and destruction so devastating – and measures to ensure its protection so critical.

After all, the protection of cultural heritage from assault – whether through evacuation, archiving, restoration or memorialization – is necessary as a pushback against the message of the perpetrators. Archaeologists have made this point:

> Every time we resurrect from the rubble one of these monuments, it undercuts the message of fear and ignorance that these people are trying to spread. … If they knock it down, we will rebuild it. If they knock it down again, we will rebuild it again.[214]

The same attitude is often expressed by Syrians, creating an entry point for post-war reconstruction.

It is encouraging that the protection of cultural property is seen as being critical for reconciliation and post-war reconstruction of society, and is also increasingly recognized by States. – The Abu Dhabi Declaration starts by stating that cultural property is "a mirror of mankind, a guardian of our collective memory and a witness to the extraordinary creative spirit of humanity, [and that] world cultural heritage represents the foundation of our common future".[215] With the bold and innovative measures that have emerged in response to the destruction of Syria's cultural heritage, when viewed as part of States' obligation to "respect and ensure respect" for IHL in all circumstances, States increasingly have the tools to contribute to that foundation.

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212 *Ibid.*, para. 22. Given that the impact of the destruction of cultural property was widely felt by the community in Timbuktu as an assault on their cultural and religious identity, and is recognized to have had a broader affect, the judges also awarded nominal damages to the Malian State and the international community through UNESCO as symbolic reparations. *Ibid.*, para. 106.

213 K. Tharoor, above note 203.

214 Stephen Farrell, "If All Else Fails, 3D Models and Robots Might Rebuild Palmyra", *New York Times*, 28 March 2016.

215 ICOMOS, above note 164.

"Safe areas": The international legal framework

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Abstract

In recent years there have been repeated calls for the establishment of so-called "safe areas" to protect civilians from the effects of hostilities in a number of contexts. The present article presents the international law framework relevant to the establishment and operation of such areas: the provisions of international humanitarian law on protected zones; the rules regulating resort to armed force, Security Council authorization and mandates for the establishment of such areas by multinational forces in the absence of agreement between belligerents; and the refugee and international human rights issues raised by such zones. Using the example of the "protection of civilians sites" in South Sudan, the article then highlights some of the operational challenges raised by safe areas. It concludes with some reflections on how to enhance the likelihood that belligerents will establish such protected zones in the future.

Keywords: safe areas, protected zones, Security Council authorization, protection of civilians sites, South Sudan.

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In recent years there have been calls for the establishment of a variety of arrangements to provide civilians with a modicum of safety in a number of countries experiencing armed conflicts. These have included "safe zones" in Libya[1] and "safe havens" or "buffer zones" in Syria (terms used interchangeably).[2] While the suffering of civilians in these contexts was severe, the calls were not always without ulterior political motives, whether in terms of stemming refugee flows[3] or providing some degree of support and legitimacy to opposition forces operating from the proposed areas. Political motives are starkly evident in the "de-escalation zones" established in Syria pursuant to the Astana Agreements of May 2017. Their purported objectives included creating ceasefires between "moderate" opposition groups and the government of Syria; enhancing humanitarian access; facilitating the rehabilitation of basic infrastructure; the creation of conditions to deliver medical aid and meet the basic needs of civilians; and the safe and voluntary return of refugees and internally displaced persons.[4] While the precise conditions and local dynamics differ in the various zones, in practice the areas have not led to a reduction in violence or to enhanced humanitarian access. On the contrary, locations that fall within these areas, most notoriously Eastern Ghouta, have witnessed some of fiercest fighting in recent months, lending credence to the arguments that the zones were established as a "war management strategy" aimed at weakening the opposition.[5]

Motivations aside, it is important to appreciate the complexities that establishing and operating such areas entail. Their feasibility and success depend on numerous factors, starting from the political will of belligerents to agree to them or, absent such agreement, that of the Security Council and third States to create them. Moreover, the decision to establish so-called "safe areas" is just the beginning. Their implementation in practice raises numerous legal and practical challenges.

The present article focuses on one of the key framing issues that must be addressed when considering the establishment of "safe zones": the international legal framework. This dimension, which at times is misrepresented or glossed over, is important *per se*, and also because it highlights some central operational issues that must be addressed if such zones are to meet the promise of safety to those seeking refuge there.

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1 League of Arab States, Res. 2360, "Outcome of the Council Meeting at the Ministerial Level", 12 March 2011.

2 See, for example, Patrick Wintour, "Syria: Former UK Development Secretaries Appeal for Safe Havens", *The Guardian*, 1 February 2016; "Drawing in the Neighbours", *The Economist*, 2 July 2015; Erin Cunningham, "U.S., Turkey Aim to Create Buffer Zone on Syrian Border. Nobody Knows How", *Washington Post*, 12 August 2015.

3 See, for example, Bill Frelick, "Blocking Syrian Refugees Isn't the Way", *The New York Times*, 24 April 2013.

4 Memorandum on the Creation of De-Escalation Areas in the Syrian Arab Republic, 14 September 2017, available at: https://syria.liveuamap.com/en/2017/4-may-heres-the-full-text-of-the-syria-deescalation-zone (all internet references were accessed in November 2018).

5 Hashem Osserian, "How De-Escalation Zones in Syria Became a War Management Strategy", *News Deeply*, 6 February 2018, available at: www.newsdeeply.com/syria/articles/2018/02/06/how-de-escalation-zones-in-syria-became-a-war-management-strategy. See also Nada Homsi and Anne Barnard, "Marked for De-escalation, Syrian Towns Endure Surge of Attacks", *The New York Times*, 18 November 2017.

A number of different areas of international law are of relevance to the establishment and operation of "safe areas" in situations of armed conflict. They include international humanitarian law (IHL), also known as *jus in bello*, the body of law regulating the conduct of hostilities and protecting those not or no longer taking direct part in hostilities; *jus ad bellum*, the rules regulating resort to the use of force; and also refugee law and international human rights law. The present article will consider the first two areas of law in some detail, and flag some refugee and human rights law concerns raised by "safe areas". It will also highlight some additional considerations relating to the broader regulatory framework, including Security Council mandates for the establishment of such zones, if belligerents fail to agree to do so, and some operational challenges raised by their implementation in practice.

International humanitarian law

The expression "safe areas" is not used in any treaty; instead, IHL refers to "protected zones". This term is preferable as it refers to concepts that are defined in international law, but also because it highlights the reality that while the areas may have been accorded special protection in law, this does not necessarily translate to safety in practice for the people seeking refuge.

Three points must be highlighted at the outset. First, as a matter of law, parties to armed conflicts must respect and protect the civilian population and wounded and sick combatants at all times, regardless of whether protected zones have been established. As a matter of practice, it is precisely because belligerents are not complying with this obligation, but are instead targeting civilians, conducting hostilities in an indiscriminate manner or forcibly displacing civilians, that the creation of such zones is considered.

Second, the general rules of IHL regulating the conduct of hostilities continue to apply even if protected zones are established, and remain of fundamental importance both for those who have sought shelter within the zones and for those who have not. These rules are outlined in more detail below.

Finally, the provisions of IHL on protected zones protect the *zones* and not the *people* who seek shelter therein. The people must be respected and protected independently, and the zones are merely a way of implementing such protections as effectively as possible.[6]

The aim of the present article is not to exhaustively analyze the relevant rules of IHL, but rather to draw out the key elements of these rules. IHL envisages various types of protected areas in international armed conflicts. They differ slightly, essentially in terms of the categories of people who may access them, but their objective is the same: to create areas where the wounded and sick

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6   Jean Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949*, Vol. 4: *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, ICRC, Geneva, 1958 (ICRC Commentary on GC IV), p. 127.

and the civilian population can seek shelter from hostilities. The key aspect to bear in mind is that, unusually for IHL treaties, which do not ordinarily include merely exhortatory language, the relevant provisions do not *require* belligerents to establish protected zones. Instead, they merely note the possibility for them to do so. Zones established by one side will benefit from special protection only if and when they have been recognized by its opponent. During the negotiations of the 1949 Geneva Conventions, despite recognizing the humanitarian value of the proposed protected zones, States were unwilling to require their establishment and recognition.[7] This approach did not change during the negotiations of the 1977 Additional Protocols.

Geneva Conventions I and IV: Hospital and safety zones and localities

Types of protected zones

In situations of international armed conflict, the First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (GC I) and the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War (GC IV) foresee the possibility of establishing hospital and safety zones and localities.[8] As noted above, their special protected status is dependent on agreement between belligerents.

With regard to wounded and sick members of the armed forces,[9] Article 23 of GC I provides that

> [i]n time of peace, the High Contracting Parties and, after the outbreak of hostilities, the Parties to the conflict, may establish in their own territory and, if the need arises, in occupied areas, hospital zones and localities so organized as to protect the wounded and sick from the effects of war, as well as the personnel entrusted with the organization and administration of these zones and localities and with the care of the persons therein assembled.
>
> Upon the outbreak and during the course of hostilities, the Parties concerned may conclude agreements on mutual recognition of the hospital zones and localities they have created. They may for this purpose implement the provisions of the Draft Agreement annexed to the present Convention, with such amendments as they may consider necessary.

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7   ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 2nd ed., Geneva, 2016 (2016 Commentary on GC I), para. 1893.

8   Article 23 of GC I refers to "hospital and safety zones", and Article 14 of GC IV refers to "hospital and safety zones and localities".

9   The "wounded and sick" also includes the related persons referred to in Article 13 of GC I.

> The Protecting Powers and the International Committee of the Red Cross are invited to lend their good offices in order to facilitate the institution and recognition of these hospital zones and localities.

In essentially identical terms, Article 14 of GC IV foresees the possibility of establishing similar zones for wounded and sick civilians. As a matter of law, the stark distinction between wounded and sick members of the armed forces and wounded and sick civilians in the 1949 Geneva Conventions was abandoned in Additional Protocol I (AP I) of 1977, where reference to "the wounded and sick" covers both civilians and members of the armed forces.[10] As a matter of practice, nothing precludes a hospital zone from accommodating wounded and sick combatants and civilians. It is important to note that admission to hospital zones and localities must be granted without adverse distinction and therefore also to enemy wounded and sick, including combatants.

In addition to "hospital zones", Article 14 of GC IV also refers to the possibility of establishing "safety zones and localities". These are envisaged as areas where members of the civilian population considered particularly vulnerable and unlikely to pose a threat to the enemy can seek shelter. Article 14 refers to "aged persons, children under fifteen, expectant mothers and mothers of children under seven", but it seems safe to assume that all civilians may seek shelter in such zones and localities, provided they do not pose such a threat. As is the case for hospital zones, the principle of non-discrimination requires that access to protected zones also be granted to vulnerable civilians of enemy nationality.[11] In practice, the various types of protected area are likely to be combined, accommodating wounded and sick civilians and members of the armed forces, as well as other vulnerable people.

At the time of the adoption of these provisions in 1949, wounded and sick members of the armed forces, those treating them, and medical establishments had long been entitled to protection.[12] As far as these persons and facilities were concerned, the creation of hospital areas as envisaged in GC I would simply make it easier to give effect to these protections in practice. The position of civilians was different, however. It was not until the adoption of GC IV that similar protections were extended to wounded and sick members of the civilian population, those treating them, and civilian medical establishments.[13] Beyond these, the civilian population and civilian objects benefited from few express protections from the

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10 AP I, Art. 8.
11 ICRC Commentary on GC IV, above note 6, pp. 125–126; GC IV, Art. 13.
12 The Geneva Conventions of 1906 and 1929, and more recently, Article 12 of GC I, require belligerents to respect and protect wounded and sick members of the armed forces. Similarly, the Geneva Conventions of 1864, 1906 and 1929, and more recently, Articles 24–26 of GC I, require belligerents to respect and protect those providing medical care to wounded and sick members of the armed forces. Article 27 of the 1907 Hague Regulations requires parties, in the conduct of hostilities, to spare as much as possible hospitals and places where the wounded and sick are collected. This protection was reiterated and strengthened in Article 19 of GC I, which provides that medical establishments for members of the armed forces may in no circumstances be the object of attack and must be respected and protected at all times.
13 GC IV, Arts 16, 18, 20.

effects of hostilities in IHL treaties.[14] Protections for civilians from the effects of hostilities were not codified until the adoption of the Additional Protocols in 1977. Before then, hospital and safety zones, if established and recognized, were therefore an important way of enhancing the protections to which civilians were entitled as a matter of law, and of reducing their actual exposure to risks.

Article 23 of GC I and Article 14 of GC IV envisage the possibility of creating the hospital and safety zones in times of peace. Although this never appears to have occurred in practice, doing so would enable States to prepare the areas with the necessary equipment and supplies. Even if the zones are only established after the outbreak of hostilities, assembling the wounded and sick in a specifically prepared area can facilitate their treatment and can also help address some of the adverse effects of armed conflict, such as shortages of medical supplies or a breakdown of health services.[15]

As highlighted above, while a belligerent may establish hospital or safety zones and localities, doing so will have no effect unless and until they are recognized by its opponent. Importantly, however, and as also already noted, the absence of agreement does not deprive the people seeking shelter in such zones of the protection to which they are entitled under the general rules of IHL on the conduct of hostilities.

Draft Agreements on hospital and safety zones and localities

The likelihood of recognition of protected zones will depend on a number of factors. Key among them are the steps taken to ensure that the zones are in fact exclusively humanitarian and are not likely to be abused. Annexed to the GC I and GC IV are virtually identical Draft Agreements that provide guidance to parties setting up hospital and safety zones and localities. It is regrettable that these Draft Agreements have received little attention in the literature and have not been considered in the recent discussions on the possible establishment of protected areas, because they set out key conditions that such zones should meet in order to serve their intended purpose of shielding certain categories of people who are *hors de combat* from the effects of hostilities.

The Draft Agreements contain three key sets of provisions. These warrant highlighting, as the underlying considerations are relevant to all protected zones: those established by agreement as foreseen by IHL, and those established by other modalities, discussed below.

The first set of provisions aim to ensure that those accommodated in protected zones are in no way involved in hostilities, thus preserving the actual and perceived exclusively humanitarian purpose of the zones and not jeopardizing their protected status. They include:

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14 See, for example, Emanuela-Chiara Gillard, "Protection of Civilians in the Conduct of Hostilities", in Rain Liivoja and Tim McCormack (eds), *Routledge Handbook on the Law of Armed Conflict*, Routledge, New York, 2016.

15 2016 Commentary on GC I, above note 7, para. 1905.

- the requirement that the zones be reserved exclusively for the wounded and sick, civilians, people administering the zones and providing medical care, and people whose permanent residence is within such zones;
- the corollary obligation for those establishing and operating the zones to take all necessary measures to prohibit access to people who are not entitled to reside there; and
- the requirement that no one residing in the zones undertake, within or outside the zones, any activity directly connected with military operations.

Although neither the Draft Agreements nor the Geneva Conventions elaborate this point, the responsibility for ensuring that a zone complies with these conditions lies with the party establishing it. Doing so may be onerous and is likely to require considerable capacities in terms of types of personnel and also the provisions of goods and services. Security personnel may be required to ensure that armed elements do not enter the zones, and to maintain law and order within them.[16] It will also be necessary to provide food, health care and, if the zones are used for prolonged periods, education. The greater the number of residents, and the longer the zones are employed, the more onerous their operation will be. Although they are not the type of protected zone envisaged by IHL, the experience of the United Nations Mission in South Sudan (UNMISS) with the "protection of civilians sites" discussed below highlights some of the operational challenges involved.

The second set of provisions in the Draft Agreements are measures that aim to enhance the security of the zones themselves. They include requirements that:

- the zones only constitute a small part of the State's territory. Larger zones are likely to impair the opponent's capacity to conduct hostilities and thus may undermine the safety of the zones themselves;
- they be distant from and free of all military objectives, not situated in areas likely to become significant for the conduct of the war, and not defended by military means;
- access roads to the zones not be used for military purposes;
- hospital zones be marked by red crosses/crescents, and other protected zones and localities by other agreed-upon signs.

The final set of provisions in the Draft Agreements are supervisory measures to ensure that the zones operate as envisaged. The party recognizing a zone is entitled to demand that an independent body have access to examine the zone and confirm that it complies with the basic requirements set out above. If shortcomings are found, the party that established the zone must rectify them within a prescribed period of time. If it fails to do so, its opponent may declare that it no longer recognizes the area as protected. This would not, however, affect the protections to which *people* accommodated in the areas are entitled under the general rules of IHL on the conduct of hostilities.

16 See, for example, Jean Pictet (ed.), *The Geneva Conventions of 12 August 1949: Commentary*, Vol. 1: *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, ICRC, Geneva, 1952, pp. 418, 421.

Geneva Convention IV: Neutralized zones

GC IV foresees the establishment of a further type of protected zone: neutralized zones. Article 15 of GC IV provides that

> [a]ny Party to the conflict may, either directly or through a neutral State or some humanitarian organization, propose to the adverse Party to establish, in the regions where fighting is taking place, neutralized zones intended to shelter from the effects of war the following persons, without distinction:
>
> (a)   wounded and sick combatants or non-combatants;
> (b)   civilian persons who take no part in hostilities, and who, while they reside in the zones, perform no work of a military character.
>
> When the Parties concerned have agreed upon the geographical position, administration, food supply and supervision of the proposed neutralized zone, a written agreement shall be concluded and signed by the representatives of the Parties to the conflict. The agreement shall fix the beginning and the duration of the neutralization of the zone.

The drafters of GC IV envisaged three principal differences between hospital/safety zones and neutralized zones. The former were intended to be located at a distance from the combat zone and to constitute a longer-term arrangement for certain categories of particularly vulnerable civilians. Neutralized zones, instead, would be in areas of active fighting to provide temporary shelter to wounded and sick combatants and civilians and the entire civilian population. In practice, on the occasions when protected zones have been established, they have taken the form of neutralized zones: located in areas of combat and accommodating both civilians and the wounded and sick.[17]

While, strictly speaking, the Draft Agreements annexed to GC I and GC IV relate to hospital and safety zones and locations, the measures they set out are equally relevant to neutralized zones – if not more so, considering the latter are located in areas of active combat.

Additional Protocol I: Demilitarized zones

The range of protected zones contemplated by IHL is further expanded by AP I, which foresees the possibility of establishing demilitarized zones.[18] The aim of

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17 These include the neutralized zones established in Jerusalem in 1948 and in Nicosia in 1974, and some hospitals in the Dubrovnik area in 1991. See Yves Sandoz, "The Establishment of Safety Zones for Persons Displaced within their Country of Origin", in Najeeb Al-Nuaimi and Richard Meese (eds), *International Legal Issues Arising under the United Nations Decade of International Law*, Martinus Nijhoff, The Hague and London, 1995, p. 800.

18 AP I also foresees the possibility of establishing "non-defended localities" in Article 59. While these can also enhance the safety of civilians, they are different in nature to the other types of protected zones outlined in this article, and there have not been calls to establish them in recent years, so they will not be discussed further.

these zones is similar to that of the neutralized zones of Article 15 of GC IV: to place localities or zones and their non-combatant population outside the theatre of war.[19] While the arrangements in the Geneva Conventions do this by foreseeing the establishment of zones to which civilians and the wounded and sick can relocate, demilitarized zones operate by "fencing off" areas from military operations for the protection of all civilians. The party establishing a demilitarized zone must ensure that it is not used for hostile activities – in a broad sense of the term, as will be seen below – and, it if recognizes the zone, its opponent must refrain from extending "military operations" – also a broad notion – to the zone.[20]

Demilitarized zones are established by agreement between belligerents in relation to areas that fulfil a number of conditions:

(a) all combatants, as well as mobile weapons and mobile military equipment, must have been evacuated;
(b) no hostile use may be made of fixed military installations or establishments in the zones;
(c) no acts of hostility may be committed by the authorities or by the population in the zones; and
(d) any activity linked to the military effort in the zones must have ceased.[21]

The agreement to establish demilitarized zones can be oral or in writing. It must specify as precisely as possible the location and limits of the zones, and, if necessary, prescribe the methods for supervising compliance with the conditions set out above.[22]

Belligerents are precluded from extending their military operations to areas to which they have conferred the status of demilitarized zones.[23] The party recognizing a demilitarized zone is released from its obligations under the agreement in case of a material breach of one of the conditions set out above, or if the zone is used for purposes related to the conduct of military operations.[24] Should that occur, protections for civilians and the wounded and sick under the general rules on the conduct of hostilities will nevertheless continue to apply.

Non-international armed conflicts

The rules on the various protected zones outlined above are only found in treaties that regulate international armed conflicts. The absence of similar provisions in

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19 Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987 (ICRC Commentary on APs), para. 2260. The expression "demilitarized zones" has been employed to refer to a number of different arrangements, including areas established as buffer zones between warring parties as part of armistices, or imposed upon defeated parties by peace treaties. In this article the expression is used to refer exclusively to demilitarized zones established for the humanitarian purpose of protecting the civilian population residing there. *Ibid.*, paras 2299–2301.
20 See discussion in *ibid.*, paras 2304–2306.
21 AP I, Art. 60(3).
22 *Ibid.*, Art. 60(2).
23 *Ibid.*, Art. 60(1).
24 *Ibid.*, Art. 60(7).

relation to non-international armed conflicts is not significant, as nothing precludes parties to such conflicts from entering into agreements with a similar effect. In fact, Article 3 common to the Geneva Conventions specifically refers to the possibility of parties concluding special agreements to bring into effect other provisions of the Conventions.

Determining whether a conflict is international or non-international in character can be extremely difficult legally and factually, and is frequently a politically charged question. The conflict in the former Yugoslavia in the 1990s was a case in point. In the interest of reaching agreement on the establishment of protected zones, belligerents agreed, through the good offices of the International Committee of the Red Cross (ICRC), to conclude *ad hoc* agreements to that effect, without entering into what would have been an inconclusive debate on the nature of the conflict that would have stymied the establishment of the zones.[25]

Protected zones: Their establishment and operation in practice

The defining element of the protected zones foreseen by IHL is the need for agreement between belligerents. This need for agreement is also a key reason why so few have been established. The Geneva Conventions suggest creating protected zones in peacetime, but as noted, this does not appear to have ever occurred. Understandably, reaching agreement after the outbreak of hostilities is extremely difficult. While belligerents could engage in direct negotiations, trusted, neutral intermediaries are likely to play an important role in helping them to reach agreement. The provisions of GC I and GC IV on hospital zones specifically mention the potential role of the protecting powers and of the ICRC in this regard.[26] The ICRC has played a central role in initiating negotiations and facilitating the conclusion of agreements for the establishment of the majority of the few protected zones that have been created by agreement.[27]

IHL does not specify the format that an agreement should take,[28] but written agreements have the obvious advantage of clarity. More important than its format are the key issues that an agreement should address, including measures to ensure the exclusively humanitarian nature of protected zones and to enable them to be accurately identified, as outlined in the Draft Agreements annexed to GC I and GC IV.

None of the treaty provisions address the central question of who is responsible for operating the protected zones, including ensuring that they meet the conditions stipulated in the agreement, providing basic services, and

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25 Y. Sandoz, above note 17, p. 920.
26 GC I, Art. 23(3); GC IV, Art. 14(3).
27 See Y. Sandoz, above note 17; Jean-Philippe Lavoyer, "International Humanitarian Law, Protected Zones and the Use of Force", in Wolfgang Biermann and Martin Vadset (eds), *UN Peacekeeping in Trouble: Lessons Learned from the Former Yugoslavia: Peacekeepers' Views on the Limits and Possibilities of the United Nations in a Civil War-like Conflict*, Ashgate, Aldershot, 2000, p. 262.
28 In relation to demilitarized zones, Article 60(2) of AP I notes that the agreement could be oral or in writing. The provisions on other protected zones do not address this issue.

maintaining law and order. Although it makes sense for this responsibility to lie with the party to the conflict that establishes the zones, it is interesting to see that in a significant number of the few protected zones that have been established by agreement, it was the ICRC that assumed all these roles.[29] This was probably feasible in the circumstances for a number of reasons, starting from the limited scope of the areas in terms of size and duration.

While humanitarian actors are likely to make important contributions to the operation of protected zones, they do not have the mandate to carry out all necessary activities, including, most notably, the screening and disarming of people entering the zones, or the maintenance of law and order within them. Moreover, they may have reservations about being involved in zones that have not been set up with the agreement of all belligerents, as doing so could give rise to a misleading impression of the safety of the zones, which would not be warranted if the opponent had not recognized them. It could also undermine perceptions of the organization's neutrality, and put its staff at risk.[30] Significant reservations are also likely to arise when the zones have been established to prevent people from crossing borders to seek asylum.[31] The supervision of protected zones to ensure that they meet the key conditions agreed to is a different matter and a role that should be carried out by a mutually trusted intermediary, which can and, as noted above, frequently has been a humanitarian organization.

There have been few instances of protected zones of any kind being established as foreseen by IHL since the adoption of the 1949 Geneva Conventions.[32] The most frequently cited examples include:

- a number of temporary arrangements established by the ICRC, including in Dhaka in 1971; in Nicosia in 1974; in Saigon and Phnom-Penh in 1975; and in Nicaragua in 1979;[33]
- some areas in Port Stanley, as well as the "Red Cross box" during the Falklands/Malvinas conflict in 1982;[34] and
- Osijek and other hospitals in the Dubrovnik area in 1991.[35]

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29 For example, the ICRC ran the neutralized zones in Jerusalem in 1948 and the Osijek protected zone established in Croatia in 1991. See Y. Sandoz, above note 17, p. 906; J.-P. Lavoyer, above note 27, pp. 268 ff.

30 See, for example, Trevor Keck, "What You Need to Know About 'Safe Zones'", *Intercross Blog*, 27 February 2017, available at: http://intercrossblog.icrc.org/blog/what-you-need-to-know-about-safe-zones. Keck notes that "[t]he ICRC would not administer any zone secured or enforced by military force as it would compromise our neutrality and independence".

31 This is an issue that the Office of the UN High Commissioner for Refugees (UNHCR) frequently has to grapple with. See, for example, Katy Long, "In Search of Sanctuary: Border Closures, 'Safe' Zones and Refugee Protection", *Journal of Refugee Studies*, Vol. 26, No. 3, 2013. The dilemma may be particularly stark for UNHCR in view of its mandate to promote principles of refugee law and protection in addition to assisting displaced persons, but it is pertinent to all humanitarian actors.

32 For examples of zones of refuge set up before 1949, see Y. Sandoz, above note 17, pp. 904–907.

33 ICRC Commentary on APs, above note 19, para. 2261; Y. Sandoz, above note 17, pp. 909–911.

34 Y. Sandoz, above note 17, pp. 915–916.

35 J.-P. Lavoyer, above note 27, pp. 266–270.

Factors that are likely to have contributed to belligerents reaching agreement in these cases appear to include, first, the existence of a trusted and credible intermediary promoting the establishment of the zones, most frequently but not exclusively the ICRC; and second, the limited scope of the zones in terms of size, in terms of categories of people accommodated (most frequently it was just the wounded and sick), in terms of numbers of people and in terms of duration. This increased the likelihood of the zones being considered acceptable, and of their being respected. It made it simpler for those operating the zones to comply with the requirement that they not pose a military threat, and, in view of their limited size, they were unlikely to impede the conduct of military operations.

A more recent example that highlights the risks of establishing so-called protected zones without the agreement of the opponent are the three successive "no-fire zones" established unilaterally by the government of Sri Lanka in early 2009, with the claimed intent of providing safety to civilians who remained in the ever-diminishing areas under the control of the Liberation Tigers of Tamil Eelam (LTTE). The LTTE did not recognize these zones and took no steps to prevent armed elements from entering them. In the final weeks of fighting, the zones were under constant attack by government forces, leading to massive civilian casualties and destruction of the hospitals located in the zones.[36]

Attention has focused on the creation of zones to provide protection to vulnerable people. However, damage or destruction of civilian objects during the conduct of hostilities can also have a severe impact on civilians' well-being. This is particularly the case for infrastructure providing essential services, such as health-care facilities, electricity generation and distribution networks, and water treatment and distribution facilities. With these considerations in mind, since 2017 the ICRC has been facilitating negotiations between the Ukrainian authorities, the Organization for Security and Co-operation in Europe, and representatives of non-government-controlled areas in Donetsk and Lugansk. The objective is to create an agreement to establish safety zones along the contact line in eastern Ukraine around two water installations: a pumping station and a filtration station. If concluded and respected, the agreement would ensure that infrastructure providing clean water to more than 1.8 million people on both sides of the contact line will continue to operate.[37]

This example highlights the value of initiatives to spare critical infrastructure from the effects of hostilities. This is a type of protected zone that has been largely overlooked but warrants closer attention. The conditions for the conclusion and operation of such humanitarian arrangements are similar to those for protected zones for vulnerable persons: agreement between belligerents, clear

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36 *Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka*, 31 March 2011, paras 80–89, 100–102, 115–123. See also Human Rights Watch, *War on the Displaced: Sri Lankan Army and LTTE Abuses against Civilians in the Vanni*, February 2009, available at: www.hrw.org/report/2009/02/19/war-displaced/sri-lankan-army-and-ltte-abuses-against-civilians-vanni.

37 ICRC, "Safety Zones: Questions and Answers with Alain Aeschlimann, Head of the ICRC in Ukraine", 10 July 2017, available at: http://ua.icrc.org/2017/07/10/safety-zones-questions-answers-alain-aeschlimann-head-icrc-ukraine/.

identification and demarcation of the areas in question, and supervision of compliance with the terms of the agreement.

The general rules of IHL regulating conduct of hostilities

As repeatedly stated, the protection afforded to protected zones is additional to that to which civilians, persons *hors de combat* (such as wounded combatants) and civilian objects are entitled under the general rules of IHL regulating the conduct of hostilities. These protections are essentially the same in international and non-international armed conflicts, and include:

- the obligation to respect and protect civilians and the wounded and sick;[38]
- the prohibition of direct attacks against civilians and civilian objects;[39]
- the prohibition of direct attacks against medical facilities;[40]
- the prohibition against conducting indiscriminate attacks, including "disproportionate attacks" – that is, attacks expected to cause incidental loss of civilian life, injury to civilians or damage to civilian objects that would be excessive in relation to the concrete and direct military advantage anticipated;[41]
- the prohibition against using civilians or other protected persons to render areas immune from attack or to shield military operations;[42]
- the obligation, to the extent feasible, to avoid locating military objectives within or near densely populated areas;[43] and
- the obligation to take constant care in the conduct of military operations to spare the civilian population and civilian objects and to take precautions in attack and defence.[44]

It is important to recall these general protections for a number of reasons: first, even if protected zones are established, and even if they operate as envisaged and provide protection, people who do not seek refuge there remain protected in accordance with these rules. The establishment of the protected zones in no way reduces their protections or belligerents' obligations towards them.

Second, these general rules continue to apply during the operation of the protected zones – for all parties. For example, should any individuals in the protected zones engage in hostilities, they must comply with the rules on precautions in defence, including the prohibitions against resorting to human shields and locating military objectives within or near densely populated areas,

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38 AP I, Arts 10, 48; Additional Protocol II (AP II), Arts 7, 13.
39 AP I, Arts 51(2), 52; AP II, Arts 13(2); Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), Rules 1, 7.
40 GC I, Art. 19; GC IV, Art. 18; AP I, Art. 12; AP II, Art. 11; ICRC Customary Law Study, above note 39, Rule 28.
41 AP I, Art. 51; ICRC Customary Law Study, above note 39, Rules 11–13.
42 Geneva Convention III, Art. 23; GC IV, Art. 28; AP I, Art. 51(7); ICRC Customary Law Study, above note 39, Rule 97.
43 AP I, Art. 58; ICRC Customary Law Study, above note 39, Rule 23.
44 AP I, Arts 57, 58; ICRC Customary Law Study, above note 39, Rules 15–24.

such as the zones themselves. Parties responding to such attacks are similarly bound, including, most notably, by the prohibition against indiscriminate attacks.

Finally, and as already noted, if, for whatever reason, protected zones lose their protected character, the people sheltering there nonetheless remain protected by these general rules.

"Safe areas" established by means other than agreement between belligerents

The assumption underlying the various protected zones foreseen by IHL is that civilians and the wounded and sick are caught up in hostilities and that, provided the necessary measures are taken to ensure the zones are in fact exclusively humanitarian, belligerents will be willing to agree to their establishment. However, this assumption does not hold in situations where the civilian population is being deliberately targeted. The objective of the party attacking civilians is to harm or forcibly displace civilians; that party is therefore unlikely to be willing to set up areas to protect them. This is the most extreme situation, but not the only one in which it may be impossible for belligerents to agree to the establishment of protected zones. In other situations, doing so might simply not have been considered, or insufficient efforts may have been made to facilitate agreement to the zones by belligerents.

In the past twenty-five years, in response to a number of conflicts in which civilians were systematically targeted, protected zones have been established without the agreement of belligerents, including, in some cases, without the consent of the State party to the conflict in whose territory the areas were set up. These include the "safe havens" in Northern Iraq in 1991, the "safe areas" in Bosnia in 1992, and the "safe humanitarian zone" in southwestern Rwanda in 1994.[45]

When so-called "safe areas" are established in such circumstances, in addition to the rules of IHL regulating the conduct of hostilities outlined above – which remain pertinent – another body of law comes into play: *jus ad bellum*, the rules regulating resort to armed force. Moreover, if the safe areas are established and administered by a multinational force, in addition to requiring the necessary authorization from the United Nations (UN) Security Council to resort to armed force in the first place, the mandate granted to such forces must also be considered, to determine whether it authorizes them to establish the areas and also, crucially, to use force to defend them.

The next section briefly presents the cases of northern Iraq, Rwanda, and Bosnia and Herzegovina. The objective is not to analyze why some areas were more successful than others in providing protection – something that has already

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45 See, for example, Karin Landgren, "Safety Zones and International Protection: A Dark Grey Area", *International Journal of Refugee Law*, Vol. 7, No. 3, 1995, pp. 442–451.

been the object of extensive research.[46] Instead, the article outlines key elements of the regulatory framework in the three cases: the legal basis for the presence of the foreign forces implementing the safe areas, and their mandate.

Jus ad bellum considerations

The safe areas in northern Iraq, Bosnia and Herzegovina, and Rwanda were established in the territory of a State party to the conflict, by the armed forces of third States. This raises questions of *jus ad bellum*, the rules of international law regulating resort to the use of force.

Article 2(4) of the UN Charter prohibits "the threat or use of force against the territorial integrity or political independence of any state". There are only two possible exceptions to this prohibition: individual or collective self-defence,[47] and collective action authorized by the Security Council acting under Chapter VII of the Charter.[48] The presence of the armed forces of a State on the territory of another State – for whatever reason – amounts to a violation of the prohibition on the use of force, unless it falls within these exceptions, or the territorial State has consented to such presence. This includes armed forces establishing and/or operating a safe area. The three above-mentioned instances in which such areas were established must be analyzed against this framework. States have never justified such areas as a form of individual or collective self-defence; instead, for the most part, they have been cases of the use of force authorized by the Security Council.[49]

In the first case, Operation Provide Comfort in northern Iraq in 1991, Iraq had not consented to the creation of the "safe havens" (at least initially), but Security Council authorization was not apparent. In response to Iraq's repression of the civilian population in the Kurdish-populated areas of the country, in April 1991 the Security Council adopted Resolution 688, in which it insisted "that Iraq allow immediate access by international humanitarian organisations to all those in need of assistance in all parts of Iraq" and appealed "to all Member States and to all humanitarian organizations to contribute to these humanitarian relief efforts".[50] Although the Council determined that the repression of the civilian population that led to massive population flows across international borders and to

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46 See, for example, Carol McQueen, *Humanitarian Intervention and Safety Zones: Iraq, Bosnia and Rwanda*, Palgrave Macmillan, Basingstoke, 2005; and, more recently, Stefano Recchia, "The Paradox of Safe Areas in Ethnic Civil Wars", *Global Responsibility to Protect*, Vol. 10, No. 3, 2018.

47 UN Charter, Art. 51.

48 *Ibid.*, Art. 42.

49 Some have suggested that the establishment of the "safe havens" in northern Iraq in 1991 was an instance of humanitarian intervention. See, for example, Michael E. Harrington, "Operation Provide Comfort: A Perspective in International Law", *Connecticut Journal of International Law*, Vol. 8, No. 2, 1993. Despite considerable debate in recent years, at present the majority view remains that "humanitarian intervention" is not an additional exception to the prohibition on the use of force. See, for example, Vaughan Lowe and Antonios Tzanakopoulos, "Humanitarian Intervention", in *Max Planck Encyclopedia of Public International Law*, May 2011.

50 UNSC Res. 688, 5 April 1991, op. paras 3, 6.

cross-border incursions threatened international peace and security, it did not expressly refer to Chapter VII.

Nonetheless, the resolution was invoked as the basis for a US-led multinational operation. Starting with airdrops, the coalition put ground forces in Iraqi territory to protect displaced persons and build camps. Using ground and air forces, it also established a "safe zone" in northern Iraq to allow civilians to return to their homes.[51] The government of Iraq and the UN eventually signed a Memorandum of Understanding on the UN's humanitarian activities in Iraq to replace the coalition forces, but the presence of coalition forces and their operations pursuant to Resolution 688 were without Iraq's consent.[52] This, coupled, with the Security Council's ambiguous language purportedly authorizing the use of force, led the government of Iraq to complain of a violation of its sovereignty and territorial integrity,[53] a view supported by some commentators.[54]

Neither Resolution 688 nor later ones addressed the details of the "safe havens" – in terms of mandates to establish them or of authorization to use force to defend those seeking shelter there.[55] While the lawfulness of the presence of the coalition forces is questionable, as is the actual mandate to establish the zones, the coalition forces adopted a robust approach to protecting the zones. In the immediate aftermath of the expulsion of Iraq from Kuwait, the threat of military action in defence of the zones had the requisite deterrent effect.[56]

In contrast to northern Iraq, the lawfulness under *jus ad bellum* of the presence of the UN Protection Force (UNPROFOR), the multinational force eventually tasked with protecting the "safe areas" in Bosnia, was unquestionable. The Security Council established UNPROFOR through Resolution 743, with the consent of the government of Yugoslavia.[57] Resolution 758 expanded its mandate to Bosnia and Herzegovina.[58]

The basis for the establishment of the safe areas in Bosnia was equally clear: in Resolution 819, acting under Chapter VII, the Security Council demanded "that all parties and others concerned treat Srebrenica and its surroundings as a safe area

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51   See, for example, Airforce Historical Studies Office, "Operation Provide Comfort and Northern Watch", available at: www.afhistory.af.mil/FAQs/Fact-Sheets/Article/458953/operation-provide-comfort-and-northern-watch/; "Operation Provide Comfort", *GlobalSecurity.org*, available at: www.globalsecurity.org/military/ops/provide_comfort.htm.

52   K. Landgren, above note 45, p. 443; Dietrich Schindler, "Humanitarian Assistance, Humanitarian Interference and International Law", in Ronald St John Macdonald, *Essays in Honour of Wang Tieya*, Martinus Nijhoff, Dordrecht, 1993, p. 699.

53   Letter dated 21 April 1991 from the Permanent Representative of Iraq to the United Nations addressed to the Secretary-General, UN Doc. S/22513, 22 April 1991.

54   See, for example, Peter Malanczuk, "The Kurdish Crisis and Allied Intervention in the Aftermath of the Second Gulf War", *European Journal of International Law*, Vol. 2, No. 2, 1991.

55   The question of safe zones was not put to the Security Council after the adoption of Resolution 688 because it was considered unlikely that all permanent members would have supported the zones. See, for example, Oscar Schachter, "United Nations Law in the Gulf Conflict", *American Journal of International Law*, Vol. 85, No. 3, 1991, p. 469; P. Malanczuk, above note 54.

56   See S. Recchia, above note 46.

57   UNSC Res. 743, 21 February 1992.

58   UNSC Res. 758, 8 June 1992.

which should be free from any armed attack or any other hostile act".[59] Resolution 824, also adopted under Chapter VII, declared that "Sarajevo, and other such threatened areas, in particular the towns of Tuzla, Zepa, Gorazde, [and] Bihac", also constituted "safe areas" and should be free from armed attacks.[60]

The Security Council's approach to safe areas in Bosnia suffered from a different shortcoming. Resolution 819 requested the Secretary-General, "with a view to monitoring the humanitarian situation in the area", to increase UNPROFOR's presence in Srebrenica and its surrounding areas, and demanded that all concerned parties cooperate with UNPROFOR for this purpose.[61] Resolution 824 contained a similar request in relation to the other locations designated as safe areas.[62] The Council did not, however, grant UNPROFOR the mandate to use force to defend the safe areas until June 1993, and even then did not allocate additional troops for this task.[63] This, coupled with the fact that the areas were not demilitarized[64] (which meant that military operations were carried out from the areas, and led to responses from opposing forces), made it impossible for UNPROFOR to protect the areas from Bosnian Serb attacks when the hostilities intensified, leading to the massacres of the Bosnian men and boys who had been seeking refuge in the areas.

In this instance, the presence of the multinational forces was unquestionably lawful from a *jus ad bellum* point of view, and they had a clear mandate to establish and administer the safe zones. However, the combination of the failure to demilitarize these zones and the lack of a mandate to use force to defend them led to the devastating outcome.[65]

In Rwanda, the Security Council first established a UN force, the UN Assistance Mission for Rwanda (UNAMIR), with the consent of the government of Rwanda and of the Rwandan Patriotic Front in Resolution 872.[66] Although its presence was lawful, UNAMIR did not have a mandate to establish safe areas. Instead, the so-called "protected sites" emerged spontaneously, either as people fled to areas where UNAMIR personnel were known to be stationed, or as UNAMIR troops were dispatched to sites where civilians had congregated. Although UNAMIR contributed to saving lives, it simply never had the capacity to

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59 UNSC Res. 819, 16 April 1993, op. para. 1.
60 UNSC Res. 824, 6 May 1993, op. para. 3.
61 UNSC Res. 819, 16 April 1993, op. para. 4.
62 UNSC Res. 824, 6 May 1993, op. para. 6.
63 UNSC Res. 836, 4 June 1994, op. para. 5, stating that the Security Council "[d]ecides to extend to that end the mandate of UNPROFOR in order to enable it, in the safe areas referred to in resolution 824 (1993), to deter attacks against the safe areas, to monitor the cease-fire, to promote the withdrawal of military or paramilitary units other than those of the Government of the Republic of Bosnia and Herzegovina and to occupy some key points on the ground, in addition to participating in the delivery of humanitarian relief to the population as provided for in resolution 776 (1992) of 14 September 1992".
64 See K. Landgren, above note 45, p. 445.
65 Numerous other aspects of the dynamics of the international community's response to the conflict also contributed to the outcome. See S. Recchia, above note 46, and references cited therein.
66 UNSC Res. 872, 5 October 1993, op. para. 2.

respond to the scale of the crisis.[67] In view of the magnitude of the crisis and the delays in bringing UNAMIR up to strength, nine months later, acting under Chapter VII, the Security Council adopted Resolution 929. This authorized the deployment of a "temporary force under national command and control aimed at contributing, in an impartial way, to the security and protection of displaced persons, refugees and civilians at risk in Rwanda".[68] From the outset, this force was authorized to use all necessary means – including the use of force – to contribute to the security and protection of displaced persons, refugees and civilians at risk in Rwanda, including through the establishment and maintenance, where feasible, of secure "humanitarian areas".[69] Led by France, and provided with significant troop numbers and equipment (including helicopters and fighter aircraft), Operation Turquiose established a "safe humanitarian zone" covering one fifth of Rwanda's territory.[70] Regrettably, this only occurred once the genocidal violence was subsiding, and the force was deployed for less than two months.

The presence of UNAMIR was lawful from a *jus ad bellum* point of view. It assumed the mandate to provide protection but, in view of its size, was overwhelmed by the extent of the violence. As far as Operation Turquoise was concerned, its presence also did not raise *jus ad bellum* concerns, and from the outset the force had the requisite mandates: to establish safe areas – which ended up being far larger than those envisaged by IHL – and to use force to ensure their protection. In view of the size of the "safe humanitarian zones", one can but wonder whether the force would have actually had the ability to ensure protection to those within the zones had they been established at an earlier stage in the violence.

Mandates, "concepts of operations" and directives on the use of force

While, absent the consent of the territorial State, Security Council authorization is necessary for the presence of a multinational force not to violate that State's sovereignty and territorial integrity, as well as the prohibition on the use of force, authorization is only the first step. As highlighted by the UNPROFOR experience, it is not sufficient *per se* to ensure the safety of any safe area that is established. The force will also require a mandate to establish and administer the area[71] and, importantly, a sufficiently robust mandate to deter and respond to attacks against the population there.

In addition, the various internal documents elaborated by a multinational force to implement the mandate, including the "concepts of operations" and

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67 In Resolution 912, adopted a fortnight after the start of the genocide, the Security Council *reduced* UNAMIR's troop numbers from 2,548 to 270 as it considered that the conductions in Rwanda were no longer permissive to supporting a peace process – the mandated purpose of UNAMIR.

68 UNSC Res. 929, 22 June 1994, op. para. 2.

69 *Ibid.*, op. para. 3.

70 K. Landgren, above note 45, pp. 449 ff.

71 For a discussion of whether peacekeeping forces have an implicit mandate to establish safe areas absent a Security Council mandate to this effect, see Bruce Oswald, "The Creation and Control of Places of Protection during United Nations Peace Operations", *International Review of the Red Cross*, Vol. 83, No. 844, 2001.

directives on the use of force, must address the range of issues likely to be raised by the existence of a safe area in a context of ongoing hostilities. These should include, for example, measures to deter and put an end to violence by hostile forces against those seeking shelter in the areas and to ensure that relief consignments can reach the areas. They will also need to include measures to ensure safety and security within the safe areas, starting with screening and disarming those entering the areas, ensuring no military activities take place within the areas, and maintaining law and order within the areas. Some of these activities require military personnel and others police staff; as highlighted in the next section, they are likely to involve close liaison with humanitarian actors, so will also need staff with experience in civil–military coordination. Missions must be appropriately staffed.

A new model of safe areas: "Protection of civilians sites" in South Sudan

The safe areas discussed thus far, whether established by agreement between belligerents or by the Security Council, were all planned in advance. A different form of safe area came into being in South Sudan following the outbreak of fighting in late December 2013: spontaneous "protection of civilians sites" (PoC sites) formed when civilians fleeing violence sought refuge within and in close proximity to UNMISS bases.

Until now, attention has focused principally on the modalities for the establishment of safe areas, but the PoC sites in South Sudan raise a number of challenges relating to their operation in practice. The PoC sites are frequently described as "unprecedented" or as presenting "unique challenges".[72] While it may be correct that there have never been so many people seeking refuge within peacekeeping bases for such prolonged periods of time,[73] this is by no means the first occasion on which this has occurred,[74] nor is it likely to be the last.[75] The sites raise innumerable operational challenges, and it is well beyond the scope of

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72 See, for example, Jenna Stern, *Establishing Safety and Security at Protection of Civilians Sites: Lessons Learned from the United Nations Peacekeeping Mission in South Sudan*, Civilians in Conflict Policy Brief No. 2, September 2015, p. 5; Jan Egeland, "Foreword", in Caelin Briggs and Lisa Monaghan, *Protection of Civilian Sites: Lessons Learned from South Sudan for Future Operations*, Norwegian Refugee Council, 31 May 2017, available at: www.nrc.no/globalassets/pdf/reports/poc-sites_lessons-from-south-sudan-copy.pdf.

73 As of March 2018, over 200,000 civilians were living in six PoC sites. UNMISS, "PoC Update", 12 March 2018, available at: https://tinyurl.com/y82a3do5. Population figures have been at this number since late 2015. See Lisa Sharland and Aditi Gorur, *Revising the UN Peacekeeping Mandate in South Sudan: Maintaining Focus on the Protection of Civilians*, Stimson Center and Australian Strategic Policy Institute, Washington, DC, December 2015, p. 14.

74 Civilians had sought shelter in the proximity of UNMISS bases on a number of occasions before the escalation of violence in December 2013, but they had done so in relatively small numbers and only for short periods of time. In April 2013 UNMISS had developed guidelines to address such situations based on the premise that civilians would remain for a maximum of seventy-two hours. Although valuable, the guidelines were intended for a very different scenario to that which unfolded after December 2013. UNMISS, *Guidelines: Civilians Seeking Protection at UNMISS Bases*, 30 April 2013. Civilians have sought refuge within or in close proximity to the bases of peacekeeping forces in other contexts as well: see the examples in C. Briggs and L. Monaghan, above note 72, pp. 17–18.

75 The UN Department for Peacekeeping Operations (DPKO) acknowledged as much. DPKO, "Practice Note on Civilians Seeking Protections at UN Facilities", 2015.

the present article to attempt to present and analyze them all;[76] nor is this article intended to be a criticism of the sites, which have played an important role in providing protection in South Sudan. Instead, it will highlight a small number of issues that have arisen in the operation of the PoC sites, as they are likely to occur when safe areas are established – by whatever means.

In terms of regulatory framework, the UN Security Council, acting under Chapter VII of the UN Charter, established UNMISS in July 2011. From the outset, its mandate included a protection of civilians dimension, and the authorization to use force to implement it. Originally, this focused on providing support to the government of Sudan to develop its capacity in this area.[77] Violence broke out at the end of 2013, but it was only in May 2014 that the mandate was changed from one of support to the government to one that required UNMISS to take measures to respond to a number of threats to civilians, including deterring violence against civilians within and outside of PoC sites and maintaining public safety and security within PoC sites.[78] Thus, while the Security Council never mandated UNMISS to administer the PoC sites, it eventually expressly tasked it with protecting the people seeking shelter there and with maintaining public safety and security within the sites.

The mere presence of thousands of people for prolonged periods of time on or in close proximity to UNMISS premises meant that the people seeking shelter there looked to the Mission not only for protection, but also for assistance and other basic services. UNMISS was reluctant to conduct activities that fell beyond its mandate and for which it lacked capacity, and this required it to cooperate with a range of humanitarian actors operating in South Sudan.[79] This cooperation was frequently fraught, starting with the reluctance of some humanitarians to be associated with armed actors by providing assistance on a military compound.[80] Difficulties also arose in terms of allocation of responsibilities for particular tasks; where ultimate decision-making authority lay; minimum standards that the sites should meet in terms of adequate food, water, sanitation and medical care; who should meet the costs of improvements to the sites, such as the construction of perimeter fences; and decisions on whether to close the sites.[81] Eventually, guidelines were adopted laying down respective roles and responsibilities for operations in the PoC sites.[82]

Even implementation of the activities with which UNMISS had been expressly tasked by the Security Council, most notably ensuring the safety of the PoC sites from external threats and maintaining safety and security within the sites,

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76   For a comprehensive analysis see C. Briggs and L. Monaghan, above note 72.

77   UNSC Res. 1996, 8 July 2011, op. paras 1, 3, 4.

78   UNSC Res. 2155, 27 May 2104, op. para. 4(a)(i), 4(a)(iv).

79   L. Sharland and A. Gorur, above note 73, pp. 14–17; International Organization for Migration (IOM) South Sudan, *If We Leave We are Killed: Lessons Learned from South Sudan Protection of Civilians Sites 2013–2016*, 2016.

80   IOM South Sudan, above note 79, p. 24.

81   C. Briggs and L. Monaghan, above note 72, Chapters 4–10; IOM South Sudan, above note 79, pp. 24–26; L. Sharland and A. Gorur, above note 73, p. 17; J. Stern, above note 72, p. 7.

82   UNMISS, *Responsibilities in UNMISS POC Sites for Planning and Budgetary Purposes*, 19 September 2014.

gave rise to operational challenges. The presence in the sites of former combatants and people who had not fully disarmed, the availability of weapons, and inter-communal violence related to the conflict gave rise to significant security concerns.[83] In addition, as is often the case when large numbers of people are accommodated in close quarters, criminality within the sites was a problem, with frequent incidents of violence – including sexual or gender-based violence, and violence related to gang, community or family disputes – as well as theft and drug smuggling.[84]

Preserving the civilian character of the PoC sites is key to preventing attacks from hostile forces. One of the principal challenges to this was the presence of former combatants in the sites. UNMISS eventually adopted guidelines stipulating how armed combatants seeking access to the sites should be treated.[85] However, it is extremely difficult to distinguish a combatant from an armed civilian in South Sudan, and the risk remains that combatants could take advantage of the PoC sites to seek temporary safety.[86] This undermines the safety of the sites and, as the sites now predominantly host people from the ethnic group that opposes the government, may give the impression that those administering the sites are not neutral but are indirectly providing support to that party to the conflict.[87]

The PoC sites are frequently compared to sites for internally displaced persons (IDPs), but they actually differ in important ways.[88] From a regulatory point of view, the fact that the sites are located within UNMISS bases means that, pursuant to the Status of Forces Agreement concluded between the UN and South Sudan, they are on territory that is "inviolable" and "under the exclusive control and authority of the UN".[89] While ordinarily in IDP camps it is the host State that carries out numerous administrative functions (including, notably, preventing and responding to criminality within the camps), this is UNMISS's responsibility with regard to the PoC sites, as a result of the status of the bases.[90] However, UNMISS's capacity to maintain security within the sites has been hampered by the absence of a law enforcement or judicial authority dimension to its mandate (a so-called "executive mandate"), allowing it to investigate crimes, conduct pre-trial detention, and prosecute and detain people for criminal activity.[91] This, coupled with the weakness of South Sudan's criminal justice institutions and the frequent impossibility of transferring suspects to the local authorities as doing so might expose them to the risk of human rights violations,

83   C. Briggs and L. Monaghan, above note 72, Chaps 6–8; J. Stern, above note 72, p. 10.
84   C. Briggs and L. Monaghan, above note 72, Chaps 6–8; J. Stern, above note 72, p. 10.
85   UNMISS, "Supplemental Guidance No. 3 to the UNMISS Guidelines on Civilians Seeking Protection at UNMISS Bases (2013)", 2015.
86   IOM South Sudan, above note 79, p. 58.
87   See, for example, Matt Wells, "The Mixed Record of UN Peacekeeping in South Sudan", *Humanitarian Exchange*, No. 68, January 2017, p. 14; C. Briggs and L. Monaghan, above note 72, p. 65.
88   C. Briggs and L. Monaghan, above note 72, Chap. 3.
89   Status of Forces Agreement between the United Nations and the Government of the Republic of South Sudan concerning the United Nations Mission in South Sudan, 8 August 2011, Section 16.
90   C. Briggs and L. Monaghan, above note 72, pp. 22–25.
91   On executive mandates see for example, DPKO and DFS, "United Nations Police in Peacekeeping Operations and Special Political Missions", 1 February 2014, paras 58 ff., available at: https://trainingfor peace.org/publications/united-nations-police-in-peacekeeping-operations-and-special-political-missions/.

has required the Mission to develop alternative approaches to dealing with criminality.[92] These have included community watch groups, intended to monitor the situation within the sites and alert UNMISS police of disturbances; and an informal mediation and dispute resolution mechanism, which deals with breaches of security that do not pose a substantial risk to public order or safety within the sites.[93] Traditional justice mechanisms have also continued to operate within the sites.[94] When breaches of security are more severe and involve persons who pose significant threats to public security, these are transferred to UNMISS, which has held such people, sometimes for prolonged periods, and expelled some of them from the PoC sites.[95] As discussed below, in the absence of an executive mandate and a legal framework regulating deprivation of liberty by UNMISS, this raises questions of compliance with international human rights law.

The PoC sites have saved tens of thousands of lives, but they have also highlighted numerous operational challenges in terms of allocation of responsibilities and coordination between missions, humanitarian actors and host States. These challenges are relevant to the operation of most safe areas.

Protection in safe areas: Refugee law and human rights law considerations

Safe areas also raise a number of refugee and human rights law-related questions. Most starkly, there are serious concerns that in some contexts the establishment of the areas was not driven by a desire to create zones of shelter for vulnerable people; rather, the primary motive was to prevent or end refugee flows across borders or to promote or effect returns of refugees at a time when the conditions on the ground did not warrant this.[96]

In law, the position is simple: the existence of safe areas must not be used to limit people's entitlement under refugee law to seek asylum,[97] nor to promote

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92 J. Stern, above note 72. See also C. Briggs and L. Monaghan, above note 72, Chap. 8.

93 C. Briggs and L. Monaghan, above note 72, pp. 76–81.

94 *Ibid.*

95 *Ibid.*, pp. 78–81. See also Flora McCrone, *Justice Displaced: Field Notes on Criminality and Insecurity in South Sudan's UN Protection of Civilian Sites*, Justice Africa Report, Spring 2016, available at: http://justiceafrica.org/wp-content/uploads/2016/07/Justice-displaced-EDITED.pdf; IOM Sudan, above note 79, pp. 51–52; J. Stern, above note 72.

96 See the examples in K. Long, above note 31, including Turkey's closure of its border to Kurdish refugees from Iraq in 1990. See also Bill Frelick, "Unsafe Havens: Reassessing Security in Refugee Crises", *Harvard International Review*, Vol. 19, No. 2, 1997. More recently, in relation to Syria, see, for example, B. Frelick, above note 3; Bill Frelick, "Safe Zones in Name Only", *Huffington Post*, August 2015, available at: www.huffingtonpost.com/bill-frelick/safe-zones-in-name-only_b_8021010.html; Norwegian Refugee Council *et al.*, *Dangerous Ground: Syria's Refugees Face an Uncertain Future*, February 2018.

97 This was expressly recognized by the UNHCR Working Group on International Protection already in 1992, in its discussion of "prevention", an umbrella term covering activities to attenuate causes of departure and to reduce or contain cross-border movements. The Working Group expressly noted that "[p]revention is not, however, a substitute for asylum; the right to asylum, therefore, must continue to be upheld". UN General Assembly, "Note on International Protection (Submitted by the High Commissioner)", UN Doc. A/AC.96/799, 25 August 1992, p. 8.

returns of refugees before they are safe. In practice, safe areas have been established or suggested for this very purpose on a number of occasions. This has raised complex questions for humanitarian actors, most notably the Office of the UN High Commissioner for Refugees (UNHCR). Should UNHCR push for respect for the principles of refugee law, including access to asylum and *non-refoulement*, and refuse to carry out activities for people in safe areas, so as not to be seen as supporting arrangements that undermine the essence of refugee protection – even if this means depriving people in need of essential services?[98]

Safe areas, however they are established, also raise questions of human rights law. The parties that operate such areas have assumed a degree of control over their residents and, with that, human rights obligations towards them.[99] These situations raise questions about the scope of extraterritorial application of human rights obligations and, if the areas are under the control of multinational forces, the manner in which human rights law applies to such forces. Both topics have been the subject of legal proceedings and considerable academic debate in recent years. A detailed discussion is beyond the scope of this article, but for present purposes it suffices to note, first, that recent human rights jurisprudence has imputed extraterritorial obligations on States when they have assumed "effective control" over areas of foreign territory,[100] or when their agents exercise physical control and authority over individuals.[101] This is understood in a broad sense, and can include overseas detention operations, but also situations in which State agents exercise control over people passing through checkpoints, and even through targeting or the use of force.[102] Second, multinational forces established by the UN Security Council must comply with international human rights law. This is because the UN must itself respect human rights, and because troops participating in multinational forces remain bound by the sending States' human rights obligations.[103]

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98 See, most recently, K. Long, above note 31. See also Jennifer Hyndman, "Preventive, Palliative or Punitive? Safe Spaces in Bosnia-Herzegovina, Somalia and Sri Lanka", *Journal of Refugee Studies*, Vol. 16, No. 2, 2003; K. Landgren, above note 45.

99 Belligerents that operate safe areas will also have IHL obligations towards people under their effective control, including the requirement to treat them in accordance with the minimum standards laid down in Article 75 of AP I and common Article 3.

100 This control may arise as a consequence of lawful or unlawful military action. European Court of Human Rights (ECtHR), *Al-Skeini and Others v. UK*, Appl. No. 55721/07, Judgment, 7 July 2011, para. 136. On the scope of extraterritorial application of human rights see, most recently, Daragh Murray, Elizabeth Wilmshurst, Françoise Hampson, Charles Garraway, Noam Lubell and Dapo Akande (eds), *Practitioners' Guide to Human Rights Law in Armed Conflict*, Oxford University Press, Oxford, 2016, Chap. 3 and paras 3.39–3.58 in particular, and references therein.

101 See D. Murray *et al.* (eds), above note 100. See also Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy*, Oxford University Press, Oxford, 2011, esp. Part IV; Marko Milanovic, "Al Skeini and Al Jedda in Strasbourg", *European Journal of International Law*, Vol. 23, No. 1, 2012; Ralph Wilde, "The Extraterritorial Application of International Human Rights Law on Civil and Political Rights", in Scott Sheeran and Nigel Rodley (eds), *Routledge Handbook of International Human Rights Law*, Routledge, London, 2013.

102 D. Murray *et al.* (eds), above note 100, para. 3.59 and references therein.

103 The UN Human Rights Committee, for example, has expressly noted that States must respect and ensure the rights under the ICCPR to "those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was

Two related cases of 2013 before the Supreme Court of the Netherlands confirmed both the extraterritorial application of the Netherlands' obligations under the European Convention on Human Rights (ECHR)[104] and the International Covenant on Civil and Political Rights (ICCPR),[105] and the responsibilities of States that contribute troops to multinational forces. The cases related to the involvement of the Dutch battalion in UNPROFOR in the "safe area" of Srebrenica. *Inter alia*, the Court found that the battalion had exercised effective control over the people in the enclave and that this had brought into play its human rights obligations. By not allowing the plaintiffs' relatives to remain in the compound where it was based, which led to their murder by Bosnian-Serb forces, the battalion and therefore the Netherlands had violated the right to life and the prohibition on torture and cruel, inhuman or degrading treatment or punishment in the ECHR and the ICCPR.[106]

According to current jurisprudence, extraterritorial human rights obligations arise only in relation to those rights that are actually subject to a State's control in a particular situation.[107] In situations of occupation, States must ensure the full spectrum of human rights. In other situations, particularly when the responsibility arises as a result of the exercise of effective control over a person, it will be more limited in scope, and may include the right to life, the prohibition on arbitrary deprivation or life or liberty, and the prohibition on torture or cruel, inhuman or degrading treatment or punishment.[108] Accordingly, the precise nature and extent of extraterritorial human rights obligations in relation to safe areas will depend on a number of factors, including the degree of

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obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation". Human Rights Committee, General Comment No. 31, "The Nature of the General Legal Obligation Imposed on States Parties to the Covenant", UN Doc. CCPR/C/21/Rev.1/Add. 13, 26 May 2004, para. 10. While to date the Human Rights Committee has not considered a complaint relating to alleged violations committed by multinational forces, in its concluding observations to periodic State reports it has frequently held that the ICCPR remains applicable when a State's forces participate in such operations. See Kijetl Mujezinovic Larsen, *The Human Rights Treaty Obligations of Peacekeepers*, Cambridge University Press, Cambridge, 2012, pp. 181 ff. and references therein. See also D. Murray *et al.* (eds), above note 100, paras 16.07 ff.

104 Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 222, 1950.

105 International Covenant on Civil and Political Rights, 999 UNTS 171, 1966.

106 Supreme Court of the Netherlands, *The State of the Netherlands v. Hasan Nuhanovic* and *The State of the Netherlands v. Mehida Mustafic-Mujic et al.*, 6 September 2013; Tom Dannenbaum, "Dutch Supreme Court Affirms that Dutchbat Acted Unlawfully in Srebrenica", *EJIL: Talk!*, 8 September 2013, available at: www.ejiltalk.org/dutch-supreme-court-affirms-that-dutchbat-acted-unlawfully-in-srebrenica/.

107 See, for example the ECtHR in *Al-Skeini*, which held that when a State through its agents exercises control or authority over an individual extraterritorially, it must secure to that person the rights "that are relevant to the situation of that individual. In this sense, therefore, the Convention rights can be 'divided and tailored'." ECtHR, *Al-Skeini*, above note 100, para. 137. See also the analysis in D. Murray *et al.* (eds), above note 100, paras 3.19 ff.

108 D. Murray *et al.* (eds), above note 100. Milanovic refines the analysis further by drawing a distinction between States' negative obligations to respect human rights, which have a broader and territorially unlimited scope of application, and States' positive duty to secure or ensure human rights, or prevent violations thereof, which, in extraterritorial situations, is limited to areas under the State's effective overall control. M. Milanovic, above note 101, Part IV.4. Mujezinovic Larsen also adopts this approach and analyzes its application in practice by multinational forces: see K. Mujezinovic Larsen, above note 103, Chap. 9.

control exercised over the residents of the safe areas by the multinational forces; the extent to which the territorial State has been excluded and thus prevented from discharging its human rights obligations towards the residents; and the specific human rights in question.[109] By way of extreme example, the human rights obligations of a State operating a no-fly zone to protect civilians will be significantly less onerous than those of a State that is operating a confined safe area.

Where multinational forces have been mandated with particular tasks in the safe areas (as is the case, for example, for UNMISS in the PoC sites), in discharging them they must comply with their human rights obligations that are relevant to the tasks in question. For example, in maintaining public safety and security within the PoC sites, UNMISS must comply with human rights standards relating to the use of force in law enforcement. If it deprives people of their liberty, it must ensure they are treated in accordance with human rights standards and are afforded due process.[110]

While UNMISS may not have publicly stated that it has human rights obligations towards the residents of the PoC sites, its approach to particular issues indicates that it considers this to be the case. This includes its reticence to hold people suspected of serious breaches of security, because, as discussed above, in the absence of an "executive mandate", holding people in such circumstances could amount to an arbitrary deprivation of liberty.[111] Similar concerns also underlie the draft memorandum of understanding submitted by UNMISS to the Ministry of Justice of South Sudan in relation to transfers of suspects to national authorities. This was an effort to give effect to the Mission's obligation under human rights law not to transfer people if a real risk exists that they may be subjected to torture or ill-treatment, a trial that does not meet minimum standards, or the death penalty.[112]

Conclusion

The track record of the "safe areas" that have been established since the Second World War has been mixed at best. Their success depends on belligerents' willingness to respect them, something that can be achieved either by establishing the areas by agreement or, absent such agreement, by the taking of robust measures to defend the areas.[113]

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109 See K. Mujezinovic Larsen, above note 103, Chap. 4.
110 This was recognized *inter alia* by the UN under-secretary-general for legal affairs. UN Under-Secretary-General for Legal Affairs and Legal Counsel, Statement to the International Law Commission, 14 May 2014, p. 11, available at: http://legal.un.org/ola/media/info_from_lc/mss/speeches/MSS_ILC_statement-14-May-2014.pdf.
111 C. Briggs and L. Monaghan, above note 72, Chap. 8.
112 J. Stern, above note 72, p. 11; Statement of the Under-Secretary-General for Legal Affairs, above note 110.
113 The report of the UN Secretary-General on the fall of Srebrenica reaches a similar conclusion, noting that "[p]rotected zones and safe areas can have a role in protecting civilians in armed conflict, but it is clear that either they must be demilitarized and established by the agreement of the belligerents, as in the case of the 'protected zones' and 'safe havens' recognized by international humanitarian law, or they must be truly

Not surprisingly, the most effective safe areas have been those established by agreement between belligerents, as envisaged by IHL. In particular, smaller, demilitarized zones accommodating limited numbers of particularly vulnerable people for short periods of time appear to be the most likely to succeed.

In view of this, should IHL be revised so as to require belligerents to agree to establish and respect protected zones? This is improbable. First, and more generally, States are extremely unlikely to open the Geneva Conventions and the Additional Protocols for revision just to amend the provisions on protected zones. Any change to these rules would have to be part of a broader process of revision, for which there is no appetite at the moment, not least because of well-founded concerns that doing so in the current political climate would reduce existing protections rather than enhance them. Second, States had the opportunity to adopt provisions requiring belligerents to establish protected zones twice: during the negotiations of the 1949 Geneva Conventions and of the 1977 Additional Protocols. On both occasions they chose not to do so. It is unrealistic to think that they would take a different approach now.

That said, experience has shown that if safe areas are to function effectively, it is essential for belligerents to agree to the details of their establishment and operation. Not only does this set clear limits for the areas, but it also addresses what are likely to be the key concerns: demilitarization and measures of supervision. Moreover, the process of negotiating an agreement may help to build a climate of trust and cooperation between belligerents – something that will be essential to the areas' effective functioning in practice, and which may also have a beneficial effect on compliance with IHL more generally.

The establishment of safe areas by agreement between belligerents has a further advantage: it might alleviate some of humanitarian actors' reservations about operating in the areas, at least in terms of involvement with arrangements imposed by one side to a conflict. Reservations would – rightly – remain if the objective of the zones was stemming refugee flows, as this would undermine the residents' right to seek asylum.

While frequently the requirement of consent by belligerents is perceived as impeding protective measures for civilians, in the case of safe areas it may actually have the opposite effect, by responsibilizing parties, building trust and ensuring that there is clarity about arrangements to enhance their effectiveness.

In view of all this, rather than calling for a reform in the law, far greater investment should be made in encouraging belligerents to reach agreement on the establishment and recognition of protected areas. Quiet diplomacy is more likely to succeed than calls in the political limelight of the Security Council, and as always, humanitarian negotiations should be kept totally separate from discussions of a political nature. Calls for the establishment of safe areas without belligerents' agreement should be made judiciously, so as not to undermine

safe areas, fully defended by a credible military deterrent. The two concepts are absolutely distinct and must not be confused." *Report of the Secretary–General Pursuant to General Assembly Resolution 53/35: The Fall of Srebrenica*, UN Doc. A/54/549, 15 November 1999, para. 499.

negotiations that may be ongoing. Those suggesting such arrangements should also bear in mind the experiences of the past, in terms of mandates, will and capacity to enforce safe areas, and also the range of operational challenges that will need to be addressed when operating the areas, as highlighted by the experience of the UNMISS PoC sites.

A universal treaty for disasters? Remarks on the International Law Commission's Draft Articles on the Protection of Persons in the Event of Disasters

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Abstract

This article analyzes the Draft Articles on the Protection of Persons in the Event of Disasters adopted by the International Law Commission in 2016 in light of the recommendation made by the Commission to elaborate a convention on the basis of this project. While the latter proposal is still under evaluation by the United Nations General Assembly, which has recently decided to postpone its decision until 2020, such a potential outcome would represent a significant novelty in the area of disaster law, currently characterized by a fragmented legal framework and the lack of a universal flagship treaty. The Draft Articles thus aim to provide a systematization of the main legal issues relevant in the so-called disaster cycle, with solutions that accommodate the different interests of actors involved in a disaster scenario – namely, the affected State, external assisting actors and disaster victims – using a complex "checks and balances" approach.

Keywords: humanitarian assistance, international disaster law, IFRC, disasters, IDRL Guidelines.

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Introduction: Setting the scene of international disaster law

As emphasized by the impressive data provided in the International Federation of Red Cross and Red Crescent Societies' (IFRC) *World Disasters Report 2018*,[1] natural and technological disasters are a commonplace phenomenon, representing one of the most significant challenges for humanitarian actors and affected States. Despite its importance, the international legal architecture addressing prevention and response to disasters is commonly depicted along similar lines: as international law has managed this topic "in a confused and uncoordinated manner",[2] through an "ad hoc incoherence of legal and institutional response",[3] the result is "a rather scattered and heterogeneous collection of instruments".[4] Indeed, the absence of an overarching and universal "flagship treaty"[5] represents an anomaly in comparison to other areas of law (for example, international humanitarian law (IHL)) and is due largely to past failures at the United Nations (UN) level, such as the 1984 Draft Convention on Expediting the Delivery of Emergency Assistance,[6] mirroring the unsuccessful experience of the International Relief Union in the 1920s.[7]

As a result, the legal landscape pertaining to prevention and response to disasters is composed of a "pot pourri"[8] of binding instruments with varying

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1   IFRC, *World Disasters Report 2018: Leaving No One Behind*, Geneva, 2018, p. 168. According to this report, in the last decade (2008–17) more than 3,700 natural hazards have been recorded, 2 billion individuals have been affected by such events, around 700,000 people have lost their lives as a result of disasters, and damages have been estimated at $1.65 trillion. Such data do not include technological hazards, armed conflicts or conflict-related famine.

2   Andrea de Guttry, "Surveying the Law", in Andrea de Guttry, Marco Gestri and Gabriella Venturini (eds), *International Disaster Response Law*, Springer, Berlin, 2012, p. 4.

3   David Caron, "Preface", in David Caron, Michael Kelly and Anastasia Telesetsky (eds), *The International Law of Disaster Relief*, Cambridge University Press, Cambridge, 2014, p. xx.

4   David Fisher, "Domestic Regulation of International Humanitarian Relief in Disasters and Armed Conflict: A Comparative Analysis", *International Review of the Red Cross*, Vol. 89, No. 866, 2007, p. 353.

5   David Fisher, "The Future of International Disaster Response Law", *German Yearbook of International Law*, Vol. 55, 2012, p. 89.

6   See the failure of the 1984 Draft Convention on Expediting the Delivery of Emergency Assistance, UN Doc. A/39/267/Add.2–E/1984/96/Add.2, 18 June 1984, elaborated at the initiative of the UN Disaster Relief Coordinator.

7   Convention Establishing an International Relief Union, 135 LNTS 247, 12 July 1927 (entered into force 27 December 1932). Due to multiple elements such as financial shortcomings, lack of support by involved States and increasing isolationism, the International Relief Union was largely ineffective in the 1930s and attempts to reactivate it in the aftermath of World War II failed, thus leading to the transfer of its assets to the UN Economic and Social Council in 1967. See Peter MacAlister-Smith, "The International Relief Union: Reflections on Establishing an International Relief Union of July 12, 1927", *Legal History Review*, Vol. 54, 1986.

8   Craig Allan and Therese O'Donnell, "A Call to Alms? Natural Disasters, R2P, Duties of Cooperation and Unchartered Consequences", *Journal of Conflict and Security Law*, Vol. 17, No. 3, 2012, p. 345.

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impacts. Several universal treaties have addressed specific types of disasters, in particular technological ones,[9] or specific forms of assistance,[10] although these are limited by their low ratification numbers.[11] Regional treaties and soft law, especially in Europe, Asia, the Caribbean and the Americas,[12] are conversely assuming an increasingly important role, giving rise to a phenomenon of "regionalization" of international disaster law. Indeed, in the past decades there have been several binding documents developed by regional organizations in this area, coupled with the creation of institutional mechanisms of coordination and cooperation, in light of mandates provided by recent founding treaties of relevant regional organizations making express reference to the possibility of cooperating with regard to disaster settings.[13] However, the effective impact or self-sufficient character of such regional initiatives can be doubted,[14] especially in the face of large-scale disasters. The numerous bilateral treaties lack coherence, being sometimes limited to an exchange of good practices and information between States, while in significant regions, such as Africa, Asia and the Middle East, there is a very limited number of such instruments.[15]

In light of States' reluctance to address the legal regulation of disaster preparation and response through binding provisions, this area has also been characterized by an impressive number of soft-law instruments.[16] Such documents range from UN strategies for disaster risk reduction endorsed by UN General Assembly resolutions[17] to instruments elaborated by non-State actors

9   E.g. Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency, 1457 UNTS 134, 26 September 1986 (entered into force 26 February 1987).

10 See in particular the Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations, 2296 UNTS 5, 18 June 1998 (entered into force 8 January 2005).

11 For instance, only forty-nine States are parties to the Tampere Convention, above note 10.

12 For an overview of regional instruments, see the database of the International Disaster Law Project, available at: http://disasterlaw.sssup.it/disasters-database/list-of-instruments-included-in-the-database/ (all internet references were accessed in December 2018). On the "regionalization" of international disaster law, see IFRC, *Law and Legal Issues in International Disaster Response: A Desk Study*, Geneva, 2007, pp. 62–79.

13 See Constitutive Act of the African Union, 2158 UNTS 3, 11 July 2000 (entered into force 26 May 2001), Art. 13(1)(e); Treaty on the Functioning of the European Union, 2702 UNTS 3, 13 December 2007 (entered into force 1 December 2009), Art. 196.

14 For instance, the Inter-American Convention to Facilitate Disaster Assistance elaborated by the Organization of American States in 1991 and entered into force on 16 October 1996 (available at: www.oas.org/juridico/english/sigs/a-54.html) has only six States Parties. For the irrelevance of the Arab Cooperation Agreement on Regulating and Facilitating Relief Operations, concluded by the League of Arab States in 1987, see IFRC, above note 12, p. 78. An unofficial English translation of this treaty is available at: www.ifrc.org/Docs/idrl/N644EN.pdf.

15 A. de Guttry, above note 2, pp. 11–17.

16 For a survey, see the International Disaster Law Project database, above note 12. See also Dug Cubie, "An Analysis of Soft Law Applicable to Humanitarian Assistance: Relative Normativity in Action?", *Journal of International Humanitarian Legal Studies*, Vol. 2, No. 2, 2011; Tommaso Natoli, "Non-State Humanitarian Actors and Human Rights in Disaster Scenarios: Normative Role, Standard Setting and Accountability", in Flavia Zorzi Giustiniani, Emanuele Sommario, Federico Casolari and Giulio Bartolini (eds), *Routledge Handbook of Human Rights and Disasters*, Routledge, London, 2018.

17 For example, the Sendai Framework for Disaster Risk Reduction, UN Doc. A/RES/ 69/283, 23 June 2015 (Sendai Framework).

such as humanitarian organizations and NGOs, reflecting trends towards informal international law-making approaches.[18] However, the concrete impact of such instruments is hardly predictable. Sometimes they might assume a substantial role, as exemplified by the Sphere Project, mentioned in the Kampala Convention[19] as a reference document for State actions, or by the 1994 Code of Conduct for the International Red Cross and Red Crescent Movement and Non-Governmental Organisations in Disaster Relief, whose acceptance by NGOs has been required in order to access funds provided by main donors.[20] Still, such documents hardly escape the typical difficulties of soft-law instruments, as evidenced by the positive but lengthy progress of influencing regulatory changes at the domestic level experienced by the "Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance" (IDRL Guidelines)[21] adopted by the 27th International Conference of the Red Cross and Red Crescent.[22]

Against this background, the activities recently carried out by the UN International Law Commission (ILC) on the topic of "Protection of Persons in the Event of Disasters" might represent the first step toward a significant law-making development in this area. As will be further discussed below, in recent years the ILC has been engaged in analyzing the abovementioned topic with the purpose of elaborating a series of Draft Articles on the Protection of Persons in the Event of Disasters (DAs) aimed at providing a legal framework for challenges raised in these contexts. This paper will thus assess activities carried out by the ILC in this area. First, the analysis will focus on the drafting history of the DAs and law-making techniques adopted by the Special Rapporteur and the ILC in order to subsequently explore and critically assess solutions endorsed in the text. In this regard attention will be paid to the structure of the DAs, arranged into "vertical" and "horizontal" dimensions, and the content of relevant provisions. Finally, the paper will address positions expressed by States on the recommendation made by the ILC to elaborate a universal treaty on the basis of the DAs, and will evaluate whether the current text is fit for this purpose.

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18 Joost Pauwelyn, Ramses Wessel and Jan Wouters (eds), *Informal International Lawmaking*, Oxford University Press, Oxford, 2012.

19 African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), 23 October 2009 (entered into force 6 December 2012), Art. 1(q), available at: https://au.int/en/treaties/african-union-convention-protection-and-assistance-internally-displaced-persons-africa.

20 Sandesh Sivakumaran, "Techniques in International Law-Making: Extrapolation, Analogy, Form and the Emergence of an International Law of Disaster Relief", *European Journal of International Law*, Vol. 28, No. 4, 2017, pp. 1103–1104.

21 For the text of the IDRL Guidelines, see the Annex to Resolution 4 of the 30th International Conference of the Red Cross and Red Crescent, reproduced in IFRC/ICRC, *Report of the 30th International Conference of the Red Cross and Red Crescent*, Geneva, 2007, pp. 51–58.

22 For an assessment, see IFRC, *Ready or Not? Third Progress Report on the Implementation of the IDRL Guidelines*, Geneva, 2015, pp. 7–9.

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Creation of the Draft Articles on the Protection of Persons in the Event of Disasters

The ILC, following an initial discussion held in 2006, decided in 2007 to include the topic "Protection of Persons in the Event of Disasters" in its programme of work,[23] a decision largely influenced by the impact and challenges raised by the 2004 tsunami affecting the Indian Ocean. In 2016, on the basis of the eight reports submitted by Special Rapporteur Eduardo Valencia-Ospina and comments[24] provided by States, international organizations, the International Committee of the Red Cross (ICRC) and the IFRC on the twenty-one draft articles adopted on first reading in 2014,[25] the ILC adopted the final text of the eighteen DAs and their commentary on second reading.[26] The relevance of this text is amplified by the choice made by the ILC to recommend "to the General Assembly the elaboration of a convention on the basis of the draft articles",[27] thus significantly diverging from recent trends of the ILC favouring "soft" final forms for topics under examination, such as guidelines or recommendations.[28] Indeed, since the late 1990s, the ILC has recommended the immediate drafting of a treaty only with regard to the Draft Articles on Diplomatic Protection,[29] coupled with few examples where the ILC has requested the General Assembly to take note of adopted texts and, "at a later stage", to consider convening a diplomatic conference.[30] The choice made in this case reflects the characteristics of the proposed text, which, as in past instances, has been

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23 ILC, *Report of the International Law Commission: Fifty-Ninth Session (7 May–5 June and 9 July–10 August 2007)*, UN Doc. A/62/10, 2007, p. 230, para. 375.

24 See comments and observations received from governments and international organizations, UN Doc. A/CN.4/696, 14 March 2016, and UN Doc. A/CN.4/696/Add.1, 28 April 2016.

25 ILC, *Report of the International Law Commission: Sixty-Sixth Session (5 May–6 June and 7 July–8 August 2014)*, UN Doc. A/69/10, 2014, para. 55. For an analysis of the text adopted on first reading, see Giulio Bartolini, Tommaso Natoli and Alice Riccardi, *Report of the Expert Meeting on the ILC's Draft Articles on the Protection of Persons in the Event of Disasters*, International Law and Disasters Working Papers Series, Vol. 3, 2015, available at: http://disasterlaw.sssup.it/wp-content/uploads/2014/01/Bartolini-Natoli-Riccardi-Report-of-the-Expert-Meeting-2015-DEF.pdf.

26 For the text of the DAs with commentaries, see ILC, *Report of the International Law Commission: Sixty-Eighth Session (2 May–10 June and 4 July–12 August 2016)*, UN Doc. A/71/10, 2016 (DAs Report), pp. 13–73, available at: http://legal.un.org/ilc/reports/2016/english/a_71_10.pdf. The text of the DAs is also reproduced in Annex 1, below.

27 DAs Report, above note 26, p. 13, para. 46.

28 See Jacob Katz Cogan, "The Changing Form of the International Law Commission's Work", in Roberto Virzo and Ivan Ingravallo (eds), *Evolutions in the Law of International Organizations*, Brill, Leiden and Boston, MA, 2015.

29 ILC, *Report of the International Law Commission, Fifty-Eighth Session (1 May–9 June and 3 July–11 August 2006)*, UN Doc. A/61/10, 2006, para. 46.

30 See the ILC recommendations regarding the Draft Articles on Responsibility of States (ILC, *Report of the International Law Commission: Fifty-Third Session (23 April–1 June and 2 July–10 August 2001)*, UN Doc. A/56/10, 2001, paras 72–73), the Draft Articles on the Law of Transboundary Aquifers (ILC, *Report of the International Law Commission: Sixtieth Session (5 May–6 June and 7 July–8 August 2008)*, UN Doc. A/63/10, 2008, para. 49), the Draft Articles on Responsibility of International Organizations (ILC, *Report of the International Law Commission, Sixty-Third Session (26 April–3 June and 4 July–12 August 2011)*, UN Doc. A/66/10, 2011, para. 85) and the Draft Articles on the Effects of Armed Conflicts on Treaties (*ibid.*, para. 97).

drafted with "the look and feel" of a convention;[31] this is evidenced by the mandatory language used for relevant provisions, with the constant use of the verb "shall" rather than "softer" alternative formulas such as "should", and the inclusion of a preamble, commonly included by the ILC for texts expected to be translated into a treaty.[32]

The final result will obviously depend on States' attitudes, which are explored in detail below. Through its Resolution 71/141 adopted in December 2016, the UN General Assembly requested States to submit "comments concerning the recommendation by the Commission to elaborate a convention on the basis of these articles" and included this item in its 2018 agenda.[33] In 2018, States provided diverging views on the final form of the DAs: some were in favour of translating them into a binding text, while others were against this potential outcome. This created a stalemate situation leading to the adoption of Resolution 73/209[34] in December 2018, which reiterated the request to receive comments by States on the proposal to adopt a treaty and noted the decision to include this topic in the General Assembly's 2020 agenda.

The law-making techniques and structure of the DAs

Taking into account the variegated legal framework provided by instruments addressing disasters, it was a complex matter for the ILC to limit its activities to traditional codification efforts based on extensive State practice, precedent and doctrine.[35] As a result, "the draft articles contain elements of both progressive development and codification of international law"[36] without clearly spelling out the current nature of proposed provisions. Although some members of the Commission spoke against the ambiguity of this approach,[37] it allowed the elaboration of a more comprehensive text that was able both to address issues not yet sufficiently crystallized into practice and to provide a broad systematization to the fragmented existing legal framework.

Furthermore, the ILC has not apparently "abused" this flexible law-making approach, as aspects of progressive development are mainly limited to provisions

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31 For a similar approach related to the Draft Articles on State Responsibility, see David Caron, "The ILC Articles on State Responsibility: The Paradoxical Relationship between Form and Authority", *American Journal of International Law*, Vol. 96, No. 4, 2002, p. 862.

32 See, for example, the Draft Articles on the Law of Transboundary Aquifers, with commentaries, in ILC, *Report of the International Law Commission, Sixtieth Session (5 May–6 June and 7 July–8 August 2008)*, UN Doc. A/63/10, 2008, para. 53).

33 UN Doc. A/RES/71/141, 13 December 2016, para. 2.

34 UN Doc. A/RES/73/209, 20 December 2018.

35 According to Article 15 of the Statute of the ILC adopted in 1947, "the expression 'codification of international law' is used for convenience as meaning the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine".

36 DAs Report, above note 26, pp. 17–18, para. 2.

37 See Sean D. Murphy, "Protection of Persons in the Event of Disasters and Other Topics: The Sixty-Eighth Session of the International Law Commission", *American Journal of International Law*, Vol. 110, No. 4, 2016, p. 719; Dire Tladi, "The International Law Commission's Draft Articles on the Protection of Persons in the Event of Disasters: Codification, Progressive Development or Creation of Law from Thin Air?", *Chinese Journal of International Law*, Vol. 16, No. 3, 2017, p. 426.

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addressing disaster risk reduction, the duties to cooperate and request assistance, and the consent of the affected State. While criticism from some States implied that solutions adopted in these provisions were not yet grounded in solid practice, other States supported the proposed solutions as they provided a systemic approach to the issue.[38] This self-restrained approach is also emphasized by the overall structure of the DAs. The ILC's final text is a short one, composed of only a preamble and eighteen articles, some of which have a mere functional role, such as provisions addressing the "Scope" (Article 1) and "Purpose" (Article 2) of the project, and the "Use of Terms" (Article 3). This solution, coupled with the decision to draft basic general principles rather than detailed provisions, permitted the ILC to limit instances where it was required to resolve contentious issues; the final result is a sort of framework convention whose content might appear elusive to some extent.

The Special Rapporteur managed the topic through complementary law-making techniques rightly qualified as being inspired by a "holistic body approach" that aimed to "systematize matters and provide order to a rather messy area of the law".[39] First, a "quantitative" analysis of relevant practice was a driving factor for inspiring the content of the proposed provisions, whose final text has at times resulted in the need to opt for one of the different wording options provided by practice, especially when practice was not entirely consistent or required to be complemented to provide overall coherence to the DAs.[40] The extensive survey of practice broadly relevant for the topics under examination ranged from binding texts to numerous references to soft-law instruments, including documents elaborated by non-governmental actors, such as groups of experts, NGOs and the IFRC.[41] Regardless of the character of such latter instruments as "even softer than soft law",[42] their substantial relevance in light of their capacity to capture elements pertaining to this area of law and to provide oriented solutions for involved actors has been particularly emphasized in this project. Second, the Special Rapporteur[43] made use of analogy, taking inspiration from provisions belonging to other branches of international law – such as IHL, international human rights law, international environmental law and refugee

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38 For comments made by States, international organizations, the ICRC and the IFRC, see above note 24.
39 S. Sivakumaran, above note 20, p. 1131.
40 See for instance, the analysis below regarding procedural obligations on notifications provided in Articles 12.2, 13.3 and 17 of the DAs.
41 As an example see Eduardo Valencia-Ospina, *Seventh Report on the Protection of Persons in the Event of Disasters*, UN Doc. A/CN.4/668, 27 February 2014, paras 15–24, with references to universal, regional and bilateral treaties, UN General Assembly resolutions, recommendations of the Council of Europe, and documents of the Institut de Droit International (IDI), IFRC, Inter-Agency Standing Committee and UN Office for the Coordination of Humanitarian Affairs.
42 Walter Kälin, "How Hard is Soft Law? The Guiding Principles on Internal Displacement and the Need for a Normative Framework", 19 December 2001, p. 6, available at: www.brookings.edu/wp-content/uploads/2016/06/20011219.pdf. The Guiding Principles on Internal Displacement are cited in the commentary to the DAs on several occasions: see DAs Report, above note 26, pp. 30–31, 60. On this issue see Arnold Pronto, "Understanding the Hard/Soft Distinction in International Law", *Vanderbilt Journal of Transnational Law*, Vol. 48, No. 4, 2015.
43 For a preliminary assessment that international disaster law shares fundamental principles with other branches of international law, see Eduardo Valencia-Ospina, *Preliminary Report on the Protection of Persons in the Event of Disasters*, UN Doc. A/CN.4/598, 5 May 2008, paras 20, 24.

law – in order to reinforce and provide a stronger legal basis for proposed solutions dealing with disaster settings, as exemplified by Articles 6 (humanitarian principles), 9 (disaster risk reduction), 12 (offers of assistance) and 13 (consent). Finally, concerning Article 5 dealing with human rights, the substantive legal framework underpinning some issues raised by relief operations was directly "outsourced" from other branches of international law.

As for their structure, the DAs are not comprehensively systematized, lacking separate sections or parts as provided in past ILC projects. Nonetheless, the provisions can be implicitly accommodated along different lines that align with the same "purpose" of the project as identified in Article 2, which makes reference to the DAs' aim "to facilitate the adequate and effective response to disasters, and reduction of the risk of disasters, so as to meet the essential needs of the persons concerned, with full respect for their rights".

This provision encompasses some of the main aspects addressed by the text. First, as the legal and operational challenges generated by disasters had brought attention to the overall disaster cycle,[44] the DAs not only included the traditional focus on the relief and recovery phases but also addressed disaster risk reduction, an additional key component of the institutional and legal discourse pertaining to this area. In such a manner, the ILC's project favoured "a more holistic approach"[45] to disaster law issues.

Second, the ILC was required to balance the different and potentially diverging perspectives of involved actors, namely (a) the affected State, whose sovereignty represents one of the pillars of the text, as reaffirmed in the preamble;[46] (b) external assisting actors, such as States, international organizations, NGOs and "entities" (a term of art intended to include the different components of the International Red Cross and Red Crescent Movement[47]); and (c) the victims of disasters. This latter perspective was potentially able to assume a more predominant role, both in light of the scope of the project and the increasing relevance of the so-called "rights-based" approach[48] that aimed to "integrate human rights into disaster responses",[49] to make relief activities "operationally directed to promoting and protecting human

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44 On this concept see Martin Nthakomwa, "Cycles of a Disaster", in Bradley Penuel and Matt Statler (eds), *Encyclopedia of Disaster Relief*, SAGE Publications, New York, 2011.

45 Jacqueline Peel and David Fisher, "International Law at the Intersection of Environmental Protection and Disaster Risk Reduction", in Jacqueline Peel and David Fisher (eds), *The Role of International Environmental Law in Disaster Risk Reduction*, Brill, Leiden and Boston, BA 2016, p. 11.

46 See para. 5 of the preamble, reproduced in Annex 1 below.

47 DAs Report, above note 26, p. 26, para. 20.

48 Dirk Salomons, "The Perils of Dunantism: The Need for a Rights-Based Approach to Humanitarianism", in Andrej Zwitter (ed.), *Humanitarian Action: Global, Regional and Domestic Legal Responses*, Cambridge University Press, Cambridge, 2014; Karen da Costa and Paulina Pospieszna, "The Relationship between Human Rights and Disaster Risk Reduction Revisited: Bringing the Legal Perspective into the Discussion", *Journal of International Humanitarian Legal Studies*, Vol. 6, No. 1, 2015, pp. 67–70.

49 Walter Kälin, "The Human Rights Dimension of Natural or Human-Made Disasters", *German Yearbook of International Law*, Vol. 55, 2012, p. 132.

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rights",[50] and to empower affected individuals to claim their rights. However, an endorsement of this latter perspective, as opposed to the more traditional "needs-based" one, would have risked undermining States' support for the ILC text. As a result, even if the commentary to Article 2 qualifies both approaches as complementary and not mutually exclusive,[51] the rights-based approach has not been overemphasized in the project. Indeed, as recently recognized by Hafner, a striking difference between the codification efforts promoted by the ILC and the 2003 Resolution on Humanitarian Assistance[52] adopted by the Institut de Droit International (IDI) is that "the IDI does not abstain from formulations that deviate from existing practice in favor of human rights. The IDI approach is still more under the influence of the right[s-based] approach than the ILC."[53]

Consequently, difficulties in balancing different perspectives finally resulted in a set of provisions implicitly accommodated along two main axes: a "vertical" axis, addressing relationships between victims, the affected State and assisting actors (Articles 4–6), so as to reflect "a vertical rights-duties approach in the classical human rights sense";[54] and a "horizontal" axis, relating to cooperation between affected States and assisting actors (Articles 7–17).

Scope of the DAs and relationship with IHL

Concerning the content of the DAs, the first set of provisions provides the boundaries of the project. Apart from the preamble, which states the basic principles of the project, and Articles 1 ("Scope") and 2 ("Purpose"), whose relevance relates only to their commentaries' ability to provide some guidance clarifying the scope of application *ratione materiae*, *personae*, *temporis* and *loci* of the DAs, a key provision can be identified in Article 3 ("Use of Terms").

In particular, Article 3(a) defines a disaster as "a calamitous event or series of events resulting in widespread loss of life, great human suffering and distress, mass displacement, or large-scale material or environmental damage, thereby seriously disrupting the functioning of society". The drafting process of this term was not an easy one, as recognized by the Special Rapporteur, according to whom "there is no generally accepted legal definition of the term in international law".[55] Nonetheless, apart from isolated practice not providing a definition of this term,

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50 Bertrand Ramcharan, "Human Rights and Human Security", *Disarmament Forum*, Vol. 1, No. 1, 2004, p. 42.

51 DAs Report, above note 26, p. 20, para. 1.

52 The Resolution on Humanitarian Assistance, adopted by the IDI at the Bruges session held in 2003, is reproduced in *International Review of the Red Cross*, Vol. 86, No. 856, 2004, pp. 874–878. On this document, see Robert Kolb, "De l'assistance humanitaire: La Résolution sur l'assistance humanitaire adoptée par l'Institut de droit international lors de sa Session de Bruges en 2003", *International Review of the Red Cross*, Vol. 86, No. 856, 2004.

53 Gerhard Hafner, "Doctrinal Views versus State Views on Humanitarian Assistance in the Event of Disasters: Comparing the Work of the Institut de Droit International with that of the International Law Commission", in Rüdiger Wolfrum, Maja Seršić and Trpimir Šošić (eds), *Contemporary Developments in International Law: Essays in Honour of Budislav Vukas*, Brill, Leiden and Boston, MA, 2016, p. 520.

54 D. Tladi, above note 37, p. 429.

55 E. Valencia-Ospina, above note 43, p. 152.

as experienced with the 1991 Inter-American Convention to Facilitate Disaster Assistance, relevant instruments generally support descriptive approaches, such as pointing to distinctive characteristics of an event in order to legally qualify it as a "disaster".[56] In light of recurring features broadly present in contemporary practice, the ILC requires the fulfilment of two cumulative criteria, namely the capacity of such events to both produce detrimental effects and to seriously disrupt the functioning of a society. Further details are provided in the commentaries to the DAs, highlighting relevant elements required by the definition.

Regarding the first element, although the ILC included the qualifier "calamitous" to raise the threshold to cover "only extreme events",[57] negative outcomes affecting persons, property and the environment are not required to be ascertained on a cumulative basis, thus enlarging the category of events able to satisfy this criteria. Furthermore, disasters are not required to have a transnational character,[58] while reference to "a series of events" aims to include cumulative small-scale disasters incapable by themselves of meeting the high threshold set by the text.[59] Properly, the ILC has refused to circumscribe its focus to so-called "natural disasters", unlike treaties such as the 2011 South Asian Association for Regional Cooperation Agreement on Rapid Response to Natural Disasters, thereby taking into account the complexity of separating the interactions between human activity and natural hazards, as emphasized by disaster studies.[60] Furthermore, mere situations of political and economic crisis are not included in this definition, and a clear statement added on second reading specifies that "[a] situation of armed conflict cannot be qualified *per se* as a disaster".[61] Indeed, even if, "[c]olloquially speaking, armed conflicts can be called disasters[,] … from an international legal point of view, armed conflicts are distinct from other man-made or natural disasters".[62] The solution adopted by the ILC, subsequently confirmed by UN documents related to the Sendai Framework for Disaster Risk Reduction (Sendai Framework),[63] clarifies this element, thus rejecting claims made by some scholars in this regard.[64]

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56 For an overview, see Giulio Bartolini, "A Taxonomy of Disasters in International Law", in F. Zorzi Giustiniani *et al.* (eds), above note 16.

57 DAs Report, above note 26, p. 22, para. 4.

58 *Ibid.*, p. 23, para. 4.

59 *Ibid.*, p. 23, para. 4.

60 See Enrico Louis Quarantelli (ed.), *What Is a Disaster? Perspectives on the Question*, Routledge, New York, 1998; Ronald Perry and Enrico Louis Quarantelli (eds), *What Is a Disaster? New Answers to Old Questions*, Xlibris, Philadelphia, PA, 2005.

61 DAs Report, above note 26, p. 24, para. 10.

62 Tilman Rodenhäuser and Gilles Giacca, "The International Humanitarian Law Framework for Humanitarian Relief during Armed Conflicts and Complex Emergencies", in Susan Breau and Katja Samuel (eds), *Research Handbook on Disasters and International Law*, Edward Elgar, Cheltenham, 2016, p. 132.

63 See UN General Assembly, *Report of the Open-Ended Intergovernmental Expert Working Group on Indicators and Terminology relating to Disaster Risk Reduction*, UN Doc. A/71/644, 1 December 2016, p. 18, where the definition of disaster excludes "the occurrence or risk of armed conflict and other situations of social instability or tension which are subject to international humanitarian law and national legislation".

64 For example, Susan Breau and Katja Samuel include in this term "financial, 'natural' and 'man-made' events (including armed conflict)". See "Introduction", in S. Breau and K. Samuel (eds), above note 62, p. 3.

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This latter element brings attention to the relationship between IHL and the DAs, especially in light of the fact that the DAs could be translated into a treaty. In particular, potential challenges concerning the application of a proper normative framework might arise in so-called "complex emergencies" – namely, disasters occurring on territories already involved in an armed conflict – due both to the geographical scope of application of IHL and the difficulties of separately addressing the situations of a population in need as a result of an armed conflict and a disaster situation.[65] To address this scenario, Article 18(2) of the DAs provides that "[t]he present draft articles do not apply to the extent that the response to a disaster is governed by the rules of international humanitarian law". This wording clarifies an aspect of the DAs which was not clearly spelt out at the first reading, namely to attribute primacy to IHL as regards the regulation of humanitarian assistance in such scenarios.[66] Nevertheless, Article 18 leaves unchanged the possibility for the DAs to apply as a residual legal framework for disaster scenarios not governed by IHL.[67]

However, a comparative examination of the DAs and IHL norms affirms that potential conflicts would be quite limited. On the one hand, the ILC has confirmed the applicability of several solutions familiar to IHL in disaster settings, such as the humanitarian principles (Article 6) and the requirement to obtain the consent of the involved State for relief operations (Article 13.1). Still, the stricter regime provided by IHL in some circumstances,[68] as in case of humanitarian assistance involving occupied territories, could take precedence through the application of Article 18.2. In some cases, however, the DAs might additionally detail some aspects not exhaustively addressed by IHL, such as the procedural obligations to consult and notify on the termination of external assistance (Article 17). Nonetheless, it should be emphasized that the ICRC, expressing its position in relation to the text and commentary adopted on first reading, introduced some critical remarks, particularly concerning the content of Article 10.2, which provides that "[t]he affected State has the primary role in the direction, control, coordination and supervision of such relief assistance". Even if this formula has been used by the ILC in light of a constant practice dealing with disaster settings, it has been argued that "this Draft Article is potentially very intrusive for impartial humanitarian organizations such as the ICRC …. IHL only authorizes the concerned parties to the armed conflict and States to verify the humanitarian nature of the assistance through a so-called right of control."[69] In

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65 On this debate, see Gabriella Venturini, "Disasters and Armed Conflicts", in A. de Guttry, M. Gestri and G. Venturini (eds), above note 2; Daniela Gavshon, "The Applicability of IHL in Mixed Situations of Disaster and Conflict", *Journal of Conflict and Security Law*, Vol. 14, No. 2, 2009; T. Rodenhäuser and G. Giacca, above note 62; Sarah Williams and Gabrielle Simm, "Assistance to Disaster Victims in an Armed Conflict: The Role of International Humanitarian Law", in F. Zorzi Giustiniani *et al.* (eds), above note 16.

66 ILC, above note 25, pp. 137–138, paras 1–3.

67 *Ibid.*, p. 73, para. 10.

68 For a comparison of obligations to allow and facilitate international humanitarian relief in armed conflicts and disasters, see D. Fisher, above note 4, pp. 347–355.

69 The ICRC comments (January 2016) are available at: http://legal.un.org/docs/?path=../ilc/sessions/68/pdfs/english/pop_icrc.pdf&lang=E. See, similarly, T. Rodenhäuser and G. Giacca, above note 62, p. 150.

this regard, however, the solution endorsed by the ILC in Article 18(2), attributing primacy to IHL, should finally permit IHL to take precedence. It should also be underlined that Article 18(1) contains a no-prejudice clause with regard to "other applicable rules of international law", aimed to give application, for instance, to more detailed rules included in treaties having the same *ratione materiae* as the DAs, such as regional or bilateral treaties on mutual assistance.

Coming back to the definition of disaster in the DAs, such an event must also fulfil the additional criteria provided by Article 3(a), specifically its capacity to "seriously disrupt the functioning of a society". This latter term has not been qualified in the commentary and might create some difficulties, especially if implied to cover only events having a very significant magnitude toward the entire society of the affected State.[70] Conversely, practice usually combines this additional criterion with other related notions, such as "community", or emphasizes the potential limited geographical reach of calamities,[71] as recently reiterated by the definition adopted by the intergovernmental group of experts requested to identify indicators for the Sendai Framework, which cited events producing "a serious disruption of the functioning of a community or a society at any scale".[72]

Article 3(b) also details other definitions relevant for determining the scope of application of the DAs. For example, the notion of "affected State", outlined by the ILC through a twofold hypothesis, refers to "a State in whose territory, or in the territory under whose jurisdiction or control, a disaster takes place", thus covering in the latter case situations where a State exercises "de jure jurisdiction, or de facto control, over another territory in which a disaster occurs".[73] This exceptional situation might imply the possibility for two States to be equally qualified as "affected" as a result of the same disaster without providing guidance on solutions to solve potential problems raised by such overlapping. Other terms appear less problematic: Articles 3(c) and 3(d) define the "assisting State" and "other assisting actor", namely a "competent intergovernmental organization or a relevant non-governmental organization or entity", so as to recognize the plurality of external assistance actors. While the text adopted in 2014 only referred to the IFRC and ICRC, the commentary expressly mentions that the term entity "is to be understood as referring to entities such as the Red Cross and Red Crescent Movement".[74] Such reference thus also covers National Red Cross

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70 For some critical remarks see Jean-Marc Thouvenin, "La définition de la catastrophe par la CDI: Vers une catastrophe juridique?", in Rafael Prieto Sanjuán and Jean-Marc Thouvenin (eds), *International Law and Disasters: Studies on Prevention and Assistance to Victims*, Grupo Editorial Ibáñez, Bogotá, 2011.

71 See, for instance, reference to the term "community" in the ASEAN Agreement on Disaster Management and Emergency Response, 26 July 2005 (entered into force 24 December 2009) (ASEAN Agreement), Art. 1(3), available at: http://agreement.asean.org/media/download/20140119170000.pdf; and in the South Asian Association for Regional Cooperation Agreement on Rapid Response to Natural Disasters, 11 November 2011 (entered into force 9 September 2016), Art. 1(3), available at: http://saarc-sec.org/uploads/digital_library_document/28_Rapid_response_to_Natural_disasters.pdf. For an overview of relevant practice, see G. Bartolini, above note 56, pp. 17–18.

72 UN General Assembly, above note 63, p. 13.

73 *Ibid*., pp. 24–25, para. 14.

74 *Ibid*., p. 26.

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and Red Crescent Societies (National Societies) in light of their significant role in disaster settings.

Finally, "relief personnel" – namely civilian or military personnel sent by external actors – and "equipment and goods" are descriptive terms based on similar texts provided by practice. Still, some States, the European Union and the IFRC advanced some criticism on the definition of "relief personnel" and the commentary adopted on first reading, as the ILC did not underline how relevant policy documents, such as the Oslo Guidelines on the use of foreign military assets in disaster relief operations,[75] qualify the use of military personnel and assets as a "last resort" option in case of lack of comparable civilian alternatives. Although the Special Rapporteur proposed on second reading to include a reference to the "last resort" formula in the definition,[76] this solution was not endorsed by the ILC. Even if this express reference would have been redundant within the text of Article 3, a mention of this principle in the commentary would have reaffirmed a basic tenet of international relief operations.

Discovering the "vertical" and "horizontal" dimensions of the DAs

The "vertical" dimension

As mentioned above, it is possible to highlight a "vertical" dimension of the project, as seen in Articles 4 ("Human Dignity"), 5 ("Human Rights") and 6 ("Humanitarian Principles") relating to the relationships between the victims and assisting actors. On the one hand, these provisions reaffirm the relevance of the protection of affected individuals within the structure of the DAs, and are included in the opening provisions of the substantive section of this document. On the other hand, to some extent they act as mere "reminder[s]"[77] of relevant obligations provided by other sources, without laying down any substantive content themselves, in particular Articles 4 and 5.

According to Article 4, "[t]he inherent dignity of the human person shall be respected and protected in the event of disasters". Reflecting its character as "a guiding principle for any action to be taken",[78] the ILC preferred to address this element in an autonomous provision rather than including a mere reference to it in the preamble, as proposed by some States. However, the commentary lacks clarifications on the actual legal relevance of the norm in disaster contexts.

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75 Piero Calvi Parisetti, "The Use of Civil and Military Defense Assets in Emergency Situations", in A. de Guttry, M. Gestri and G. Venturini (eds), above note 2.

76 Eduardo Valencia-Ospina, *Eighth Report on the Protection of Persons in the Event of Disasters*, UN Doc. A/CN.4/697, 17 March 2016, para. 91.

77 See the commentary to Article 5 of the DAs: "It also serves as a reminder of the duty of States to ensure compliance with all relevant human rights obligations applicable both during the disaster and the pre-disaster phase." DAs Report, above note 26, p. 31, para. 1.

78 *Ibid.*, p. 28, para. 1.

More relevantly, Article 5 affirms that "[p]ersons affected by disasters will be entitled to respect for and protection of their human rights in accordance with international law". Even if this provision appears self-evident, since "there is no doubt that international human rights law applies to natural disasters",[79] it has the merit of emphasizing the critical relevance of human rights for the protection of persons affected by disasters. Indeed, although "from a strictly legal point of view, there is no *categorical* difference between disasters and any other situation to which human rights apply",[80] calamities may nonetheless lead to interpretative tensions in the application of relevant rules. As emphasized by an increasing practice developed by human rights bodies,[81] disasters might require a context-based interpretation of relevant obligations – for instance, implying the need for additional efforts to be made by States to address vulnerabilities raised or accentuated by disasters, or that States could request limitations or derogations from their existing obligations in order to deal with the effects of a disaster.[82]

In this regard, the deliberate choice of the ILC was to include a mere reminder[83] on the potential relevance of the human rights legal framework, on the assumption that the drawing up of a comprehensive list of relevant rights was not feasible.[84] This approach, which may be qualified as minimal in the light of the purpose of the project, was nevertheless welcomed by States,[85] particularly those concerned with the possible shift of the project toward a rights-based approach. Nevertheless, Article 5 and its commentary provide some guiding elements.

Compared to the version adopted on first reading, the ILC outlined on the second reading the relevance of both negative and positive obligations, as underlined by the additional reference to the term "protection", to accompany the original reference to "respect" for human rights. Indeed, positive obligations might be particularly relevant in disaster settings, given the need to adopt proactive measures, as emphasized by a series of relevant documents adopted by human rights bodies (in 2018 alone) confirming the growing attention paid to the protection of human rights in such scenarios.[86] The commentary to the

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79   *Ibid.*, p. 28, para.1.
80   Kristian Cerdevall Lauta, "Human Rights and Natural Disasters", in S. Breau and K. Samuel (eds), above note 62, p. 94.
81   See, in this regard, W. Kälin, above note 49; Dug Cubie and Marlies Hesselman, "Accountability for the Human Rights Implications of Natural Disasters: A Proposal for Systemic International Oversight", *Netherlands Quarterly of Human Rights*, Vol. 33, No. 1, 2015; F. Zorzi Giustiniani *et al.* (eds), above note 16.
82   Human Rights Council, *Final Research-Based Report of the Human Rights Council Advisory Committee on Best Practices and Main Challenges in the Promotion and Protection of Human Rights in Post-Disaster and Post-Conflict Situations*, UN Doc. A/HRC/28/76, 10 February 2015.
83   DAs Report, above note 26, p. 31, para. 1.
84   *Ibid.*, p. 32, para. 5.
85   E. Valencia-Ospina, above note 76, paras 109–120.
86   See, for example, UN General Assembly, *Report of the Special Rapporteur on the Right to Food*, UN Doc. A/HRC/37/61, 25 January 2018 (focusing on the right to food in the context of natural disasters); Committee on the Elimination of Discrimination against Women, *General Recommendation No. 37 (2018) on the Gender-Related Dimensions of Disaster Risk Reduction in the Context of Climate Change*, UN Doc. CEDAW/C/GC/37, 13 March 2018; Human Rights Committee, *General Comment No. 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life*, UN Doc. CCPR/C/GC/36, 30 October 2018, paras 26, 62.

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DAs also identifies some potentially relevant human rights: the right to life, health, food, housing, education and information. This list can be extended to other significant issues, such as the right to a healthy environment. Furthermore, the commentary makes reference to specific challenges raised by vulnerable groups. Significantly, as recognized by Article 2 of the IDI's 2003 Resolution on Humanitarian Assistance,[87] the ILC also included "the right to receive humanitarian assistance" among relevant rights in the DAs, even though the commentary does not further develop this sensitive issue, which is particularly debated by scholars in relation to the possibility of identifying a potential individual right on this matter.[88]

Finally, as requested by several States,[89] the commentary underlines how reference in Article 5 to the enjoyment of these rights "in accordance with international law" refers to an "affected State's right to suspend or derogate where it is recognized under existing international agreements".[90] In this case too, the ILC preferred to make a renvoi to the pertinent legal system rather than directly addressing this issue, reflecting recurring scenarios where States have limited or expressly derogated from their human rights obligations in times of disaster.[91] Furthermore, it should be noted that the relevance of human rights for the DAs is not limited to Article 5. In particular, the basis of several provisions pertaining to the so-called "horizontal" dimension of the project have also been underpinned by relevant human rights obligations. This is the case, in particular, for Articles 7, 9, 10, 11, 12, 13 and 14, thus confirming the complementary relevance of human rights standards to justifying solutions endorsed by the ILC.[92]

Article 6, addressing humanitarian principles, states that "[r]esponse to disasters will take place in accordance with the principles of humanity, neutrality and impartiality, and on the basis of non-discrimination, while taking into account the needs of the particularly vulnerable". The provision is particularly significant because although these principles, largely transposed from IHL, are reaffirmed in seminal soft-law instruments addressing disasters, such as UN General Assembly Resolution 46/182, or documents such as the 1994 Red Cross Code of Conduct, they have only been incorporated on a few occasions into binding texts, such as Article 214(2) of the Treaty on the Functioning of the EU or Article 3 of the Framework Convention on Civil

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87 For a comment on this provision of the resolution, see R. Kolb, above note 52, pp. 861–863.
88 For further references to doctrine, see Annalisa Creta, "A (Human) Right to Humanitarian Assistance in Disaster Situations? Surveying Public International Law", in A. de Guttry, M. Gestri and G. Venturini (eds), above note 2.
89 E. Valencia-Ospina, above note 76, para. 113.
90 DAs Report, above note 26, p. 32, para. 7.
91 Emanuele Sommario, "Limitation and Derogation Provisions In International Human Rights Law Treaties and Their Use in Disaster Settings", in F. Zorzi Giustiniani et al. (eds), above note 16.
92 Anne Peters, Beyond Human Rights: The Legal Status of the Individual in International Law, Cambridge University Press, Cambridge, 2016, pp. 240–246.

Defence Assistance.[93] The express recognition of humanitarian principles in Article 6 of the DAs must consequently be welcomed, since in disaster contexts "these principles and their underlying rationale are under increasing challenge".[94]

The material content of Article 6 has some peculiarities. First, there is an unusual difference between its text, which is limited to the response phase, and the commentary, where humanitarian principles are rightly qualified as being applicable "to the provision of disaster relief assistance, as well as in disaster risk reduction activities",[95] as this latter scenario might also raise similar concerns. Equally significant is the qualification of non-discrimination as an "autonomous principle"[96] potentially infringed by biases of "ethnic origin, sex, nationality, political opinions, race, religion and disability",[97] whereas on some occasions non-discrimination has been qualified as a sub-specification of the principle of impartiality.[98] The reference made to the "needs of the particularly vulnerable" in the DAs emphasizes the potential exigency to adopt positive discrimination towards certain individuals or groups.[99] While reference is made to girls, boys, women, older persons, and persons with disabilities or debilitating diseases, as well as to internally displaced persons through cross-references to UN General Assembly Resolution 69/135 and the IDRL Guidelines, this list could potentially be extended to other vulnerable groups during disasters, such as migrants or indigenous people as recognized by the International Organization for Migration and the UN Human Rights Council.[100]

The "horizontal" dimension

A significant set of provisions can be grouped around the "horizontal" dimension of the project (Articles 7–17), which aims to regulate the legal relationships involving the affected State and assisting actors during the disaster cycle, focusing on disaster risk reduction (Article 9) and, subsequently, the relief/recovery phases (Articles 10–17).

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93 According to Article 214(2) of the Treaty on the Functioning of the European Union, above note 13, the EU's operations for victims of disasters "shall be conducted in compliance … with the principles of impartiality, neutrality and non-discrimination". Under Article 3 of the Framework Convention on Civil Defence Assistance, 2172 UNTS 213, 22 May 2000 (entered into force 23 September 2001), "[a]ssistance shall be provided without discrimination, particularly with regard to race, colour, sex, language, religion, political or any other opinion, to national or social origin, to wealth, birth, or any other criterion", and "[a]ssistance shall be undertaken in a spirit of humanity, solidarity and impartiality".

94 D. Fisher, above note 5, p. 101.

95 DAs Report, above note 26, p. 33, para. 1.

96 *Ibid.*, p. 34, para. 5.

97 *Ibid.*, p. 33, para. 4.

98 Jean Pictet, *The Fundamental Principles of the Red Cross*, ICRC, Geneva, 1979, pp. 23–28. On this theoretical debate, see Federico Casolari, "Addressing Discrimination in Disaster Scenarios", in F. Zorzi Giustiniani *et al.*, above note 16.

99 With reference to disaster settings, see Mary Crock, "The Protection of Vulnerable Groups", in S. Breau and K. Samuel (eds), above note 62.

100 Human Rights Council, *Promotion and Protection of the Rights of Indigenous Peoples in Disaster Risk Reduction, Prevention and Preparedness Initiatives*, UN Doc. A/HRC/27/66, 7 August 2014; Migrants in Countries in Crisis, *Guidelines to Protect Migrants in Countries Experiencing Conflict or Natural Disaster*, 2016, available at: https://micicinitiative.iom.int/guidelines.

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These relationships, according to Article 7, must be inspired by a duty to cooperate, which can be achieved through measures identified in Article 8, which deals with cooperation.[101] Through this provision the ILC deemed it desirable to emphasize the relevance of the principle of solidarity, which significantly is reaffirmed in the preamble.[102] However, the effective legal value of this provision, which some States argued should be deleted or redrafted in non-binding terms,[103] is rather uncertain, as already experienced in past ILC projects where similar rules have been included.[104] The commentary simply provides an overview of this principle in international law, highlighting the different nature of actors potentially affected, as this provision was not intended to identify "the level of cooperation being envisaged, but rather the actors with whom the cooperation should take place".[105] Its scope can be better interpreted in light of other provisions. For instance, Article 7 ("Duty to Cooperate") raises the question of whether, on its basis, a more timely obligation to provide cooperation might be inferred, a hypothesis excluded by the commentary both to Article 8 ("Forms of Cooperation in the Response to Disasters"), the purpose of which is merely to be "illustrative of possible forms of cooperation" and which "is not intended to create additional legal obligations for either the affected States or other assisting actors",[106] and Article 12 ("Offers of External Assistance"), which underlines the non-existence of "a legal duty to assist".[107] In a more incisive manner, the duty to cooperate is recalled among the rationales behind Article 11 on the obligation to seek assistance. For the ILC, "Draft Article 7 affirms that the duty to cooperate is incumbent upon … affected States where such cooperation is appropriate";[108] this scenario is raised once the affected state is unable to cope with the disaster, thus triggering the obligation provided by Article 12. In essence, Article 7 outlines a general principle allowing better framing of the activities that different actors may be called upon to put in place. In the present author's view, Article 7 may impose a duty on the affected State to notify other States of disasters that may be potentially detrimental to them, a hypothesis admitted by the ILC only with reference to

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101 Article 8 states: "Cooperation in the response to disasters includes humanitarian assistance, coordination of international relief actions and communications, and making available relief personnel, equipment and goods, and scientific, medical and technical resources."

102 Para. 3 of the preamble refers to the "fundamental value of solidarity in international relations and the importance of strengthening international cooperation in respect of all phases of a disaster". On this concept, see Rüdiger Wolfrum and Chie Kojima (eds), *Solidarity: A Structural Principle of International Law*, Springer, Berlin, 2010.

103 On this debate, see E. Valencia-Ospina, above note 76, paras 142–157.

104 See, for instance, Owen McIntyre, *Environmental Protection of International Watercourses under International Law*, Routledge, New York, 2016, p. 319, on difficulties in providing concrete content to the "general obligation to cooperate" provided by Article 8 of the Draft Articles on the Law of the Non-Navigational Uses of International Watercourses.

105 DAs Report, above note 26, p. 39, para. 6.

106 *Ibid.*, p. 42, para. 5.

107 *Ibid.*, p. 57, para. 2.

108 *Ibid.*, p. 53, para. 1.

specific treaty obligations.[109] Such conduct might represent a concrete expression of the duty to cooperate.

Disaster risk reduction

Although disaster risk reduction (DRR) may historically qualify as a "second generation" in the development of the legal and policy framework pertaining to disasters (which originally focused mainly on the relief phase), this area has since acquired a high degree of relevance as DRR activities are able to significantly reduce the negative impact of potential disasters. The universal approach to DRR has, however, been addressed mainly by non-binding instruments in line with informal international law-making trends, as expressed in the past and current strategies developed by world conferences on DRR (Yokohama, Hyogo, Sendai[110]), which aim to foster domestic activities in this area and enhance international governance aimed at implementing such goals.[111] These universal initiatives have been able to play a significant role in shaping the activities of States, international organizations and non-State entities, including through voluntary report mechanisms aimed at assessing at the domestic level the fulfilment of goals provided by the strategies, and attempts to identify indicators to better assess States' performance. In addition, recent binding international disaster law instruments have increasingly imposed on State measures in this area,[112] thus confirming the possibility of translating DRR activities into concrete obligations. Other instruments, such as the IFRC/United Nations Development Programme (UNDP) *Checklist on Law and Disaster Risk Reduction* presented to the 32nd International Conference of the Red Cross and Red Crescent in 2015,[113] have aimed to play a guiding role for States.

Consequently, the ILC devoted Article 9(1) of the DAs to DRR, claiming that "[e]ach State shall reduce the risk of disasters by taking appropriate measures, including through legislation and regulations, to prevent, mitigate and prepare for disasters". Undoubtedly this provision is one of the most significant in the project, although it should be recalled that some States have been critical, requesting its

109 See Convention for the Protection of the Mediterranean Sea against Pollution, 1102 UNTS 27, 16 February 1976 (entered into force 12 February 1978), Art. 9(2); International Convention on Oil Pollution Preparedness, Response and Cooperation, 1891 UNTS 77, 30 November 1990 (entered into force 13 May 1995), Art. 5(1); World Health Organization (WHO), International Health Regulations, 2005 (entered into force 15 June 2007) Art. 6.1, available at: https://tinyurl.com/y9e2xqrj.
110 For the Sendai Framework adopted in 2015, see above note 17.
111 For an overview of relevant practice, see DAs Report, above note 26, pp. 44–47. For the qualification of DRR practices as informal international law-making approaches, see Luca Corredig, "Effectiveness and Accountability of Disaster Risk Reduction Practices: An Analysis through the Lens of IN-LAW", in Ayelet Berman, Sanderijn Duquet, Joost Pauwelyn, Ramses A. Wessel and Jan Wouters (eds), *Informal International Lawmaking: Case Studies*, TOAEP, The Hague, 2012.
112 See, for instance, ASEAN Agreement, above note 71, Arts 5, 6, 7; Decision No. 1313/2013 of the European Parliament and of the Council of 17 December 2013 on a Union Civil Protection Mechanism, *Official Journal of the European Union*, L 347/924, 20 December 2013, Arts 5, 6.
113 IFRC and UNDP, *The Checklist on Law and Disaster Risk Reduction*, October 2015, available at: https://tinyurl.com/pklojko.

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deletion or the use of "should" instead of "shall".[114] Contrariwise, the ILC linked this obligation to multiple potential bases, in particular (a) the "widespread practice of States reflecting their commitment to reduce the risk of disasters";[115] (b) positive human rights obligations, as recently also emphasized by the Human Rights Committee; and (c) the due diligence principle expressed in international environmental law.[116] In this case, the context-based character of the relevant obligation, as expressed by the due diligence standard provided by the wording of this provision, would determine a certain margin of appreciation on States concerning the extent of measures to fulfil this obligation. Still, especially regarding the increasing practice developed by human rights bodies in this context,[117] it might be claimed that positive obligations imposed by some human rights provisions, as regarding the right to life, might provide a strong legal basis for requiring States to properly act to prevent and mitigate disasters in some concrete circumstances.

Measures to be adopted have a distinct character in comparison to those pertaining to the relief/recovery phases. Reference could be made to the development of technical prevention standards at the domestic level – for example, sectoral laws dealing with development planning, construction, land use and environmental protection, as enucleated in the abovementioned IFRC/UNDP *Checklist*, or to measures identified by Article 9(2), namely the "conduct of risk assessments, the collection and dissemination of risk and past loss information, and the installation and operation of early warning systems". Such latter measures have mostly been adopted by the ILC from similar examples provided by the Sendai Framework, thus confirming the close relationship between these two instruments. Indeed, as explicitly recognized by the UN International Strategy for Disaster Reduction's comment on the DAs, there is a "functional relationship between the draft articles and the Sendai Framework in that the former articulates the duty to reduce the risk of disasters and to cooperate, and the latter articulates the modalities and measures that States need to adopt to discharge such duty".[118] Through Article 9(2), there is the possibility of enunciating a proper legal obligation in this area that is able to override the soft-law approach endorsed by States in elaborating the universal DRR strategies.

The "checks and balances" approach between the interests of the affected State and assisting actors in the relief phase

As mentioned above, the "horizontal" dimension of the project (Articles 10–17) governs the response/recovery phases and the relationships between the affected State and

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114 E. Valencia-Ospina, above note 76, paras 177–186.
115 DAs Report, above note 26, p. 44, para. 5.
116 *Ibid.*, p. 43, para. 4; Human Rights Committee, above note 86, para. 26.
117 Emanuele Sommario and Silvia Venier, "Human Rights Law and Disaster Risk Reduction", *Questions of International Law*, Zoom-In 49, 2018.
118 See "UNISDR's Comments and Observations on the Draft Articles on the 'Protection of Persons in the Event of Disasters'", December 2015, para. 5, available at: http://legal.un.org/docs/?path=../ilc/sessions/68/pdfs/english/pop_unsdr.pdf&lang=E.

external assisting actors. These provisions establish a complex mechanism of "checks and balances" between the potentially diverging perspectives of relevant actors, namely the affected State, whose sovereignty in the affected area has a series of legal implications, and external actors interested in operationalizing the values of cooperation and solidarity expressed in Article 7. This complex equilibrium is reflected in these provisions, characterized by a drafting tension expressed through different techniques. For example, parallel provisions can counterbalance measures required of different actors, such as Article 11, which obliges the affected State to seek international assistance in some circumstances, coupled with Article 12(2), which conversely imposes on external actors a duty to evaluate requests for assistance from an affected State. This contrast can also be expressed in the same provision, as in Article 13: on the one hand, para. 1 reiterates that external assistance can only be performed with the consent of the affected State; on the other, para. 2 highlights an obligation of the affected State not to arbitrarily deny such assistance.

The first focal point for any disaster operation is certainly the affected State, in light of legal implications of the customary rule on sovereignty. As remarked in para. 5 of the preamble and its commentary, "the principle of the sovereignty of States … is a core element of the draft articles. The reference to sovereignty … provides the background against which the entire set of draft articles is to be understood."[119] Therefore, the ILC aimed to balance the different perspectives inherent in this rule.

On the one hand, the ILC included provisions linked to traditional "sovereignty duties"[120] related to sovereignty in order to limit the activities of external actors in the territory of the affected State, as well as requiring the State to protect against detrimental acts carried out in its own territory. In the first case, reference could be made to provisions requiring the consent of the affected State to provide external assistance (Article 13) or permitting it to impose conditions on such assistance (Article 14), while the duty to protect relief personnel (Article 17) is an example of the second hypothesis. Likewise, sovereignty is a sound legal basis for Article 10(2), according to which "[t]he affected State has the primary role in the direction, control, coordination and supervision of such relief assistance", reflecting the State's role in managing different coordination models of external actors offered by bilateral and regional assistance treaties or by the complex UN coordination system.[121]

On the other hand, the ILC has emphasized "positive" duties associated with sovereignty, thus inferring a series of obligations for the affected State aimed at strengthening protection for victims. Similarly to the approach adopted in UN General

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119 DAs Report, above note 26, p. 18, para. 6.

120 Samantha Besson, "Sovereignty", in *Max Planck Encyclopedia of Public International Law* (online edition), Oxford University Press, Oxford, 2012, paras 123–127.

121 Giovanni De Siervo, "Actors, Activities, and Coordination in Emergencies", in A. de Guttry, M. Gestri and G. Venturini (eds), above note 2.

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Assembly Resolution 46/182,[122] Article 10(1) states that "[t]he affected State shall have the duty to ensure the protection of persons and the provision of disaster relief assistance on its territory, or on territory under its jurisdiction or control". In this manner the ILC transposes into this area solutions endorsed by the UN Secretary-General's High Level Panel on Threats, Challenges and Change, according to which sovereignty "clearly carries with it the obligation of a State to protect the welfare of its peoples and to meet its obligations to the wider international community".[123]

To reach this outcome, the development of dedicated and efficient national structures capable of managing disasters is a basic requirement, as implied by policy standards pertaining to DRR.[124] However, where national capacities are insufficient, Article 11 states that "[t]o the extent that a disaster manifestly exceeds its national response capacity, the affected State has the duty to seek assistance". According to the ILC, this obligation originates both from duties expressed by the rule on sovereignty and by positive human rights obligations, which may impose on the affected State a proactive duty to look for international support to protect victims.[125] However, the ILC, to avoid sensitive issues and solutions not grounded in concrete practice, did not focus on the potential involvement of third-party actors, such as the United Nations Emergency Relief Coordinator, in assessing the inability of the affected State to seek assistance. Such assessment will still be based on self-evaluations made by the concerned State which "must be carried out in good faith", thus emphasizing a potential legal parameter.[126] The relevance of this rule should not be underestimated, as in past disasters States have unduly delayed requests of external support for reasons of national prestige.[127] Furthermore, this provision could be an example of the ILC's preference for a "holistic" approach to relevant legal issues and providing a systemic solution toward aspects not clearly addressed in disaster law instruments, as emphasized by this duty only previously being recognized in non-binding documents such as the IDI's Resolution on Humanitarian Assistance and the IDRL Guidelines.[128]

As mentioned, the "horizontal" dimension of the project aims to balance the interests of the affected State with those of assisting actors, and consequently a number of provisions address the latter's role. First of all, Article 12(2) states

122 UN General Assembly, *Strengthening of the Coordination of Humanitarian Emergency Assistance of the United Nations*, UN Doc. A/RES/46/182, 19 December 1991, para. 4.

123 UN General Assembly, *A More Secure World: Our Shared Responsibility. Report of the High Level Panel on Threats, Challenges and Change*, UN Doc. A/RES/59/565, 2 December 2004, para. 29. With reference to the doctrine of the responsibility to protect, see International Commission on Intervention and State Sovereignty (ICISS), *The Responsibility to Protect*, International Development Research Centre, Ottawa, 2001.

124 See Priorities for Action 2 and 5 of the Hyogo Framework for Action, World Conference on Disaster Reduction, *Report of the World Conference on Disaster Reduction*, UN Doc. A/CONF.206/6, 16 March 2005, para. 14; Sendai Framework, above note 17.

125 See, for instance, Economic, Social and Cultural Rights Committee, General Comment No. 3, "The Nature of States Parties Obligations", UN Doc. E/1991/23, 14 December 1990, para. 13.

126 DAs Report, above note 26, p. 57, para. 7.

127 IFRC, above note 12, p. 89: "For example, significant delays were reported after various storm events in Fiji and after the 1999 earthquake in Turkey before international assistance was requested."

128 For an analysis, see Eduardo Valencia-Ospina, *Fourth Report on the Protection of Persons in the Event of Disasters*, UN Doc. A/CN.4/643, 11 May 2011, pp. 13–14.

that "in the event of disasters, States, the United Nations and other potential assisting actors may provide assistance to the affected State". This provision is primarily intended to underline that such offers cannot be regarded as interference in the affected State's internal affairs,[129] according to the similar solution elaborated for humanitarian assistance in armed conflicts.[130] On the other hand, the Commission has expressly maintained that "[s]uch offers … are essentially voluntary and should not be construed as a recognition of the existence of a legal duty to assist".[131] Consequently, the ILC denied the existence of a legal obligation to provide assistance, in light of refusals expressed by States on earlier solutions suggested by the Special Rapporteur which aimed to identify a duty for assisting States as a legal obligation of conduct.[132]

Nonetheless, even in this case, the ILC offered a balance between various interests, specifying in Article 12(2) that "[w]hen external assistance is sought by an affected State by means of a request addressed to another State, the United Nations, or other potential assisting actor, the addressee shall expeditiously give due consideration to the request and inform the affected State of its reply". This rule, echoing practice aimed to facilitate the activities of regional coordination mechanisms,[133] assumes a far-reaching character in this context, aiming to limit the discretion of assisting actors. Through the procedural obligation laid out in para. 2, the affected State might increase political-diplomatic pressure on potential assisting actors, as they are obliged "first, to give due consideration to the request; and, second, to inform the affected State of … their reply".[134]

Consent of the affected State

The effective implementation of international relief activities ultimately depends on the consent of the affected State. However, the ILC has sought to keep a complex balance between basic prerogatives provided by sovereignty and the need to protect victims through international support. This normative tension is expressed in Article 13, which provides:

1. The provision of external assistance requires the consent of the affected State.
2. Consent to external assistance shall not be withheld arbitrarily.

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129 DAs Report, above note 26, p. 57, para. 3.
130 International Court of Justice, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment, *ICJ Reports 1986*, para. 242.
131 DAs Report, above note 26, p. 57, para. 2.
132 Eduardo Valencia-Ospina, *Fifth Report on the Protection of Persons in the Event of Disasters*, UN Doc. A/CN.4/652, 9 April 2012, para. 81. For comments on this provision, see E. Valencia-Ospina, above note 76, paras 230–247.
133 See Decision No. 1313/2013, above note 112, Art. 15.4, according to which "[a]ny Member State to which a request for assistance is addressed through the Union Mechanism shall promptly determine whether it is in a position to render the assistance required and inform the requesting Member State of its decision". See ASEAN Agreement, above note 71, Art. 11, involving a similar regional coordinating centre.
134 DAs Report, above note 26, pp. 58–59, para. 10.

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3. When an offer of external assistance is made in accordance with the present draft articles, the affected State shall, whenever possible, make known its decision regarding the offer in a timely manner.

The drafting process of this provision has been particularly contentious in light of similar problems encountered by efforts to regulate humanitarian assistance in armed conflicts, where a similar ongoing debate is evidenced by the recent elaboration of the *Oxford Guidance on the Law Relating to Humanitarian Relief Operations in Situations of Armed Conflict* (Oxford Guidance) commissioned by the UN Office for the Coordination of Humanitarian Affairs (OCHA).[135] As a result, the solution provided by Article 13 deserves particular attention.

First, para. 1 reinforces the sovereignty of the affected State, subordinating the provision of assistance to its consent in line with practice provided by international disaster law instruments.[136] This basic requirement also satisfies another rationale, namely the possibility of regulating the influx of humanitarian actors in order to avoid situations where "open door" policies "have encountered problems of supply-driven thinking, non-professional relief workers (often with their own particular goals) and the blocking of appropriate aid".[137] Indeed, through the consent requirement, the affected State can eventually better regulate the flow of international actors, avoiding cases where the activism of non-professional actors or the massive presence of assisting actors could create bottleneck effects for assistance effectively required by the affected State. Such practice is reflected in the decision of the Chilean authorities to pose limitations in the aftermath of the 2010 earthquake. The limitations aimed to allow consent only for limited forms of assistance and related assisting actors in light of targeted needs.[138] This rule, when applied in good faith, can therefore indirectly contribute to the protection of affected communities.

However, the ILC, despite the opposition of some States,[139] has maintained the inclusion of para. 2 in order to underline how the affected State cannot refuse consent in an arbitrary manner. The ILC, in line with Article 8 of the IDI's Resolution on Humanitarian Assistance, has therefore significantly transposed

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135 OCHA, *Oxford Guidance on the Law Relating to Humanitarian Relief Operations in Situations of Armed Conflict*, 2016 (Oxford Guidance), available at: https://tinyurl.com/yc76p7nh. The Oxford Guidance reiterates that "[t]he consent of the concerned states is required before offers to conduct humanitarian relief operations may be implemented" (p. 16). However, under Article 59 of Geneva Convention IV of 1949, the Occupying Power shall agree to relief schemes on behalf of the population of occupied territories inadequately supplied. In this case, however, it seems that there is still a possibility of prescribing technical arrangements. In this regard it should be emphasized that Article 18(2) of the DAs attributes primacy to solutions provided by IHL.
136 Sandesh Sivakumaran, "Arbitrary Withholding of Consent to Humanitarian Assistance in Situations of Disaster", *International and Comparative Law Quarterly*, Vol. 64, No. 3, 2015, pp. 504–509.
137 Craig Allan and Therese O'Donnell, "An Offer You Cannot Refuse? Natural Disasters, the Politics of Aid Refusal and Potential Legal Implications", *Amsterdam Law Forum*, Vol. 5, 2013, p. 40.
138 See "Press Conference on Chile by Deputy Emergency Relief Coordinator", 2 March 2010, available at: www.un.org/press/en/2010/100302_Bragg.doc.htm.
139 See E. Valencia-Ospina, above note 76, paras 250–272.

into this area a solution already proposed in IHL,[140] identifying its origin in positive obligations under human rights law and in duties of protection implied in the principle of State sovereignty.

The commentary to the DAs also better defines the scope of application of Article 13(2), providing an interpretation on the concept of arbitrariness. For example, the ILC qualifies as non-arbitrary refusals situations where the affected State is able to cope with the disaster or obtain appropriate support by other actors, or cases where offers are not in line with the humanitarian principles expressed in Article 6. One can see how the application of such principles – for instance, in the US refusal of Cuban offers of medical support in the aftermath of hurricane Katrina – might be justified, provided the affected State was able to obtain similar assistance from other entities.[141] Conversely, the ILC suggested that if the affected State does not provide motivation concerning its decision to refuse offers of external assistance, this attitude might demonstrate absence of good faith, thus raising doubts about the fulfilment of the criteria expressed in para. 2.[142] Consequently, the ILC provided the procedural obligation expressed by para. 3 concerning a duty to promptly evaluate offers of assistance. Given potential practical difficulties, the ILC admits that this provision "encompass[es] a wide range of possible means of response, including a general publication of the affected State's decision regarding all offers of assistance",[143] in light of practice where States have made generic declarations qualifying international assistance as "welcomed".[144]

Overall, the ILC has sought a complex balance on a sensitive issue that has recently become intertwined with the responsibility to protect doctrine. This doctrine was initially considered applicable also to disaster contexts,[145] but despite the support

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140 According to Article 8 of the Resolution on Humanitarian Assistance, above note 52, "[a]ffected States are under the obligation not arbitrarily and unjustifiably to reject a *bona fide* offer exclusively intended to provide humanitarian assistance or to refuse access to the victims". During the negotiations of the 1977 Additional Protocols, the requirement that consent must not be arbitrarily denied was discussed in-depth by the delegations. Indeed, even if both Article 70 of Additional Protocol I and Article 18 of Additional Protocol II affirm that relief activities are subject to the agreement of the parties/high contracting party concerned in such relief actions, the Commentary is clear in restating, on the basis of the official records of the diplomatic conference, that this clause "did not imply that the Parties concerned had absolute and unlimited freedom to refuse their agreement to relief actions. A Party refusing its agreement must do so for valid reasons, not for arbitrary or capricious ones." See Yves Sandoz, "Article 70", in Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, p. 816, para. 2085. For a similar approach, see Sandesh Sivakumaran, "Article 3", in ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 2nd ed., Geneva, 2016, paras 832–839. This element is reaffirmed in the Oxford Guidance, above note 135, pp. 21–25.
141 Mary Murray, "Katrina Aid From Cuba? No Thanks, Says US", *NBC News*, 14 September 2005, available at: https://tinyurl.com/yc8yy6hk.
142 DAs Report, above note 26, p. 62, para. 10.
143 DAs Report, above note 26, p. 63, para. 12.
144 Rebecca Barber, "Legal Preparedness for the Facilitation of International Humanitarian Assistance in the Aftermath of Vanuatu's Cyclone Pam", *Asian Journal of International Law*, Vol. 8, No. 1, 2016, p. 10.
145 See ICISS, above note 123, p. 33, para. 4.20.

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expressed by some scholars,[146] the Special Rapporteur immediately refused this hypothesis;[147] this position was later confirmed by the UN Secretary-General, who maintained that "to try to extend it to cover other calamities, such as HIV/AIDS, climate change or the response to natural disasters, would undermine the 2005 consensus".[148] Nevertheless, some issues have not been addressed by the ILC itself – for example, Article 20 of the ILC Draft Articles on State Responsibility, concerning authorities legitimized to provide consent, and its modalities.[149]

A more complex issue is defining consequences in case of an arbitrary denial of consent. Indeed, as exemplified by IHL, even if a party to the conflict denies its consent in an arbitrary manner, such a decision would not give entities intended to provide humanitarian assistance a right to provide assistance in its territory regardless of lack of consent. Non-authorized operations, even if carried out with an arbitrary denial of consent by the relevant authorities, would indeed conflict with State sovereignty. In the recent Oxford Guidance, a series of solutions were proposed to cope with such stalemate situations, such as possible authorizations provided by UN Security Council resolutions, as obtained during the Syrian conflict,[150] or, in exceptional cases, recourse to circumstances precluding wrongfulness, such as state of necessity or countermeasures.[151] It is not surprising, therefore, that the commentary to the DAs avoided taking a stance on this sensitive issue with regard to disaster scenarios.

Finally, Article 14 on "Conditions on the Provision of External Assistance" is strictly linked to Article 13, emphasizing how the affected State can impose additional limitations on the activities of assisting actors provided those limitations are "in accordance with the present draft articles, applicable rules of international law and the national law of the affected State" and in line with "the identified needs of the persons affected by disasters and the quality of the assistance". Indeed, the general consent to international relief activities under Article 13 does not translate into an automatic possibility of action for external actors. Failure to comply with conditions provided by Article 14 might justify a

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146 Rebecca Barber, "The Responsibility to Protect the Survivors of Natural Disaster: Cyclone Nargis, a Case Study", *Journal of Conflict and Security Law*, Vol. 14, No. 1, 2009; Jarrod Wong, "Reconstructing the Responsibility to Protect in the Wake of Cyclones and Separatism", *Tulane Law Review*, Vol. 84, No. 2, 2009. Doubts are expressed by Milena Costas Trascas, "Access to the Territory of Disaster-Affected State", in A. de Guttry, M. Gestri and G. Venturini (eds), above note 2; A. Peters, above note 92, pp. 246–250.

147 E. Valencia-Ospina, above note 43, para. 55.

148 UN General Assembly, *Implementing the Responsibility to Protect: Report of the Secretary-General*, UN Doc. A/63/677, 12 January 2009, para. 10(b). At the 2005 World Summit, States limited the possibility of applying the responsibility to protect doctrine to cases involving genocide, war crimes, ethnic cleansing and crimes against humanity.

149 Affef Ben Mansour, "Consent", in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility*, Oxford University Press, Oxford, 2010.

150 See UN Security Council Resolutions 2139 (22 February 2014), 2165 (14 July 2014) and 2393 (19 December 2017) providing authorization for cross-border and cross-conflict-line humanitarian access to Syria. On this issue, see Phoebe Wynn-Pope, "Humanitarian Access in International Humanitarian Law: The Case of Syria and Security Council Resolution 2139 (2014)", in Jadranka Petrovic (ed.), *Accountability for Violations of International Humanitarian Law*, Routledge, London, 2016.

151 Oxford Guidance, above note 135, pp. 51–55. More extensively, see Emanuela-Chiara Gillard, "The Law Regulating Cross-Border Relief Operations", *International Review of the Red Cross*, Vol. 95, No. 890, 2014.

denial of consent under Article 13(2). The ILC therefore has preferred to provide in Article 14 a guidance on the characteristics and rationale of conditions which might be imposed by affected States regarding provision of external assistance.

Crucially, Article 14 balances different considerations: the possibility for the affected State to impose specific conditions is opposed by the requirement according to which these limitations should be in line with "humanitarian and legal principles already addressed elsewhere, notably, sovereignty, good faith and the humanitarian principles dealt with in draft article 6".[152] This provision thus addresses one of the most common problems in contemporary international assistance, namely ensuring quality and effectiveness of international support.[153] As such, it draws inspiration from existing practice such as Article 12(4) of the Association of Southeast Asian Nations (ASEAN) Agreement on Disaster Management and Emergency Response, which expressly refers to the quality of assistance.[154] Although there are no universally binding technical standards in this area, humanitarian actors have developed a series of relevant documents intended to ensure that assistance meets minimal requirements and humanitarian principles, such as the *Sphere Handbook*, the 2014 Core Humanitarian Standards on Quality and Accountability, or, most recently, the World Health Organization (WHO) initiative on classification and minimum standards for emergency medical teams.[155]

The "operational" provisions

The final set of provisions (Articles 15–17) is more directly related to the operational management of relief activities. Article 15 addresses capabilities potentially attributed by the affected State to assisting actors. Indeed, as amply testified to by research carried out by the IFRC,[156] ordinary legislation and regulations of the affected State may represent a significant obstacle jeopardizing the effective provision of international assistance. Article 15(1) provides that "[t]he affected State shall take the necessary measures, within its national law, to facilitate the prompt and effective provision of external assistance", making reference to issues such as "privileges and immunities, visa and entry requirements, work permits, and freedom of movement". This list has an obvious non-exhaustive character in light of the multifaceted problems faced by external assisting actors, extending to areas such as recognition of professional qualifications and liability issues.[157]

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152 DAs Report, above note 26, p. 64, para. 3.
153 For recent examples see R. Barber, above note 144, pp. 11–16.
154 See ASEAN Agreement, above note 71, Art, 12: "The relief goods and materials provided by the Assisting Entity should meet the quality and validity requirements of the Parties concerned for consumption and utilization." Similarly, Article 3(b) of the Framework Convention on Civil Defence Assistance, above note 93, refers to "ways and customs" of the affected State.
155 On this initiative, see information available at: www.who.int/hac/techguidance/preparedness/emergency_medical_teams/en/. The 2017 joint IFRC/WHO study on this topic is available at: www.ifrc.org/PageFiles/115542/EMT%20Report%20HR.PDF.
156 IFRC, above note 12, pp. 89–157.
157 Giulio Bartolini, "Attribution of Conduct and Liability Issues Arising from International Disaster Relief Missions: Theoretical and Pragmatic Approaches to Guaranteeing Accountability", *Vanderbilt Journal of Transnational Law*, Vol. 48, No. 4, 2015.

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The ILC therefore refrained from developing autonomous and standardized solutions, preferring to adopt a bottom-up approach requiring States to adopt relevant legislative, administrative or executive measures. Unfortunately, few States have developed a coherent domestic system fit for facilitating international assistance, as evidenced by shortcomings emphasized in reports elaborated by the IFRC and National Societies comparing domestic frameworks with good practice standards suggested by the IDRL Guidelines.[158] As a result, although the ILC suggested that States should take into account relevant documents to modify their domestic framework, such as the IDRL Guidelines and the related 2013 Model Act,[159] difficulties inherent in the bottom-up approach are notable. As recently recognized by the IFRC, significant weaknesses persist[160] and the margin of appreciation left to States by the ILC is unlikely to result in a uniform approach towards such challenges.

Equally relevant is Article 16, according to which "[t]he affected State shall take the appropriate measures to ensure the protection of personnel and equipment and goods". The purpose of this provision is twofold. On the one hand, by virtue of "sovereignty duties", it imposes on the affected State a duty to protect international assisting actors, in light of security concerns linked to performance of their activities, the value of their assets, and fragile safety situations. On the other hand, this provision is an indirect protection for the affected population, as it facilitates the inflow of international assistance which would potentially be slowed down without such guarantees. As for actors that may represent a security threat, two hypotheses emphasize the different characteristics of the relevant obligations. The first case deals with wrongful actions attributable to organs of the affected State, where an obligation of result can be identified. Regarding harmful activities carried out by private individuals, a duty of due diligence conversely imposes a duty on the affected State to adopt appropriate measures to avoid prejudices towards relief personnel, for instance through the exchange of relevant information or the provision of specific protection. In this regard, the ILC made a proper reference to standards endorsed by members of the Inter-Agency Standing Committee in the 2013 *Non-Binding Guidelines on the Use of Armed Escorts for Humanitarian Convoys*,[161] in order to avoid an over-securitization of relief activities.

Finally, Article 17 underlines the temporal limits of relief activities: the affected State and assisting actors "may terminate external assistance at any time. Any such State or actor intending to terminate shall provide appropriate notification." Article 17 also imposes an obligation for the affected State and assisting actors to consult each other "with respect to the termination of external assistance and the modalities

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158 See the dozens of reports available at: www.ifrc.org/what-we-do/disaster-law/research-tools-and-publications/disaster-law-publications. For example, see IFRC, *International Disaster Response Law (IDRL) in Samoa*, Geneva, 2016.

159 IFRC, Model Act on Disaster Relief, available at: www.ifrc.org/en/what-we-do/disaster-law/about-disaster-law/international-disaster-response-laws-rules-and-principles/model-act-on-idrl/.

160 See IFRC, above note 22.

161 DAs Report, above note 26, p. 69, para. 9. The text of the *Non-Binding Guidelines* is available at: https://tinyurl.com/y8f774vp.

of termination". Regardless of the lack of coherent treaty practice making reference to this scenario, the ILC elaborated a provision which aimed both to favour a holistic approach, by imposing a clear standard in this area, and to balance the different perspectives of relevant actors. For the affected State, this provision is a further reaffirmation of its sovereignty, and since external actors do not have an obligation to provide assistance, Article 17 therefore simply reiterates their option to freely decide when to withdraw their services. As premature and uncoordinated disengagement might be detrimental to victims, the ILC introduced both the procedural obligation to provide notification that is "appropriate" in terms of its "form and timing, preferably early",[162] and a duty of consultation, the rationale for which pursues the same goal as, and represents a further expression of, the principle of cooperation provided by Article 7.

The way forward

Against this background, States were requested in 2016 by UN General Assembly Resolution 71/141 to provide their comments on the proposal made by the ILC to adopt a treaty on the basis of the DAs. In this regard, both during the meeting of the General Assembly Sixth Committee recently devoted to this topic and in advance of it,[163] States have expressed mixed positions on the recommendation made by the ILC, which did not directly reflect their geopolitical interests or status as disaster-prone or donor States.

A relevant number of States have voiced their preference for a treaty in this area, and are ready to foster discussions in view of such a goal. This has been the case for El Salvador[164] (speaking on behalf of the thirty-three member States of the Community of Latin American and Caribbean States, as supported by additional similar individual statements made by Argentina,[165] Brazil,[166] Colombia,[167] El Salvador,[168] Honduras[169] and Peru[170]), Iceland[171] (on behalf of the five Nordic countries, which have declared themselves favourable

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162 DAs Report, above note 26, p. 71, para. 7.

163 See comments included in UN General Assembly, *Protection of Persons in the Event of Disasters: Report of the Secretary-General*, UN Doc. A/73/229, 24 July 2018 (Secretary-General's Report); and statements delivered on 1 November 2018 at the UN General Assembly Sixth Committee, available at: https://papersmart.unmeetings.org/en/ga/sixth/73rd-session/agenda/.

164 See remarks by El Salvador on behalf of the Community of Latin American and Caribbean States, available at: https://papersmart.unmeetings.org/media2/20305329/el-salvador-e-celac-.pdf.

165 See remarks by Argentina, available at: https://papersmart.unmeetings.org/media2/20305351/argentina-s-90-.pdf.

166 See remarks by Brazil, available at: https://papersmart.unmeetings.org/media2/20305365/brazil-90-.pdf.

167 See remarks by Colombia, available at: https://papersmart.unmeetings.org/media2/20305355/colombia-s-90-.pdf.

168 See remarks by El Salvador, Secretary-General's Report, above note 163, p. 2.

169 See remarks by Honduras, available at: https://papersmart.unmeetings.org/media2/20305333/honduras-s-90-.pdf.

170 See remarks by Peru, available at: https://papersmart.unmeetings.org/media2/20305359/peru-s-90-.pdf.

171 See remarks by Iceland on behalf of the five Nordic Countries, available at: https://papersmart.unmeetings.org/media2/20305379/iceland-90-.pdf.

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to discussing the proposal made by the ILC), Italy,[172] the Philippines,[173] Portugal,[174] Qatar,[175] Togo[176] and Sri Lanka.[177] Other States, such as Japan and Singapore,[178] have expressed generally positive evaluations on the DAs, without however adopting a clear stance on the notion of a treaty. In other cases a more cautious approach was endorsed, either emphasizing the need to better assess the DAs in light of current practice, as expressed by Austria and Bangladesh,[179] or voicing uncertainties as to whether the time would be right for convening a diplomatic conference on this topic, as maintained by Iran.[180] Finally, some States, such as the Czech Republic,[181] Russia[182] and the United States,[183] have opposed the recommendation to adopt a treaty. Still, several of the opposing States expressed appreciation for the large majority of provisions included in the DAs, suggesting that the text could act as a guideline for international cooperation efforts,[184] or maintained that "the draft articles could be seen as the focal reference point internationally with regard to disaster relief and management".[185] In this regard, Switzerland suggested that the DAs should be translated into regional agreements and domestic legislation, though it cautioned on their possible application in complex emergencies.[186]

In light of the stalemate created by the divergent attitudes presented by States, with several UN member States still having to express their views on the recommendation made by the ILC, the General Assembly has finally decided, through its Resolution 73/209, both to require further comments by States and to inscribe this item in its seventy-fifth session planned for 2020.[187] At this stage

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172 See remarks by Italy, available at: https://papersmart.unmeetings.org/media2/20305334/italy-90-.pdf.
173 See remarks by the Philippines, available at: https://papersmart.unmeetings.org/media2/20305368/philippines-90-.pdf.
174 See remarks by Portugal, available at: https://papersmart.unmeetings.org/media2/20305348/portugal-90-.pdf.
175 See remarks by Qatar, Secretary-General's Report, above note 163, p. 3.
176 See remarks by Togo, available at: https://papersmart.unmeetings.org/media2/20305353/togo-f-90.pdf.
177 See remarks by Sri Lanka, available at: https://papersmart.unmeetings.org/media2/20305345/sri-lanka-90-.pdf.
178 See remarks by Japan, available at: https://papersmart.unmeetings.org/media2/20305502/japan-90-.pdf. See remarks by Singapore, available at: https://papersmart.unmeetings.org/media2/20305349/singapore-90-.pdf.
179 See remarks by Austria, Secretary-General's Report, above note 163, p. 2; remarks by Bangladesh, available at: https://papersmart.unmeetings.org/media2/20305370/bangladesh-90-.pdf.
180 See remarks by Iran, available at: https://papersmart.unmeetings.org/media2/20305396/iran-islamic-republic-of-90-.pdf.
181 See remarks by the Czech Republic, Secretary-General's Report, above note 163, p. 2.
182 See remarks by Russia, available at: https://papersmart.unmeetings.org/media2/20305363/russian-federation-r-90-.pdf.
183 See remarks by the United States of America, available at: https://papersmart.unmeetings.org/media2/20305354/united-states-of-america-90-.pdf.
184 See remarks by Israel, available at: https://papersmart.unmeetings.org/media2/20305507/israel-90-.pdf; remarks by the United Kingdom, Secretary-General's Report, above note 163, p. 4.
185 See remarks by Malaysia, available at: https://papersmart.unmeetings.org/media2/20305357/malaysia-90-.pdf.
186 See remarks by Switzerland, available at: https://papersmart.unmeetings.org/media2/20305341/switzerland-f-e-90-.pdf.
187 UN General Assembly, *Protection of Persons in the Event of Disasters*, UN Doc. A/Res/73/209, 20 December 2018.

such a solution was probably opportune, permitting States and other actors involved in humanitarian activities to further reflect on the opportunities and challenges of developing the long-awaited flagship treaty on disaster prevention and response and take a final position on the proposal made by the ILC.

Concluding remarks

The protection of persons in disasters has represented a challenge for the ILC, given the dynamic and partly still embryonic character of the relevant regulatory framework and the need to reconcile the various perspectives of involved actors.

The current text of the DAs certainly has points of merit, as it aims to elaborate a coherent framework for a non-homogenous area of law in order to cover the main legal issues pertaining to the disaster cycle, including several contentious ones. It has allowed the provision of a general framework that is able to highlight the main challenges related to disasters, attracting attention to the legal complexities raised by such events with regard to both disaster risk reduction and post-disaster activities. Several points can be commended, such as the holistic attitude characterizing the law-making approach followed by the ILC, aimed at finding comprehensive solutions even with regard to elements not yet crystallized in coherent and consistent practice, and the complex balance maintained with regard to different perspectives of actors involved in disaster scenarios, namely the affected State, assisting actors and victims. On some issues, such as DRR or arbitrary denial of consent, the adopted solutions aim to favour progressive trends, still grounded on coherent legal foundations, while in other circumstances, for example concerning humanitarian principles, the text has established basic elements aimed at guiding the activities of relevant stakeholders.

At the same time, the text has some weaknesses, partly linked to its structure. The preference for the adoption of a short document, aimed at sketching out basic principles in this area, has finally resulted in a series of provisions able to represent a potential framework convention, without a specific focus towards detailed provisions. This situation is hardly suited to entirely solving the common regulatory challenges raised in relief activities. Still, the reinforcement of the "operational" side of the current project might be achieved in the subsequent diplomatic negotiation process, in light of the original proposal made by the ILC Secretariat for the 1946 Convention on the Privileges and Immunities of the United Nations,[188] characterized by its exhaustive provisions, as a reference model for the activities of the ILC on this topic.

For instance, potential uncertainties resulting from the "bottom-up" approach adopted in Article 15 concerning facilitation of external assistance, where States are requested to support assisting actors through measures to be adopted at the domestic level without imposing specific obligations on them in this regard, could

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188 ILC, above note 29, p. 210, para. 24. The "Proposed Outline", *ibid.*, p. 213, included several areas of interest for potential rules dealing with the provision of disaster relief and access to the affected State.

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be reduced through detailed provisions. Similarly, the development of technical annexes, to be periodically updated by a committee of experts, might allow for the creation of universal standards for quality of assistance, an issue which up until now has been limited to non-binding initiatives managed by relevant humanitarian professionals.[189] Such technical annexes might pursue multiple purposes, maintaining a balance between the diverging perspectives of involved actors.

On the one hand, technical annexes could facilitate the activities of assisting actors by ensuring predictable standards and therefore promoting easier access to affected States once they are able to satisfy such requirements. Several solutions could be proposed for such purposes – for example, there could be certification process managed under the auspices of the universal treaty, aimed at verifying the consistency of assisting actors' activities according to a set of technical standards. Similarly, assisting actors, especially those formally unable to become parties to the future treaty, such as NGOs or components of the International Red Cross and Red Crescent Movement, could be granted the opportunity to provide unilateral acceptance to such technical requirements and the core features of the future treaty, including the humanitarian principles mentioned in Article 6, in light of similar experiences concerning Deeds of Commitment developed in the framework of IHL[190] or the abovementioned non-binding initiatives related to disaster scenarios. On the other hand, affected States might decide to attribute privileges to assisting actors, currently to be identified at the domestic level according to Article 15, primarily to those entities willing and able to comply with such minimal requirements. For the affected State, this solution might increase the quality of assistance for its own population and minimize the current phenomenon of inappropriate assistance, creating a mutual trade-off.

As mentioned, in 2020 the UN General Assembly will have another opportunity to evaluate the possibility of a universal treaty for the protection of persons in disasters on the basis of the DAs. For "international lawyers … the Holy Grail would be the adoption and widespread ratification of a flagship global treaty",[191] and the capacity of the DAs to represent the missing overarching convention capable of effectively facilitating relief operations would finally be tested by States. It is hard to predict the final outcome. Some elements militate against such a possibility, such as the current lack of appeals for multilateral treaties and the criticisms made by some States regarding the progressive character of some provisions that go beyond the codification of international law in this area. At the same time, the increasing frequency of disasters and their magnitude, accompanied by a rising awareness of the relevance of the legal component in DRR and relief and recovery activities, as well as the balanced character of the text adopted by the ILC, could be the very elements pressing States to finally adopt a universal treaty in this area. The DAs might act as a valid and solid starting point of reference for further

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189 See above note 155.
190 Pascal Bongard and Jonathan Somer, "Monitoring Armed Non-State Actor Compliance with Humanitarian Norms: A Look at International Mechanisms and the Geneva Call Deed of Commitment", *International Review of the Red Cross*, Vol. 93, No. 883, 2011.
191 D. Fisher, above note 5, p. 114.

negotiations aimed at strengthening their contents. Even if a treaty could not finally be achieved on the basis of activities performed by the ILC, the DAs and their commentaries will nonetheless act as a framework reference document capable of influencing future legal and political debates concerning humanitarian action in the event of disasters.

Annex 1: Draft Articles on the Protection of Persons in the Event of Disasters

Adopted by the International Law Commission at its sixty-eighth session, in 2016, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/71/10), para. 48. The report will appear in Yearbook of the International Law Commission, 2016, vol. II, Part Two.
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Protection of persons in the event of disasters

Bearing in mind Article 13, paragraph 1 (a), of the Charter of the United Nations, which provides that the General Assembly shall initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification,

Considering the frequency and severity of natural and human-made disasters and their short-term and long-term damaging impact,

Fully aware of the essential needs of persons affected by disasters, and conscious that the rights of those persons must be respected in such circumstances,

Mindful of the fundamental value of solidarity in international relations and the importance of strengthening international cooperation in respect of all phases of a disaster,

Stressing the principle of the sovereignty of States and, consequently, reaffirming the primary role of the State affected by a disaster in providing disaster relief assistance,

Article 1
Scope

The present draft articles apply to the protection of persons in the event of disasters.

Article 2
Purpose

The purpose of the present draft articles is to facilitate the adequate and effective response to disasters, and reduction of the risk of disasters, so as to meet the essential needs of the persons concerned, with full respect for their rights.

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Article 3
Use of terms

For the purposes of the present draft articles:

(a) "disaster" means a calamitous event or series of events resulting in widespread loss of life, great human suffering and distress, mass displacement, or large-scale material or environmental damage, thereby seriously disrupting the functioning of society;

(b) "affected State" means a State in whose territory, or in territory under whose jurisdiction or control, a disaster takes place;

(c) "assisting State" means a State providing assistance to an affected State with its consent;

(d) "other assisting actor" means a competent intergovernmental organization, or a relevant non-governmental organization or entity, providing assistance to an affected State with its consent;

(e) "external assistance" means relief personnel, equipment and goods, and services provided to an affected State by an assisting State or other assisting actor for disaster relief assistance;

(f) "relief personnel" means civilian or military personnel sent by an assisting State or other assisting actor for the purpose of providing disaster relief assistance;

(g) "equipment and goods" means supplies, tools, machines, specially trained animals, foodstuffs, drinking water, medical supplies, means of shelter, clothing, bedding, vehicles, telecommunications equipment, and other objects for disaster relief assistance.

Article 4
Human dignity

The inherent dignity of the human person shall be respected and protected in the event of disasters.

Article 5
Human rights

Persons affected by disasters are entitled to the respect for and protection of their human rights in accordance with international law.

Article 6
Humanitarian principles

Response to disasters shall take place in accordance with the principles of humanity, neutrality and impartiality, and on the basis of non-discrimination, while taking into account the needs of the particularly vulnerable.

Article 7
Duty to cooperate

In the application of the present draft articles, States shall, as appropriate, cooperate among themselves, with the United Nations, with the components of the Red Cross and Red Crescent Movement, and with other assisting actors.

Article 8
Forms of cooperation in the response to disasters

Cooperation in the response to disasters includes humanitarian assistance, coordination of international relief actions and communications, and making available relief personnel, equipment and goods, and scientific, medical and technical resources.

Article 9
Reduction of the risk of disasters

1. Each State shall reduce the risk of disasters by taking appropriate measures, including through legislation and regulations, to prevent, mitigate, and prepare for disasters.

2. Disaster risk reduction measures include the conduct of risk assessments, the collection and dissemination of risk and past loss information, and the installation and operation of early warning systems.

Article 10
Role of the affected State

1. The affected State has the duty to ensure the protection of persons and provision of disaster relief assistance in its territory, or in territory under its jurisdiction or control.

2. The affected State has the primary role in the direction, control, coordination and supervision of such relief assistance.

Article 11
Duty of the affected State to seek external assistance

To the extent that a disaster manifestly exceeds its national response capacity, the affected State has the duty to seek assistance from, as appropriate, other States, the United Nations, and other potential assisting actors.

Article 12
Offers of external assistance

1. In the event of disasters, States, the United Nations, and other potential assisting actors may offer assistance to the affected State.

2. When external assistance is sought by an affected State by means of a request addressed to another State, the United Nations, or other potential assisting actor, the addressee shall expeditiously give due consideration to the request and inform the affected State of its reply.

Article 13
Consent of the affected State to external assistance

1. The provision of external assistance requires the consent of the affected State.

2. Consent to external assistance shall not be withheld arbitrarily.

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3. When an offer of external assistance is made in accordance with the present draft articles, the affected State shall, whenever possible, make known its decision regarding the offer in a timely manner.

Article 14
Conditions on the provision of external assistance

The affected State may place conditions on the provision of external assistance. Such conditions shall be in accordance with the present draft articles, applicable rules of international law and the national law of the affected State. Conditions shall take into account the identified needs of the persons affected by disasters and the quality of the assistance. When formulating conditions, the affected State shall indicate the scope and type of assistance sought.

Article 15
Facilitation of external assistance

1. The affected State shall take the necessary measures, within its national law, to facilitate the prompt and effective provision of external assistance, in particular regarding:

(a) relief personnel, in fields such as privileges and immunities, visa and entry requirements, work permits, and freedom of movement; and

(b) equipment and goods, in fields such as customs requirements and tariffs, taxation, transport, and the disposal thereof.

2. The affected State shall ensure that its relevant legislation and regulations are readily accessible, to facilitate compliance with national law.

Article 16
Protection of relief personnel, equipment and goods

The affected State shall take the appropriate measures to ensure the protection of relief personnel and of equipment and goods present in its territory, or in territory under its jurisdiction or control, for the purpose of providing external assistance.

Article 17
Termination of external assistance

The affected State, the assisting State, the United Nations, or other assisting actor may terminate external assistance at any time. Any such State or actor intending to terminate shall provide appropriate notification. The affected State and, as appropriate, the assisting State, the United Nations, or other assisting actor shall consult with respect to the termination of external assistance and the modalities of termination.

Article 18
Relationship to other rules of international law

1. The present draft articles are without prejudice to other applicable rules of international law.

2. The present draft articles do not apply to the extent that the response to a disaster is governed by the rules of international humanitarian law.

Naval robots and rescue

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Abstract

The development of unmanned systems (UMS) for naval combat poses a profound challenge to existing conventions regarding the treatment of the shipwrecked and wounded in war at sea. Article 18 of the 1949 Geneva Convention II states that warring parties are required to take "all possible measures" to search for and collect seamen left in the water after each engagement. The authors of the present paper analyze the ethical basis of this convention and argue that the international community should demand that UMS intended for roles in war at sea be provided with the capacity to make some contribution to search and rescue operations.

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Introduction

Robots will play an important role in war at sea in the decades to come.[1] All around the world, navies are beginning to field unmanned aerial vehicles (UAVs), unmanned surface vehicles (USVs) and unmanned undersea vehicles (UUVs) to take on tasks that are "dull, dirty and dangerous" for human beings. In the remote future it is possible that wars between technologically advanced adversaries will be fought almost entirely using such systems. For the foreseeable future, however, wars at sea are likely to be fought by human beings and robots working alongside one another. The operational and strategic implications of this prospect are now beginning to receive significant attention.[2] The ethical and legal issues raised by the use of unmanned systems (UMS) in naval warfare have, as yet, received comparatively little attention.[3] In this article, we aim to raise

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1   Bruce Berkowitz, "Sea Power in the Robotic Age", *Issues in Science and Technology*, Vol. 30, No. 2, 2014.
2   Tim Barrett, *The Navy and the Nation: Australia's Maritime Power in the 21st Century*, Melbourne University Press, Melbourne, 2017, pp. 53–55; Bryan Clark, *The Emerging Era in Undersea Warfare*, CSBA, Washington, DC, 2015; US Department of Defense (DoD), *Unmanned Systems Integrated Roadmap: FY2013–2038*, Washington, DC, 2014 (UMS Roadmap); US Navy, *The Navy Unmanned Surface Vehicle (USV) Master Plan*, Washington, DC, 2007 (USV Master Plan).
3   Robert Sparrow and George Lucas, "When Robots Rule the Waves?", *Naval War College Review*, Vol. 69, No. 4, 2016, offers the most comprehensive discussion of the ethical issues raised by the use of UMS in war at sea of which we are aware to date. The most extensive discussion of the legal issues of which we are aware is Capt. Andrew Norris, *Legal Issues Relating to Unmanned Maritime Systems*, US Naval War College, Newport, RI, 2013. See also Brendan Gogarty and Meredith Hagger, "The Laws of Man over Vehicles Unmanned: The Legal Response to Robotic Revolution on Sea, Land and Air", *Journal of Law, Information and Science*, Vol. 19, No. 1, 2008; Andrew H. Henderson, "Murky Waters: The Legal Status of Unmanned Undersea Vehicles", *Naval Law Review*, Vol. 53, 2006; Rob McLaughlin, "Unmanned Naval Vehicles at Sea: USVs, UUVs, and the Adequacy of the Law", *Journal of Law Information and Science*, Vol. 21, No. 2, 2011. The use of *autonomous* weapon systems in war at sea would, of course, raise issues discussed in the larger debate about the ethics of the development and deployment of autonomous weapon systems. For a recent survey and further sources, see Robert Sparrow, "Robots and Respect: Assessing the Case against Autonomous Weapon Systems", *Ethics and International Affairs*, Vol. 30, No. 1, 2016.

awareness of one particular ethical and legal issue: the impact of the development and deployment of UMS on the prospects of those individuals who find themselves in the water at the end of a military engagement. Article 18 of the 1949 Geneva Convention II (GC II) emphasizes that the strong expectation of mutual aid which has evolved over generations amongst those who go to sea exists even during wartime: at the end of each engagement, belligerent parties are expected to take "all possible measures to search for and collect the shipwrecked, wounded and sick".[4] The development of UMS for naval warfare threatens to undermine this expectation, because absent a deliberate decision to provide UMS with the capacity to contribute to search and rescue operations, whenever the only assets able to respond within a life-saving timeframe are unmanned, "all possible measures" may realistically be "none". There is, therefore, a real risk that the development of UMS for war at sea may eventually all but extinguish hope of rescue for those who are lost at sea in future conflicts.

In the first section of this article, entitled "UMS and the Future of Naval Warfare", we offer a brief survey of naval UMS that are either deployed already or in the advanced stages of development in order to motivate the discussion that follows. The second section, "The Moral Foundations of the Duty of Rescue", provides an account of the moral and pragmatic foundations of the duty of rescue in war at sea, emphasizing the benefits of the social practice of rescue for all those who go to sea. The third section, "UMS and Rescue: The Ethical Challenge", describes and emphasizes the challenge that the development of UMS poses to the future of this social practice. In the fourth section, "The Case Against a Duty of Rescue for UMS", we summarize the arguments that might be made to resist the idea that UMS should be required to have a capacity to contribute to search and rescue operations. As long as we think of UMS as weapons analogous to mines, torpedoes or cruise missiles, the idea that they should be provided with the means of contributing to search and rescue operations is likely to seem implausible. However, as we argue in the fifth section of the article, "The Case for a Duty of Rescue for UMS", the more complex the operations that UMS are tasked with become, the more it seems that they should

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4   Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950), Art. 18. This expectation is both longstanding as an article of law (for example, Hague Convention (X) for the Adaptation to Maritime War of the Principles of the Geneva Convention, 1907, Art. 16(1)), and broadly cast as an obligation, as in, for instance, International Committee of the Red Cross (ICRC), *Commentary on the Second Geneva Convention: Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 2nd ed., 2017 (ICRC Commentary on GC II), para. 1619. Importantly, of course, an obligation to rescue also exists in peacetime: see International Convention for the Safety of Life at Sea, 1184 UNTS 278, 1 November 1974. See also Martin Davies, "Obligations and Implications for Ships Encountering Persons in Need of Assistance at Sea", *Pacific Rim Law and Policy Journal*, Vol. 12, No. 1, 2003; Irini Papanicolopulu, "The Duty to Rescue at Sea, in Peacetime and in War: A General Overview", *International Review of the Red Cross*, Vol. 98, No. 902, 2016; Robert D. Peltz, "Adrift at Sea – The Duty of Passing Ships to Rescue Stranded Seafarers", *Tulane Maritime Law Journal*, Vol. 38, No. 2, 2014; Matteo Tondini, "The Legality of Intercepting Boat People Under Search and Rescue and Border Control Operations with Reference to Recent Italian Interventions in the Mediterranean Sea and the Ecthr Decision in the Hirsi Case", *Journal of International Maritime Law*, Vol. 18, No. 1, 2012.

also be required to have the capacity to contribute to search and rescue operations. In the sixth section, "Designing UMS for Rescue", we therefore discuss the ways in which various classes of UMS might be provided with this capacity. We conclude that the international community should quickly move to establish an expectation that UMS will be provided with the capacity to make some contribution to search and rescue operations in order that, in the future, belligerent parties will continue to be able to meet their obligations under Article 18 of GC II.

UMS and the future of naval warfare

Unmanned systems are systems that comprise the necessary elements to control an unmanned vehicle and, according to the US Department of Defense (DoD), minimally consist of "equipment, network and personnel".[5] When referring to the maritime domain, UMS may be divided into systems that support the operations of two subcategories of unmanned maritime vehicles (UMVs) – USVs and UUVs — and include "all necessary support components, and the fully integrated sensors and payloads necessary to accomplish the required missions".[6] USVs operate "with near continuous contact with the surface of the water",[7] while UUVs are "self-propelled submersible(s) whose operation is either fully autonomous (pre-programmed or real-time adaptive mission control) or under minimal supervisory control".[8] Of course, navies are also intensely interested in the potential of UAVs for contributing to operations at sea.

The DoD acknowledges that the military demand for UMS "continues unabated" and that their application in a growing number of combat scenarios is expanding. The US Navy already deploys UMS to undertake tasks such as mine neutralization, intelligence, surveillance and reconnaissance (ISR), and special operations.[9] While we have concentrated here on the US programs with which we are most familiar, other major military powers are also rapidly moving to develop and deploy naval UMS.[10] Consequently, there are now more UMS being developed for naval warfare than we can hope to list here. However, even a brief survey of some of the most well-known and/or sophisticated systems

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5   DoD, *DoD Dictionary of Military and Associated Terms*, Washington, DC, 2017, p. 246.
6   UMS Roadmap, above note 2, p. 8.
7   USV Master Plan, above note 2, p. 7.
8   US Navy, *The Navy Unmanned Undersea Vehicle (UUV) Master Plan*, Washington, DC, 2004, p. 4. Beyond conventional hull configurations, USVs "include hydrofoils and semi-submersible (i.e., continuously snorkeling) crafts": see USV Master Plan, above note 2, p. 7.
9   UMS Roadmap, above note 2, p. 109.
10 Some information about the British, Russian and Chinese programmes is available at: www.royalnavy. mod.uk/search?q=Maritime+Autonomy+Surface+Testbed; "United Kingdom Naval Drones", *Naval Drones*, available at: www.navaldrones.com/United-Kingdom-Naval-Drones.html; "China's Naval Drones", *Naval Drones*, available at: www.navaldrones.com/China.html; "Russia's Naval Drones", *Naval Drones*, available at: www.navaldrones.com/Russian-Naval-Drones.html.

demonstrates the investment that navies around the world are making in robots for use in war at sea.

Aerial drones are in many ways the poster child for the utility of UMS, and naval forces have been quick to see their potential for war at sea. The US Navy has deployed the MQ-8B Fire Scout autonomous helicopter to Afghanistan and to the Littoral Combat Ship. A larger version of this helicopter system, the MQ-8C, has recently been developed.[11] While the storied UCAS-D/UCLASS project has now evolved into the MQ-25 Stingray, with the primary role of providing an unmanned aerial refuelling capacity, it remains possible that this system or a descendant thereof will eventually take on more ambitious roles, including ISR and perhaps even combat roles.[12]

Discussions of UUVs invariably promote their role in ISR, and the US Navy has identified persistent ISR in contested or inaccessible (denied) areas as a task uniquely suited to UUVs. In part, this is due to the expectation that UUVs achieve a clandestine capability beyond that of other naval systems and will provide greater protection to high-value assets and personnel during ISR.[13] UUVs such as the Sea Stalker and Sea Maverick operate at depths of up to 1,000 feet and are specifically designed for ISR missions and target acquisition, while the former is also capable of carrying weapons.[14] UUV programmes such as those of the Mk 18 Mod 2 Kingfish and Mk 18 Mod 1 Swordfish complement the ISR capabilities of these and similar UUVs. The mission capabilities of the Kingfish are stated to include surface warfare/anti-surface warfare and mine warfare/ organic mine countermeasures, while the capabilities of the Swordfish include mine warfare/organic mine countermeasures and, in addition, explosive ordinance disposal.[15]

As the technology matures it is anticipated that naval UMS will fulfil more complex roles such as harbour security and ocean tracking,[16] and the US DoD's ambitious programme of research and deployment of UMVs extends to weaponized operations.[17] Increasingly, the roles envisioned for naval robots include combat operations. For example, the US Navy's USV Master Plan[18] identified high-priority missions for USVs that include support for maritime

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11 See "Fire Scout", *Northrop Grumman*, available at: https://tinyurl.com/y9zkjojz.
12 Sam LaGrone, "Pentagon to Navy: Convert Uclass Program into Unmanned Aerial Tanker, Accelerate F-35 Development, Buy More Super Hornets", *USNI News*, 1 February 2016, available at: https:// tinyurl.com/hwk9gtx; Kris Osborn, "Navy Awards MQ-25 Stingray Tanker Deal", *Defense Systems*, 24 October 2016, available at: https://defensesystems.com/articles/2016/10/24/stingray.aspx.
13 UUV Master Plan, above note 8, p. 9.
14 "Sea Stalker UUV", *Naval Drones*, available at: www.navaldrones.com/Sea-Stalker-UUV.html; "Sea Maverick UUV", *Naval Drones*, available at: www.navaldrones.com/Sea-Maverick.html. The Sea Stalker and Sea Maverick programmes were respectively initiated in 2008 and 2009, with both undergoing final demonstration in 2010: see US Defense Science Board (DSB), *The Role of Autonomy in DoD Systems*, Office of the Under Secretary of Defense for Acquisition, Technology and Logistics, Washington, DC, 2012, p. 89.
15 DSB, above note 14, p. 88.
16 For a detailed outline of current and future operations, see UMS Roadmap, above note 2, pp. 109, 88.
17 See DSB, above note 14, pp. 85–86.
18 USV Master Plan, above note 2, pp. 11, 38.

interdiction operations, antisubmarine warfare (ASW), and surface warfare, with USVs anticipated to utilize lethal and non-lethal weapons. The equivalent UUV Master Plan[19] identified amongst the high-priority missions ISR, but also ASW, payload delivery and time-critical strikes.[20] Perhaps most ambitious is the development of a large-displacement UUV capable of open ocean transit and operating without direct human supervision for over seventy days.[21] The DoD intends this UUV to have ASW capabilities,[22] and Clark suggests that the large-displacement UUV will be able to carry and deploy large quantities of common very lightweight torpedo.[23] In the USV domain, the ASW continuous trail unmanned vehicle, or Sea Hunter, is a large USV that is currently undergoing testing in open waters. The 132-foot trimaran USV has successfully hosted an ISR payload and is intended to operate in the open seas for over a month at a time, with the capacity to cover thousands of kilometres.[24]

The system that arguably has the most potential today to contribute to combat operations is the Protector USV. The Protector has a rigid inflatable hull structure and is reconfigurable so as to enable flexibility in mission performance. The range of missions includes ISR, ASW, naval warfare and anti-surface warfare, and the fifth generation (11-metre) variant launched in 2012 includes a "Mini-Typhoon" weapon station. The weapon station supports small-calibre guns such as the Browning .50-calibre machine gun and a 40-mm grenade launcher and can accommodate Spike missiles, with the latter successfully launched in a recent munitions demonstration by Rafael Advanced Defense Systems.[25] It is reported that the Spike missile unit (Typhoon MLS-ER) mounted on the Protector supports Spike ER missiles, which have operating modes that enable missile steering post-launch or "fire and forget".[26] The subsystems on the

19 UUV Master Plan, above note 8, pp. 7–15.
20 The US DSB has reiterated the centrality of combat missions to the research and deployment of UMVs: see DSB, above note 14, p. 17.
21 See *ibid.*, p. 86.
22 See Richard Scott, "ONR to Swim Ahead on ASW Package for Large UUV", *IHS Jane's Navy International*, 20 November 2014.
23 B. Clark, above note 2, p. 13.
24 The Sea Hunter is now considered a medium-displacement USV, a characterization that reveals the US Navy's interest in extending its surface combatant capabilities. See Richard Scott, "Surface Navy 2017: Sea Hunter Trials to Inform Unmanned Debate for Next Surface Combatant", *IHS Jane's Navy International*, 11 January 2017; Geoff Fein, "Sea Hunter Begins Operational Testing, Readies for 2017 Colregs Certification", *Jane's International Defence Review*, 5 December 2016; Richard Scott, "Talons Raised Aloft in USN Testing", *IHS Jane's Navy International*, 17 November 2016.
25 "Protector USV", *Naval Drones*, available at: www.navaldrones.com/protector.html; "Protector Unmanned Surface Vehicle (USV), Israel", *Naval Technology*, available at: www.naval-technology.com/projects/protector-unmanned-surface-vehicle/.
26 Huw Williams, "Rafael Launches Spike Missiles from Protector USV", *Jane's International Defence Review*, 8 March 2017.

Protector, such as the electro-optical director, enable day and night target tracking and boast a high probability of "target hit and kill".[27]

For the moment most of these systems are tele-operated rather than autonomous, but it is clear that, as relevant technologies improve, UMS will be granted more and more autonomy.[28] The communication infrastructure required to control UMS remotely is a weak point of these systems and is an obvious target for attack by a technologically sophisticated adversary. This is especially the case with submersibles. The difficulties of transmitting large amounts of data over distances underwater render it impossible to remotely control submersibles in real time. Indeed, the moment a submersible emits any sort of signal in order to transmit data to a human controller, it renders itself liable to detection and destruction by the enemy.[29] As other nations begin to deploy autonomous systems, it is not inconceivable that the operational tempo will increase so that eventually it is only autonomous systems that are capable of making an effective contribution to some forms of combat at sea.[30]

Should war at sea ever come to be fought entirely by UMS, the need for combatants to conduct search and rescue operations might be greatly reduced. Even then, though, it seems likely that military transports will continue to carry troops across the oceans. It is also possible that civilian vessels with crew and/or passengers on board might be sunk deliberately, if subject to attack as a result of their conduct (for example, as auxiliaries under San Remo Manual Rule 13(h), or as neutral merchant vessels which have lost their exemption from attack in accordance with San Remo Manual Rule 67), or accidentally, or even as acceptable collateral damage during the targeting of a high-value military objective.[31] Moreover, given the uneven rate at which technologies are introduced around the world, there will be an extended period wherein wars are fought using both manned and unmanned systems. As long as people continue to brave the seas during wartime, some individuals will inevitably end up in need of rescue. The question of what UMS will be capable of doing in this circumstance is therefore likely to remain a vital one for several decades at least.

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27 "Protector Unmanned Surface Vehicle (USV), Israel", above note 25.
28 Peter Warren Singer, *Wired for War: The Robotics Revolution and Conflict in the 21st Century*, Penguin, New York, 2009, pp. 126–128; R. Sparrow, "Robots and Respect", above note 3.
29 There are intimations in the literature that recent technological breakthroughs have significantly increased the capacity of submersibles to communicate with other vessels and shore installations without revealing their location (see, for instance, B. Clark, above note 2, p. 14). In particular, short-burst transmissions from deployed devices, timed to transmit after the submarine has left the area, are within the current inventory. Nevertheless, we think it is unlikely that any such technology will allow continuous tele-operation of a UUV under combat conditions without jeopardizing the safety of the UUV.
30 Thomas K Adams, "Future Warfare and the Decline of Human Decision Making", *Parameters*, Vol. 31, No. 4, 2001; R. Sparrow, "Robots and Respect", above note 3.
31 Louise Doswald-Beck (ed.), *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, Cambridge University Press, Cambridge and New York, 1995. It is possible that eventually, once the technology becomes available, most commercial shipping will also be unmanned, in which case it is only the presence of troop transports or commercial passenger vessels that would establish a risk of persons being left shipwrecked, wounded or sick.

The moral foundations of the duty of rescue

The ethical tradition of just war theory and the modern law of armed conflict, also known as international humanitarian law (IHL), abjure both pacifism and "total war" in order to try to civilize what seems to be an inescapable human evil: war.[32] Roughly speaking, these ethical and legal (respectively) traditions try to balance the demands of military necessity with the moral obligation of respect for humanity.[33] One – not the only – way of attempting to realize this balance is to give each of these demands its due in succession. War typically has a rhythm and a tempo, which consists of periods of combat interrupted by periods of relative quiet. While some of the moral and legal obligations on combatants – for instance, not to make civilians the object of attack[34] – are most demanding during combat, others may be relaxed for the period during which combatants are actually fighting, only to return with more force after combat has ended. An important example of an obligation of the latter sort is the legal obligation to assist the wounded and inter the dead, which, although it must be met on a continuous basis ashore, is only required between engagements at sea. This obligation is outlined in Geneva Convention I (Article 15) and Geneva Convention IV (Article 16)[35] but receives an especially clear expression in GC II, owing to the fact that (as will be discussed further below) because the sea itself is a threat to all those who go to sea, a failure to care for the sick, wounded and shipwrecked is especially egregious in this context.[36] Article 18 of GC II states:

> After each engagement, Parties to the conflict shall, without delay, take all possible measures to search for and collect the shipwrecked, wounded and sick, to protect them against pillage and ill-treatment, to ensure their adequate care, and to search for the dead and prevent their being despoiled.

As the International Committee of the Red Cross (ICRC) Commentary on GC II notes, "The obligation to 'take all possible measures' applies, as a

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32   Just war theory is a tradition of moral, political and philosophical argument regarding the ethics of war, which has strongly influenced the development of IHL. Classically, just war theory is concerned both with the question of when States are justified in resorting to war (*jus ad bellum*) and with the question of how wars may permissibly be fought (*jus in bello*). The most influential contemporary source on just war theory is Michael Walzer's *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, published by Basic Books and now in its fifth edition (2015). For an account of the history of this tradition, see James T. Johnson, *Ideology, Reason and Limitation of War: Religious and Secular Concepts, 1200–1740*, Princeton University Press, Princeton, NJ, 1981.

33   Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight, 1868; Geoffrey S Corn *et al.*, *The Law of Armed Conflict: An Operational Approach*, Wolters Kluwer Law and Business, New York, 2012.

34   Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978) (AP I), Art. 48.

35   Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) (GC I); Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950).

36   I. Papanicolopulu, above note 4.

matter of international humanitarian law, to the 'Parties to the conflict' as a whole."[37]

A proper understanding of the strength and ethical grounds of this obligation is essential in order to comprehend just what is at stake when it is threatened by the introduction of UMS. There are at least four separate considerations which support establishing an expectation on belligerent parties that they will conduct search and rescue operations at the end of each engagement.

First, because the oceans are an unpredictable and dangerous environment (and are doubly so during wartime), anyone may find themselves in the water, desperately hoping to be rescued. The hostile nature of the marine environment means that even individuals in good health who are left behind when the warring forces move on face almost certain death by drowning or exposure. When one needs to be rescued, the benefits of the existence of the social practice of rescue are enormous. By contrast, the costs of affirming the obligation in ordinary circumstances will generally be low. Most vessels will only be called upon to conduct search and rescue operations infrequently. In wartime, once an enemy vessel has been sunk or disabled, the deaths of those on board will make little further contribution to securing military victory, especially compared to the alternative of their being taken prisoners of war.[38] As the benefits of maintaining the expectation that the warring parties will conduct search and rescue operations as required are large and the costs small (most of those who affirm their willingness to conduct such operations will never be called on to do so), it is in the interests of every person who goes to sea – and especially of those who go to sea in wartime – that this expectation exist.

Second, the practice of conducting search and rescue operations serves the vital interests of the families and loved ones of those lost at sea. Not knowing whether one's son or daughter, or husband or wife, is dead or alive – or knowing that they are dead, but being unable to conduct a proper funeral service for them in the absence of their mortal remains – can be devastating.[39] Of the considerations we treat here, this one provides the strongest support for the obligation to recover and prevent the despoiling of the bodies of those killed in the course of war at sea.

Third, as well as directly serving the interests of those lost at sea and those who care about them, acknowledging a duty of rescue also provides members of both these groups with hope where otherwise they would have none. Independently of whether or not those who are lost at sea are actually rescued, leaving vulnerable people without hope of rescue – abandoning them – would be a further and distinct evil. Similarly, leaving the relatives of those lost at sea

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37 ICRC Commentary on GC II, above note 4, para. 1619.
38 It is true that there are sometimes significant inconveniences associated with the transport and care of prisoners of war. Nevertheless, these are clearly outweighed by the benefits of the practice to those who would otherwise be left to drown.
39 Pauline Boss, "Families of the Missing: Psychosocial Effects and Therapeutic Approaches", *International Review of the Red Cross*, Vol. 99, No. 905, 2017.

without hope that they will learn the fate of their loved ones adds cruelty to misfortune.

Finally, and relatedly, affirming a duty of rescue acknowledges an important truth about war and affirms the humanity of our enemies. Combatants are enemies by virtue of being combatants, and not as individuals; as Rousseau notes, it is States that have reasons to wage war and that go to war.[40] Until their nations go to war, individual combatants typically have no reason to try to kill enemy nationals, nor would they be justified in doing so.[41] When an enemy is rendered *hors de combat* by virtue of being sick, wounded or shipwrecked, they cease to be a combatant and become instead, ethically – if not legally – speaking, just another human being in need.[42] In acknowledging this fact, the social practice of conducting search and rescue operations between engagements plays an important role in civilizing war more generally.

Two features of this formulation of the moral obligation on combatants are widely held to be crucial to its implications in practice. First, while the exhortation to act "without delay" emphasizes the urgency of the task, as observed above the obligation to rescue shipwrecked seamen applies only "after each engagement", which is to say after the particular local action has paused or concluded such as to allow search and rescue activity.[43] In particular, unless a truce has been agreed, participants are not expected to rescue those left stranded in the water immediately after an enemy ship is sunk, if there remain nearby other enemy ships or other forces (such as aircraft) capable of engaging in combat. Second, while the formulation "all possible measures" sets the bar high, our account of what is possible will itself have to be subject to an implicit test of its reasonableness. As the ICRC Commentary on GC II puts it:

> The scope of what a Party to the conflict is actually required to do on the basis of Article 18(1) will depend on the interpretation of the qualifier "possible". What will be possible in the circumstances is inherently context-specific. Thus, the measures that must be taken in each case have to be determined in good faith, based on the circumstances and the information reasonably available to

40   Jean-Jacques Rousseau, *The Social Contract*, trans. Maurice Cranston, Penguin, London, 2003, p. 56. The phenomena of civil wars and counter-insurgencies problematizes Rousseau's claim, but even in cases of non-international armed conflicts the actors must be collective and "State-like" in order to justify the description of a conflict as "war" rather than as another less organized form of political violence, such as civil unrest or banditry.

41   Robert Sparrow, "'Hands up Who Wants to Die?': Primoratz on Responsibility and Civilian Immunity in Wartime", *Ethical Theory and Moral Practice*, Vol. 8, No. 3, 2005.

42   The legal status of (former) combatants who have become non-combatants by virtue of being *hors de combat* is more complicated given that, for instance, they may be taken as prisoners of war where civilian non-combatants may not. Legally speaking, therefore, although it is prohibited to attack them, such persons remain "enemy" nationals. See, *inter alia*, Article 3 common to the four Geneva Conventions; GC I, Art. 12; GC II, Art. 12; AP I, Arts 10, 41(2); Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609, 8 June 1977 (entered into force 7 December 1978), Arts 4, 7.

43   GC II, Art. 18.

both the commanders on the spot or nearby and to the other organs acting on behalf of the Party to the conflict.[44]

Some actions that might be theoretically possible will not be expected of combatants where, for instance, carrying them out would represent an unacceptable and disproportionate risk to their own lives, as well as to the capability their vessel represents. Indeed, the law is explicit on this in both peacetime and wartime contexts, and there are a number of well-known and well-litigated examples, such as the Laconia Order, where these limits have been discussed at length.[45] Both of these limits on the obligation acknowledge that the rights of combatants (and non-combatants) to self-preservation and the demands of military necessity must be weighed alongside our concern for the lives of those who are sick, wounded or shipwrecked.

UMS and rescue: The ethical challenge

The development and advent of UMS arguably poses a profound challenge to existing conventions regarding the treatment of the shipwrecked and wounded in war at sea. As observed above, the belligerent parties are required to take "all possible measures" to search for and collect the sick, wounded and shipwrecked at sea after each engagement. However, unless UMS are consciously and deliberately provided with the capacity to conduct such search and rescue operations, they are unlikely to have any capacity to do so. If no measures are possible given the resources available, then warring parties will *in practice* have no obligation to conduct search and rescue operations at the end of each military engagement.[46] As a consequence, those left in the water after an attack by an unmanned system may be denied any hope of rescue, when previously they would at least have had some cause for hope of rescue after an attack by a manned vessel. In effect, UMS may reduce the risk to the lives and capability of friendly combatants at the cost of increasing the risks to adversary and neutral

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44 ICRC Commentary on GC II, above note 4, para. 1636.
45 The Laconia Order was issued by Grand Admiral Karl Dönitz of the German Navy in 1942, subsequent to an Allied attack on a German U-boat involved in rescuing the survivors of a German attack on the Royal Mail steamer *Laconia*. The order instructed the commanders of the U-boat fleet to cease conducting rescue operations. Dönitz's having issued the Laconia Order was one of the matters at stake in Dönitz's trial for war crimes at Nuremberg. See *Nuremberg Trial Proceedings*, Vol. 13, 125th Day, 9 May 1946, available at: http://avalon.law.yale.edu/imt/05-09-46.asp; G. Harry Bennett, "The 1942 Laconia Order, the Murder of Shipwrecked Survivors and the Allied Pursuit of Justice 1945–46," *Law, Crime and History*, Vol. 1, No. 1, 2011; Maurer Maurer and Lawrence J. Paszek, "Origin of the Laconia Order", *Royal United Services Institution Journal*, Vol. 109, No. 636, 1964; William J Fenrick, "The Exclusion Zone Device in the Law of Naval Warfare", *Canadian Yearbook of International Law*, Vol. 24, 1986, p. 103. See also note 53 below.
46 Alternative formulations would be to insist either that the belligerent parties still have an obligation but would have no way of fulfilling it or that they would have an excuse for not fulfilling their obligations. Either way, though, they would in practice have no obligation to perform any particular action that might benefit those in need of rescue in such a case.

sick, wounded and shipwrecked persons.[47] Not only would this make war at sea more dangerous for all people physically in the battlespace, but it would also undermine a social practice which, as argued above, plays an important role in civilizing war and underpinning respect for IHL more generally. Such an outcome from the adoption of UMS would be doubly unfortunate given that an influential argument in favour of developing UMS – especially autonomous versions thereof – rests on the claim that their introduction will reduce the risks to non-combatants and save non-combatant lives.[48]

Things would be different if UMS did have the capacity to conduct search and rescue operations. In this case, "all possible measures" would include the use of UMS, and warring parties would be obligated to use UMS to try to save the lives of those left adrift in the waters, or otherwise imperilled, at the end of each engagement.

The question at hand, then, is how we should conceptualize the legal and ethical obligations of parties regarding search and rescue operations in the new circumstances established by the development of UMS. Should we expect the designers and manufacturers of these systems to, wherever possible, provide them with the capacity to conduct, or at least facilitate, search and rescue operations? This moral question is an urgent one because choices made in the design of the first few systems will play an important role in shaping future expectations.

Unless the international community acts quickly to establish such an expectation, designers are likely to design systems that will eventually extinguish any hope of rescue for those imperilled at sea in wartime. Critics have often worried that the development of UMS distances those launching or operating these systems from the consequences of their actions. Typically their concern is that the geographic and (perhaps) emotional distance from the target provided by these systems will make it easier for people to kill and therefore more likely to do so.[49] A version of this concern may also arise regarding the duty of rescue: one might worry that people controlling tele-operated systems will be less motivated to save the lives of individuals drowning hundreds of kilometres away than they would be if those individuals were actually nearby. However, the relevant issue here is the distance between the *designers* of the systems and the circumstances of

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47 Paul W. Kahn, "The Paradox of Riskless Warfare", *Philosophy & Public Policy Quarterly*, Vol. 22, No. 3, 2002, has argued that, alongside other systems involved in high-tech warfare, UMS systematically transfer risks from combatants to non-combatants in ways that threaten traditional justifications for the use of force. To our knowledge, however, we are the first to notice this particular way in which such a shift might occur.

48 Ronald C. Arkin, "Lethal Autonomous Systems and the Plight of the Non-Combatant", *AISB Quarterly*, No. 137, 2013.

49 Bryan Bender, "Attacking Iraq, from a Nev. Computer", *Boston Globe*, 3 April 2005; P. W. Singer, above note 28, pp. 330–333; David L. Ulin, "When Robots Do the Killing", *Los Angeles Times*, 30 January 2005. For critical evaluation of this claim, see Robert Sparrow, "Robotic Weapons and the Future of War", in Jessica Wolfendale and Paolo Tripodi (eds), *New Wars and New Soldiers: Military Ethics in the Contemporary World*, Ashgate, Surrey and Burlington, VA, 2011. For a discussion of the implications of the geographical distance between the operators and the actions of remotely controlled systems for the extent to which the operators can cultivate the martial virtues, see Robert Sparrow, "War without Virtue?", in Bradley Jay Strawser (ed.), *Killing by Remote Control*, Oxford University Press, Oxford, 2013.

their use.[50] Engineers who design UMS have little reason to fear that one day they might find themselves adrift in the water praying that someone will rescue them. Consequently, unlike those who actually go to sea, they have little personal reason to concern themselves with the future of the conventions regarding search and rescue. By distancing those who have the power to initiate or withhold search and rescue operations from those who may need them, the development of UMS for war at sea poses a unique challenge to the future of the conventions regarding the conduct of search and rescue operations in wartime.

The case against a duty of rescue for UMS

Arguments *against* an obligation to provide UMS with the capacity to conduct rescue operations may take two forms. First, it may be denied that there is any ethical – let alone legal – obligation at all on the designers of UMS to provide them with the capacity to conduct search and rescue operations. Second, it may be argued that while an ethical obligation to do this does exist, it is outweighed by other morally relevant considerations.

There are, in turn, two ways to make the first argument. One way to do so is by drawing attention to the use, design and historical development of other weapons. Many of the UMS currently on the drawing board are plausibly thought of as "smart" mines or torpedoes, or as light aircraft. Naval mines and torpedoes have a long history of military use despite having no capacity to conduct search and rescue operations. Nor has there been much, if any, pressure on the designers of these weapons and/or the systems that support them to provide them with such.[51] Similarly, cruise missiles have no capacity to conduct search and rescue operations, and there has been – to our knowledge – no complaint about this fact. Many of the strike aircraft used in war at sea also have very

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50 Engineers and weapon designers have almost always been a long way from the front lines, of course. What is distinctive about UMS is that the design and programming of these weapons encompasses more and more aspects of their use. Indeed, the logical end point of the development of UMS is the creation of systems that only need to be launched before proceeding to conduct combat operations entirely autonomously. In this case, the designers of these systems would become responsible for *all* of the decisions previously made by the combatants who formally carried out this combat role. For a discussion of the ethical issues that arise in the course of the design of UMS more generally, see Robert Sparrow, "Building a Better Warbot: Ethical Issues in the Design of Unmanned Systems for Military Applications", *Science and Engineering Ethics*, Vol. 15, No. 2, 2009.

51 Distinguishing between weapons, weapon systems and agents remains a significant challenge in terms of both law and ethics when assessing compliance with obligations. See Robert Sparrow, "Twenty Seconds to Comply: Autonomous Weapon Systems and the Recognition of Surrender", *International Law Studies*, Vol. 91, 2015. Regrettably, compliance with the ongoing obligation upon States to conduct weapons reviews on all new means and methods of warfare (AP I, Art. 36) is far from universal. See, generally, ICRC, "A Guide to the Legal Review of New Weapons, Means and Methods of Warfare: Measures to Implement Article 36 of Additional Protocol I of 1977", *International Review of the Red Cross*, Vol. 88, No. 864, 2006.

limited capacity to affect search and rescue operations, and this is not seen as a moral failing on the part of their designers.[52]

Another way to deny that there is any ethical or legal obligation on the designers of UMS to provide them with the capacity to conduct search and rescue operations is to insist that the suggestion that there *is* such an obligation misidentifies UMS as *participants* in warfare, when in fact they are only tools used by the real participants – human beings. Belligerent parties have a legal obligation to conduct search and rescue operations after each naval engagement, but they have no legal or ethical obligation to use weapons that can themselves conduct such operations. Consequently, there is no legal or ethical obligation on designers to provide weapon systems with the capacity to conduct such operations. This second line of argument is itself strengthened by the first, which already implicitly highlights the nature of UMS as weapon systems – indeed, in many cases, as weapons – by analogy with other weapons.

Even if there is some ethical obligation on the designers of UMS to provide these systems with the capacity to conduct search and rescue operations, this obligation could be outweighed by other morally relevant considerations. As noted above, the legal – and, arguably, ethical – obligation on human combatants is limited by their right to self-preservation and the need to preserve the military capability that they represent, and a similar argument might be made on behalf of UMS. In some cases, conducting rescue will place the unmanned system itself in jeopardy, if not immediately, then in future engagements – for instance, by making it easier for the enemy to locate and track it. This is particularly relevant to submersibles, the military utility of which is to a large extent a product of their capacity to operate undetected by enemy forces.[53] More controversially, it might be argued that the cost to the effectiveness of UMS as weapon systems involved in providing them with the capacity to conduct search and rescue operations is too high, given that UMS without such capacity will typically be faster, lighter,

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52 Strike aircraft do typically possess the capacity to notify nearby surface vessels of the existence of survivors in the water after an engagement, and are morally obligated to do so when they do possess this capacity.

53 Historically, the conventions and protocols regulating maritime conflict, particularly relating to rescue, centre on the conduct of surface ships, posing distinct problems for submarines. First, as the military utility and strategic advantage of submersibles depends on their status as "stealth vehicles", detection uniquely threatens their military capability and makes them highly vulnerable to enemy attack. Consequently, regulations that oblige participation in surface operations distinctively jeopardize submersible vehicles. Second, submarines have few crew and limited space and resources, all of which restricts their ability to perform rescue. Accordingly, it has been unclear historically what is required of these vehicles in providing for the safety of non-combatants. See Jeffrey Legro, *Cooperation under Fire: Anglo-German Restraint During World War II*, Cornell University Press, Ithaca, NY, 1995, pp. 35–40. During the Nuremberg Trials, Germany argued that as the "security of the submarine is, as the first rule of the sea, paramount to rescue", and because of the "unusual additional danger" that rescue presented to submarines, there was cause for an exception to the rescue duty of submersible vehicles. Further, they argued that for the reasons we have mentioned here (space, crew, stealth), the submarine was "subject to special considerations" as rescue "prejudices the military mission". Subsequently, while it was accepted that on 17 September 1942 Grand Admiral Dönitz of the German Navy had forbidden all rescue efforts by submarines, the sentencing of Dönitz for war crimes "was not assessed on the ground of his breaches of the international law of submarine warfare". *See Nuremberg Trial Proceedings*, Vol. 18, 179th Day Tuesday, 16 July 1946, available at: http://avalon.law.yale.edu/imt/07-16-46.asp; *Judgement: Doenitz*, available at: http://avalon.law.yale.edu/imt/juddoeni.asp.

cheaper and more reliable. An argument can be made that any such sacrifice of combat effectiveness is morally relevant insofar as better weapons enable warfighters to preserve their own lives and the military capability they represent. This argument is, however, properly controversial because, by its very nature, just war theory places moral limits on the activities of warring States and combatants, and these limits sometimes require them to resile from policies or actions that they would otherwise be inclined to adopt in the pursuit of military victory.

The case for a duty of rescue for UMS

The case *for* an obligation on designers to provide UMS with the capacity to conduct search and rescue operations begins by emphasizing the strength and importance of the existing duty of rescue. The moral case for a duty of rescue has been made at length above, so we shall simply assume it here.

It is possible to argue directly for the existence of such an obligation on designers of UMS by interpreting the claim that parties are obligated to take "all possible measures" expansively, and insisting that this injunction itself requires them to, wherever possible, use weapon systems that facilitate the location and rescue of shipwrecked personnel, as well as to design this capacity into these systems themselves. One problem with this line of argument, however, has already been pointed out: the history of the development and use of torpedoes and naval mines in war at sea provides little evidence for the existence of such an obligation.[54]

Clearly, the fact that a weapon doesn't possess the capacity to conduct search and rescue operations does not rule out its use being ethical. Nevertheless, there are two important ways in which (some) UMS differ from such weapons systems. First, by their nature, torpedoes and mines are destroyed when they attack a target. This may also be true of some UMS, but many of the systems being developed are themselves armed with weapons with which they can attack targets, and will remain in the area after the attack has been carried out. It would

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54 It might be argued that because mines tended to be deployed near coasts and at choke points, and thus were never far from observation, manned systems have always been available to conduct rescue operations for those whose vessels were sunk by mines – with the consequence that the question of the ethics of the use of naval mines in relation to the duty of rescue did not arise. Similarly, torpedoes have a limited life when launched. The fact that free-floating mines are required by IHL to render themselves (or be rendered) inert after one hour and that torpedoes are expected to become inert at the end of their run might further be adduced in support of this claim. See Hague Convention (VIII) Relative to the Laying of Automatic Submarine Contact Mines, 18 October 1907, Art. 1. However, we believe the legal expectations when it comes to the use of free-floating mines and torpedoes are better explained as arising from a concern for distinction, and that the empirical claim about the availability of manned systems is disputable. See, generally, Howard S. Levie, "Submarine Warfare: With Emphasis on the 1936 London Protocol", *International Law Studies*, Vol. 65, 1993; Dale Stephens and Mark Fitzpatrick, "Legal Aspects of Contemporary Naval Mine Warfare", *Loyola of Los Angeles International and Comparative Law Journal*, Vol. 21, No. 4, 1999; David Letts, "Naval Mines: Legal Considerations in Armed Conflict and Peacetime", *International Review of the Red Cross*, Vol. 98, No. 902, 2016; US Navy, *US Navy Commander's Handbook on the Law of Naval Operations*, NWP 1-14M, 2017, section 9.2.

therefore not be impossible for this latter class of systems to be required to have some capacity to conduct – or at least facilitate – search and rescue operations. Second, until very recently it wasn't possible for anything other than a vessel (or aircraft) under the command of a human being on board to conduct search and rescue operations. It is hardly surprising, then, that the question of whether previous weapons and/or weapons systems should be provided with this capacity did not arise. Yet the current military enthusiasm for UMS has arisen precisely because these systems are now capable of carrying out relatively complex operations. An issue therefore arises regarding our expectations of these systems where it does not for previous generations of systems. Moreover, the question is *not* whether it would be ethical to deploy an unmanned system without the capacity to conduct search and rescue operations once such a system exists, but rather whether there is an obligation on designers to provide the systems they design with the capacity to conduct search and rescue operations, or, at the least, to enable UMS to provide a link in the chain enabling other assets – such as aircraft – to respond. The argument that this obligation flows directly from parties' ethical and legal obligations under GC II therefore has, we believe, some force, at least in relation to the design of systems that are persistent and over a certain tonnage.[55]

We imagine that some readers will balk at the idea that an ethical – let alone a legal – obligation can be derived from existing IHL. Another way of approaching the matter, then, is to observe that all of the arguments supporting the existing ethical *and* legal obligation also support the claim that it would be beneficial if UUVs and USVs were provided with the capacity to conduct search and rescue operations. That is to say, an obligation to design future UMS so as to be able to conduct search and rescue operations might instead be thought of as a new obligation arising as a result of the rapid increase in the capacities of UMS and supported by the same considerations as support the historical obligation.

Moreover, the arguments *against* providing systems with the capacity to rescue may all be contested. Whether the principles of just war theory – or of morality more generally – could ever be understood as applying "to", or making demands of, UMS themselves, or only of the human beings who design and deploy them, is the topic of ongoing controversy in the larger debate about the ethical issues raised by the development of military robotics. Some authors have held that robots may, at some stage in the future, become sufficiently

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55 UMS that destroy themselves in the course of an attack *cannot* make any contribution to search and rescue operations. Where systems are operated remotely by personnel on board manned vessels nearby, it is less important that the unmanned system is able to contribute to search and rescue operations because presumably the manned vessel would have the capacity to do so. However, where UMS are capable of extended operations and travelling long distances, it increases the chance that they might be the only vessel in the vicinity of people in need of rescue, which in turn increases the force of the case that they should be provided with the capacity to contribute to search and rescue operations. Similarly, larger vessels have more of a capacity to carry life rafts and/or take seamen aboard, so it would be especially egregious if they were not provided with such functionality. For further discussion of the extent to which it is reasonable to expect that different sizes and sorts of UMS should be provided with the capacity to contribute to search and rescue operations, see the section "Designing UMS for Rescue", below.

autonomous as to create a "responsibility gap", such that it becomes difficult to hold any human being responsible for the consequences of the actions of the machine.[56] Some authors have even argued that at this point our best option would be to hold the machine itself responsible for what it does.[57] At this point it would presumably also make sense to blame the machine if it failed to meet its obligations under just war theory, including the obligation to conduct search and rescue operations.

Another line of argument which might support the claim that at least some UMS should be held to be under an ethical obligation to conduct search and rescue operations draws on the idea that, in the context of war at sea, the legal obligations on the belligerent parties devolve, in the form of ethical obligations, to vessels in the immediate area of operations rather than individuals.[58] It is extremely difficult for individuals to ply the oceans by themselves, and even more so for them to make an effective contribution to a military effort conducted in this domain. The vast majority of those who go to sea do so alongside others, as crew or passengers of boats, ships or submarines. Once on board a vessel, though, individuals have very little opportunity to act without the cooperation of the other people on board. For this reason, it makes little sense to hold each and every combatant individually to be under a duty (for instance) to conduct search and rescue operations. Instead, the burdens of this obligation fall on vessels and their captains. "Vessels" (and aircraft) are, for the most part, the actors in naval conflict and thus the appropriate subject for the immediate practical obligations deriving from the legal obligations of the belligerent parties under Article 18 of GC II. As the updated 2017 ICRC Commentary on GCII states:

> If a ship is close to the place where the obligations of Article 18 are to be implemented, and depending on such factors as the temperature of the water, it may be the only entity in a position to save those in need, notably shipwrecked persons.[59]

There are independent reasons why some scholars have wished to categorize at least some USVs and UUVs as vessels.[60] For example, classing systems as vessels (thus

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56 Andreas Matthias, "The Responsibility Gap: Ascribing Responsibility for the Actions of Learning Automata", *Ethics and Information Technology*, Vol. 6, No. 3, 2004; Heather M Roff, "Killing in War: Responsibility, Liability, and Lethal Autonomous Robots", in Fritz Allhoff, Nicholas G Evans and Adam Henschke (eds), *Routledge Handbook of Ethics and War: Just War Theory in the 21st Century*, Routledge, Milton Park, 2013; Robert Sparrow, "Killer Robots", *Journal of Applied Philosophy*, Vol. 24, No. 1, 2007.

57 Thomas Hellström, "On the Moral Responsibility of Military Robots", *Ethics and Information Technology*, Vol. 15, No. 2, 2013.

58 R. Sparrow and G. Lucas, above note 3. See also the discussion in I. Papanicolopulu, above note 4, pp. 495–497, 504, on the references in the 1989 International Convention on Salvage and the 1910 Salvage Convention to the duties of the masters of vessels, which, Papanicolopulu argues, persist in wartime.

59 ICRC Commentary on GC II, above note 4, para. 1630.

60 B. Gogarty and M. Hagger, above note 3, pp. 114–116; A. H. Henderson, above note 3, p. 66; R. McLaughlin, above note 3, p. 112; A. Norris, above note 3; Wolff Heintschel von Heinegg, "Submarine Operations and International Law", in Ola Engdahl and Pål Wrange (eds), *Law at War: The Law as It Was and the Law as It Should Be*, Koninklijke Brill, Leiden, 2008, p. 146.

requiring that they have a nationality[61]) provides them with an organic sovereign status – unconnected to a parent "unit" – in terms of sovereign immunity. This is important in that this status carries with it an expectation and obligation, in peacetime, of non-interference in almost all situations, but also an expectation of direct sovereign accountability (in that such vessels are assumed to be engaged solely in the bidding of their sovereign) which is greater than that linked to a non-sovereign immune vessel of the same nationality.[62] If such UMS are vessels, then, they have the same obligations to conduct search and rescue operations as other vessels. Those who design them are in turn under an obligation to provide them with the capacity to do so, or at the minimum, with the capacity to contribute to such operations.

However, one does not need to treat UMS as "autonomous" in some strong sense to believe that there might be an obligation on the designers of such systems to provide them with the capacity to conduct search and rescue operations. One can insist that even if, in the future, battles were to come to be fought entirely between robots, the real combatants would remain the human beings who ordered the robots into combat, and still hold that the designers of military robots for use in naval combat should ensure that these robots have some capacity to facilitate search and rescue operations. By emphasizing the moral responsibility of the human user, this argument essentially treats autonomous systems as though they were tele-operated systems. The reason for providing both sorts of systems with the capacity to facilitate search and rescue operations is simply to allow human combatants to meet *their* obligations. In the future, as wars come to be fought increasingly by UMS, unless robots have this capacity, human beings won't be able to search for survivors and for human remains after a combat engagement has ended.

Furthermore, the countervailing considerations that might be cited by the opponents of an obligation to provide UMS with the capacity to facilitate search and rescue are arguably weak. As noted above, the fact that meeting an obligation posed by just war theory might make it harder to win a particular battle or even a war is not in itself an objection to it. The *raison d'être* of such obligations is to motivate us to do things we would otherwise not be inclined to do. It would not be unreasonable to expect designers to provide UMS with the capacity to facilitate search and rescue operations, even if this would make the systems more expensive or larger or less reliable. Importantly, the main consideration that sometimes excuses manned vessels from attempting rescue – that doing so would pose a grave risk to the lives of those on board, and the military capability they represent – has reduced force in cases involving UMS. If an unmanned system endangers itself in carrying out a rescue, it remains the case that it risks no lives (although it does risk capability). Insofar as UMS are more expendable, there is arguably *more* of an obligation on UMS than on other vessels to come to the aid of seamen in peril. Even if there might be circumstances in which it *would* be reasonable to hold that risking the

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61 Law of the Sea Convention, 1982, Arts 91 ("Nationality of Ships"), 92 ("Status of Ships").
62 R. McLaughlin, above note 3.

destruction of an unmanned system by ordering it to participate in search and rescue operations would jeopardize human lives (or a morally significant military capability), this is compatible with the existence of a general moral obligation on such systems to participate in such operations. As such, an exception could be made in this case, as is currently done for manned vessels.

The importance of rescue to those who require it, the role that acknowledging an obligation to rescue has in civilizing war more generally, and the relative weakness of the case against the proposal inclines the present authors to conclude that designers of UMS are indeed, at the very least, morally obligated to provide UMS above a certain size with at least some capacity to facilitate search and rescue operations.[63]

Designing UMS for rescue

Should the designers of UMS wish to provide them with the capacity to conduct or at least facilitate search and rescue operations, either because they are convinced by the argument above or because they are concerned with being able to assist their own personnel in the event of their becoming sick, wounded or shipwrecked, then there are three different capabilities that might be provided to particular UMS.

First, UMS might be provided with the capacity to recognize the post-engagement presence (or at least the likelihood thereof) of sick, wounded and shipwrecked persons, and to communicate their location (or suspected location) to other forces nearby, either friendly, neutral or enemy, who might then conduct rescue and recovery operations. Indeed, we presume that all UMS – even the most autonomous systems – will have some capacity to communicate with a controller in order to be tasked with their missions, and that some of them are likely to possess sensors capable of detecting (some) objects in the water.[64] The cost of notifying other vessels of the location of sick, wounded and shipwrecked persons will then generally be low, although in some cases this will alert the enemy to the presence of a particular military asset in the area. Of the ways in which UMS might contribute to search and rescue operations that we survey here, this is the only role that it is plausible to think that UAVs could be required to be able to play.

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63 Insofar as "ought implies can", the obligations on UMS to conduct search and rescue obligations – or, more precisely, on the designers of UMS to provide them with the capacity to contribute to search and rescue operations – is a function of the capacity of systems to facilitate search and rescue operations. Our reasons for thinking that larger systems have a greater capacity to contribute to search and rescue operations are provided immediately below.

64 Unless they can communicate with a human controller, UMS cannot be switched to "active" mode at the beginning of a conflict and risk continuing to engage in combat after a conflict has ended. The capacity to detect objects in the water is essential to most of the roles for which naval UMS are intended, and especially to combat operations in and under the water. Detecting individual persons in the water is a formidable challenge, but detecting objects such as life rafts or the presence of life jackets that emit light or signals may well be plausible for a sophisticated unmanned system located nearby. UAVs could presumably transmit video footage to a human controller who could assess the nature of the post-conflict environment and the likelihood that it contains persons in need of assistance.

However, simply broadcasting the location of people who are sick, wounded and shipwrecked will do them little good if there is nobody available to assist them. Second, then, USVs and UUVs might be provided with the capacity to launch life rafts, flotation devices and other resources that would help shipwrecked sailors to survive until they can be rescued by other forces. In theory, it is even possible for UUVs to be provided with the capacity to launch flotation devices while remaining submerged so as to reduce the risk of revealing their precise location. These resources would greatly increase the chance of shipwrecked seamen surviving until they can be rescued by other forces. Admittedly, they would likely also increase the size of the USV or UUV, but the same is true of providing this capacity to manned ships, which must by regulation carry such equipment.

Finally, and most ambitiously, USVs and (perhaps) UUVs might be designed so as to be able to conduct rescue operations and to take the sick, wounded and shipwrecked on board, if necessary as prisoners of war. This would presumably only be an option for very large USVs, of the sort that are intended to replace a corvette, or UUVs that are intended to replace a medium-sized submarine.[65] Such systems would need to be engineered so as to rule out the possibility of them then being commandeered or sabotaged by those they take on board, and, more problematically, to facilitate medical care to the wounded and sick (an almost impossible task unless the unmanned system leverages the rescued personnel to provide the care). For the moment this last option remains, we suspect, beyond the bounds of technological feasibility. However, the dynamics pushing towards the development of UMS should eventually be expected to lead to the development of corvette-class systems capable of a wide range of independent operations, in which case it is not unreasonable to expect that these operations should also include search and rescue.

Conclusions

The way in which wars are fought has, inevitably, evolved alongside the weapons that are used to fight them. The increasing introduction of unmanned systems into warfare is likely to prove no exception to this rule. While this process is not itself to be regretted, all those with an interest in war – and, in particular, those who might fight wars – are well advised to pay close attention to it. New technologies may shift the burdens and benefits of different roles during wartime, and not always for the better. We have argued that, although the introduction of UMS to war at sea might reduce the risk to active combatants, unless concrete

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65 It is possible that UUVs should be held to have a limited *obligation* to conduct search and rescue operations by analogy with the case of manned submersibles. However, as suggested in the section "The Case for a Duty of Rescue for UMS" above, it is also plausible to think that they are under *more* of an obligation to do so than manned submersibles insofar as they are more expendable than manned submersibles. In any case, if there are *any* circumstances in which they have such an obligation, the issues discussed here will arise.

steps are taken now, this may be achieved at a significant cost to those who have been rendered *hors de combat* by virtue of being shipwrecked, wounded or sick, as well as civilians in these perilous circumstances. Absent a capacity to undertake search and rescue operations, belligerent parties with only UMS fielded in the area of operations may ultimately have no obligation to do so in practice. Because the shipwrecked, wounded or sick pose no military threat, this transfer of the burdens of war cannot be justified by military necessity.

Any erosion of the expectation that belligerent parties will conduct search and rescue operations between engagements will be disastrous for all those who go to sea during wartime. It would also undermine the commitment to reciprocity that currently underpins military practice regarding the treatment of those who are shipwrecked, wounded or sick and which, we have argued, plays an important role in civilizing war more generally. We therefore believe that the international community should quickly move to establish an expectation that nations developing and fielding UMS intended for use in naval warfare will ensure that these systems are provided with some capacity to conduct or contribute to search and rescue operations. In particular, this means that the designers of early UUVs and USVs should provide these systems with this capacity and publicize the fact that they have done so. In order to motivate this policy, we would strongly encourage those who are responsible for the design of these systems to imagine that they might be fighting alongside them – or might at least have to go to sea during wartime – and thus might one day find themselves in need of rescue.

REPORTS AND DOCUMENTS

Emerging military technologies applied to urban warfare

ICRC, Programme on the Regulation of Emerging Military Technologies, Asia Pacific Centre for Military Law, 21–22 March 2018*

IHL symposium report

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Executive summary

The roundtable on "Emerging Military Technologies Applied to Urban Warfare" brought together governmental, military and academic experts from various disciplines, including law, ethics, political science, philosophy, engineering and strategic studies. Over two days, experts from across Australia[1] considered three areas of emerging technology and their intersection with urban warfare: cyber-capabilities, new robotics and autonomous weapons, and human modification technologies. In the final session, the roundtable discussed the influence of new technologies on military and strategic decision-making processes, with a focus on the implications in urban environments.

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*   This report is a summary of an IHL symposium and does not necessarily represent the views of the ICRC, the Program on the Regulation of Emerging Military Technologies, or the Asia Pacific Centre for Military Law. Special thanks to Emily Defina for her work in preparing this report.

Several themes recurred in the discussions. These included:

- the particular vulnerabilities of the urban environment and its civilian population to the direct and indirect impacts of armed conflicts;
- calls for standard, workable definitions to promote cross-discipline understanding and to inform public debate more generally;
- agreement around the sufficiency of extant law but recognition of the challenges in applying it to new technologies and ensuring compliance;
- the need to look beyond the strictly legal paradigm and incorporate ethical, policy and strategic considerations into the approach to new military technologies;
- the importance of grounding legal and academic discourse in the technical reality and the operational context;
- the value of receptivity to positive uses of new technologies and the risk of inhibiting such developments through hasty blanket prohibitions;
- the possible requirement to deploy emerging technology where it might improve compliance with international humanitarian law (IHL) and humanitarian outcomes; and
- the benefits of a multidisciplinary approach in terms of sharing complementary expertise and providing insight into State practice.

* * *

Introduction

The IHL roundtable on "Emerging Military Technologies Applied to Urban Warfare", co-hosted by the International Committee of the Red Cross (ICRC), the Program on the Regulation of Emerging Military Technologies, and the Asia Pacific Centre for Military Law, was held at Melbourne University Law School on 21 and 22 March 2018. The roundtable, which took place in the context of the ICRC's 2017–18 conference cycle on "War in Cities", gathered governmental, military and academic experts from various disciplines, including law, ethics, political science, philosophy, engineering and strategic studies, to discuss the legal and ethical issues raised by new military technologies, with a focus on their impact in urban environments.

Given the roundtable's focus on urban warfare, discussions often emphasized the unique vulnerabilities presented by the complex and fragile urban

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1   Asia Pacific Centre for Military Law: Professor Alison Duxbury, Sqn Ldr Anthony Erman, Col. Arun Lambert, Ms Grace Corbiau, Dr Robert Mathews. Australian Defence College: Dr Michael Evans. Australian National University: Associate Professor David Letts, Dr Adam Henschke. Australian Red Cross: Ms Isabel Robinson, Ms Kylie Leach. Griffith University: Dr Samuli Haataja. ICRC: Mr Leonard Blazeby, Ms Ellen Policinski, Ms Georgia Hinds, Ms Emily Defina. University of Melbourne: Professor Tim McCormack, Dr Suelette Dreyfus, Dr Tim McFarland, Ms Kobi Leins, Ms Natalia Jevglevskaja, Mr Simon McKenzie. University of New South Wales: Dr Deane Peter-Baker, Dr Jai Galliott. University of Queensland: Dr Rain Liivoja. University of Tasmania: Ms Natalie Nunn. Brigham Young University: Dr Eric Talbot Jensen. With thanks to the governmental and military experts who participated under Chatham House rules.

environment, especially with regard to the difficulty in estimating the reverberating impacts of attacks. In addition, there were several other themes that repeatedly surfaced during the sessions and generated interesting questions for further consideration.

Definitions were discussed in each session, with participants noting competing nascent categorizations of new technologies, which potentially impact the development or interpretation of legal regulation. Participants considered that it could be beneficial to establish some common vocabulary between disciplines; it was observed that disparate terminology impedes the development of cross-disciplinary understanding and poses an issue for messaging and communication between government, the military and civil society.

Existing legal norms were seen as a sufficient framework for regulating new technologies, although further clarification and development of the law may be needed to address certain challenges. Experts stressed the need to clarify the application of current norms to specific situations and technologies, and to work to strengthen compliance. Participants noted that IHL was developed to encompass innovations in warfighting and that its principles continue to be fundamentally relevant – for example, by subjecting new weapons to Article 36 review and regulating a weapon's effects rather than its form. The practical and political obstacles to negotiating new international treaties were considered to provide further impetus to rely upon the current framework.

There was widespread agreement that although the law is the crucial starting point, once a practice is deemed lawful it should nonetheless continue to be interrogated in light of other policy considerations. Ethical issues may be of equal or greater relevance than legal ones; indeed, through reference to the Martens Clause, ethics may influence the interpretation of law or provide a source of law itself.

It was emphasized that the conversation on new military technology needs to be grounded in reality rather than in imagined developments far in the future that may not come to pass. Lawyers and academics must have an understanding of the technical capabilities and potential of the relevant technology and its intended operational use. At the same time, whilst being mindful of these parameters, discourse should not be restricted to the status quo; there must be an attempt to look to the future and plan for contingencies in order to avoid a humanitarian catastrophe resulting from a failure to consider the possible effects of emerging technology.

Participants often acknowledged the potential for positive uses of new technologies in urban environments. Examples included humanitarian uses for technologies, such as aid delivery and unmanned evacuation vehicles, and a reduction in casualties (both combatant and civilian) through minimized troop contact and precision targeting. Several participants expressed concern that pre-emptive blanket prohibitions of new technologies might inadvertently restrict the development of these positive applications.

Some participants raised the thought-provoking assertion that parties with access to certain technologies might be considered to have an obligation to deploy

that technology where it represents the most humane and IHL-compliant option. This was posited as a moral obligation which might also have some legal basis in the context of the restriction on choice of means and methods of warfare for those States party to Additional Protocol I (AP I).[2]

Lastly, the merits of the multidisciplinary approach recurred throughout discussions as a path towards strengthening the response to emerging technologies and the unique challenges of the urban setting via a broad church of perspectives. Collaboration between professionals of different backgrounds, such as lawyers and information technology (IT) experts, is essential to anticipate challenges and ensure that new technology complies with IHL. Diverse technical expertise may also be required in the field, such as consultation with cities experts and engineers to determine the anticipated harm caused by attacks in complex urban environments.

Cyber warfare

All States are reliant on cyber-space to a greater or lesser extent; civilian, private industry and military activities are increasingly performed online. In urban areas in particular, the interconnectedness of these networks, and of supporting kinetic infrastructure, creates challenges for the fundamental principle of distinction and in the assessment of proportionality. In a recent US Cyber Command report, referenced in the session, the United States predicts that the future of warfare is in cyberspace.[3]

Increasing capacity (on the part of both State and non-State actors) to pursue military aims using cyber means raises concerns about indiscriminate use, particularly in the hands of parties who consistently display a willingness to violate IHL. Conversely, the digital domain presents an opportunity to record and publish violations in real time through platforms such as social media.

The definitional challenges identified by participants as relevant to the cyber sphere were confined to the need to disseminate an existing vocabulary between disciplines and to promote public understanding. As an example, it was noted that the term "cyber-warfare" in the legal sense denotes a context in which *jus in bello* applies, but is widely used in other fields and in the media to refer to a much broader range of cyber activities.

Military uses of cyber-technology bear inherent relevance to urban settings given their concentration of networked infrastructure. Weaponization of and targeting in the cyber domain could pose particular concerns in urban theatres, where the effects of conflict on the civilian population are already severe. The resilience of such populations to new forms of attack is already degraded by the

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2 See, further, Michael Schmitt, "Precision Attack and International Humanitarian Law", *International Review of the Red Cross*, Vol. 87, No. 859, 2005.

3 US Cyber Command, "Achieve and Maintain Cyberspace Superiority: Command Vision for US Cyber Command", March 2018, available at: https://assets.documentcloud.org/documents/4419681/Command-Vision-for-USCYBERCOM-23-Mar-18.pdf (all internet references were accessed in July 2018).

protracted nature of modern conflict. Cyber presents an ability to target infrastructure in new ways and could intensify vulnerabilities to the incidental effects of attack, whether to the civilian use of potentially dual-use objects such as the electricity grid or transportation networks or to civilian and specially protected objects such as banking institutions and health facilities.

Legal issues

IHL applies to cyber-warfare, including the rules governing the conduct of hostilities, but many challenges in interpretation and application of the law remain.[4] Calls have been made for a new treaty to regulate cyber-space; for example, Microsoft president Brad Smith is an advocate for a "digital Geneva Convention".[5] Participants were sceptical about the prospects of such a binding instrument, expressing doubts as to its ability to gain State consensus and endorsement, and concerns about the effect of a potentially low opt-in rate. Further, the prevailing view was that current law is actually sufficient to deal with issues in cyber-space, and that the true challenge lies in the application of and compliance with this law. The roundtable identified the value of international guidance and fora such as the *Tallinn Manual on the International Law Applicable to Cyber Warfare* (Tallinn Manual) and the United Nations Group of Governmental Experts on Developments in the Field of Information Security and Telecommunications in the Context of International Security (UN GGE on Information Security). This is not to deny that there might be a need to develop the law further as technologies evolve or their humanitarian impact becomes better understood.

Applicable law

On the threshold issue of the applicability of international law to cyber operations, it was noted that the academic discussion may have progressed further than State practice. The position of the Australian government, set forth in the Australian International Cyber Engagement Strategy,[6] is that international law applies without reservation to cyber operations. This view is compatible with that of the Tallinn Manual's group of international experts but is in contrast to some of the views expressed during the 2016/17 meetings of the UN GGE on Information Security. The UN GGE on Information Security failed to reach a consensus on the applicability of key areas of international law to cyber-space.

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4   See ICRC, "International Humanitarian Law and the Challenges of Contemporary Armed Conflicts", *International Review of the Red Cross*, Vol. 97, No. 900, 2015, pp. 1473–1475.
5   See Brad Smith, "The Need for a Digital Geneva Convention", *Microsoft On the Issues*, 14 February 2017, available at: https://blogs.microsoft.com/on-the-issues/2017/02/14/need-digital-geneva-convention/.
6   Commonwealth of Australia, Department of Foreign Affairs and Trade, "Australia's International Cyber Engagement Strategy", October 2017, available at: http://dfat.gov.au/international-relations/themes/cyber-affairs/aices/pdf/DFAT%20AICES_AccPDF.pdf.

This lack of agreement amongst States, on such fundamental principles, creates a level of ambiguity which can be exploited by international actors deliberately operating in a space without clear, accepted parameters. There is a so-called "grey zone" in which actors are able to conduct cyber operations that fall short of a use of force but that nonetheless generate significant harmful effects. This has implications for the use of lawful countermeasures (for example, whether force can legitimately be used in self-defence) in response and creates legal uncertainty for States responding to cyber threats. One participant raised the possibility of applying a "doctrine of accumulation" in relation to cyber activities, whereby multiple acts over a period of time, which individually fail to constitute a use of force, may, taken in combination, reach the requisite threshold. In this participant's view, such an approach could be extrapolated as an extension of International Court of Justice (ICJ) cases such as *Nicaragua*[7] and *Armed Activities*.[8]

Proportionality and precautions

The complex environment of cities presents difficulties in accounting for the reverberating effects of cyber-attacks and raises questions about the extent of obligations to avoid or at least minimize incidental harm. One participant drew an analogy with the use of explosive weapons in densely populated urban areas and proposed that there is an obligation on parties to refrain from launching cyber-attacks in such environments, where their effects cannot be contained or predicted. In any case, there was general consensus that not only primary effects but also foreseeable reverberating effects must be included in the assessment of expected loss of civilian life, injury to civilians and damage to civilian objects required by the principle of proportionality. Experts agreed that an assessment of only the primary effects of weapons is particularly inadequate in the urban setting, and would be contrary to the letter of IHL.

Questions were posed probing the limits of the proportionality assessment of cyber-attacks conducted against targets located in urban areas: if cyber-security measures may make it more difficult for commanders to anticipate or understand the direct and indirect effects of an attack, how do these security measures affect the obligation to assess "expected" incidental loss? How does a nation equip and train a commander to understand this? As cyber-attacks can be re-engineered by other parties, should this be taken into account when an attack is launched and, if so, how?

Responses to such questions focused on the need for commanders to consult, prior to launching a cyber-attack and to the extent feasible, with experts not only in IT but across disciplines including urban planning and water engineering. The feasibility of consultations would be greater in a deliberate targeting situation than in a dynamic one.

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7   ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment, 26 November 1984.

8   ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, 19 December 2005.

Attribution

The nature of the cyber domain creates practical and legal difficulties for attribution. Despite this challenge, participants noted the United Kingdom and United States' recent public attribution of the "NotPetya" cyber operation to Russia (which Russia denies).[9] Some suggested there may be a deterrent value in such attribution. At the same time, some experts voiced concerns that attribution in the absence of visible punitive measures is of limited value (and, indeed, could be perceived as acquiescence, which risks setting a dangerous precedent). However, they cautioned that States should not be hasty in attributing actions in the face of significant ambiguity. It was noted that some members of the UN GGE on Information Security had raised the possibility of funding a body with the role of investigating cyber incidents and producing a report, in part to overcome issues of attribution. Participants suggested a number of reasons why the proposal had failed to receive support: the lack of positive precedent;[10] the cost of establishing and running such a body; the unwillingness of States to relinquish their best cyber experts to the organization; and the objection to investing in an organization which could be seen as reactive rather than preventative.

Positive uses in armed conflict

Cyber means could mitigate the effects of an attack by minimizing kinetic force (for example, reducing the blast and fragmentation effects of explosive weapons, and the resultant debris) and thus the associated incidental loss of civilians and civilian objects. This is especially pertinent to cities, where military and civilian objects and personnel are closely intermingled and the effects of kinetic weapons may be difficult or even impossible to contain.

Cyber-capabilities may also increase the feasible precautions available to a party conducting an attack – for example, by expanding the ability to map an area and allowing the party to input a greater range of data into its Collateral Damage Estimates. In complex urban environments, this may enable a belligerent to better account for civilian movement and to more widely and effectively distribute warnings about military operations to personal devices.

One participant took the view that cyber-capabilities may also increase the opportunities for a defender to minimize harm to civilians, such as by live-publishing data to the adversary on the location of humanitarian evacuation corridors or providing access to CCTV feeds in areas with dense civilian activity. This would increase the information available to a commander to inform precautionary measures and avoid civilian causalities, as well as removing a level of deniability in the event of violations.

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9   See Sarah Marsh, "US Joins UK in Blaming Russia for NotPetya Cyber-Attack", *The Guardian*, 15 February 2018, available at: www.theguardian.com/technology/2018/feb/15/uk-blames-russia-notpetya-cyber-attack-ukraine.

10   See, for example, the tendency of some States to discredit reports by the Organisation for the Prohibition of Chemical Weapons, which could be considered as a model for such an investigative body.

New robotics

Participants spoke of the inevitable increased integration into the military of robotics and artificial intelligence in the coming decades. The session on new robotics centred on the development of autonomous systems and particularly on the issues raised by autonomous weapon systems. These weapon systems raise questions about when, and to what degree, human involvement is ethically and legally necessary in the use of force.

On the one hand, the ability of robotics to rapidly process large quantities of data and to provide precision targeting may be beneficial in reducing incidental loss to non-military personnel and objects. On the other, distance from a victim (including physical, psychological and mechanical distance) has been shown to lower inhibitions to the use of lethal force,[11] which may have ramifications for the number of casualties (military and civilian). A related concern is whether, by reducing the human cost to a party in the form of troop casualties, the use of such systems could actually reduce incentives for resolution and result in a more protracted conflict. Fears were also raised about the possibility of rogue or hacked robots performing indiscriminate attacks.

Finally, it was noted that the operators and programmers of autonomous weapon systems will not necessarily be military personnel, complicating the distinction between combatants, civilians and civilians directly participating in hostilities.

Legal issues

Definitional issues were discussed, including the ICRC's proposed umbrella term of "autonomous weapon systems".[12] One contributor expressed discomfort with the idea of defining autonomous weapon systems prior to clarifying the issue which needs to be regulated and working backwards from this point. For example, is the main concern protecting the dignity of combatants, preservation of civilian life, or preventing the accumulation of an asymmetric advantage in conducting warfare? The answer may affect the specific definition that is adopted for that regulatory purpose.

Proponents at the roundtable suggested that robotic systems could be programmed to reduce casualties and eliminate biases. However, others were concerned that, even with machine learning, these systems will never have the

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11 See, for example, David Grossman, *On Killing: The Psychological Cost of Learning to Kill in War and Society*, Back Bay Books, New York, 1995, Section III and Section IV Ch. 3.

12 The ICRC has proposed that "autonomous weapon system" is an umbrella definition for any weapon system with autonomy in the critical functions of selecting and attacking targets. See ICRC, *Convention on Certain Conventional Weapons (CCW) Meeting of Experts on Lethal Autonomous Weapons Systems, 11–15 April 2016: Views of the International Committee of the Red Cross (ICRC) on Autonomous Weapon System[s]*, Geneva, 11 April 2016, available at: www.icrc.org/en/document/views-icrc-autonomous-weapon-system. See also ICRC, "Autonomous Weapon Systems under International Humanitarian Law", 31 January 2018, available at: www.icrc.org/en/document/autonomous-weapon-systems-under-international-humanitarian-law.

capacity to apply rules such as distinction and proportionality, which require an element of subjective judgement that cannot or should not be satisfied by an algorithm. Indeed, it is the ICRC's position that only humans can apply IHL.[13] Without the ability to be used in compliance with these rules, such robots would be prohibited by existing IHL, thus perhaps negating the need to develop an autonomous weapon system-specific prohibition.

Accountability

Initially, several participants queried the ability to apply legal accountability mechanisms such as individual and command responsibility to a violation resulting from the use of an autonomous weapon system. By the end of the session there was general agreement that autonomy in robotic systems was not likely to actually pose an obstacle to international criminal law. It was felt that the use of force could always be traced back to a human commander or operator making the decision to deploy the weapon, or at the most distant degree of control, to a human programmer.

A moral obligation to use new technologies?

The hypothetical was given of a comparable rate of 80% human accuracy with a non-autonomous weapon system in striking the correct target and a 20% rate of error putting civilians and civilian objects at risk, versus a machine with respective 95% and 5% accuracy rates. Where use of the machine results in greater compliance with IHL than the human with a non-autonomous weapon but nonetheless also results in errors, some questioned whether the quest for the perfect system was overshadowing the possible benefits in reduced civilian casualties and infrastructure damage.

A handful of participants went so far as to query whether there is a legal obligation, based on the requirement to take precautions and the restriction on choice of means and methods of warfare, to employ autonomous weapon systems where their use can deliver superior reliability to humans using non-autonomous weapon systems.

Positive uses

Optimism was expressed for the potential benefits of autonomous systems in urban areas, where robots may be able to process and analyze data faster than their human counterparts. This is salient considering the complexity of the built environment, where the co-mingling of civilians and combatants presents difficulties for applying distinction and conducting evacuations, and creates many options for defenders to conceal themselves. Urban fighting has a tendency to break forces into small units and can produce particularly brutal close-combat fighting. The ability to design artificial systems not to engage in self-defence and to fire only

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13 See ICRC, "Towards Limits on Autonomy in Weapon Systems", Statement, 9 April 2018, available at: www.icrc.org/en/document/towards-limits-autonomous-weapons.

after being fired upon were identified as potential assets in these settings. Fixed or area-restricted autonomous systems could avoid driving combat into homes, and robots would not necessarily require the same air support as human troops, thus reducing one of the largest contributors to incidental loss to civilian life and infrastructure in urban conflict.

Human enhancement

The enhancement of human capability is not a new phenomenon in armed conflict. The roundtable cited the use of the methamphetamine Pervitin by the German armed forces in the Second World War as one historical example, but emphasized that scientific advances have greatly increased the range of possible enhancements.

Participants noted that determining what falls within the definition of an enhancement can be difficult, given that a state of normality is highly variable and subjective, and that the effects and intended use of the technologies are very diverse. Furthermore, some enhancement techniques can also be used as therapy in the process of restoring a human to normal ability, such as techniques to improve soldiers' resilience to disease, injury or psychologically traumatic events.

It was queried whether the term "human modification" should be preferred over "human enhancement", to avoid the assumption of an inherently beneficial process. One speaker suggested that human modifications can generally be separated into three categories: physical modifications which alter characteristics such as endurance or the senses; psychological modifications which impact a person's emotional processes, for example relating to aggression or trauma; and cognitive modifications which affect intelligence and decision-making ability, attention, memory, and acquisition of new skills.

Whilst no definition was nominated, it was generally agreed that behaviour modification techniques such as training exercises and military conditioning do not fall within the scope of enhancements and that biomedical intervention would be required to justify inclusion in that category.

Although the forum was an opportunity to explore the connections between emerging military technologies and urban settings, experts found that the characteristics of the urban environment did not bear specific relevance to the issues raised by human enhancement.

Ethical issues

A variety of ethical issues were flagged, arising at distinct stages: the process of undergoing modification, during deployment, and following return to civilian life. Given that obedience to the military hierarchy may undermine the voluntariness of consent, one expert proposed that a higher threshold than informed consent should be required for members of the armed forces to undergo enhancement procedures. Some felt that modifications should only be permitted when

reversible and were also concerned about the ability of modified fighters to reintegrate, including due to the effects of the removal of the modification.

Legal issues

IHL and international human rights law

Experts accepted that IHL is generally not concerned with regulating the treatment of a party's own forces.[14] Therefore a domestic law approach, informed by the human rights framework, would be most applicable to the protection of combatants from coercion and risk associated with human modification. The processes of modification and reintegration also mostly occur outside of the context of an armed conflict, where IHL will not apply.

Ability to comply with IHL

Concerns were raised about the impact of cognitive and psychological modifications upon a person's ability to make subjective judgements and therefore to apply IHL rules, notably those of proportionality and distinction. Again, the issue of distance was discussed, with concerns raised that altering emotions may produce a level of psychological distance which could reduce resistance to killing.

Article 36 review

It was generally accepted that it would be problematic, both from a legal and a humanitarian point of view, to classify an enhanced human as a "weapon" rather than as a "combatant". Nevertheless, it was considered possible that some modifications may fall within the review requirements of Article 36 of AP I, either as a means or a method of warfare. For example, if an implanted device were a component of a weapon system, such as a brain–computer interface, it might constitute a "means" of warfare, while a psychoactive drug that increases aggression could be a tactical "method".

One speaker made the argument that, irrespective of any possible legal duty to review human enhancements, there is a good policy argument to do so given the sensitive ethical issues around human modification that will likely place a strain on civil–military relations. A transparent and thorough review process could assist with building assurance within government and with the public.

In response to the concern that it could be practically difficult to review an embedded modification due to the variability of the controlling human, it was noted

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14 Noting that there are exceptions for certain acts such as rape and sexual slavery: see International Criminal Court, *The Prosecutor v. Bosco Ntaganda*, Case No. ICC-01/04-02/06-1962, 15 June 2017. See also *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 2nd ed., Geneva, 2016, Art. 3, paras 547–549.

that conventional weapons may also be used differently according to the user, and that training can function as a form of standardization.

Medical personnel

Though the majority of the discussion focused on the modified soldier, one speaker called attention to the possible consequences for medical personnel called upon to administer or supervise the use of modifications. The question was posed (without answer) that if medical personnel closely supervise the application of enhancements, could they be said to be performing acts harmful to the adversary and thus be stripped of their protection from targeting under IHL?

Countering enhanced personnel

Another issue identified relates to weapons deployed to counter modified humans. Firstly, should enhancements be taken into account for the purposes of assessing superfluous injury and unnecessary suffering? For example, would it be permissible under IHL to deploy a weapon against a soldier who has been modified to have a higher pain tolerance when that weapon would otherwise fall foul of the prohibition on weapons of a nature to cause superfluous injury or unnecessary suffering? Secondly, as weapons are generally regulated under IHL by virtue of their primary affects, how might counter-modification weapons affect "normal" humans who are not the primary target?

One speaker noted that the only explicit reference to human enhancement in IHL is found in Protocol IV to the 1980 Convention on Certain Conventional Weapons (also known as the Protocol on Blinding Laser Weapons), which prohibits weapons with the combat function of causing blindness to *unenhanced* vision, "that is to the naked eye or to the eye with corrective eyesight devices".[15] It was posited that a risk existed that weapons whose combat function was to counter enhanced vision would not be prohibited by the protocol.

Positive uses

Some participants viewed human modification techniques as potentially creating more humane conditions for combatants. Examples included modifying memory associations to reduce trauma, as well as increasing the survivability of fighters. One contributor wondered whether an argument could be made in favour of an *obligation* to modify soldiers, drawing an analogy with the ruling of the UK courts that the UK government was obliged to properly equip soldiers as an aspect of the right to life under the European Convention on Human Rights.[16]

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15   CCW, Protocol IV (Protocol on Blinding Laser Weapons), 13 October 1995, Art. 1.
16   UK Supreme Court, *R (on the Application of Smith) (FC) (Respondent) v. Secretary of State for Defence (Appellant) and Another*, [2010] UKSC 29, 30 June 2010.

New technology and military and policy decision-making

Decisions to regulate new technologies

There was universal agreement that the existing IHL framework regulates these new technologies in armed conflict. However, as technologies develop, further clarification and development of the law may be needed to address certain challenges. In the context of developing regulatory frameworks for new technologies, one speaker highlighted the need to first clarify what is sought to be achieved and the basis of any intuitive objections to the use of new technologies. This requires us to interrogate issues such as: is the regulation directed at the technology itself, or at its effects, or even at a broader aim such as increased participation in decision-making or non-proliferation? Who are we seeking to regulate? And is a legal solution the most appropriate for the issue, or could it have unintended or inappropriate consequences (for example, in the case of a complete ban)?

Military decision-making

One speaker outlined key aspects of the military decision-making process that are relevant to the broader discussion of new technologies in armed conflict. At the development and acquisition phase, these include evaluations of civilian expectations of the military and weapons reviews conducted pursuant to Article 36 of AP I. Force composition decisions then guide deployment of any weapon systems, and strict rules ultimately continue to regulate the use of force by any technology. It was argued that, too often, this context is left out of discussions such as those in the UN GGE in relation to autonomous weapon systems.

Applying these considerations to autonomous weapon systems, it was noted by one participant that, to be militarily effective, these systems must be able to operate in a bounded way to deliver controlled violence. This is necessary not only for reasons of predictability and planning, but also to ensure that the military's use of force retains a level of moral and social legitimacy.

Referring to this element of predictability required for military efficacy, one participant queried how this might be affected by "black box" decision-making. That is to say, if the decision-making process of a weapon system was completely opaque such that it made the correct decision 99% of the time but it was not possible to ascertain why it did so, could this weapon system be assessed as sufficiently predictable? Such considerations also pose interesting questions in the context of Article 36 reviews.

Another expert took up the idea of accountability systems and mechanisms, and their potential to play a role in alleviating social concerns and calculating public morays. Established firm parameters were flagged as particularly important given that new technology will likely be widely and cheaply available in the future and not restricted to conventional militaries.

Conclusions

As one participant noted, "as a lawyer I always think the law is sacrosanct and all I have to do is hand someone the law". However, there is a need to look beyond the law to the ethical and policy considerations which should also inform decision-making. The roundtable prompted questions as to what role humans should play amidst increasing automation. Compassion, a sense of fairness and justice, a moral check and balance: these may not be qualities which we can mechanize. At the same time, some discussions challenged the concept of the human as the ideal; perhaps there are tasks and decisions which may be better performed and made by machines. On the other hand, there may also be decisions – especially judgments regarding compliance with international humanitarian law – that must be taken by humans. Similarly, increasingly autonomous systems and modified soldiers present regulatory and ethical challenges but offer opportunities in both military and humanitarian applications.

Hopes were expressed that legal developments and accountability mechanisms around emerging technology will be both proactive and grounded in strategic and operational realities. Especially in light of the need to anticipate future uses (and possible abuses), experts praised a multidisciplinary approach, which combines technical knowledge with humanitarian, military, governmental, academic and civil perspectives.

There is still some way to go to reach comprehensive and widely accepted definitions in complex areas such as human modification. Some of the difficulty in distilling the most appropriate definitions was identified as stemming from uncertain or competing directions of potential regulation. As discussions progress and the technologies continue to develop, regulatory priorities will become clearer.

There is need for greater compliance with extant law, and significant value in fora and expert guidance such as the UN GGEs and the Tallinn Manual. IHL is equipped to set parameters around the use of new technologies, and its principles and rules continue to be fundamentally relevant, although further clarification and development of the law may be needed to address certain challenges raised by these technologies.

The potential of new technologies to reduce casualties and assist humanitarian operations, such as evacuations and medical relief activities, provide a positive counterpoint to the concerns raised. In the increasingly urban setting of modern conflicts, it is hoped that such capabilities will contribute to preservation of civilian life and infrastructure where dense populations are at greatest risk from the reverberating effects of attacks.

REPORTS AND DOCUMENTS

The laws of war are our shield against barbarity

Speech given by ICRC President Peter Maurer to the UN Human Rights Council, Geneva, 26 February 2018

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Ladies and gentlemen,

On the 70th anniversary of the Universal Declaration of Human Rights, I pay tribute to the work of the Council and the High Commissioner as a tireless advocate for freedom, equality and dignity.

The challenges we face today are sobering. We regularly see the heartbreaking results of widespread violations of international human rights law and international humanitarian law. In every part of the globe, too many civilians are the target of fighting, too many are detained in inhumane conditions and too many are forcibly displaced – all in defiance of humanitarian rules.

The challenge of preventing, responding to and recovering from these atrocities is immense, and the solutions are complex and multifaceted. But we have many of the tools already at our disposal; it is a matter of harnessing them.

Today I urge all member States to fulfil their obligations – as those primarily responsible for the protection of their civilians – and reinvigorate the fundamental contract of humanity: to respect and preserve life and dignity.

It is clear that we will have limited success in alleviating suffering unless there are major preventative efforts to reduce the needs of people. First and foremost this comes from respect for international humanitarian law, which every country around the world is bound by.

The law is the line of our common humanity; it is our shield against barbarity. [It holds that] civilians are not targets; rape, torture and executions are never acceptable; hospitals treating the injured and sick are not targets; those who help cannot be kidnapped or killed; civilians cannot be used as human shields; illegal weapons, which create enormous suffering, must never be used; those who help must have access to those in need; [and] civilians caught between the front lines must be able to leave for safer places.

While we must pay critical attention to violations of the law, we must equally recognize the many positive examples of respect. For the law is an inherently practical tool. It can shape behaviour and influence those bound by it to exercise restraint. It offers guidance on dilemmas of humanity and military necessity, allowing armies to exercise common decency, to keep their honour clean.

The law provides a basis, a shared language, for warring parties to come to the table, to find common ground or mutual advantage – for example, to agree limits on destructive weapons, such as the treaty on anti-personnel mines and subsequent extensive de-mining programmes, which have saved thousands of lives; or to negotiate prisoner exchanges or guarantee safe passage for civilians out of besieged cities.

The law helps to increase humane treatment, reduce torture and prevent cycles of resentment and radicalization.

The law ensures there is humanity for all, that groups and individuals are not forgotten. It provides, for example, that foreign fighters are not "disappeared" or left hidden from the world.

The law enables the International Committee of the Red Cross [ICRC] to trace missing people, reunite families and address the tragedy of societies ripped apart by war.

International humanitarian law not only works, but it has positive and reverberating impacts when it is respected. For example, when the principles of proportionality and distinction are applied, lives are saved, hospitals and schools remain open, electricity and water supplies continue, and markets function. These are factors that all contribute to stability once the guns have fallen silent.

The ICRC aims to create an environment where life and dignity are respected through protecting and upholding the humanitarian space. We use the law to do this, and we talk with everyone with influence because everyone has a role to play in ensuring respect for the law.

Ladies and gentlemen, nowadays, wars are rarely "won". Instead they are increasingly protracted, lasting sometimes for decades, leaving cities and their residents in ruin.

In this reality, international humanitarian law is an incredibly useful, and potentially powerful, tool in an army's response. As conflicts are increasingly protracted it becomes critically important to mitigate the damage of war, ending battles of retribution, reducing radicalization and lessening the damage on civilian populations. The law provides a basis to win the peace and to set the foundations for community acceptance.

I urge member States, individually and collectively, to continue to engage constructively with the ICRC and redouble their efforts to comply with their commitments.

The choice is political and it is also yours, ladies and gentlemen, representatives of States: you can get trapped in vicious circles of unbridled and boundless violence or you can choose the virtue of law.

I know only too well that the reading of the law in today's complex circumstances is challenging. But what it offers us, when today we are faced with growing levels of mistrust, impunity and political polarization, is a practical way out of the darkness.
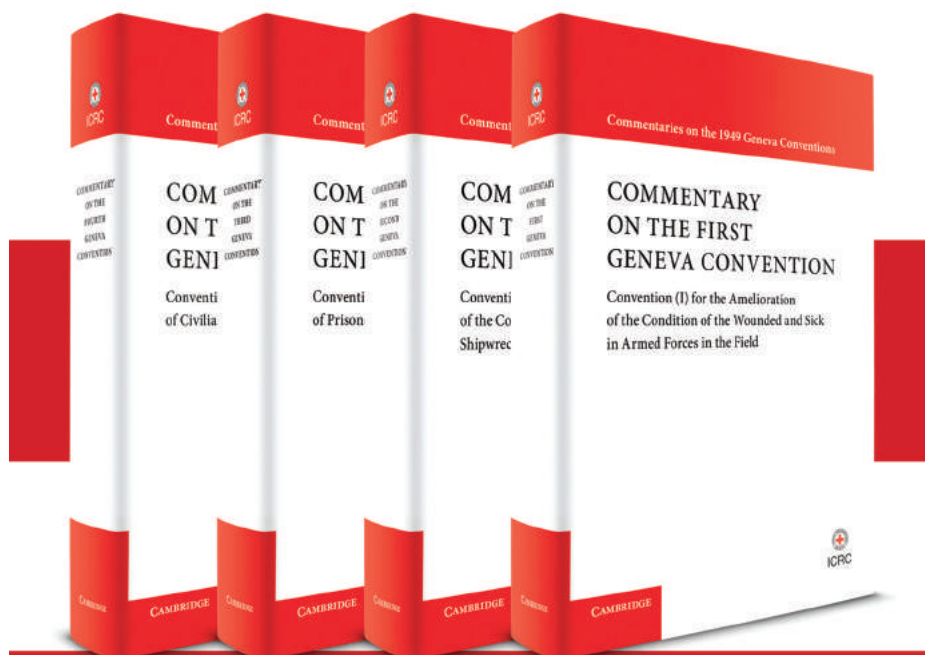
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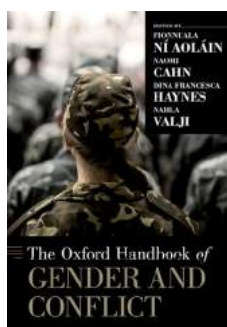
BOOK REVIEW

The Oxford Handbook of Gender and Conflict

Fionnuala Ní Aoláin, Naomi Cahn, Dina Francesca Haynes and Nahla Valji (eds)*

Book review by Gillian Wylie, Assistant Professor of International Peace Studies at Trinity College Dublin.

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In times when the very concept of gender and the field of gender studies are coming under political attack from populist governments, this comprehensive, multifaceted handbook is a timely reminder of how crucial gender analyses are to understanding the causes and consequences of war and the conditions of peace. The four editors, working with a host of expert contributors, trace an arc from pre- to post-conflict contexts, illuminating along the way how gender shapes war and can deepen peace. That arc begins with gendered discourses about masculine protectors and female victims, which make war thinkable. It then extends into a range of gendered practices and harms that go into making warfare and ends with upended gender relations in post-conflict societies, and even possibilities for gender-sensitive peace and post-conflict justice. The chapters of this book, organized in five sections on background and context, the United Nations (UN) Women, Peace and Security agenda, legal and political elements, conflict and post-conflict space, and case studies, illuminate all this – and much more – in

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*   Published by Oxford University Press, Oxford, 2018.

ways that stimulate nuanced understandings of gendered war and creative imagining about gendered peace.

This sizeable volume teems with theories, policy analyses and case studies, to capture a rich research field that is in rapid evolution. While the study of gender, war and peace began only a couple of decades ago from a feminist urge to "add women and stir" – breaking the silence about women's presence and activism in relation to conflict and peace – most current thinking, as reflected here, complicates and goes beyond the idea that gender equals women. The opening section, incorporating several helpful "background and context" chapters, encapsulates this trajectory. Dubravka Zarkov, for instance, charts how waves of feminist thinking have impacted on the study of conflict. In line with the main tenets of third-wave feminism and contemporary gender studies, current scholarship tends towards complicating homogeneous understandings of women's experiences, focusing on relations between complex women and men, and acknowledging diversity across a range of masculinities and femininities. Intersectionality and post-colonial theory, which both draw attention to the ways in which people's identities are also shaped by race, class and context, are key to underpinning these developments, and these perspectives influence many of the chapters here (for example, those by Eilish Rooney, Amina Mama and Pascha Bueno-Hansen).

The value of intersectional and heterogeneous approaches to gender and conflict is to break down simple gender binaries – those sharp conceptual divisions which see the world as composed of homogenous groups called "men" and "women" – that inscribe women as war's passive outsiders and victims, and men as purely patriarchal perpetrators of armed conflict and gender-based violence. This openness to the complexity of gendered identities and their varied impacts on experiences of war are recognized in most of the chapters of the book. Thus, male victims of conflict-related sexual and gender-based violence are present, and women's engagement as citizen supporters or active combatants in armed struggles is here too. Easy assumptions about direct links between militarized masculinity and sexual abuse of women civilians are questioned, as are equally easy assumptions that just bringing more women into politics will make for gender-sensitive post-conflict peace. The sense of a field in rapid evolution is also captured by the inclusion of chapters on current forms of violence beyond conventional wars as fought and experienced between or within States. Contemporary concerns about violent extremism are the subject of a chapter by Naureen Chowdhury Fink and Alison Davidian – they analyze how gendered ideologies can provoke engagement with radicalization for women and men, and raise the prospect of how women's empowerment might help prevent such violence. Looking into the future, Christof Heyns and Tess Borden consider what the mounting use of autonomous weaponry will imply for militarized masculinities, women as soldiers, and gendered harms experienced by those targeted by drones.

As the book comprehensively captures, theorizing gender and conflict has evolved to encompass the complexities of diverse gendered lives. However, another

key theme uniting much of the book is the way in which gender binaries still predominate in the shaping of political and legal responses to gendered war and peace. Several chapters in the book's second section on the UN's Women, Peace and Security resolutions, for example, pinpoint the narrow focus by governments and civil society actors on women as war's innocent victims.[1]

Several contributors to this book suggest that there is an overemphasis on the "protection" pillar of UN Security Council Resolution 1325 on "Women, Peace and Security" and its subsequent resolutions, with advocacy and policy efforts focused on ending women's vulnerability to conflict-related sexual and gender-based violence. Chapters by a number of contributors (such as Dianne Otto, Karen Engle, Kimberly Theidon and Chris Dolan) argue that an overemphasis on the "protection" of women not only once again positions members of this sex as the perpetual victims of war, but also stresses the awfulness of sexual violence to the neglect of other forms of gendered harm that are distressingly prevalent in warfare, such as forced conscription or massacres of civilians of fighting age – both of which befall men rather than women. Other contributors, such as Martina Vendenberg on "Peacekeepers, Human Trafficking and Sexual Abuse", seem less convinced of this broader approach to gendered harm, stressing the importance of maintaining a focus on approaches that prioritize responding to violence against women as a "weapon of war" and advocating an end to legal impunity for perpetrators. By containing these differing views, the book encompasses differences within feminism over whether violence against women or broader understandings of gendered harm should be the basis of activism and policy. Yet, there is general consensus across many chapters that political support is needed across all the pillars of Resolution 1325, especially increasing attention to women's empowerment and participation as central to preventing conflicts or bringing conflicts to peaceful ends.

Although the book overall holds a remit for a broad, non-dichotomous understanding of gender as it shapes and is shaped by conflict, the ability to maintain this perspective seems to fade somewhat as the chapters progress. A focus on women alone begins to emerge, particularly as the issues of conflict give way to the theme of peace in the middle of the book's fourth section on "Conflict and Post-Conflict Space". Here, there are many excellent chapters, including an account of the causes and consequences of women's exclusion from peace processes (Christine Bell), a discussion on the role of women in building bridges between conflicted communities (Aili Mari Tripp), and a study of the ongoing gender inequality experienced by women as UN peacekeepers (Sabrina Karim and Marsha Henry).

Helpfully, many of the themes expressed in the fourth section of the book are reiterated and exemplified in the fifth and final "Case Studies" section. Here we

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1   UN Security Council Resolution 1325 on "Women, Peace and Security" was passed in 2000. It has four main pillars – participation, protection, prevention, and relief and recovery. It has been followed up by a family of related resolutions in subsequent years. For details, see: www.peacewomen.org/why-WPS/solutions/resolutions.

find (among others) the transversal, cross-community politics of women in Northern Ireland discussed by Monica McWilliams and Avila Kilmurray; the defiant agency of birthing mothers in Palestine taking risks to ensure their children are born as citizens in Jerusalem, captured by Nadera Shalhoub-Kevorkian; and the complex history of women's political role in post-genocide Rwanda, as analyzed by Doris Buss and Jerusa Ali.

Notably, Buss and Ali's chapter, "Rwanda: Women's Political Participation in Post-Conflict State-Building", offers a subtle debunking of the simplistic equation which states that adding more women politicians will make for gender-sensitive peace. While women compose an unprecedented number of Rwandan parliamentarians, their record regarding gender equality legislation remains mixed, given the competing pressures exerted on these politicians in regard to their gender identity, their party affiliation and the influence of the government's authoritarian tendencies.

While these case study chapters are revealing in bringing to life women's complex experiences as soldiers, victims and activists, effectively complementing the background discussions of the earlier chapters, some of the commitment to maintaining insight into the complexity of gender is lost in these accounts. Only Maria Baaz and Maria Stern's case study addresses masculinities, offering a carefully layered analysis of what causes militarized men to perpetrate sexual violence in the Democratic Republic of the Congo. Concurrently, some chapters fall back into treating women as a homogenous group with unified, discernible interests. Importantly too, these parts of the book do not revisit an intriguing idea floated in an early chapter by Diane Otto – that to establish peace there is a need to go beyond adding women into existing peace efforts. Instead, peace should be imagined as a "multi-gendered project" which involves "engaging men and other genders, as well as women", so as to avoid, as Karen Engle notes, narrowing the scope for possibilities of peace. This idea of how men and other genders might connect to peace-building, or be reshaped by peace efforts, is to date an under-researched theme in the wider study of gender and peace, and there is not much in this book to further this train of thought. A new area for research suggests itself as a consequence.

If there is something else missing from this wide-ranging volume, it is the question of LGBTQI experiences of war and peace. Admittedly, the editors themselves note this gap in their introduction to the book. Yet, this seems to be a glaring omission, especially in a book that works so consciously with an awareness of the complexity of gendered lives. It is a little odd that a book which does so much to critique gender dichotomies seems to shy away from including the spectrum of gender identities – even more so at a time when transgender soldiers are facing dismissal from the US military for not conforming to the gender binary required by the Trump administration,[2] and LGBTQI people are

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2   "White House Announces Ban on Transgender People Serving in Military", *The Guardian*, 23 March 2018, available at: www.theguardian.com/us-news/2018/mar/23/donald-trump-transgender-military-ban-white-house-memo.

facing distinct forms of conflict-related sexual and gender-based violence in ongoing wars in Syria and elsewhere.[3]

At 600 pages and forty-five chapters, this is a hefty book. But it needs to be so, in order to do the justice it undoubtedly does to the richness of contemporary theorizing, policy analysis and empirical research on the multiple ways in which gender shapes conflict situations and peace processes. Despite its size, the book is made readily navigable by its organization into five main sections that will guide readers with particular interests; each chapter is relatively short but exquisitely concise, capturing key ideas, debates or cases and providing a helpful bibliography. As such, this book will be invaluable for researchers, teachers, students, policy-makers, advocates and activists in the field of gender, conflict and peace. It is one I will definitely use as a central text when teaching students and supervising PhD researchers. When all its parts are drawn together, this book provides a wealth of insights into the myriad ways in which the arc from pre- to post-conflict is gendered, provides important guidance for those crafting responses, and is also a source of inspiration for those wishing to imagine sustainable peace as a "multi-gendered project".

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3   See, for example, the writings of Danny Ahmad Ramadan, available at: http://dannyramadan.com/.

INTERNATIONAL
REVIEW
of the Red Cross

BOOKS AND ARTICLES

New publications in international humanitarian law and on the International Committee of the Red Cross

Behaviour of combatants/military ethics

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