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Do the Hostilities in Syria amount to an Armed Conflict Not of an International Character?

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Do the Hostilities in Syria amount to an Armed Conflict Not of an International Character?
In November 2011, the Report of the Independent International Commission of Inquiry on the Syrian Arab Republic expressed concern that the situation in Syria might rise to an armed conflict not of an international character.¹ This paper argues that the hostilities have in fact risen to an armed conflict not of an international character by applying legal precedent to ascertain the intensity and organization of the hostilities in Syria. Although the term is used in the Geneva Conventions and the Additional Protocols, an armed conflict is not defined in either. Therefore the first step in ascertaining the meaning of the term “armed conflict” in international law is to look at both the text and the object and purpose of the Geneva Conventions. In this case, protracted armed violence has been on-going since July 2011 between governmental authorities and the Free Syrian Army (“FSA”), a non-state group that leads the opposition in Syria and is composed of defected Syrian Armed Forces personnel who have been active since the Syrian Uprising. The events transformed from an uprising into an armed conflict upon the FSA’s ability to challenge the Assad regime consequently creating a civil war-like atmosphere.

As of November of 2011, the commission was unable to verify the level of intensity of combat between the Syrian forces and the FSA, and it was also unable to confirm the level of organization of the opposition, and thusly did not apply International Humanitarian Law (“IHL”) to the events that had occurred.² As summarized by the International Committee of the Red Cross (“ICRC”), “IHL is a set of rules which seek, for humanitarian reasons, to limit the effects of armed conflict. It protects persons who are not or are no longer participating in the hostilities and restricts the means and methods of warfare.”³ If an armed conflict exists, then IHL must apply. This paper attempts to describe the level of intensity of combat in Syria and the level of organization of the FSA to argue that the Syrian situation is an armed conflict as governed by

¹ http://www.ohchr.org/Documents/Countries/SY/A.HRC.S-17.2.Add.1_en.pdf; A/HRC/S-17/2/Add.1
Common Article 3 of the Geneva Conventions of 12 August 1949, subsequently necessitating the application of IHL.

IHL only applies in an armed conflict, so whether the violence occurring between a state and a non-state actor in fact rises to the level of an armed conflict is the first step of analysis. Violence is occurring in Syria, but the nature of the hostilities in Syria, the key focus for this paper, determines whether IHL applies. The 1949 Geneva Conventions attempt to address all instances of armed conflict and has laid out two categories of armed conflict which trigger the application of IHL: international armed conflicts and armed conflicts not of an international character. Common Article 2 of the Geneva Conventions of August 1949 states that the Conventions “shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.”

Common Article 3 of the Geneva Conventions of August 1949 sets forth minimum provisions applicable “in the case of armed conflict not of an international character occurring in

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5 See id. ICRC, Commentary on the Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War 26 (Oscar M. Uhler & Henri Coursier eds. 1958) [hereinafter GC IV Commentary] (“Born on the battlefield, the Red Cross called into being the First Geneva Convention to protect wounded or sick military personnel. Extending its solicitude little by little over other categories of war victims, in logical application of its fundamental principle, it pointed the way, first to the revision of the original convention, and then to the extension of legal protection in turn to prisoners of war and civilians. The same logical process could not fail to lead to the idea of applying the principle in all cases of armed conflicts, including those of an internal character.”).
the territory of one of the High Contracting Parties.” Common Article 3, its Commentary, and various cases will be used for the framework of this paper. Each analytical section will begin with precedent before application. The Geneva Conventions adopted the term armed conflict specifically to avoid the technical, legal, and political drawbacks of the term “war.” The determination of an armed conflict in a territory does not have to turn on a formal declaration of war, nor by how the participants of the conflict characterize it, but rather on the facts on the ground of the hostilities. Just as the existence of an armed conflict prompts the application of IHL to dictate the status of persons and the rights and obligations of parties to the conflict, the nature of the conflict—whether international or non-international—determines the extent of the applicable law. This paper serves to simply answer whether or not an armed conflict not of an international character exists in Syria. Armed conflicts not of an international character are subject to the more limited legal regime of Common Article 3 and the steadily growing customary international law applicable include the principles of humanity, proportionality, distinction, and necessity.

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7 GC I, supra note 6, art. 3; GC II supra note 6, art. 3; GC III, supra note 6, art. 3; GC IV supra note 6, art. 3.
9 See generally GC IV Commentary, supra note 5, at 17-25 (addressing Article 2 common to the Geneva Conventions).
10 Common Article 2 of the 1949 Geneva Conventions applies to “all cases of declared war or of any other armed conflict…between two or more [states], even if the state of war is not recognized by one of them.” GC I, supra note 6, art. 2; GC II, supra note 6, art. 2; GC III, supra note 6, art. 2; GC IV, supra note 6, art. 2; see, e.g., Anthony Cullen, Key Developments Affecting the Scope of Internal Armed Conflict in International Humanitarian Law, 183 MIL. L. REV. 66, 85 (2005) (“[I]t is worth emphasizing that recognition of the existence of armed conflict is not a matter of state discretion.”).
11 See supra note 4 at 160-161.
In situations of armed conflict, IHL provides a range of protections for civilians and other persons *hors de combat* (outside of combat). It establishes a legal framework for the conduct of hostilities between the parties to armed conflict by, for example, prohibiting direct attacks against civilians or civilian objects. Under IHL, an attack directed against a military objective, a combatant, or a civilian directly participating in hostilities — even if it results in incidental civilian death — is not prohibited so long as the attack meets legal criteria under IHL. Those criteria include the prohibition of indiscriminate attacks and proportionality of the anticipated effects of the attack against civilians and civilian objects, precautionary measures to limit harm to civilians, and the prohibition of certain weapons and methods of warfare.\(^{13}\) When determining if a specific right has been violated during armed conflict, IHL usually prevails over other legal frameworks, such as international human rights law.

Under IHL, humanitarian organizations have solid grounds to engage in relief operations. Common Article 3 of the Geneva Conventions provides that independent and impartial organizations acting on a neutral basis may offer their services to all the parties in order to assist populations affected by the conflict. Therefore, analyzing whether Syria is an armed conflict not of an international character is determining whether IHL applies or not. Determining whether IHL applies subsequently leads to a controlled conflict rather than indiscriminate violence. This paper means to suggest that there is armed conflict not of an international character between the Syrian regime and the FSA, and therefore IHL must apply.

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\(^{13}\) http://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter1
Defining Armed Conflict

Neither Common Article 2 nor Common Article 3 specifically defines armed conflict. The most commonly cited contemporary definition of armed conflict comes from the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) in Prosecutor v. Tadic, where the tribunal held that an armed conflict not of an international character exists when there is, “protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.” 14 In the view of the ICTY, for an armed conflict not of an international character to exist, non-state armed groups must carry out protracted hostilities, and these groups must be organized. Common Article 3 provides a minimum threshold for distinguishing internal armed conflict from riots or skirmishes. 15 According to the Commentary of Common Article 3 (“Commentary”), no specific test for determining the applicability of Common Article 3 exists. The goal is to interpret Common Article 3 as broadly as possible. 16 The conflicts referred to in Article 3 are armed conflicts, with armed forces on either side engaged in hostilities. Such conflicts are similar to an international war, but take place within the confines of a single country. In many cases, each of the Parties is in possession of a portion of the national territory, and there is often some sort of front.” 17 Control of a portion of the

14 Supra note 11 at para. 6.
16 GC IV COMMENTARY, supra note 5, at 36 (“Does this mean Article 3 is not applicable in cases where armed strife breaks out in a country, but does not fulfill any of [the suggested criteria]? We do not subscribe to this view, We think, on the contrary, that the Article should be applied as widely as possible.”).
17 Supra note 11 at para. 7.
territory by a non-state armed group is not required for the application of common Article 3, but would be strong evidence for its application.

The Commentary does, however, offer guidance in the form of suggestive, but not dispositive, factors of a Common Article 3 conflict based on the nature and behavior of both state and non-state parties. Two considerations have proven to be particularly important to those courts and tribunals forced to work with the uncertainty about the existence of an armed conflict not of an international character: “the intensity of the conflict and the organization of the parties to the conflict.” These measurements help to “distinguish an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law.” For example, the response of the state is a critical component. If the state employs its regular armed forces in combating the non-state actor and whether it has recognized the non-state actor as a belligerent are two oft-cited standards for an armed conflict not of an international character to be found to exist. Also, several other considerations can provide useful guidance for understanding whether violence or hostilities have progressed beyond internal disturbances, like whether the non-state actor: 1) has an organized military force; 2) has an authority responsible for its actions; 3) acts within a determinate territory, having the means of ensuring respect for the Geneva Conventions; and 4)

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18 Tadic, Case No. IT-94-1-T, Judgment, para. 562 (ICTY May 7, 1997); Vite, supra note 9, at 75-76.
19 Tadic, Case No. IT-94-1-T, Judgment, para. 562. Government forces are presumed to be sufficiently organized to be a party to an armed conflict. Haradinaj, Case No. IT-04-84-T, Judgment, para. 60; Vite, GC IV Commentary, at 77.
20 Corn, supra note 9, at 17.
acts as a de facto governing entity with its armed forces prepared to obey the laws of war.\textsuperscript{21}

**The Nature of the Assad Regime and the Free Syrian Army**

The nature and quantity of the armed engagement between Assad’s army and the FSA has been erratic yet constant over the 13 months. An examination into the current fighting in the context of existing jurisprudence over the definition of an armed conflict seems to substantiate that unrest in Syria is in fact an armed conflict not of an international character. The conflict began its transformation into an intense battle between the two parties in July 29, 2011 when the FSA was formally announced. The FSA had been active for months but began expanding because of various defections from the Syrian army that have totaled 20,000.\textsuperscript{22} The nature of this particular conflict is protracted, violent and unrelenting. The best way to examine the intensity of the hostilities and the organization of the FSA is to compare it to past precedent. The two sections of this paper will cite various legal precedents that have set standards which describe past hostilities armed conflicts not of an international character. To begin the analysis, the first section will focus on the standard of intensity.

1. **Intensity**

To analyze the intensity of the fighting in Syria, the seriousness of the fighting must be measured in order to determine whether it has transformed from upheaval and other acts of randomized violence, to engagements that resemble regularized military action between two parties. A range of factors ultimately correspond with analyzing intensity. The three main

\textsuperscript{21}See supra note 4 at 163. See also GC IV COMMENTARY. See also Prosecutor v. Haradinaj, Case No. IT-04-84-T Judgment, para. 49 (ICTY Apr. 3, 2008).
factors that will head the discussion for this section are: a) the seriousness of attacks and the increase in armed clashes; b) the distribution of clashes over territory and time; and c) the number and mobilization of government forces. The ICTY provided much legal precedent on the subject. It considered applicable factors like the number, duration, and intensity of individual confrontations; the type of weaponry and other military equipment used; the number of geographic and temporal distribution of the clashes; the territory which has been captured and held by the opposing parties; the number of casualties; the extent of material destruction; and the number of civilians fleeing combat zones.\(^{23}\) The ICTY has also declared that the involvement of the United Nations Security Council (UNSC) may reflect the intensity of a conflict.\(^{24}\) Other factors that will be incorporated into the analysis include the collective nature of the fighting, the state’s resort to its armed forces, the duration of the conflict, and the frequency of military operations and acts of violence in general.\(^{25}\)

Trial Chambers have also taken into account the number of civilians forced to flee from the combat zones; the type of weapons used, in particular the use of heavy weapons, and other military equipment like tanks or heavy vehicles; the blocking or besieging of towns and the heavy shelling of these towns; the degree and number of casualties caused by shelling or fighting; the quantity of troops and units deployed; the occupation of territory, towns, and villages; the deployment of government forces to the crisis area; the closure of roads; cease fire orders and agreements, and the attempt of representatives from international organizations to broker and enforce cease fire agreements.\(^{26}\) Whether these factors appear in Syria or not will be the best approach to analyzing the degree of intensity of the hostilities. The only factors which

\(^{23}\) Haradinaj, Case No. IT-04-84-T, Judgment, para. 49.
\(^{24}\) Haradinaj, Case No. IT-04-84-T, Judgment, para. 49.
\(^{25}\) Vite, supra notes 4 and 20.
\(^{26}\) See supra note 11.
weigh in favor of Syria not meeting the threshold are the fact that the confrontations have been for only 13 months and the fact that the FSA has been inconsistent in holding territory. However, holding territory is not dispositive.

a. **Seriousness of Attacks and Increase in Armed Clashes**

i. **Legal Precedent**

Past cases suggest that the types of clashes and ongoing violence in Syria could be categorized as an armed conflict not of an international character. For example, the ICTY examined the fighting between the Kosovo Liberation Army (“KLA”) and the government of Yugoslavia in a variety of cases to determine if the situation in Kosovo amounted to armed conflict, thus giving the tribunal jurisdiction. In *Prosecutor v. Limaj*, the defendant argued that “regionally disparate and temporally sporadic attacks carried out over a broad and contested geographic area should not be held to amount to an armed conflict.”27 The Trial Chamber held, however, that the nature of incidents and violence were intense enough to constitute an armed conflict. The Trial Chamber pointed to firefights that lasted twenty minutes, a clash resulting in sixteen deaths, and engagements involving fifty to one hundred rounds of ammunition to show that hostilities were “not accurately described as temporally sporadic or geographically disperse[d].”28 Rather, “periodic armed clashes occurred virtually continuously at intervals averaging three to seven days over a widespread and expanding geographic area.”29 The Tribunal found that a KLA attack against a Serbian police station, the deployment of heavy weapons by Serbian government forces, and “heavy fighting…[that] continued for two days”30 constituted attacks serious enough to trigger jurisdiction. Another good example is when anti-

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28 *Id.* para. 168; see id paragraphs 138, 140.
29 *Id.* para. 168.
30 *Id.* para. 138-9, 142.
government protestors attacked an Argentinian military barracks which led to a day and a half firefight. The Inter-American Commission of Human Rights differentiated the situation from one of “internal disturbances” because it was not equivalent to large scale violent demonstrations.\textsuperscript{31} The court concluded that “the concerted nature of the hostile acts undertaken by the attackers, the direct involvement of governmental armed forces, and the nature and level of the violence” rendered the attack on and the recapture of the barracks of La Tablada an armed conflict which triggered IHL.\textsuperscript{32}

\textit{ii. Application}

The clashes in Syria have been serious and thus the hostilities meet the first prong needed for the intensity threshold. The FSA has been able to capture territory, kill numerous security forces, and has inspired hundreds of soldiers to defect and join their ranks. There have been ten important battles throughout the year and they have all been complicated skirmishes that have taken days at a time and have been in various territories throughout Syria. Attacks against intelligence complexes, raids against checkpoints, and general firefighting and grenade launching has occurred throughout the country with the purpose of bringing down the government, protecting civilians, and encouraging army defection through armed action.\textsuperscript{33} This armed action has taken the form of ambushes, raids, and street battles to destroy logistical infrastructure to further degrade the Syrian army’s tactical advantages. In fact, in the areas of Deir ez-Zor, Al-Rastan and Abu Kamal, the FSA engaged in street battles with the Syrian army that raged for

\textsuperscript{32} Id. para. 155 (“[P]articularly, the attackers involved carefully planned, coordinated and executed an armed attack, i.e., military operation, against a quintessential military objective—a military base.”)
days with no particular side gaining the advantage.\textsuperscript{34} The FSA is equipped with AK-47s, RPG-7s, ammunition from raids on government checkpoints, M16s, FN FALs, shotguns, G3 assault rifles, and PK machine guns.\textsuperscript{35} Below is a graph that depicts the total deaths as of January 2012. Starting from the left, the places that have been most affected are: Homs, Idlib, Daraa, Hama, and the suburbs of Damascus.\textsuperscript{36}

![Graph of total deaths](image)

Although the source of this information comes from the opposition, the seriousness of the attacks and the increase in armed clashes should be considered intense as they have cost the lives of thousands of people and have been categorized as a civil war by the United Nations. Over 14,000 Syrians have fled to Turkey’s Hatay Province and a total of about 10,000 Syrians will be moved to a refugee camp with housing units.\textsuperscript{38} Many fleeing Syrians have been killed by the

\textsuperscript{34} Hafez, Salam (8 October 2011). "Syrian Opposition Call for No-Fly Zone". \textit{The Journal of Turkish Weekly}. Retrieved 8 October 2011.
\textsuperscript{36} As translated by author
\textsuperscript{37} revolutionintelligence.com
\textsuperscript{38} http://www.todayszaman.com/news-274221-fleeing-violence-nearly-500-syrians-pour-into-turkey.html
government en route. In fact, on April 9, 2012 it was reported that refugees had been fired on and killed by the Syrian regime on Turkish territory.\(^{39}\)

The conflict has other characteristics which substantiate intensity through this first prong. The FSA has been recorded capturing government tanks in Homs by video footage. The tanks carried flags of the opposition and was seen firing with armed men in civilian clothing. Various weapons are coming in with the defection of soldiers per day and through various other channels. Material destruction has also been a serious issue in Syria: "I was horrified by the destruction I saw," Valerie Amos, the UN under-secretary-general for humanitarian affairs, said in a statement on her two-day visit to Syria. "Almost all the buildings had been destroyed and there were hardly any people left there."\(^{40}\) The hostilities and the clashes seem to average almost 15 reported days of violence per month.\(^{41}\) In February, the Assad regime even announced the results of a referendum on a new constitution that Syrian authorities lauded as a step towards political reform in response to the mounting pressure. While it imposes a limit of two seven-year terms on the president, the US and its allies have dismissed the vote as a farce meant to justify the bloody crackdown.\(^{42}\) This reaction by the government corroborates the seriousness of the situation and the escalation of the violence between the two parties. The number of fatalities according to the Syrian opposition’s Arabic website www.syrianshuhada.com was 11,616 as of March 22, 2012.\(^{43}\) Other estimates have ranged from 6,000 to 9,000. Here is a table of the death toll from a range of sources:


\(^{40}\) [http://news.xinhuanet.com/english/world/2012-03/10/c_131457954.htm](http://news.xinhuanet.com/english/world/2012-03/10/c_131457954.htm)

\(^{41}\) As calculated by author’s research.


\(^{43}\) "Syrian Martyrs" (in Arabic). Free Syria. Retrieved 14 March 2012
<table>
<thead>
<tr>
<th>Source</th>
<th>Casualties</th>
<th>Time period</th>
</tr>
</thead>
<tbody>
<tr>
<td>Avaaz</td>
<td>9,000 killed</td>
<td>15 March 2011 – 23 February 2012</td>
</tr>
<tr>
<td>Syrian government</td>
<td>5,6946,343 killed</td>
<td>15 March 2011 – 12 March 2012</td>
</tr>
<tr>
<td>Local Coordination Committees</td>
<td>9,700 killed</td>
<td>15 March 2011 – 15 March 2012</td>
</tr>
<tr>
<td>The Violation Documentation Centre</td>
<td>9,736 killed</td>
<td>15 March 2011 – 15 March 2012</td>
</tr>
</tbody>
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48 http://www.timesofmalta.com/articles/view/20120402/world/more-than-10-000-dead-in-syria-crackdown.413908
UN officials have described Syria as a state in civil war. The UN was in a dead-lock about issuing a resolution. However, the resolution was vetoed by Russia. Kofi Anna, UN-Arab League envoy to Syria, has been struggling to issue a resolution acceptable to the non-interventionist states and the states demanding that the death toll throughout Syria demands action. Weapons-distribution and violence has been pervasive and it is clear that the government has struggled to keep the resistance at bay. The attacks are serious and regime-FSA clashes have been steadily increasing. As of April 12, 2012, the UNSC stated it could be approving a resolution to sending unarmed UN observers to Syria to monitor a ceasefire. However, by April 17, the ceasefire gave way to more violence when loyalists to the regime killed five people.

b. Distribution of Clashes over Territory and Time

i. Legal Precedent

Small-scale clashes spreading over Kosovo merited a finding that the KLA and the government of Serbia were engaged in an armed conflict not of an international character. The sporadic clashes between Serbian government forces and KLA fighters over a period of just one year were considered sufficiently constant to constitute an armed conflict. The total area of the clashes was also limited to mostly the center of the area, but the clashes, despite their limitations were held to be distributed enough to pass the intensity threshold. In considering the conflict relating to the events in op{tina Prijedor, the Trial Chamber was not bound to confine its attention to the immediate area of that op{tina or to the time of the offences but could consider

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50 “UN official describes Syria as ‘in a state of civil war’”, BBC News. 1 December 2011
52 http://www.reuters.com/article/2012/04/12/us-syria-un-envoys-idUSBRE83B16420120412
the ongoing conflict between the Government of the Republic of Bosnia and Herzegovina and the Bosnian Serb forces in its entirety. As the Appeals Chamber pointed out, “the temporal and geographical scope of both internal and international armed conflicts extends beyond the exact time and place of hostilities.”

No general cessation of hostilities had occurred in the territory of the former Yugoslavia which was a standard applied in Prosecutor v. “Dule.”

**ii. Application**

In Syria, the clashes have been distributed over a vast amount of territory for the past 13 months. The number and distribution of deaths reported by governorates between March 18, 2011 and March 12, 2012 has been staggering:

- Homs: 3,445
- Hama: 1214
- Idlib: 1,275
- Daraa: 1,005
- Damascus Suburbs: 881
- Lattakia: 379
- Dayr Az-Zor: 328
- Aleppo: 286
- Tartous: 173
- Damascus: 185
- Hasaka: 93
- As-Suweida: 50
- Raqqa: 50
- Al-Qunaytirah: 17

The last few months have seen several large battles and small clashes between the Assad regime and the FSA. The FSA’s strategy is to keep the defection rate of soldiers steady, so that when 25,000 to 30,000 soldiers have defected, they can exhaust the Syrian army within a year and a half from January. Ten different large events can be taken from the last months: the Battle of Rastan, the Battle of Zabadani, the Battle of Douma, the Homs clashes, the Battle of Al-Qusayr, the Damascus clashes, the Idlib Province clashes, the Daraa Province clashes, the

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53 Appeals Chamber Decision, para. 67
Homs airbase attack and the Hama clashes. The Battle of Rastan was the first intense action that occurred in September of 2011 and lasted for one week. Clashes continued in the Idlib Province in October of 2011 and in November Syrian armored vehicles converged on a village in Idlib creating intense fighting that killed at least 20 people. The continuing month was defined by defections from the army, checkpoint raids and the Damascus Intelligence complex attack, the Homs airbase attack, army convoy ambushes and by December of 2011 the FSA was making slight yet steady progress. December was characterized by the Idlib intelligence building raid, escalating clashes in Daraa, urban fighting in the city of Homs and the largest loss of life on the FSA’s part when 72 defectors of the Syrian army were gunned down during their attempt to escape to the FSA.

Since January, the FSA’s attempt to destabilize the Syrian regime has steadily progressed. Clashes around Damascus were rife at the beginning of the year. Even though the FSA declared a cease fire, they besieged two checkpoints belonging to security forces and captured dozens of loyalist troops. By mid-January, the FSA was able to capture and take control over the border town of Zabadani even in spite of security forces trying to assault the town several times. The end of January saw battles for the Damascus suburbs which cost hundreds of lives on both sides with the Syrian security forces ultimately taking control. February saw an increase in intensity. The FSA retook complete control of the city of Rastan, there was more fighting in the Damascus suburbs, and the city of Homs was bombed until renewed fighting began in the Idlib Province. Heavy fighting occurred at the Battle of Al-Qusayr in Homs around mid-February with the FSA capturing the headquarters of the secret service, killing five force members and twenty government soldiers. After a worsening of

57 "Rebels capture Syrian troops in north – opposition", *Reuters*. 2 January 2012
humanitarian conditions in the Baba Amr district in Homs, the FSA retreated from the area because of a lack of weaponry, ammunition, food, medicine, water and electricity. \(^{59}\) Clashes have increased in both violence and space over time. As more soldiers defect from the Syrian army, the weaker the army becomes simultaneously relinquishing muscle to the FSA. The larger the FSA becomes, the more capable they are to maintain the hostilities. Their capability is what has made the uprising transform from a massacre against unarmed protestors into an armed conflict between a state party and a non-state actor. The FSA’s increase in support has directly contributed to their ability to destabilize the Syrian regime subsequently leading to a merciless reaction by the Assad regime.

c. Increase in the Number and Mobilization of Government Forces

i. Legal Precedent

Important standards were described in *Prosecutor v. Ljube Boskoski and Johan Tarculovski* for meeting the intensity necessary to be categorized as an armed conflict. \(^{60}\) Two points include: any increase in the number of government forces and mobilization, as well as whether the conflict has attracted the attention of the UNSC and whether any resolutions have passed. In Israel, the Supreme Court held that “[s]ince the end of September 2000, fierce fighting had been taking place in Judaea, Samaria and the Gaza Strip.” The situation was not just mere policing, but rather an armed struggle. \(^{61}\) The court came to this reasoning by taking into account that since the end of September 2000 until 2002, more than 600 Israeli citizens had been killed and more than 4,500 injured, and that “many” Palestinians had also been killed and

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61 *Ajuri v IDF Commander*, HCJ 7015/02; HCJ 7019/02, Israel, Supreme Court sitting as the High Court of Justice, Judgement of 3 September 2002, para 1.
wounded. To counter the “terrorist” attacks, the Israeli Defense Forces, among other things, had conducted special military operations since June 2002 “to destroy the Palestinian terrorism infrastructure and to prevent further terrorist attacks.”

The Constitutional Court of the Russian Federation recognized in a 1995 judgment that Additional Protocol II (“AP II”) applied to the armed conflict in the Chechen Republic. The Court observed that the use of the armed forces under the Constitution did not require a link with a declaration of a state of emergency or a state of war. When the State Duma adopted a resolution in 1994 on the use of the armed forces, it had declared that the disarmament of the illegal regular armed units in the Republic, which were equipped with tanks, rocket installations, artillery systems and combat planes “is in principle impossible without the use of the forces of the army.”

ii. Application

The situation in Syria has challenged an increase in the mobilization of the Assad regime. On March 31, CNN reported that Syria planned to keep its military in major cities for the time being despite a U.N. peace plan that calls for the regime to start moving out its troops. The State security apparatus is large and effective, with a multitude of security forces and intelligence

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62 Ibid
63 The case concerned the additional measures that had been adopted by the Ministerial Committee for National Security on 31 July 2002, due to the recognition that the “special military operations did not provide an adequate response to the immediate need to stop the grave terrorist attacks.” Ibid., at para 4.
64 Ibid., para 3.
65 Decision of the Constitutional Court of the Russian Federation on the constitutionality of Presidential Decree No. 2137 of 30 November 1994 on measures for the restoration of the Constitution and the rule of law on the territory of the Chechen Republic, of Presidential Decree No. 2166 of 9 December 1994 on repression of the activities of illegal armed units within the territory of the Chechen Republic and in the zone of the Ossetino-Ingushetian conflict, of Resolution No. 1360 of 9 December 1994 on ensuring the security and territorial integrity of the Russian Federation, the principle of legality, the rights and freedoms of citizens, and disarmament of illegal armed units within the territory of the Chechen Republic and contiguous regions of the northern Caucasus, and of Presidential Decree No. 1833 of 2 November 1993 on the basic provisions of the military doctrine of the Russian Federation. Sobranie Zakonodatelstva Rossii, 1995, No. 33, Article 3424.
66 Ibid., para 6.
agencies that have overlapping missions. They play a powerful role in Syrian society, monitoring and repressing opposition to the Government. The internal security apparatus includes police forces under the Ministry of the Interior, Syrian Military Intelligence, Air Force Intelligence, the National Security Bureau, the Political Security Directorate and the General Intelligence Directorate. The latter consists of 25,000 members formally under the Ministry of the Interior but reporting directly to the President and his inner circle. It includes Internal Security (also known as the State Security Service), External Security and the Palestine Division.\textsuperscript{68}

Even with the foregoing, the Syrian army has been challenged repeatedly with the FSA’s raids, ambushes and recruitment tactics which disrupt Syrian security forces by inciting defection. The result has been an increase in the mobilization and number of security forces that have been deployed to quell the anti-regime sentiment. The government has steadily increased its presence throughout Syria and has engaged in massacre to the most merciless of levels. Certain places like \textit{Mezze} have a risk of arrest which is so high that even walking around is problematic.\textsuperscript{69} In the city of Homs, people are avoiding the outdoors because of the danger of the \textit{shabiha} snipers, civilians armed by the government to suppress anti-regime sentiment.\textsuperscript{70} The increasing casualties in the city have led to an increase in government security, arbitrary, and extrajudicial killings that have in turn made clinics overwhelmingly full.\textsuperscript{71}

The Syrian army has definitely been on the offensive around the country. Human Rights Watch has explained that the government has forced local residents to march in front of the army during recent arrest operations, troop movements, and attacks on towns and villages in the north. In fact one of Kofi Annan’s newest plans includes demands for the immediate withdrawal of

\textsuperscript{68} http://www.ohchr.org/Documents/Countries/SY/A.HRC.S-17.2.Add.1_en.pdf
\textsuperscript{69} http://www.guardian.co.uk/world/2012/feb/19/syrian-security-increase-pressure-damascus-protesters
\textsuperscript{70} http://www.guardian.co.uk/world/2012/feb/21/homs-snipers-target-anyone?intcmp=239
\textsuperscript{71} http://www.guardian.co.uk/world/2012/feb/21/homs-snipers-target-anyone?intcmp=239
heavy armor from residential areas.\textsuperscript{72} Reports have explained that Syrian Armed Forces have mobilized in an aggressively offensive manner in response to the FSA. The Armed Forces have used shelling, tank and mortar fire to repress opposition forces. The Syrian Observatory for Human Rights (“SOHR”) has explained that thousands of soldiers and over a hundred military vehicles were trying to enter the area of Lahat in the Daraa province as of late March, and their clashes with the FSA have continued to result in fatal and non-fatal casualties.\textsuperscript{73} On March 25 the SOHR reported 27 killed, 15 of which were civilians, during heavy shelling in the central city of Homs and in Idlib. House raids have become more typical in Deir al-Zor so Syrian troops can capture dissidents.\textsuperscript{74} On September 9, 2011 the Assad regime declared Operation ”Bayrak al-Assad.” Operation ”Bayrak al-Assad” was implemented secretly, and is a ”major military operation” requiring full mobilization of military forces in Syria for concentrated offensives on cities across the country in order to eliminate ”terrorists who threaten us,” according to the report.\textsuperscript{75} Bayrak al-Assad was implemented secretly, and is a ”major military operation” requiring full mobilization of military forces in Syria for concentrated offensives on cities across the country in order to eliminate ”terrorists who threaten us,” according to the report. Assad’s heavy mobilization shows his acknowledgment of the FSA’s threat-level. His response also suggests a level of organization of the non-state actor.

\textbf{2. Organization}

Courts look to a non-state party’s level of organization as a second way to distinguish an armed conflict from chaotic violence or short-lived rioting. First, there must be two or more parties—for example, government forces fighting an organized armed group, or two organized

\textsuperscript{72} \url{http://www.reuters.com/article/2012/03/25/syria-idUSL6E8EP1XX20120325}.
\textsuperscript{73} \url{http://www.reuters.com/article/2012/03/25/syria-idUSL6E8EP1XX20120325}.
\textsuperscript{74} \url{http://www.reuters.com/article/2012/03/25/syria-idUSL6E8EP1XX20120325}.
\textsuperscript{75} \url{http://www.jpost.com/MiddleEast/Article.aspx?id=237312}
armed groups fighting each other. The level of organization is a key question for IHL to apply. The three factors that will head the discussion for this section are the FSA’s: a) hierarchical structure; b) territorial control and administration; and c) operational complexity. Aspects that the ICTY have identified as relevant to deconstructing whether a group is sufficiently organized to be a party to an armed conflict includes a hierarchical structure;\(^76\) territorial control and administration;\(^77\) the ability to recruit and train combatants;\(^78\) and the ability to enter peace or cease-fire agreements.\(^79\) In addition, the ICRC considers the authority to launch attacks bringing together different units and the existence or promulgation of internal rules.\(^80\) Jelena Pejic has summarized other factors that can be analyzed as well: “disciplinary rules and mechanisms within the armed group; the existence of headquarters; and the group’s ability to plan, co-ordinate and carry out military operations including troop movements and logistics.”\(^81\) These factors are present in Syria and describe the organization of the FSA.

a. Hierarchical Structure

i. Legal Precedent

The Army of the Republika Srpska (“VRS”) and the Kosovo Liberation Army (“KLA”), as examined in Tadic and Limaj, respectively, were strongly hierarchical. The Trial Chamber in Limaj discussed that the KLA had a general staff, divided Kosovo into districts of operation and was able to appoint district commanders who responded to KLA general staff commands.\(^82\) The Trial Chamber concluded that the KLA was sufficiently organized and able to engage in armed

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\(^{77}\) Prosecutor v. Lukic, Case No. IT-98-32/1-T, Judgment, para. 884 (ICTY July 20, 2009) (highlighting militias’ organization by noting their control of territory in the vicinity of Visregard and their control of “all of the roads”).

\(^{78}\) Prosecutor v. Haradinaj, Case No. IT-04-84-T, Judgment, para. 60 (ICTY Apr. 3, 2008).

\(^{79}\) Haradinaj, Case No. IT-04-84-T, Judgment, para. 60.

\(^{80}\) Vite, *supra* note 67, at 77.


\(^{82}\) Prosecutor v. Limaj, Case No. IT-03-66-T, Judgment, para. 90 (ICTY Nov. 30, 2005) at 95-109.
conflict not of an international character.\textsuperscript{83} The \textit{Tadic} Trial Chamber concluded that the VRS was fundamentally composed of ethnic Serb units that had ceded from the disintegrating Yugoslav People’s Army (“JNA”).\textsuperscript{84} It should be noted that the ICTY did overlook some of the KLA’s organizational flaws. The ICTY expressed that those flaws were due to the subversive and underground nature of the KLA.\textsuperscript{85} The KLA also had a political and public relations operation that issued reports and press releases for communicating goals to its constituents. The key here is to identify what appears to be a sufficient set of characteristics that constitutes a hierarchically structured armed group in light of existing jurisprudence.

\textit{ii. Application}

The FSA has a hierarchical structure, a strategy, and channels of communication which their constituents can access. The FSA is led by its founder, Colonel Riad al-Asaad, who is the Commander, Colonel Malik Kurdi, who is the deputy, and Colonel Ahmed Hijazi, who is the Chief of Staff.\textsuperscript{86} The FSA had around 37 battalion units as of January 2012 and a little more than half of these units were actively engaged in combat.\textsuperscript{87} Lieutenant Colonels, Captains, and Lieutenants have defected from the Syrian troops to lead battalions, superimposing their prior hierarchical structure to their new organization. The FSA seems to have a relatively horizontal structure and field units are led by commanders who keep a close relation to Col. Riad al-Asaad and the FSA leadership in general.\textsuperscript{88} The leadership appears to give the units general direction while the field commanders seem to maintain a high level of autonomy and can decide on when

\begin{footnotesize}
\begin{itemize}
\item Id. at 134
\item See Prosecutor v. Tadic, Case No. IT-94-1-T, Judgment, paragraphs 114-15 (ICTY May 7, 1997).
\item Limaj, Case No. IT-03-66-T, Judgment, paras. 94, 104.
\item http://english.al-akhbar.com/content/wadi-khaled-free-syrian-army-base-lebanon-ii
\end{itemize}
\end{footnotesize}
and how to launch their respective attacks. The FSA also has access to an extensive internet-based communication network that the Assad regime has yet to penetrate.

The FSA is configured like a guerilla force with tactics that follow such a structure. There are around 300 to 400 fighters split in combat units of six to ten men with each man in the unit armed with a light weapon such as an AK-47, while the combat unit is equipped with an RPG launcher and light machine guns. The battalion unit carries out communications via walkie-talkies. The FSA works closely with the local populations that regularly offer defects that join the units from the region or town that they come from. The FSA is closely intertwined with impromptu networks in liberated areas and it works with civilian-formed councils. The FSA has even interacted, to a very limited extent, through a governing lens. By late February 2012, the Syrian National Council (SNC), the partially recognized government in exile, established a military bureau to oversee the military operations of the FSA. However, this initiative has been met with controversy and criticism by FSA leaders. Finally, the Arab League, in their leaked mission report, described the FSA as an armed entity born from the excessive force the Syrian regime has employed.

Both the expansion of the FSA and attacks by the Syrian regime suggests that the hierarchical structure has made the FSA attractive to one side of the hostilities and a threat to the other. Riad al-Asaad has met with Kofi Annan and the Arab League which further demonstrates the level of organization of the FSA. However, it is to be noted that most Arabic news reports have described these meetings as useless because nothing tangible is being imposed to stop “the

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89 http://www.spiegel.de/international/world/0,1518,817225,00.html
90 http://www.thedailybeast.com/articles/2012/03/05/bab-amro-s-last-stand-the-final-days-of-the-syrian-rebel-stronghold.html
92 http://mideast.foreignpolicy.com/posts/2012/01/20/syrian_dissidents_start_to_call_cairo_home
killing machine.” In the case of an armed conflict not of an international character occurring in the territory of one of the High Contracting Parties between their armed forces and dissident armed forces, AP II would apply. However, while the International Court of Justice (among others) has held that Common Article 3 reflects customary law, AP II applies only with respect to states parties. Syria has not become a party to AP II, so the hostilities could only trigger Common Article 3 and customary IHL.

b. Territorial Control and Administration

i. Legal Precedent

The ICTY explained that the VRS exercised control and administration over a sizeable portion of territory. The ICTY determined that armed entities called “Muslim forces” were organized enough to constitute a party to an armed conflict in Lukic simply because they “controlled territory in and around the Visegrad municipality.” Similarly, the Trial Chamber in Tadic found that the VRS exercised exclusive administrative control over the Serb-dominated areas of Bosnia. The KLA even established checkpoints on some highways in Kosovo. According to the Tadic criteria, the degree of organization required to engage in protracted violence can be lower than the degree of organization required for carrying out sustained and concerted military operations. The particular importance of Tadic is that it lessened the requirement of “sustained military operations from Protocol II, Article 1 to protracted military

96 See generally, Prosecutor v. Tadic, Case No. IT-94-1-T, Judgment, paras. 123-25 (ICTY May 7, 1997) (describing the Yugoslav People’s Army (“JNA”) taking control of various Serbian regions of Bosnia and the transfer of control to the Army of the Republika Srpska (“VRS”) after formal JNA withdrawal).
97 Limaj, Case No. IT-03-66-T, Judgment, paras. 144-45.
operations, which is maintained in Rome Statute, Article 8(2) (f). The new standard allows for interruptions in a conflict, and leads to applying IHL earlier.98

ii. Application

The FSA operates throughout the country in both urban areas and rural areas. Forces are mostly active in the northwest (Idlib and Aleppo), the central regions (Homs, Hama and Rastan), the south (Deraa and Houran), the east (Dayr al-Zawr and Abu Kamal) and in some parts of Damascus. The overall largest concentration seems to be in the central region of Homs and Hama with over nine battalions active in the area.99 The FSA does not use tactics that are aimed to occupy areas once a fight is complete, but by the end of 2011 large areas of Syria had fallen under partial control of the FSA.100 The FSA has succeeded in taking control of Zabadani in the Damascus province after intense clashes with the Assad regime’s troops. On January 21st, the FSA temporarily captured the town of Douma near Damascus as well. For three months the FSA controlled about two-thirds of Homs, Syria’s third largest city and around the same time, many suburbs in Damascus fell to the FSA. Examples like Saqba show that the FSA is able to control areas until the Assad regime answers back with heavy bombardment.101 In late February 2012, the city of Idlib was under the FSA’s control with opposition flags flying in the city center, but partial control is all the FSA can hold. In a head to head battle with the Syrian army, it is almost always unable to hold territory for long. However, it has controlled territory and has administered local opposition networks throughout Syria.

c. Complexity of Operations

100 [http://www.reuters.com/article/2012/01/13/us-syria-defections-idUSTRE80C2IV20120113](http://www.reuters.com/article/2012/01/13/us-syria-defections-idUSTRE80C2IV20120113)
i. **Legal Precedent**

The ICTY discussed the complexity of the KLA’s operations because of the KLA’s fortified positions. The KLA also used rocket launchers in an attack, which indicated its ability to conduct operations that were sustained. The KLA was also able to offer resistance to the Serbian forces as well. The ICTY determined that the KLA had the ability to engage in a varied organizational capacity which indicated its level of organization. In *Lukic*, the ICTY highlighted the use of both offensive and defensive actions which indicated military planning in determining that the group was sufficiently organized. Other actions included fortifying and camouflaging positions, setting ambushes, attacking and holding villages and using mortars and other forms of ammunition to keep their resistance afloat.

ii. **Application**

The FSA is also operating in a fairly complex manner. In fact, they have attacked logistics vehicles like tank transporters, fuel trucks, they have cut coaxial communications cables servicing airfields, and destroyed telecommunications towers, sabotaged engines of combat and other vehicles used by government forces by sugaring the fuel tank and attacking railways and pipelines. In the Battle of Rastan there were reports that the FSA destroyed 17 large armored vehicles using RPGs and booby traps. In the clashes in the Idlib province, there was a report of a rocket-propelled grenade by defected soldiers which killed nine soldiers. Ambushes in Idlib have also been reported near the Turkish border. Notable attacks on Damascus

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102 *Limaj*, Case No. IT-03-66-T, para. 79.
103 Id. para. 158
105 Id. paras. 90-100, 880-84.
intelligence and airbase staffs, in Homs by rocket propelled grenades and 50 cal. machine guns, and anti-aircraft weaponry respectively, have been reported as well.\textsuperscript{110} The FSA attacks are meant to destabilize the Assad regime’s strongholds by attempting to attack bases, convoys or headquarters. By 2012, the FSA managed to take control over the border town of Zabadani which is less than 15 miles away from the suburbs of Damascus and completely retook control of the city of Rastan. By the beginning of February, videos surfaced showing armored personnel carriers called BMP-2’s (an amphibious infantry fighting vehicle) in Homs carrying Syrian independence flags firing at government forces.\textsuperscript{111} Western and Arab leaders are due to meet in Istanbul in early April to back the revolt against the Syrian regime which shows that the opposition is a threatening and credible force to be reckoned with. In fact, the strategy is to incite defection enough to fatigue the armed forces and continue to interfere with the army’s ability to keep control.\textsuperscript{112}

In undermining the government by protecting civilian protesters, encouraging army defection and by carrying out armed attacks, the FSA has been able to adopt guerilla-style tactics. The FSA actively ambushes security forces and the state’s \textit{shabiha} (sniper) militia. The FSA also confronts the army to encourage defection and recruit new members. Much of the attacks have been on buses bringing in security reinforcements through planting explosives and carrying out attack and retreat operations. The FSA mounts attacks on government command and control and logistical infrastructure. A sabotage campaign on the Syrian regime’s logistics assets like security service command centers and on Syrian social media sites has been the strategy of the FSA. The FSA has also defended neighborhoods opposed to the government by

\textsuperscript{110} Six Elite Syrian Pilots 'Killed In Ambush' In Homs Province Military Says In TV Statement | World News | Sky News
\textsuperscript{112} http://www.reuters.com/article/2012/03/25/syria-idUSL6E8EP1XX20120325
guarding the streets while protests take place, and attacks the \textit{shabiha} which are an integral part of the government’s efforts to suppress dissent.\textsuperscript{113} It has also been reported that at least 600 fighters of the National Liberation Army from Libya had been dispatched to support and train the Free Syrian Army and had entered Syria through Turkey.\textsuperscript{114} Ultimately, the FSA has managed successes and failures but has had an operation that has been complex enough to disenfranchise the Syrian army, a juggernaut of sorts, in many parts of the country. The complexity of their operations substantiates the argument that Syria is in fact in a state of civil armed conflict not of an international character.

\textbf{Conclusion}

On balance, the hostilities in Syria are an armed conflict not of an international character, subject to Common Article 3, because they are intense and the parties are organized. The level of intensity is high because Syria is characterized by factors described by legal precedent. For instance, the attacks are serious and there have been an increasing amount of armed clashes throughout Syria which has resulted in thousands dead. The increase of armed clashes between the Syrian troops and the FSA has challenged the regime to mobilize not only more forces, but also revert to merciless tactics against the opposition like arming civilian-snipers. Also, a range of weaponry has reached the opposition to answer what was once from the high number of defecting soldiers from the Syrian army which has subsequently led to a civil war-like environment. With this being said, the United Nations-Arab League convoy, Kofi Annan, has been struggling to create resolutions, and as of March 31, the UN announced making plans for a Syrian ceasefire mission, without the approval of the Assad regime, if hostilities are not

\textsuperscript{114} “Syrian dissidents to get arms, volunteers from Libya to fight Assad’s regime”, \textit{Al Arabiya} (Dubai). 26 November 2011. Retrieved 27 November 2011.)
halted.\textsuperscript{115} The intensity of the situation has created thousands of refugees fleeing into bordering countries from their neighborhoods that have been shelled and besieged. \textit{Shabiha} snipers, road closures and firefighting between the two actors have resulted in territories throughout the country with destroyed infrastructure and provinces in tumult, either under Syrian occupation or opposition occupation. The hostilities for the last nine months, the UN has even discussed, has resembled a civil war-like environment. The State party has been in a protracted and armed struggle against the FSA which formed in July 2011. Before their formation into a military force with a military authority and steadily increasing numbers, the Syrian troops were simply massacring non-violent protestors. These factors exist in Syria and have existed in a steadily increasing nature since July 2011 which shows that the intensity prong for the analysis has been met. The hostilities in Syria are intense, protracted and merit this portion of the Common Article 3 definition of an armed conflict not of an international character.

The second prong is the organization of the hostilities. By July, the opposition organized into a horizontally functioning structure with Colonels, Lieutenants and other ranks filing into battalions to destabilize Assad’s regime. With time and credibility came an erratic territorial control and administration over neighborhoods which begot more credibility and faith. The organization of the FSA has sharpened due to reported training by the National Liberation Army from Libya, the application of former structures of the defected troops onto the FSA, and by the slow yet steady advancement in challenging the Syrian Army. The SNC, an opposition government in exile, who is recognized or supported by 12 UN member states, actively backs the opposition within Syria. The FSA has self-brokered ceasefire agreements, but have failed to carry them out effectively. The FSA has also tried to remain anti-ideological, anti-sectarian and only anti-Assad. Their operations are characterized by raids, ambushes and attacks on

\textsuperscript{115} \url{http://www.news24.com/World/News/UN-plans-for-Syria-ceasefire-mission-20120331}
infrastructure. Firefights have been quite regular as well. The complexity of their operations is defined by their proximity to power and access, and like the KLA, the FSA must be resourceful, tactical and patient. Their operations are only fairly complex, yet it seems that complexity is developing.

The hostilities, on balance, have risen to the minimum threshold of intensity and organization to characterize the situation as an armed conflict worthy of IHL application. The conflict has taken several thousand lives and the instability does not seem to be slowing. The attacks have been serious and the distribution of clashes has increased throughout the country over the last 13 months. The Assad regime has increased his mobilization and has acknowledged the threat of the FSA by calling them terrorists. Even with a relatively short period of fighting, the hostilities surpass the threshold of intensity required. The FSA has a hierarchical and organized structure as well. Though its territorial control and administration has been inconsistent, the group has successfully captured and controlled several towns throughout Syria and continues to gain more defections and support. Finally, the complexity of the FSA’s operations is limited due to their modest yet effective strategy of inciting defection from the army and protecting civilians from the regime. Despite the foregoing, though, the actions of the FSA, on balance, meet the threshold of organization. In the spirit of Tadic, IHL must apply at an earlier stage not only for civilian life, but for the political and ideological ramifications of controlled warfare and transitioning systems. For these reasons, IHL needs to apply to the hostilities in Syria because it is an armed conflict not of an international character.