

NOTES & COMMENTS

The Geneva II Peace Talks and the Syrian Conflict: Neglected Legal Elements

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The Syrian conflict consists of political and legal components that can be managed under the UN Charter by both political and legal measures. As a result of Russian and Chinese vetoes, the UN Security Council has failed to resolve the conflict by forcible measures, although the Council was able to convene the Geneva II peace talks between the Syrian government and the Syrian opposition on January 24, 2014. The legal aspect of this conflict has been referred to in numerous reports from UN bodies that have emphasized that war crimes have been committed by the Syrian government. Thus, we believe that the UNSC has an obligation to submit this case to a court with appropriate international jurisdiction for its legal resolution. This legal solution should be part of a compromise that satisfies Russia and China pursuant to a Security Council resolution under Chapter VII of the Charter that accompanies the peace talks.

Keywords

Syrian Conflict, UN Security Council, Geneva II peace talks, Geneva Convention, Crimes against Humanity, HRC, IICISAR, Rome Statute

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1. Introduction

As with any conflict between a State and rebel groups, the current conflict in Syria consists of both political and legal elements. On the one hand, this conflict may be resolved politically through either force (military resolution) or peaceful methods (peace talks, negotiation and/or mediation) that may be prescribed by the United Nations Security Council (“UNSC”) under the United Nations Charter. On the other hand, a legal resolution can only be determined through measures that accord with the UNSC’s power under both the UN Charter and the Rome Statute of the International Criminal Court [hereinafter Rome Statute or “RSICC”]. These two methods could be invoked, albeit separately, to find a peaceful resolution to the Syrian conflict.

When the UNSC proposed the convening of the Geneva II peace talks between the Syrian government and the Syrian opposition, it considered these approaches under the Charter as possibilities to end the conflict. However, when the first session began on January 24, 2014, the topic of discussion was mainly political; in fact, the key legal component of this conflict was not included in the agenda.

The double-pronged objective of this article is to shape the tangible legal component of this conflict and to persuade the parties to the Geneva II peace talks to pay appropriate attention to such legal component in the future. This article consists of six parts, including Introduction. Part two will critically evaluate the effectiveness of the political methods (including forcible measures) that have been undertaken by the UN bodies and the UNSC in attempting to manage the conflict. Part three will discuss the UNSC’s peaceful measures for defining the legal nature of the Syrian conflict and its fact-finding missions. Part four will analyze the violation of legal rules governing the rights and obligations of the parties to the conflict. Part five will touch upon crimes committed during the conflict under RSICC. Finally, Part six will suggest a potential legal remedy to the conflict.

2. The Evolution of the Syrian Crisis and UN Political Measures

The Syrian conflict began with peaceful protests demanding the democratization of

the Syrian government in March 2011.¹ When the government attempted an armed suppression, the protesters shifted their demands from ‘reforming’ to ‘replacing’ the regime. Shortly thereafter, on July 29, 2011, the Syrian Free Army (“SFA”) was established by protesters inside Syria.² The Syrian Opposition Council (“SOC”) was also formed by the opposition living outside Syria on November 11, 2012.³

SFA began to take up arms against the government forces to defend the demonstrations, and bloodshed ensued.⁴ The conflict led to an outflow of refugees streaming across Syrian borders into neighboring countries and eventually to an exigent humanitarian crisis⁵ that continues to endanger international peace and security. This humanitarian crisis has tested the effectiveness of the UN political measures “[t]o maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace”⁶ in Syria. Both the Human Rights Council (“HRC”) and the UNSC have invoked political methods under the UN Charter to address the conflict.

The HRC can urge other UN bodies to act regarding certain humanitarian problems, such as the Syrian crisis. From March 2011 through September 2013, the HRC adopted approximately 12 resolutions⁷ with respect to the human rights situation in Syria and clarified certain facts about the conflict. In its first resolution on May 4, 2011, the HRC indicated that it “unequivocally condemns the use of lethal violence against peaceful protesters by the Syrian authorities...”⁸ The HRC asked the

¹ It first became apparent on March 15, 2011. See Arab Spring: A Research & Study Guide, Cornell University Library, available at <http://guides.library.cornell.edu/content.php?pid=259276&sid=2163169> (last visited on Apr. 6, 2014).

² SFA consists of defected Syrian Armed Forces personnel and volunteers. See J. Spyer, *Defying a Dictator: Meet the Free Syrian Army*, WORLD AFF. (May/June 2012), available at <http://www.worldaffairsjournal.org/article/defying-dictator-meet-free-syrian-army> (last visited on Apr. 19, 2014).

³ S. Talmon, *Recognition of Opposition Groups as the Legitimate Representative of a People*, 12 CHINESE J. INT’L L. (2013), available at <http://chinesejil.oxfordjournals.org/content/early/2013/05/31/chinesejil.jmt014.full> (last visited on Apr. 6, 2014). On the recognition of States and government, see generally W. BISHOP, INTERNATIONAL LAW: CASES AND MATERIALS 337 (3d ed. 1971); I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 89 (3d ed. 1983).

⁴ E. Bagy, *The Free Syrian Army*, Institute for the Study of War, available at <http://www.understandingwar.org/report/free-syrian-army> (last visited on Apr. 6, 2014).

⁵ UNHCR, UNHCR Works with Lebanon to Help Thousands Fleeing Syria Violence, May 20, 2011, available at <http://www.unhcr.org/4dd66d3e6.html> (last visited on Apr. 6, 2014).

⁶ U.N. Charter art. 1. On the function and power of the UNSC, see D. BOWETT, THE LAW OF INTERNATIONAL INSTITUTIONS 33 (4th ed. 1981).

⁷ For all the resolutions of the HRC on Syria until 2013, see OHCHR, Documentation, Independent International Commission of Inquiry on the Syrian Arab Republic, available at <http://www.ohchr.org/EN/HRBodies/HRC/IICISyria/Pages/Documentation.aspx> (last visited on Apr. 6, 2014).

⁸ H.R.C. Res. 16, U.N. Doc. A/HRC/RES/S-16/1 (May 4, 2011), available at <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Syria%20AHC%20RES%20S-16%201.pdf> (last visited on Apr. 6, 2014).

Office of the United Nations High Commissioner for Human Rights (“UNHCR”): (1) to immediately send a mission to Syria to investigate human rights violations; (2) to establish the facts and circumstances of any crimes; and (3) to ensure that the perpetrators of such crimes are held responsible.⁹ The resolution also requested the UNHCR to submit reports on any human rights developments in Syria at its 17th and 18th sessions.¹⁰

Consequently, the UN Secretary-General’s Special Advisers on the Prevention of Genocide and the Responsibility to Protect issued a statement regarding Syria on July 21, 2011.¹¹ The statement illustrated the range and intensity of the violence in Syria and warned of crimes against humanity being committed. The UNSC reminded the Syrian government of its duty to protect its people and urged the government security forces to abide by international humanitarian law.¹²

The HRC then established the Independent International Commission of Inquiry on the Syrian Arab Republic [hereinafter Commissioner or “IICISAR”], on August 22, 2011, with the mandate to investigate all human rights violations committed against the Syrian people after the protests began in March 2011.¹³ The HRC also asked IICISAR to identify the perpetrators and hold them accountable. In a reply dated March 1, 2012, however, the Syrian government refused to grant a visa to the UN Under-Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator who was willing to enter Syria,¹⁴ the Syrian government released a similar denial to IICISAR on September 29, 2011.¹⁵

The HRC increased the political pressure on the Syrian government with another resolution on December 2, 2011¹⁶ which recommended that the main bodies of the

⁹ *Supra* note 7.

¹⁰ *Supra* note 8. The resolution was adopted by a recorded vote of 26 to nine with seven abstentions. *Id.*

¹¹ UN, Special Advisers of the United Nations Secretary-General on the Prevention of Genocide, Francis Deng, and on the Responsibility to Protect, Edward Luck, on the Situation in Syria Press Release, (July 21, 2011), *available at* <http://www.un.org/en/preventgenocide/adviser/pdf/OSAPG%20statement%20Syria%2022%20July%202011%20FINAL.pdf> (last visited on Apr. 6, 2014).

¹² *Id.*

¹³ OHCHR, About the Commission of Inquiry, Independent International Commission of Inquiry on the Syrian Arab Republic, *available at* <http://www.ohchr.org/EN/HRBodies/HRC/IICISyria/Pages/AboutCoI.aspx> (last visited on Apr. 6, 2014).

¹⁴ See UN Security Council Press Statement on Syria, Press Release, U.N. Doc. SC/10564 (Mar. 1, 2012), *available at* <https://www.un.org/News/Press/docs/2012/sc10564.doc.htm> (last visited on Apr. 6, 2014).

¹⁵ UN Human Rights Council, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, annexes II–IV, U.N. Doc. A/HRC/S-17/2/Add.1 (Nov. 23, 2011) [hereinafter First Report], *available at* http://www.ohchr.org/Documents/Countries/SY/A.HRC.S-17.2.Add.1_en.pdf (last visited on Apr. 6, 2014).

¹⁶ H.R.C. Res. 18, U.N. Doc. A/HRC/RES/S-18/1 (Dec. 2, 2011), *available at* <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/G11/172/09/PDF/G1117209.pdf?OpenElement> (last visited on Apr. 6, 2014).

UN, including the UNSC, urgently consider the report from the commission of inquiry¹⁷ and take appropriate action.¹⁸ It also recommended adoption of the Arab League initiative. However, the Resolution was not adopted due to opposition from Russia, China and certain other States.¹⁹

On June 11, 2013, the HRC adopted a resolution warning the Syrian government:

...the statements made by the United Nations High Commissioner for Human Rights before the Human Rights Council and the Security Council and by the special procedures of the Human Rights Council that crimes against humanity are likely to have been committed in the Syrian Arab Republic, and noting the repeated encouragement by the High Commissioner to the Security Council to refer the situation to the International Criminal Court....²⁰

Consequently, the UNSC adopted a resolution on April 14, 2011,²¹ authorizing the deployment of military observers in Syria.²² However, this resolution was not implemented because the Syrian government did not cooperate with the mission. The UNSC adopted another resolution on October 4, 2011,²³ that imposed mild sanctions on the Syrian regime, but the resolution was vetoed by both Russia and China.²⁴

On February 4, 2012, the UNSC failed yet again to adopt a resolution authorizing action in Syria.²⁵ Since then, the UNSCs' actions have been stymied by Russian and

¹⁷ H.R.C. Res. 17, ¶ 13, U.N. Doc. A/HRC/S-17/2 (Aug. 22, 2011), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/169/88/PDF/G1116988.pdf?OpenElement> (last visited on Apr. 6, 2014).

¹⁸ *Supra* note 16, at ¶ 8.

¹⁹ *Id.*

²⁰ H.R.C. Res. 23, U.N. Doc. A/HRC/23/L.29 (June 11, 2013), available at <http://www.ohchr.org/EN/HRBodies/HRC/IICISyria/Pages/Documentation.aspx> (last visited on Apr. 6, 2014).

²¹ The resolution, which authorizes the dispatch of an advance team of up to 30 unarmed military observers to Syria to monitor compliance with the ceasefire agreement, passed 15:0. The observers are tasked with establishing and maintaining contact with both sides of the conflict and reporting with respect to compliance with the ceasefire agreement until a full mission is deployed in the country. See S.C. Res. 2043, U.N. Doc. S/Res/2043 (Apr. 21, 2012), available at <http://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Syria%20SRES%202043.pdf> (last visited on Apr. 6, 2014).

²² *Id.*

²³ Security Council, Security Council Fails to Adopt Draft Resolution Condemning Syria and Crackdown on Anti-Government Protestors, Owing to Veto by Russian Federation, China, ¶ 9, Press Release, U.N. Doc. SC/10403 (Oct. 4, 2011), available at <https://www.un.org/News/Press/docs/2011/sc10403.doc.htm> (last visited on Apr. 6, 2014).

²⁴ U.N. SCOR, 66th Sess., 6627th mtg. at 2, U.N. Doc. S/PV.6627 (Oct. 4, 2011), available at http://www.un.org/en/ga/search/view_doc.asp?symbol=S/PV.6627 (last visited on Apr. 6, 2014).

²⁵ For the draft resolution, see U.N. Security Council, *Bahrain, Colombia, Egypt, France, Germany, Jordan, Kuwait, Libya, Morocco, Oman, Portugal, Qatar, Saudi Arabia, Togo, Tunisia, Turkey, United Arab Emirates, United Kingdom of Great Britain and Northern Ireland and United States of America: draft resolution*, S.C. Res. 2012, U.N. Doc.

Chinese opposition for forceful interference in the Syrian crisis. The UNSC passed a resolution on September 27, 2013, that required, *inter alia*, convening of the Geneva II peace talks in January 2014 and endorsed the establishment of a transitional governing body in Syria with full executive powers.²⁶ However, despite reaching a compromise agreement, could the results of these peace talks stand without a concurrent legal remedy for the Syrian people found by a competent body, such as IICISAR?

3. The Legal Nature of the Syrian Conflict

A. Fact-Finding Missions

The Syrian conflict represents a significant danger to international peace and security.²⁷ The UN Charter empowers the UNSC to investigate “any situation which might lead to international friction or give rise to a dispute.”²⁸ These mechanisms include fact-finding missions initiated by the UN Secretary-General (“UNSG”) or the HRC.

The UN figures supported establishing a specialized body to investigate all human rights abuses in the Syrian conflict.²⁹ Following the statements from the UNSC President³⁰ and the UNSG on August 3, 2011,³¹ the HRC established IICISAR on August 22, 2011.

S/2012/77 (Feb. 4, 2012), available at <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Syria%20S2012%2077.pdf> (last visited on Apr. 6, 2014). The Russian Federation and China vetoed the draft resolution that would have demanded that both government forces and the armed opposition groups stop all violence and reprisals. The draft resolution was supported by the 13 other UNSC members; see Security Council Fails to Adopt Draft Resolution on Syria as Russian Federation, China Veto Text Supporting Arab League’s Proposed Peace Plan, Press Release, U.N. Doc. SC/10536 (Feb. 4, 2012), available at <http://www.un.org/News/Press/docs/2012/sc10536.doc.htm> (last visited on Apr. 6, 2014).

²⁶ See S.C. Res. 2118, U.N. Doc. S/RES/2118 (Sept. 27, 2013), available at http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_res_2118.pdf (last visited on Apr. 6, 2014).

²⁷ U.N. Charter arts. 11, 33–38 & 99 (demonstrating the bases of the UNSC’s decisions concerning the specific settlement of disputes within the framework of these articles).

²⁸ U.N. Charter art. 34.

²⁹ *Supra* note 17.

³⁰ See Statement by the President of the Security Council, U.N. Doc. S/PRST/2011/16 (Aug. 3, 2011), available at <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Syria%20%20SPRST%202011%2016.pdf> (last visited on Apr. 6, 2014).

³¹ *Supra* note 17.

B. IICISAR

IICISAR has investigated the human rights situation in Syria since the beginning of the demonstrations in March 2011 and has ascertained the facts and circumstances that may have led to the commission of crimes against humanity and has identified perpetrators of such crimes for the purpose of establishing accountability.³²

1. The IICISAR Reports

Since its inception, IICISAR has produced six reports and four periodic updates that has revealed human rights abuses committed in Syria.³³ The reports are based on interviews with the witnesses and victims inside and outside of Syria.³⁴ In addition, the factual findings are similar in substance and form throughout the reports.

In its first report dated November 23, 2011,³⁵ IICISAR showed documented examples of crimes committed in Syria, the appropriate law that apply to these crimes and the likely perpetrators. The crimes listed included “extrajudicial executions, arbitrary detentions, enforced disappearances, torture and other forms of ill-treatment, sexual violence, violations of children’s rights, displacement and restriction of movement, violations of economic and social rights...”³⁶ The applicable law included “international law, international human rights law, international humanitarian law, international criminal law...”³⁷ The parties responsible should

³² For the members of IICISAR, see OHCHR, Independent International Commission of Inquiry on the Syrian Arab Republic, available at <http://www.ohchr.org/EN/HRBodies/HRC/IICISyria/Pages/IndependentInternationalCommission.aspx> (last visited on Apr. 6, 2014).

³³ See *First Report*, *supra* note 15; U.N. Human Rights Council, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, U.N. Doc. A/HRC/19/69 (Feb. 22, 2012) [hereinafter *Second Report*], available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G12/106/13/PDF/G1210613.pdf?OpenElement>; U.N. Human Rights Council, *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, U.N. Doc. A/HRC/21/50 (Aug. 15, 2012) [hereinafter *Third Report*], available at <http://reliefweb.int/report/syrian-arab-republic/report-independent-international-commission-inquiry-syrian-arab-republ-1>; U.N. Human Rights Council, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, U.N. Doc. A/HRC/22/59 (Feb. 5, 2013) [hereinafter *Fourth Report*], available at <http://reliefweb.int/report/syrian-arab-republic/report-independent-international-commission-inquiry-syrian-arab-republ-3>; UN Human Rights Council, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, U.N. Doc. A/HRC/23/58 (June 4, 2013) [hereinafter *Fifth Report*], available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G13/156/20/PDF/G1315620.pdf?OpenElement>; U.N. Human Rights Council, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, U.N. Doc. A/HRC/24/46 (Sept. 11, 2013) [hereinafter *Sixth Report*], available at <http://www.ohchr.org/EN/HRBodies/HRC/IICISyria/Pages/Documentation.aspx> (all last visited on Apr. 6, 2014).

³⁴ The reports were based on interviews with over 1,400 witnesses and victims. The interviews were conducted with people in camps and hospitals in countries neighboring Syria; see *First Report*, *supra* note 15.

³⁵ See *First Report*, *supra* note 15, ¶¶ 41–108.

³⁶ *Id.* ¶¶ 27–83.

³⁷ *Id.* ¶¶ 84–108.

be held to standards involving “[s]tate responsibility [and] individual responsibility for crimes against humanity...”³⁸ The first report indicated that grave human rights violations, including crimes against humanity, occurred in different locations in Syria³⁹ since March 2011. The report blamed the Syrian Arab Republic for these violations and crimes and reminded the Republic of its duty to punish the criminals and compensate the victims.

The second report, dated February 22, 2012,⁴⁰ also included examples of the crimes that had been committed, the parties responsible for crimes against humanity, and specific recommendations. Furthermore, it indicated that the “[r]esponsibility for crimes against humanity” and “gross violations and abuses” of human rights lies with ‘State authorities’ and “anti-government armed groups, including Free Syrian Army groups...”⁴¹

The second report also affirmed that the Syrian authorities had committed serious human rights violations through policies and directives from the highest levels of the armed forces and the government.⁴² Although the second report indicated that members of SFA might also be criminally accountable under international law, the Commission acknowledged in the same report that the abuses performed by “armed groups” were not in the same proportion in either scope or administration as the abuses committed by government forces.

IICISAR issued its final (Sixth) report on August 16, 2013,⁴³ which made the following recommendations.

1. The Syrian government should respect international humanitarian law and grant the Commission full access to investigate alleged crimes committed in Syria;⁴⁴
2. The parties should find a political solution based on the final communiqué from the Action Group for Syria;
3. The international community should support a peace process for Syria based on the Geneva communiqué and the Joint Special Representative of the UN and the League of Arab States based on the principles of international law;⁴⁵ and
4. The HRC should support the IICISAR recommendations and transmit the

³⁸ *Id.* ¶¶ 109–111.

³⁹ *Id.*

⁴⁰ See Second Report, *supra* note 33.

⁴¹ *Id.* ¶¶ 83–120.

⁴² *Id.* at 17.

⁴³ See Sixth Report, *supra* note 33.

⁴⁴ *Id.* annex II, ¶ 201.

⁴⁵ *Id.* ¶ 203. For the practice of the League of Arab States in settling disputes among Arab States, see generally H. HASSOUNA, THE LEAGUE OF ARAB STATES REGIONAL DISPUTES: A STUDY OF MIDDLE EAST CONFLICTS (1975).

report to the UNSC through the UNSG,⁴⁶ and the UNSC should implement them.⁴⁷

It may be reasonably concluded that there are two legal aspects that must be the basis of any legal remedy to the Syrian conflict. The first is the legal nature of the conflict, which requires only the definition of the legal rules that have been violated and that govern the rights and obligations of the parties to this conflict. The other is the legal measures that UNSC has not yet filed with the International Criminal Court [hereinafter the Court or “ICC”].

4. Legal Rules Governing the Rights and Obligations of the Parties to the Syrian Conflict

The IICISAR reports have defined the legal nature of the atrocities committed in the Syrian conflict as crimes against international conventions.⁴⁸ They have also alleged that the Syrian government is responsible for these acts.⁴⁹ What criteria, can then be used to identify the legal rules governing the rights and obligations of the parties to the Syrian conflict? The principal criterion that is applicable is international humanitarian law, which includes the decisive grounds defining the applicability of such law to internal and international armed conflicts.

A. The Geneva Conventions and the Syrian Conflict

International humanitarian law includes, *inter alia*, the four Geneva Conventions of 1949 [hereinafter Geneva Conventions] and their protocols.⁵⁰ International humanitarian law differentiates its application to various types of conflicts, such as an international armed conflict, internationalized armed conflict and non-international armed conflict. Based on this distinction, the Syrian conflict is

⁴⁶ See Sixth Report, *supra* note 33, ¶ 204.

⁴⁷ *Id.* ¶ 206

⁴⁸ See First Report, *supra* note 15, ¶¶ 41–108.

⁴⁹ *Id.*

⁵⁰ ICRC, 1949 Conventions and Additional Protocols, and their Commentaries, available at <http://www.icrc.org/applic/ihl/ihl.nsf/vwTreaties1949.xsp> (last visited on Apr. 6, 2014; T. MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 41 (1989).

neither an international armed conflict,⁵¹ nor an internationalized armed conflict.⁵² According to Common Article 2 of the 1949 Geneva Conventions, an international armed conflict typically refers to an inter-State conflict,⁵³ which would not involve the Syrian conflict. The Syrian conflict is between the Syrian government and SFA, i.e., national armed groups struggling to overthrow the existing [non-democratic] government within their national borders, which makes it an armed conflict of a non-international character.

The Syrian conflict also has the characteristics of non-international character. In the *Nicaragua* case, the International Court of Justice (“ICJ”) held:

The conflict between the contras’ forces and those of the Government of Nicaragua is an armed conflict which is ‘not of an international character’. The acts of the contras toward the Nicaraguan Government are therefore governed by the law applicable to conflicts of that character; whereas the actions of the United States in and against Nicaragua fall under the legal rules relating to international conflicts.⁵⁴

In the *Tadić* case, moreover, the International Criminal Tribunal for the former Yugoslavia (“ICTY”) affirmed that a non-international armed conflict exists when there is “protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.”⁵⁵ Thus, the ICTY describes a non-international armed conflict having two elements: (1) non-State-armed groups must be engaged in protracted hostilities; and (2) the groups must be organized.

Because the Syrian conflict is a non-international armed conflict, Common Article 3 of the Geneva Conventions and its 1977 Additional Protocol II (“APII”) is

⁵¹ On this specific point and generally on the qualification of armed conflicts under International Humanitarian Law, see S. Vité, *Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations*, 91 INT’L REV. THE RED CROSS 69–84 (2009).

⁵² This type of conflict is defined as when a state intervenes indirectly without the use of its armed forces in a non-international armed conflict on the side of the rebels. The *Tadić* case, which was decided by the International Criminal Tribunal for the former Yugoslavia (“ICTY”), concluded that ‘...overall control...’ of a rebel group would be sufficient to internationalize the conflict. The standard set by the Tribunal does not require the “...issuing of specific orders by the State, or its direction of each individual operation...”; it is sufficient that a state “...has a role in organizing, coordinating or planning the military actions...” of a given non-state armed group. See *Prosecutor v. Tadić*, Case No. IT-94-1-A, International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, at 59 (July 15, 1999), available at <http://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf> (last visited on Apr. 6, 2014).

⁵³ *Supra* note 50.

⁵⁴ See *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 114 (June 27), available at <http://www.icj-cij.org/docket/files/70/6503.pdf> (last visited on Apr. 6, 2014).

⁵⁵ *Tadić*, Case No. IT-94-1-A.

invokable. Common Article 3 provides, *inter alia*, that:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions...⁵⁶

The International Committee of the Red Cross (“ICRC”) explained the meaning of the conflicts referred to in this article in its commentary as follows:

... it must be recognized that the conflicts referred to in Article 3 are armed conflicts, with armed forces on either side engaged in hostilities—conflicts that are in many respects similar to an international war but that are occurring 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 frequently some type of front.⁵⁷

Note that the control of a large portion of the Syrian territory by SFA is not the basis for applying Common Article 3⁵⁸ to the Syrian conflict, although it is strong evidence that the Article should be applied. Instead, Common Article 3 is applied due to the nature of the conflict and the principles embodied in the provision.

The basic principles of Common Article 3 would protect the Syrian population and individuals in the armed conflict, but are not sufficient to resolve the serious humanitarian problems caused by the conflict. Further, Common Article 3 does not contain the definition for a non-international armed conflict⁵⁹ that can be precisely applied to the current Syrian conflict, like APII.

APII is mainly devoted to non-international conflicts with the objective of applying the basic rules of law on international armed conflict to internal armed conflicts, such as the Syrian conflict. APII neither denies the rights of States to use legal means to maintain their existence, nor justifies the intervention of one State into the internal affairs of another, including non-recognition of the legal status of armed opposition groups.⁶⁰

⁵⁶ *Supra* note 50, art. 3.

⁵⁷ J. PICTET, COMMENTARY ON THE FOUR GENEVA CONVENTIONS OF 1949, 36 (1952-1960).

⁵⁸ See generally M. Gandhi, *Notes and Comments, Common Article 3 of Geneva Conventions, 1949 in the Era of International Criminal Tribunals*, 2001 INDIAN SOC'Y OF INT'L L. Y.B. OF INT'L HUMANITARIAN & REFUGEE L., available at <http://www.worldlii.org/int/journals/ISILYBIHRL/2001/11.html> (last visited on Apr. 6, 2014).

⁵⁹ See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3, Aug. 12, 1949, 75 U.N.T.S. 31, available at <http://www.icrc.org/applic/ihl/ihl.nsf/9861b8c2f0e83ed3c1256403003fb8c5/baa341028ebff1e8c12563cd00519e66> (last visited on Apr. 6, 2014).

⁶⁰ ICRC, Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims

As demonstrated through the IICISAR Reports, the scope and criteria for applying APII to any non-international armed conflict are compatible with the Syrian conflict in the following manner. First, the conflict is between the Syrian government forces and SFA. Second, the SFA members act under a responsible command. Third, SFA controls part of Syrian territory and conducts military operations against government forces. Finally, APII excludes low-intensity conflicts such as internal tensions and riots from the scope of its application.⁶¹

Since the Syrian conflict meets the criteria for the application of APII, Common Article 3 and APII could simultaneously be applied to the conflict owing to the APII's scope of application, which is narrower than that of Common Article 3. However, if the Syrian conflict were of a lower intensity and did not meet the criteria for application of APII, Common Article 3 would solely apply.

B. What Has the Syrian Government Violated?

In all its reports, IICISAR has firmly documented that the Syrian forces have engaged in systematic, intentional and widespread violations of international law since March 2011. The following are the international conventions and treaties that have been violated by the Syrian government in the course of this conflict: (1) The Geneva Conventions, including the Additional Protocols;⁶² (2) the International Covenant on Civil and political rights;⁶³ (3) the Convention on the rights of the child;⁶⁴ (4) the Convention against torture;⁶⁵ (5) the International Covenant on Economic, Social and Cultural Rights;⁶⁶ (6) the Convention on the Prevention and Punishment of the Crime of Genocide of 1948;⁶⁷ and (7) the RSICC.⁶⁸

of Non-International Armed Conflicts (Protocol II) (June 8, 1977) art. 3, 1125 U.N.T.S. 609 [hereinafter Protocol II], available at <https://treaties.un.org/doc/Publication/UNTS/Volume%201125/volume-1125-I-17512-English.pdf> (last visited on Apr. 6, 2014).

⁶¹ *Id.* art. 1 (2).

⁶² AMNESTY INTERNATIONAL, DEADLY REPRISALS: DELIBERATE KILLINGS AND OTHER ABUSES BY SYRIA'S ARMED FORCES 55 (2012), available at <http://www.amnesty.org/en/library/asset/MDE24/041/2012/en/30416985-883b-4e67-b386-0df14a79f694/mde240412012en.pdf> (last visited on Apr. 6, 2014).

⁶³ See First Report, *supra* note 15, at 17, ¶ 94.

⁶⁴ *Id.* ¶ 94.

⁶⁵ *Id.* ¶ 93.

⁶⁶ *Id.* at 19, ¶ 96.

⁶⁷ Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277, available at <https://treaties.un.org/doc/Publication/UNTS/Volume%2078/volume-78-I-1021-English.pdf> (last visited on Apr. 6, 2014).

⁶⁸ Rome Statute of the International Criminal Court (July 17, 1988), 2187 U.N.T.S. 90 [hereinafter Rome Statute], available at <http://www.icc-cpi.int/nr/rdonlyres/add16852-ace9-4757-abe7-9cdc7cf02886/283503/romestatuteng1.pdf>

5. Legal Measures for the Peaceful Resolution of the Syrian Conflict

A. *Applicability of the RSICC to the Syrian Conflict*

In its first report, IICISAR confirmed that the Syrian government has violated not only international human rights law and international humanitarian law, but also international criminal law.⁶⁹ One of the reports by IICISAR also concluded⁷⁰ that these violations constituted crimes under international criminal law, both substantively and procedurally. It urged the UNSC to ensure that criminal procedures are undertaken by submitting the conflict to the ICC when the crimes are substantiated. In this case, IICISAR substantiated that the commission of the crimes, referring to Article 7 of the Rome Statute (Crimes against Humanity). The IICISAR reports have ascribed war crimes and crimes against humanity to the Syrian government as follows.

1. *War Crimes*

The first report of IICISAR confirmed that war crimes had been committed by the Syrian government against its own people in a systematically planned manner. IICISAR declared:

The sheer scale and consistent pattern of attacks by military and security forces on civilians and civilian neighborhoods and the widespread destruction of property could only be possible with the approval or complicity of the State...⁷¹ Prior to operations to stop civilian demonstrations, military commanders told their units, falsely, that they were going to fight 'terrorists,' 'armed gangs' or Israel is... Journalists who attempted to report on the protests were arrested, detained, tortured and interrogated about the activities of their colleagues...⁷²

The Commission also noted as follows: "This degree of coordination between the military and the security forces could only be possible under the direction of the

(last visited on Apr. 6, 2014).

⁶⁹ See First Report, *supra* note 15, ¶¶ 84–108.

⁷⁰ See IICISAR reports, *recited from supra* note 15, at 31.

⁷¹ See First Report, *supra* note 15, at 19, ¶ 107. *Cf.* these crimes with the war crimes at the Nuremberg Trials, *see* G. GINSBURGS & V. KUDRIAVTES, *THE NUREMBERG TRIAL AND INTERNATIONAL LAW* 155 (1990).

⁷² See First Report, *supra* note 15, at 18, ¶ 104.

highest levels of the Government and the military.”⁷³ Furthermore, the Commission believed that “expenditure of such large quantities of State resources would only be possible pursuant to the policies and directives of the Government.”⁷⁴

2. *Crimes against Humanity*

The Rome Statute has established two criteria in defining crimes against humanity. The first is that the crimes are committed against the civilian population without regard to sex, language or political orientation.⁷⁵ It distinguishes such crimes from genocide, which is a crime committed against a particular religious or ethnic group.⁷⁶ The second is that the crime should be committed as part of widespread or structured attacks without denying the tight connection between the two criteria.⁷⁷ ‘Attacks’ in crimes against humanity may be committed by the sState, by non-governmental groups such as SFA or by any national liberation movement, separatist movement or terrorist organization.⁷⁸ Regarding the crimes by the Syrian government, IICISAR indicated the following:

The commission received numerous, credible and consistent first-hand reports about widespread and systematic violations of the human rights of civilians in the Syrian Arab Republic since March 2011. The scale of these attacks against civilians in cities and villages across the country, their repetitive nature, the levels of excessive force used consistently by units of the armed forces and diverse security forces, the coordinated nature of these attacks and the evidence that many attacks were conducted on the orders of high-ranking military officers all lead the commission to conclude that the attacks were apparently conducted pursuant to a policy of the State.⁷⁹

The Commission also added:

The above conclusion finds support in diverse sources of information. Multiple witnesses indicated that, on different days and in different locations, officers at the level of Colonel and Brigadier General issued orders to their subordinate units to open fire on protesters, beat

⁷³ *Id.* ¶ 105.

⁷⁴ *Id.* at 19, ¶ 106.

⁷⁵ Rome Statute art.7(1)

⁷⁶ *Id.* art. 6.

⁷⁷ *Id.* art. 7(1).

⁷⁸ *See generally* the war between Al-Nusra Front and the Islamic State in Iraq and Syria; R. Mortada, *Syria: al-Nusra Front Declares War on ISIS*, ALAKHBAR ENGLISH, Feb. 26, 2014, available at <http://english.al-akhbar.com/node/18785> (last visited on Apr. 6, 2014).

⁷⁹ *See* First Report, *supra* note 15, at 18, ¶ 102.

demonstrators and fire at civilian homes. The commission received credible evidence that it is unlikely that the officers issued these orders independently given that the Syrian military forces are professional forces subject to military discipline. The commission therefore believes that orders to shoot and otherwise mistreat civilians originated from policies and directives issued at the highest levels of the armed forces and the Government.”⁸⁰

IICISAR finally concluded:

According to international law, when certain crimes are committed as part of a widespread or systematic attack against civilians and the perpetrators know that their conduct is part of this attack, such offences constitute crimes against humanity. The commission is thus gravely concerned that crimes against humanity of murder... torture...rape...or other forms of sexual violence of comparable gravity...imprisonment or other severe deprivation of liberty...enforced disappearances of persons...and other inhumane acts of a similar character ...have occurred in different locations in the country since March 2011, including, but not limited to, Damascus, Dar’a, Duma, Hama, Homs, Idlib and along the borders.⁸¹

Pursuant to the descriptions of IICISAR, the acts committed in the Syrian region fall under the jurisdiction of the ICC⁸² because: (a) the acts were “[c]ommitted as part of a widespread or systematic attack;”⁸³ (b) directed against ‘civilian population’ in Syria; and (c) implemented as part of a policy of “a State or organization,” such as Syria or SFA, in accordance with the instigation or consent of the state, such as the death squads (*Shabeeha*).

All IICISAR reports⁸⁴ have authenticated these types of war crimes and crimes against humanity in the Syrian conflict and have attributed them to the Syrian government. Unfortunately, the UNSC has thrust all these legal efforts to the side to concentrate entirely on the political aspects of the conflict, although the UNSC is capable of invoking legal procedures to settle the dispute.⁸⁵

⁸⁰ *Id.* ¶ 103.

⁸¹ *Id.* at 19, ¶ 108.

⁸² Amnesty International, The International Criminal Court: Fact sheet 4: The Court Accused of Crimes against Humanity, available at <http://www.amnesty.org/fr/library/asset/IOR40/005/2000/fr/364a3f1e-df61-11dd-aaaa-7d9091d4638f/ior400052000ar.html> (last visited on Apr. 6, 2014).

⁸³ Rome Statute art. 7.

⁸⁴ IICISAR reports, recited from *supra* notes 15, at 31.

⁸⁵ U.N. Charter art. 33(1).

*B. Legal Procedures under the ICC*⁸⁶

Under the UN Charter, the UNSC is the only body that is legally authorized to take action in a conflict such as the Syrian conflict that threatens international peace and security.⁸⁷ Moreover, in the context of the Syrian conflict, the UNSC could invoke two procedural options, such as the UNSC's referral procedure to the CC⁸⁸ and the Charter-based tribunal.⁸⁹ Of the two options, the ICC would be more convenient because it is currently operating with a wide criminal jurisdiction that covers most crimes committed in Syria, whereas the Charter-based tribunal requires a UNSC resolution, which could be frustrated by veto.

Considering Article 8 (1) of RSICC, which provides for the jurisdiction of the ICC over war crimes,⁹⁰ moreover, there is little room in which the Syrian government can maneuver to avoid legal action.⁹¹ Although Syria is not a party to RSICC,⁹² the ICC can exercise its jurisdiction over the Syrian case if the UNSC refers the case to the Court.⁹³ In these cases, the Court can exercise jurisdiction over accused Syrian nationals without Syria's consent, even if Syria is not a party to RSICC.

The ICC jurisdiction covers all perpetrators in this case, including individual Syrian citizens and civilian and military officials.⁹⁴ The extension of the ICC jurisdiction may be legally justified under the condition that Syrian governmental officials have acted to commit these crimes pursuant to their authority as instruments of the state. It may be argued, however, that a State can act only through its duly constituted authorities so that official acts may be attributed to the State rather than individuals.⁹⁵ However, because a state is a juridical person under international

⁸⁶ The UN's human rights chief, Navi Pillay says that: "Crimes against humanity are likely to have been committed in Syria since March's government crackdown began and asks the Security Council to refer the situation to the International Criminal Court." See *UN: Crimes against Humanity Likely Committed in Syria*, THE TELEGRAPH, Feb. 13, 2012, available at <http://www.telegraph.co.uk/news/worldnews/middleeast/syria/9080515/UN-crimes-against-humanity-likely-committed-in-Syria.html> (last visited on Apr. 6, 2014).

⁸⁷ U.N. Charter art. 24(1).

⁸⁸ Rome Statute art. 13(b).

⁸⁹ U.N. Charter art. 36.

⁹⁰ Rome Statute art. 8 (1). It reads: "The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes."

⁹¹ *Id.*

⁹² ICC, States Parties to the Rome Statute, Chronological List, ASP Information, Mar. 15, 2013, available at http://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/states%20parties%20_%20chronological%20list.aspx (last visited on Apr. 9, 2014). See also Rome Statute, *supra* note 68.

⁹³ Rome Statute art. 13(b).

⁹⁴ *Id.* art. 27.

⁹⁵ See Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001), ch. I, available at <http://www.>

law, it cannot be punished (in such cases). Accordingly, high-ranking officials of the Syrian government, such as the head of State or the foreign minister, are punishable under RSICC for crimes committed in Syria.⁹⁶

Finally, it is currently the time to submit the Syrian case to international jurisdiction. A UNSC referral decision on the Syrian case has taken an unreasonably long period of time although UNSC has sufficiently reliable information to refer Syria to ICC, as indicated by the UNHCR⁹⁷ on March 28, 2012. Although such a resolution might incite an objection by either or both of the Russian and/or Chinese vetoes, the legal aspect of the Syrian conflict might be placed on the discussion table of the Geneva II political peace talks as a package. In this case, the UNSC members might reach a *compromis* on the entire conflict just as they unanimously reached an agreement on holding the Geneva II peace talks.

6. Conclusion

The Syrian conflict consists of both political and legal elements. Thus, the political elements of the conflict may be handled by political measures, while the legal elements can be settled through legal measures under provisions of the UN Charter and Article 13(b) of RSICC. Because both elements are inseparable in their effects on the Syrian people, the political and legal methods for settling them would be complementary to one another in the peace process.

The attempts by the appropriate UN bodies to resolve the Syrian conflict based on these two methods may be assessed as follows. First, the UNSC's measures to resolve the Syrian conflict (including the use of forcible measures but excluding legal methods) have thus far failed to manage the conflict because of the veto system inherent in UNSC, except that it did convene the Geneva II peace talks on January 24, 2014 that have not (as of this writing) reached a concrete outcome. Second, the UNSC has not effectively handled the legal measures, i.e., the UN fact-finding missions that have investigated the legal aspects of the Syrian conflict. Notably, these missions determined that the Syrian conflict was characterized by the widespread

ilsa.org/jessup/jessup06/basicmats2/DASR.pdf (last visited on Apr. 6, 2014).

⁹⁶ Rome Statute art. 7. See generally M. Tinta, *Commanders on Trial*, 47 NETH. INT'L L. REV. 293 (2000).

⁹⁷ See *Middle East, Syria Authorities Target Children, Says UN Rights Chief*, BBC NEWS, Mar. 28, 2012, available at <http://www.bbc.co.uk/news/world-middle-east-17532966> (last visited on Apr. 6, 2014). (citing a statement by Ms. Pillay).

and intentional commission of international crimes that were mostly attributed to the Syrian government.

Consequently, the author would recommend defining and analyzing the substantive legal rules that govern the rights and obligations of the parties to the conflict, as well as which of these substantive rules have been violated by the Syrian government. There are very good legal bases for the assessment whether crimes have been committed by the Syrian government. One is the legal measures which would substantiate the commission of such crimes under RSICC. The other is certain legal procedures that are yet to be implemented by the UNSC in the Syrian conflict. The UNSC is obligated to invoke such procedural legal measures embodied in the UN Charter and RSICC by submitting the entire conflict to the ICC before or simultaneously with the peace talks on the Syrian conflict. Eventually, the case should be decided under such jurisdiction as a legal remedy for the Syrian people, which would presumably be an integral component of comprehensive peace process to resolve the conflict.