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Five Legal Takeaways from the Syrian War

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On December 19, 2018, President Trump ordered the withdrawal of U.S. forces from Syria.³ While U.S. troops have not completely left Syria,⁴ the slow drawdown provides an opportunity to reflect on some of the legal challenges that arose during the conflict. The U.S. Army regularly uses after action reports (AAR) to record observations and capture lessons learned from military operations,⁵ and while not strictly an AAR, the following list of five takeaways is intended to memorialize some of the legal trends that arose during the military campaigns in Syria and Iraq. Our hope is that this admittedly non-exhaustive list will stimulate a broader conversation about the legal consequences of the Syrian War.

Takeaway #1: Targeting “war-sustaining” objects will remain a significant part of future air campaigns.

In April 2016, then-Secretary of Defense Ashton Carter informed Congress that U.S. forces had been deliberately targeting the war-sustaining capacity of the Islamic State of Iraq and Syria (ISIS or ISIL).⁶ Testifying before Congress, Carter stated, “Our attacks on ISIL’s economic infrastructure, from oil wells and trucks to cash storage to ISIL’s financial leaders, is putting a stranglehold on ISIL’s ability to pay its fighters, undermining its ability to govern, and making it harder to attract new recruits.”⁷ This targeting approach proved so effective that three other permanent members of the United Nations (UN) Security Council conducting operations in Syria (the United Kingdom, Russia, and France) also targeted those types of objects to deny resources to ISIS.⁸ Targeting war-sustaining objects, however, is legally complicated as “war-sustaining” objects may be considered lawful military objectives, while “war-supporting” objects are civilian property that cannot be lawfully targeted.⁹

Although neither “war sustaining” nor “war supporting” is formally incorporated into the law of armed conflict, both terms have proven helpful in guiding the legal analysis of targetable objects. In a speech at New York University in 2016, Jennifer O’Connor, then the General Counsel

³ Mark Landler, Helene Cooper & Eric Schmitt, *Trump to Withdraw U.S. Forces from Syria, Declaring ‘We Have Won Against ISIS,’* N.Y. TIMES (Dec. 19, 2018), <https://www.nytimes.com/2018/12/19/us/politics/trump-syria-turkey-troop-withdrawal.html> [perma.cc/U5JE-8ZTR].

⁴ See, e.g., David Martin, *Nearly 1,000 U.S. Troops Still in Syria Months After Last ISIS-Held Territory Was Liberated*, CBS NEWS (July 22, 2019, 6:38 PM), <https://www.cbsnews.com/news/1000-u-s-troops-still-in-syria-months-after-last-isis-held-territory-was-liberated/> [perma.cc/YK6Z-SCTE].

⁵ See DEP’T OF THE ARMY, DEP’T OF DEF., AR 11–33, ARMY LESSONS LEARNED PROGRAM app. B (2017), https://armypubs.army.mil/epubs/DR_pubs/DR_a/pdf/web/ARN2887_AR11-33_Web_FINAL.pdf [perma.cc/W3Z9-MWS7]; see also JOHN E. MORRISON & LARRY L. MELIZA, FOUNDATIONS OF THE AFTER ACTION REVIEW PROCESS 1–2 (1999), <https://apps.dtic.mil/dtic/tr/fulltext/u2/a368651.pdf> [perma.cc/M5W8-LCKJ] (describing the history and purpose of AARs in the U.S. Army).

⁶ See *Counter-ISIS (Islamic State of Iraq and the Levant) Operations and Middle East Strategy: Hearing Before the S. Comm. on Armed Servs.*, 114th Cong. 6 (2016) (statement of Ashton Carter, Sec’y of Def.), <https://www.govinfo.gov/content/pkg/CHRG-114shrg25619/pdf/CHRG-114shrg25619.pdf> [perma.cc/ZBG8-XAB5].

⁷ *Id.*

⁸ Jennifer M. O’Connor, Gen. Counsel, Dep’t of Def., *Speech at the New York University School of Law: Applying the Law of Targeting to the Modern Battlefield*, at 8–9 (Nov. 28, 2016), <https://dod.defense.gov/Portals/1/Documents/pubs/Applying-the-Law-of-Targeting-to-the-Modern-Battlefield.pdf> [perma.cc/6P3X-92LN].

⁹ See *id.* at 9.

of the Department of Defense (DoD), explained how the United States distinguishes between the two. O'Connor noted that the United States "consider[s] each potential target on a case-by-case basis and evaluate[s] it in light of the information we have available, in order to assess whether it meets the definition of a military objective."¹⁰ In other words, possible war-sustaining objects are evaluated in the same way as other potential targets to determine whether they are legitimate military objectives under the law of armed conflict.¹¹ The objects are assessed, often in light of intelligence information, to establish whether they are "objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage."¹² Ultimately, if they are determined to be military objectives, they are targetable as war-sustaining objects.

But what distinguishes "war-sustaining" from "war-supporting" objects under the United States' approach? First, war-sustaining objects must make an effective contribution to an enemy's ability to conduct or sustain combat operations. For example, some, but not all, currency holding facilities in ISIS-controlled territory could be characterized as targetable war-sustaining objects. To be targetable, a currency holding facility must have a military use, such as the storage of bulk cash to pay fighters or to buy weapons.¹³ A civilian-operated bank, therefore, would be viewed differently from an ISIS-run bulk cash facility. Second, destroying war-sustaining objects must offer a definite military advantage, such as the elimination of currency used by ISIS to support its military operations.¹⁴ Uncertainty regarding the character of an object or the military value of its destruction—resulting, for example, from an incomplete target picture from an intelligence, surveillance, and reconnaissance platform—would require a commander to make a reasonable determination, based on facts and circumstances, about the war-sustaining nature or function of the object. Article 52(3) of Additional Protocol I to the Geneva Conventions of 1949—which the United States has not ratified—states that "[i]n case of doubt whether an object which is normally dedicated to civilian purposes . . . is being used to make an effective contribution to military action, it shall be presumed not to be so used."¹⁵ Importantly, however, the DoD in its *Law of War Manual* maintains that the presumption of civilian status is not a part of customary international law and that such a presumption does not prevent commanders or other military personnel from acting based on available information in doubtful cases.¹⁶

¹⁰ *Id.*

¹¹ *See id.*

¹² Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 52(2), *adopted* June 8, 1977, 1125 U.N.T.S. 3, 27 [hereinafter AP I].

¹³ *See* O'Connor, *supra* note 6, at 9 (noting that "certain cash stored in ISIL bulk cash storage sites" has "ma[d]e an effective contribution to ISIL's military action").

¹⁴ *Id.* at 9–10.

¹⁵ AP I, *supra* note 10, art. 52(3).

¹⁶ *See* OFFICE OF GEN. COUNSEL, DEP'T OF DEF., DEPARTMENT OF DEFENSE LAW OF WAR MANUAL § 5.4.3.2 (2016) [hereinafter DoD LAW OF WAR MANUAL], <https://dod.defense.gov/Portals/1/Documents/pubs/DoD%20Law%20of%20War%20Manual%20-%20June%202015%20Updated%20Dec%202016.pdf> [perma.cc/TBV2-HFYN] ("Under customary international law, no legal presumption of civilian status exists for persons or objects, nor is there any rule inhibiting commanders or other military personnel from acting based on the information available to him or her in doubtful cases.); *see also* Int'l Comm. of the Red Cross, *Rule 10: Civilian Objects' Loss of Protection from Attack*, ICRC, <https://ihl->

Once war-sustaining objects have been identified as military objectives, related rules of the law of armed conflict, such as proportionality and precautions in the attack, apply.¹⁷ So, for example, a war-sustaining object's proximity to civilians, the timing of the strike, and the type of weapons used must be taken into consideration before engaging the target. Finally, policy restrictions—articulated through theater-specific Rules of Engagement—must also be consulted and obeyed. So, even if a currency-holding facility is determined to be a valid military objective, political or strategic reasons may prevent an attack on the target.

Given its prevalence during the Syrian conflict, the targeting of “war-sustaining” objects is likely to arise again in future conflicts. Thus, the distinction between war-sustaining and war-supporting objects—and the validity of the war-sustaining approach to targeting more generally—will continue to be a matter of debate.

Takeaway #2: States will continue to use Private Military Contractors (PMCs) aggressively in offensive operations.

In February 2018, a large contingent of Russian-speaking fighters, widely believed to be employees of Wagner Group, a Russian private military company registered in Argentina,¹⁸ accompanied Syrian regime forces in an attack on Kurdish and U.S. Special Forces near a gas plant in Deir al-Zour province, Syria.¹⁹ When U.S. surveillance equipment detected that ground forces were speaking Russian, U.S. officials contacted their Russian military counterparts.²⁰ Russia

databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule10 [perma.cc/5LD4-2SR4] (last visited Aug. 29, 2019) (“The issue of how to classify an object in case of doubt is not entirely clear.”). The DoD *Law of War Manual* “provide[s] information on the law of war to DoD personnel responsible for implementing the law of war and executing military operations”; it “represents the legal views of the Department of Defense.” DOD LAW OF WAR MANUAL, *supra*, § 1.1.1.¹⁷ See O’Connor, *supra* note 6, at 10 (“After applying the rules to determine whether a cash or revenue-generating object is targetable as a military objective, we must still apply the proportionality rule and assess feasible precautions.”). The *Operational Law Handbook* describes proportionality as a principle that “requires commanders to refrain from attacks in which the expected harm incidental to such attacks would be excessive in relation to the concrete and direct military advantage anticipated to be gained.” NAT’L SEC. LAW DEP’T, JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., U.S. ARMY, OPERATIONAL LAW HANDBOOK 11 (2018) [hereinafter OPERATIONAL LAW HANDBOOK]; see also AP I, *supra* note 10, art. 51(5)(b) (prohibiting “attack[s] which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated”). With regard to precautions in the attack, the DoD *Law of War Manual* states, “Combatants must take feasible precautions in planning and conducting attacks to reduce the risk of harm to civilians and other persons and objects protected from being made the object of attack.” DOD LAW OF WAR MANUAL, *supra* note 14, § 5.11; see also AP I, *supra* note 10, art. 57(2)(a)(ii) (requiring “[t]hose who plan or decide upon an attack” to “[t]ake all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects”).

¹⁸Allison Quinn, *Vladimir Putin Sent Russian Mercenaries to ‘Fight in Syria and Ukraine,’* TELEGRAPH (Mar. 30, 2016, 7:05 PM), <https://www.telegraph.co.uk/news/2016/03/30/vladimir-putin-sent-russian-mercenaries-to-fight-in-syria-and-uk/> [perma.cc/983X-6HSW].

¹⁹Thomas Gibbons-Neff, *How a 4-Hour Battle Between Russian Mercenaries and U.S. Commandos Unfolded in Syria*, N.Y. TIMES (May 24, 2018), <https://www.nytimes.com/2018/05/24/world/middleeast/american-commandos-russian-mercenaries-syria.html> [perma.cc/ZV57-5XVW].

²⁰*Id.*

repeatedly denied controlling the fighters, however, and the United States eventually ordered airstrikes, resulting in the death of a number of Russian nationals.²¹

Despite the risks, the benefits of using PMCs like Wagner can be significant for states interested in obscuring their involvement in another state. In particular, PMCs enable aggressor states to exploit gaps and ambiguities in international law to gain a military advantage. Under Article 8 of the International Law Commission's *Draft Articles of Responsibility of States for Internationally Wrongful Acts*, the conduct of a group acting on the instructions, direction, or control of a state could be imputed to the state under international law.²² By denying sufficient control of Wagner, Russia obfuscated legal responsibility for the group's actions. In other situations, PMCs allow a state to run along the application thresholds of both *jus ad bellum* and *jus in bello*. While a PMC's behavior may cross the armed attack threshold in the *jus ad bellum*, a state may be insulated from claims of responsibility. Or, even in an armed conflict, the use of a PMC may transform an otherwise international armed conflict into a non-international armed conflict, thereby altering the applicable legal rules.

Acting as putatively non-attributable intermediaries, PMCs thus offer states enhanced military involvement with minimal political or legal consequences. In some cases, then, the benefits of using PMCs may outweigh the potential costs. In the future, the use of PMCs is likely not only to continue, but to expand—at least until a more comprehensive and robust legal framework evolves to address the use of PMCs.

Takeaway #3: Non-state Actors now often act like states.

The number of non-state actors involved in the Syrian War, by some accounts, numbered as high as 1,000 in 2013.²³ Many of these groups, including ISIS, the Syrian Democratic Force (SDF), Hezbollah, and Hay'at Tahrir al-Sham (formerly Jabhat al-Nusra), became extraordinarily powerful as the Syrian government collapsed.²⁴ The power vacuum allowed these groups to control territory, govern large groups of people, and organize standing militaries.²⁵ Consequently,

²¹ *Id.*

²² See G.A. Res. 56/83, U.N. Doc. A/Res/56/83, annex, Responsibility of States for Internationally Wrong Acts, art. 8 (Dec. 12, 2001), <https://undocs.org/A/RES/56/83> [perma.cc/6WKU-6SVM].

²³ *Guide to the Syrian Rebels*, BBC (Dec. 13, 2013), <http://www.bbc.com/news/world-middle-east-24403003> [perma.cc/66C2-KRV3] (“There are believed to be as many as 1,000 armed opposition groups in Syria, commanding an estimated 100,000 fighters.”).

²⁴ See David Wallace, Amy McCarthy & Shane R. Reeves, *Trying to Make Sense of the Senseless: Classifying the Syrian War Under the Law of Armed Conflict*, 25 MICH. ST. INT'L L. REV. 555, 567–71, 590 (2017).

²⁵ See E. Corrie Westbrook Mack & Shane R. Reeves, *Tethering the Law of Armed Conflict to Operational Practice: “Organized Armed Group” Membership in the Age of ISIS*, 36 BERKELEY J. INT'L L. 334, 342–45 (2018) (noting that ISIS is “[h]eavily armed,” *id.* at 342, and “continues to control territory and govern a small group of civilians under a strict version of Sharia law,” *id.* at 343); Rukmini Callimachi, *The ISIS Files: When Terrorists Run City Hall*, N.Y. TIMES (Apr. 4, 2018), <https://www.nytimes.com/interactive/2018/04/04/world/middleeast/isis-documents-mosul-iraq.html> [perma.cc/J82W-2E2R] (explaining that at one point, ISIS “controlled a stretch of land . . . the size of Britain, with a population estimated at 12 million people”).

these non-state actors became “more akin to pseudo-states than local militias” and the *de facto* sovereigns in their respective territories.²⁶

As a 2015 RAND study noted:

[ISIS] was (and is) bureaucratic and hierarchical. Lower-level units reported to upper-level units, and units shared a basic structure in which upper-level emirs were responsible for security, sharia, military, and administration in a particular geographic area. These emirs worked with departments or committees and managed a layer of sector emirs and specialized emirs at lower levels. This structure created a bench of personnel knowledgeable about managing a terrorist group that intended to become a state.²⁷

This display of state-like behavior by a non-state actor in Syria was not exclusive to ISIS. For example, in the summer of 2016, powerful conventional-type armies from both ISIS and the SDF engaged in a ferocious battle for the city of Manbij, Syria.²⁸ This urban battle lasted seventy-three days, left thousands of fighters dead, and significantly damaged the city.²⁹ While state actors were involved—the United States-led coalition provided air support for the SDF—the hostilities occurred almost exclusively between these competing non-state actors.³⁰ Furthermore, the SDF detained thousands of ISIS members in SDF-operated facilities³¹ and even engaged with the administration of Syrian President Bashar al-Assad to negotiate a political deal to preserve their autonomy.³²

The state-like behavior of the Syrian non-state actors is increasingly common as other failing states continue to fragment.³³ This development does have, in some circumstances, an unintended positive impact. A group, such as the SDF, may crave legitimacy and thus seek to demonstrate respect for the law of armed conflict.³⁴ However, as more groups detain each other,

²⁶ Shane Reeves, *What Happens When States No Longer Govern?*, LAWFARE (Feb. 13, 2017, 3:30 PM), <https://www.lawfareblog.com/what-happens-when-states-no-longer-govern> [perma.cc/3R2P-5BK2].

²⁷ HOWARD J. SHATZ & ERIN-ELIZABETH JOHNSON, RAND CORP., *THE ISLAMIC STATE WE KNEW* 2 (2015), https://www.rand.org/content/dam/rand/pubs/research_reports/RR1200/RR1267/RAND_RR1267.pdf [perma.cc/8TEM-QDNW].

²⁸ Reeves, *supra* note 24.

²⁹ *Id.*

³⁰ *Id.*

³¹ Eric Schmitt, *Pentagon Wades Deeper into Detainee Operations in Syria*, N.Y. TIMES (Apr. 5, 2018), <https://www.nytimes.com/2018/04/05/world/middleeast/pentagon-detainees-syria-islamic-state.html> [perma.cc/ET5X-GVFU].

³² Tom Perry, *Syrian Kurdish-Backed Council Holds Talks in Damascus*, REUTERS (July 27, 2018, 3:08 AM), <https://www.reuters.com/article/us-mideast-crisis-syria-talks/syrian-kurdish-backed-council-holds-talks-in-damascus-idUSKBN1KH0Q9> [perma.cc/C973-EH2P].

³³ See Reeves, *supra* note 24.

³⁴ See, e.g., *Syria: First Training Session on the Law of Armed Conflict for the Syrian Democratic Forces Near Raqqa*, GENEVA CALL (Sept. 27, 2017), <https://genevacall.org/syria-first-training-law-armed-conflict-syrian-democratic-forces-near-raqqa/> [perma.cc/4RG9-RDVA].

fight each other, and even at times negotiate with states, the greater question is how to incentivize non-state actors to comply with international law

Takeaway #4: Technology has extended the reach and lethality of non-state actors on the battlefield.

Former Deputy Secretary of Defense, William J. Lynn, III, once observed that “few weapons in the history of warfare, once created, have gone unused.”³⁵ The weaponization of new technologies, however, has never been the sole preserve of states. As in Syria, non-state actors have also responded to the siren song of technological innovation, sometimes with notable results.³⁶ In Syria, ISIS’s employment of drones appeared to fulfill the long-predicted use of drones by non-state actors.³⁷ ISIS’s adoption of other modern innovations, including social media, has also demonstrated how new technologies have influenced the conduct of contemporary military operations.³⁸ Ultimately, the conflict in Syria reinforced the proposition that as new technologies become cheaper, more reliable, and more widely available, non-state actors will invariably weaponize and exploit them to gain a battlefield advantage.

As early as the Reagan Administration, the CIA predicted the proliferation of drones and the use of drones by non-state actors.³⁹ In a 1986 report titled *Remotely Piloted Vehicles in the Third World: A New Military Capability*, the CIA envisioned the use of drones by terrorists as precision weapons delivery platforms.⁴⁰ Perhaps informed by the bombing of the Marine Corps barracks in Beirut, Lebanon just three years earlier,⁴¹ the report predicted that “[a] bomb-laden [remotely piloted vehicle] provided to a terrorist group by a patron state could be used against a US embassy or other target in a dramatic fashion.”⁴² A drone, the report continued, “would provide a standoff system capable of delivering a sizable bomb accurately.”⁴³ Since then, both states and

³⁵ William J. Lynn, III, Deputy Sec’y of Def., Remarks on Cyber at the RSA Conference (Feb. 15, 2011), <https://archive.defense.gov/speeches/speech.aspx?speechid=1535> [perma.cc/Z8F7-W4UA].

³⁶ See, e.g., Eric Schmitt, *Pentagon Tests Lasers and Nets to Combat a Vexing Foe: ISIS Drones*, N.Y. TIMES (Sept. 23, 2017), <https://www.nytimes.com/2017/09/23/world/middleeast/isis-drones-pentagon-experiments.html> [perma.cc/GW73-ZXAJ].

³⁷ See DIRECTORATE OF INTELLIGENCE, CENT. INTELLIGENCE AGENCY, REMOTELY PILOTED VEHICLES IN THE THIRD WORLD: A NEW MILITARY CAPABILITY 10 (1986) [hereinafter REMOTELY PILOTED VEHICLES], <https://www.cia.gov/library/readingroom/docs/CIA-RDP87T01127R001000830003-3.pdf> [perma.cc/6WZX-T36D] (“Some terrorist groups may be attracted to [remotely piloted vehicles] in their quest for new and dramatic ways to carry out their violent acts.”).

³⁸ See, e.g., MAJID ALFIFI ET AL., MEASURING THE IMPACT OF ISIS SOCIAL MEDIA STRATEGY (2018), <http://people.tamu.edu/~kaghazgaran/papers/alfifi2018mis2.pdf> [perma.cc/3KRT-T57D]; Antonia Ward, *ISIS’s Use of Social Media Still Poses a Threat to Stability in the Middle East and Africa*, GEO. SECURITY STUD. REV. (Dec. 10, 2018), <http://georgetownsecuritystudiesreview.org/2018/12/10/isis-use-of-social-media-still-poses-a-threat-to-stability-in-the-middle-east-and-africa/> [perma.cc/8RZC-6C5Z].

³⁹ See REMOTELY PILOTED VEHICLES, *supra* note 35, at 10.

⁴⁰ See *id.*

⁴¹ See Thomas L. Friedman, *Buildings Blasted*, N.Y. TIMES (Oct. 24, 1983), https://archive.nytimes.com/www.nytimes.com/learning/general/onthisday/991023onthisday_big.html [perma.cc/YXH2-9HFU] (“A suicide terrorist driving a truck loaded with TNT blew up an American Marine headquarters at the Beirut airport today, killing at least 161 marines and sailors and wounding 75.”).

⁴² REMOTELY PILOTED VEHICLES, *supra* note 35, at iv.

⁴³ *Id.* at 10.

non-state actors have experimented with and deployed drone technology with varying levels of success.⁴⁴

While ISIS's employment of drones in Syria may have been foreseeable, other aspects of the group's drone program have come as a surprise. For example, the group's use of global supply chains to develop in-house drone modification and manufacturing capabilities exposed how ineffectively states monitor and restrict the delivery of certain dual-use items.⁴⁵ In *The Islamic State and Drones*, published in 2018 by the Combating Terrorism Center at West Point, Don Rassler outlines how ISIS acquired commercially available drones and other components to develop an internal drone program. According to Rassler, ISIS used a "global and layered supply chain" involving the purchases of drones and drone parts from at least 16 different companies based in or operated from at least seven different countries.⁴⁶ By combining off-the-shelf technology with other widely available components, ISIS managed to create innovative, new bomb-drop capable drones devised to release munitions from the air with relative accuracy.⁴⁷ ISIS also began manufacturing its own rudimentary drones at workshops featuring standardized production and quality-control measures.⁴⁸ As a result, at the peak of the drone threat in the spring of 2017, ISIS conducted an estimated 60 to over 100 aerial drone attacks per month in Iraq and Syria.⁴⁹

Rassler suggests that countering the threat of drones and other technology-enabled threats by non-state actors will require better tracking of dual-use items and closer partnerships with industry. He states:

Terrorist groups and hostile state actors will almost always be able to find supply chain gaps and seams. But that does not mean that efforts cannot or should not be made to tighten or better track the purchase of predictable dual-use items—such as commercial drones, rocket and counter-surveillance equipment, and other similar devices that helped the Islamic State to enhance its defensive and offensive capabilities—through creative partnerships with industry.⁵⁰

⁴⁴ See Adam Rawnsley, *How the Reagan-Era CIA Predicted Our Drone Dystopia*, DAILY BEAST (Mar. 10, 2016, 12:02 AM), <https://www.thedailybeast.com/how-the-reagan-era-cia-predicted-our-drone-dystopia> [perma.cc/UYA4-64GB].

⁴⁵ DON RASSLER, U.S. MIL. ACAD., *THE ISLAMIC STATE AND DRONES: SUPPLY, SCALE, AND FUTURE THREATS* 10–17, 23–24 (2018), <https://ctc.usma.edu/app/uploads/2018/07/Islamic-State-and-Drones-Release-Version.pdf> [perma.cc/R53C-VJG5].

⁴⁶ *Id.* at 17.

⁴⁷ See *id.* at IV, 2; see also CONFLICT ARMAMENT RESEARCH, *ISLAMIC STATE'S WEAPONISED DRONES 1* (2016), http://www.conflictarm.com/download-file/?report_id=2416&file_id=2417 [perma.cc/SP27-UZ4L] (reporting discovery of ISIS's construction of drones and its "attempts to repurpose missile components," which "plausibly suggests attempts by [ISIS] to develop some form of weaponised drone").

⁴⁸ See Kelsey D. Atherton, *What We Know About ISIS's Scratch-built Drones*, POPULAR SCI. (Nov. 7, 2016), <https://www.popsoci.com/isis-drones> [perma.cc/H4ND-EKT6]; CONFLICT ARMAMENT RESEARCH, *STANDARDISATION AND QUALITY CONTROL IN ISLAMIC STATE'S MILITARY PRODUCTION* 31–33 (2016), http://www.conflictarm.com/download-file/?report_id=2454&file_id=2955 [perma.cc/JG8W-XB2P].

⁴⁹ RASSLER, *supra* note 43, at 4.

⁵⁰ *Id.* at 24.

ISIS's ability to constitute a lethal drone program from commercially available components, simple modifications, and basic manufacturing should serve as a reminder that access to advanced technology and technical expertise is not solely a state prerogative. Easy access to technology may require states to devote renewed attention to export controls and arms control agreements—and perhaps even negotiate ones that integrate organized armed groups—to mitigate the threats posed by non-state actors.

Takeaway #5: Lack of consensus at the UN Security Council has forced states to become creative in their *jus ad bellum* decisions.

Lastly, the conflict in Syria highlighted how the UN Security Council's paralysis has forced states to abandon international, consensus-based solutions to international disputes. Instead, states have increasingly come to rely on creative *jus ad bellum* justifications to explain uses of armed force that otherwise should have been considered by the Security Council for approval. As prospects for Security Council action have dwindled, so too has the possibility for deliberation and debate on resorts to armed force in the international community.

The *jus ad bellum* governs the resort to armed force by states.⁵¹ The U.N. Charter generally prohibits the threat or use of force to resolve international disputes, and Article 2(4) of the U.N. Charter specifically requires that states “refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state.”⁵² Exceptions to this general prohibition include uses of force authorized by the Security Council⁵³ and actions taken in self-defense.⁵⁴ The Security Council's failure to effectively address recent conflicts in places such as Syria, Yemen, and Ukraine, however, has left states without meaningful access to the institutional authority of the United Nations for use-of-force decisions. Consequently, states have embraced other theories, including measures outside the Council apparatus such as humanitarian intervention, to justify military action. Russia's intervention in Crimea, for example, was initially justified as necessary to protect Russian nationals in Ukraine.⁵⁵ Similarly, many states

⁵¹ See, e.g., GARY D. SOLIS, *THE LAW OF ARMED CONFLICT* 22 (2010).

⁵² U.N. Charter art. 2, ¶ 4; see also GEOFFREY CORN ET AL., *NATIONAL SECURITY LAW: PRINCIPLES AND POLICY* 100 (2d ed. 2019) (“[Article 2(4)'s] presumptive prohibition has become the binding legal paradigm regulating force internationally.”).

⁵³ See U.N. Charter chs. VI–VII. Because the U.N. Charter gives the Security Council primary responsibility for maintaining international peace and security, uses of force and authorizations for the use of force granted by the Security Council do not contravene the prohibitions of Article 2(4). See *id.* arts. 24–25; see also CORN ET AL., *supra* note 50, at 101.

⁵⁴ See U.N. Charter art. 51 (“Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United States . . .”). A third exception is consent given by the state where force will be used. CORN ET AL., *supra* note 50, at 101.

⁵⁵ Brian Resnick, *How the Russian Constitution Justifies War in Ukraine*, *THE ATLANTIC* (Mar. 3, 2014), <https://www.theatlantic.com/politics/archive/2014/03/how-the-russian-constitution-justifies-war-in-ukraine/453810/> [perma.cc/5A8C-J7GL] (quoting Russian Foreign Minister Sergey Lavrov as saying, “We are talking here about protection of our citizens and compatriots, about protection of the most fundamental of the human rights—the right to live, and nothing more.”).

that engaged ISIS in Syria and Iraq relied on self-defense under Article 51 of the U.N. Charter for legal authority to employ armed force.⁵⁶

In its year-in-review summary for 2018, the United Nations itself acknowledged the Security Council's inability to act on some of the most pressing contemporary global issues. The report stated, "The Security Council remained largely paralysed by expanding rifts and mounting tensions involving its permanent members in 2018, a year characterized by the rise of nationalist movements and breaches of long-standing global norms that sparked questions about the very future of multilateralism."⁵⁷ The summary further noted that while the Security Council's five permanent members remained "gridlocked," "regional organizations such as the African Union took an increasingly prominent role in addressing their own challenges, raising new questions about the role and responsibilities of the United Nations in an evolving and more complex world."⁵⁸ Of course, individual states have also chosen to act unilaterally in the absence of a Security Council consensus. In 2017, for example, the United States launched a missile strike against Syria in response to the Syrian government's use of chemical weapons against civilians.⁵⁹ In remarks before an emergency meeting of the Security Council, U.S. Ambassador to the United Nations Nikki Haley commented, "When the United Nations consistently fails in its duty to act collectively, there are times in the life of states that we are compelled to take our own action."⁶⁰

While it may be tempting to ascribe Security Council dysfunction to the unique circumstances of the contemporary geopolitical environment, it is worth remembering that the efficacy of the Security Council has long been a matter of concern and comment.⁶¹ In a 1970 article published in the *American Journal of International Law*, Thomas M. Franck famously asked,

⁵⁶ See Patrick C. R. Terry, *The Return of Gunboat Diplomacy: How the West Has Undermined the Ban on the Use of Force*, 10 HARV. NAT'L SEC. J. 75, 108–09 (2019); see also, e.g., Chargé d'affaires a.i. of the Permanent Mission of Turkey to the U.N., Letter Dated 24 July 2015 from the Chargé d'affaires a.i. of the Permanent Mission of Turkey to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2015/563 (July 24, 2015); Permanent Rep. of the United Kingdom to the U.N., Letter Dated 25 November 2014 from the Permanent Rep. of the United Kingdom of Great Britain and Northern Ireland to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2014/851 (Nov. 26, 2014); Permanent Rep. of the United States to the U.N., Letter Dated 23 September 2014 from the Permanent Rep. of the United States of America to the United Nations Addressed to the Secretary-General, U.N. Doc. S/2014/695 (Sept. 23, 2014).

⁵⁷ Round-up Release, Security Council, Paralysis Constricts Security Council Action in 2018, as Divisions Among Permanent Membership Fuel Escalation of Global Tensions, U.N. Round-up Release SC/13661 (Jan. 10, 2019), <https://www.un.org/press/en/2019/sc13661.doc.htm> [perma.cc/GHD4-5LMD].

⁵⁸ *Id.*

⁵⁹ Michael R. Gordon, Helene Cooper & Michael D. Shear, *Dozens of U.S. Missiles Hit Air Base in Syria*, N.Y. TIMES (Apr. 6, 2017), <https://www.nytimes.com/2017/04/06/world/middleeast/us-said-to-weigh-military-responses-to-syrian-chemical-attack.html> [perma.cc/C2U5-ZJ9Q].

⁶⁰ Nikki Haley, U.S. Permanent Representative to the United Nations, Remarks at an Emergency U.N. Security Council Meeting on Chemical Weapons in Syria (Apr. 5, 2017), <https://sy.usembassy.gov/amb-haley-emergency-un-security-council-meeting-chemical-weapons-syria/> [perma.cc/Q9AE-YVYM].

⁶¹ See, e.g., Thomas M. Franck, *Who Killed Article 2(4)? or: Changing Norms Governing the Use of Force by States*, 64 AM. J. INT'L L. 809 (1970); High-Level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, U.N. Doc A/59/565, ¶186 (Dec. 2, 2004) ("For the first 44 years of the United Nations, Member States often violated [the U.N. Charter] rules and used military force literally hundreds of times, with a paralysed Security Council passing very few Chapter VII resolutions and Article 51 only rarely providing creditable cover.").

“Who Killed Article 2(4)?”⁶² Franck’s article lamented the demise of Article 2(4) and the promise of collective security the U.N. Charter had professed. “[T]he high-minded resolve of Article 2(4) mocks us from its grave,” Franck declared.⁶³ Meanwhile, “the concept of self-defense remained a convenient shield for self-serving and aggressive conduct.”⁶⁴ “Insofar as the facts about the initiation of a dispute have not been satisfactorily ascertainable,” Franck observed, “the operation of Article 51 is effectively and dangerously unlimited. The temptation remains what it was before Article 2(4) was conceived: to attack first and lie about it afterwards.”⁶⁵

Perhaps, then, the conflict in Syria should serve as a reminder that states will invariably fill the void left by Security Council inaction with creative justifications for the use of armed force. These may include expansive interpretations of Article 51 or new theories for intervention.⁶⁶ But without the imprimatur of the Security Council, each will remain subject to debate.

Conclusion

The above list of takeaways is obviously not exhaustive. Other issues will continue to arise, for example detainees and refoulement, as the international community reflects on this complicated conflict. Clearly, a broader conversation will be necessary going forward. However, these five takeaways are worth considering if we want to ensure that international law remains tethered to the practical realities of the contemporary battlefield.

⁶² Franck, *supra* note 59. *But see* Louis Henkin, *The Reports of the Death of Article 2(4) Are Greatly Exaggerated*, 65 AM. J. INT’L L. 544, 544 (1971) (“Article 2(4) lives and, while its condition is grave indeed, its maladies are not necessarily terminal. There is yet time to prescribe, transplant, salvage, to keep alive at all cost the principal norm of international law in our time.”).

⁶³ Franck, *supra* note 59, at 809.

⁶⁴ *Id.* at 811.

⁶⁵ *Id.*; *see also* Michael J. Glennon, *Pre-empting Proliferation: International Law, Morality, and Nuclear Weapons*, 24 EUR. J. INT’L L. 109, 111 (2013) (arguing “the *jus ad bellum* rules that the Charter laid down have, tragically, become paper rules: rules that lay out aspirational goals for the management of state-sponsored force rather than binding precepts of international law”).

⁶⁶ *See generally, e.g.*, Terry, *supra* note 54 (outlining the West’s attempts to reform the *jus ad bellum* by permitting a growing number of exceptions to the prohibition against the use of force).