

**ADDRESSING THE FOREIGN ISIS FIGHTER PROBLEM:  
DETENTION AND PROSECUTION BY THE SYRIAN  
DEMOCRATIC FORCES**

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*Each of us also has an urgent responsibility to address the foreign fighter detainee problem. We all must ensure captured terrorists remain off the battlefield and off your streets by taking custody of detainees from our countries, or quickly coming up with other suitable options.<sup>1</sup>*

### I. Introduction

From the moment the Syrian Democratic Forces (SDF) swept through the last Islamic State in Iraq and Syria (ISIS) strongholds in Northeastern Syria, one problem has remained at the forefront for the international community: what should be done with the most radicalized and hardened foreign ISIS fighters who are confined in SDF detention facilities? Despite former Secretary of Defense James Mattis's encouragement,<sup>2</sup> nations have been reluctant to take custody of their citizens who have been captured on

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<sup>1</sup> *Remarks by Secretary Mattis and Secretary-General Stoltenberg to the Defeat ISIS Coalition, Brussels, Belgium*, U.S. DEP'T OF DEF. (June 8, 2018), <https://dod.defense.gov/News/Transcripts/Transcript-View/Article/1545787/remarks-by-secretary-mattis-and-secretary-general-stoltenberg-to-the-defe%E2%80%A6>.

<sup>2</sup> *Id.*

the battlefield in Syria, fighting for ISIS.<sup>3</sup> Therefore, these fighters, numbering roughly two thousand by current estimates, remain in SDF detention and in legal purgatory.<sup>4</sup>

Further complicating the situation, the SDF are a non-state armed group, comprised primarily of Kurds and Arabs, which are conducting military operations against ISIS<sup>5</sup> and holding Syrian territory without the consent of the Syrian government.<sup>6</sup> As such, the SDF and their civilian political arm, the Syrian Democratic Council (SDC),<sup>7</sup> are not an internationally recognized sovereign government and they are not an official state entity recognized by the Syrian government.<sup>8</sup> Therefore, as a collective non-state actor actively engaged in hostilities against other state and non-state actors, significant legal, political, and international issues are raised by the SDF's detention of foreign ISIS fighters.

Given these complications, this article analyzes the application of international law to the SDF and proposes a solution to address the foreign ISIS fighter problem highlighted by Secretary Mattis: that the SDF can detain and ultimately prosecute foreign ISIS fighters<sup>9</sup> in compliance with the law of armed conflict (LOAC). This article begins by classifying the

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<sup>3</sup> Charlie Savage, *As ISIS Fighters Fill Prisons in Syria, Their Home Nations Look Away*, N.Y. TIMES (July 18, 2018), <https://www.nytimes.com/2018/07/18/world/middleeast/islamic-state-detainees-syria-prisons.html>.

<sup>4</sup> Michael R. Gordon & Benoit Faucon, *U.S., Europeans Clash Over How to Handle Islamic State Detainees*, WALL ST. J. (Dec. 1, 2019, 2:56 PM), <https://www.wsj.com/articles/u-s-europeans-clash-over-how-to-handle-islamic-state-detainees-11575201600>.

<sup>5</sup> Jim Garamone, *Iraqi, Syrian Democratic Forces Destroy ISIS' 'Caliphate,' U.S. DEP'T OF DEF.* (Dec. 11, 2017), <https://dod.defense.gov/News/Article/Article/1393645/iraqi-syrian-democratic-forces-destroy-isis-caliphate/igphoto/2001888747/igphoto/2001773969>.

<sup>6</sup> Tom Perry & Ellen Francis, *Syria's Kurds Reel from U.S. Move, Assad Seen Planning Next Step*, REUTERS (Dec. 20, 2018, 1:59 PM), <https://www.reuters.com/article/us-mideast-crisis-syria-kurds-analysis/syrias-kurds-reel-from-us-move-assad-seen-planning-next-step-idUSKCN1OJ2IP>.

<sup>7</sup> Lara Seligman, *Syrian Kurdish Leader Asks U.S. to Save Her People from 'Catastrophe,' FOREIGN POL'Y* (Feb. 5, 2019, 2:29 PM), <https://foreignpolicy.com/2019/02/05/syrian-kurdish-leader-asks-u-s-to-save-her-people-from-catastrophe>.

<sup>8</sup> 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>.

<sup>9</sup> The term "foreign ISIS fighter" refers to those fighters whose country of origin is not Syria or Iraq. While the law of armed conflict (LOAC) would apply equally to the Syrian and Iraqi fighters, there are additional domestic considerations related to those individuals that are beyond the scope of this article. At the same time, the foreign ISIS fighter problem has gained the most attention from United States due to the unique challenges it presents. Thus, the focus of this article is the detention and prosecution of the foreign ISIS fighters rather than the local Syrian and Iraqi ISIS fighters.

type of conflict in which the SDF and ISIS are engaged to determine whether international law is applicable to the overall conflict. Next, it explains the theories that apply international law to non-state actors. Using these theories, this article then determines the relevant LOAC principles applicable to the SDF's detention and criminal prosecution of foreign ISIS fighters. Using these LOAC principles, it then analyzes the source of the SDF's authority to detain. Finally, this article describes how the SDF can prosecute foreign ISIS fighters in compliance with LOAC, ensuring long-term detention of those fighters not ultimately repatriated to their countries of origin.

## II. Background

The events that led to the current conflict in Syria provide crucial context for evaluating which international legal principles are applicable to the SDF. The Syrian Civil War created an environment that ISIS was able to exploit, allowing it to take control of considerable territory stretching from areas east of the Euphrates River in Syria into Western Iraq.<sup>10</sup> ISIS' subsequent control of civilian population centers, coupled with its brutality and extremist ideology<sup>11</sup> created the catalyst for local Kurdish and Arab militias to band together under one organized group.<sup>12</sup> This group—the SDF—then took up arms against ISIS and began to liberate the ISIS-controlled territory in Syria.<sup>13</sup> These facts, further described below, provide the context to which the international legal framework can be applied.

In early 2011, a series of political and economic protests broke out across the Middle East.<sup>14</sup> The pro-democracy uprisings ultimately resulted in regime changes in Tunisia, Egypt, and Libya.<sup>15</sup> These events came to be known in the international community as the Arab Spring.<sup>16</sup> While the cause

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<sup>10</sup> Hum. Rts. Council, Rep. of the Indep. Int'l Comm'n of Inquiry on the Syrian Arab Republic on Its Twenty-Seventh Session, Rule of Terror: Living Under ISIS in Syria, at 2–3, U.N. Doc. A/HRC/27/CRP.3 (2014) [hereinafter 2014 UNHRC Report].

<sup>11</sup> *Id.*

<sup>12</sup> Garamone, *supra* note 5.

<sup>13</sup> Perry & Francis, *supra* note 6.

<sup>14</sup> *The Arab Spring: A Year of Revolution*, NAT'L PUB. RADIO (Dec. 17, 2011, 6:02 PM), <https://www.npr.org/2011/12/17/143897126/the-arab-spring-a-year-of-revolution>.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

of the Syrian Civil War remains complex, the Arab Spring and the values it represented were a major trigger for the conflict.<sup>17</sup>

The unofficial start of the Syrian Civil War came in March 2011, when a group of school children were detained and tortured for writing anti-government graffiti on the walls of public buildings in Dar'a, Syria.<sup>18</sup> The children's detention, coupled with the Syrian government's violent suppression of the resulting peaceful protests, sparked outrage and demonstrations across the region.<sup>19</sup> The Syrian government, headed by Bashar al-Assad, brutally clamped down on the demonstrations by killing, detaining, and torturing thousands of protestors.<sup>20</sup> The international community called for Assad to resign,<sup>21</sup> but he refused.<sup>22</sup> This brutality sparked more demonstrations and outrage and, by 2012, the internal strife had turned into a full-fledged armed conflict between Syrian government forces and armed opposition groups across the country.<sup>23</sup> Further fueling the conflict was the international support for both sides of the fighting. The United States, Saudi Arabia, Qatar, Turkey, and other Western countries supported moderate Syrian government opposition groups, while Russia, Iran, and militant Iranian proxies, such as the Lebanese Hezbollah, supported the Syrian government.<sup>24</sup>

The resulting chaos and instability in Syria allowed radical Islamist groups to operate with impunity. In addition, the local population's discontent with the government provided these groups with a cooperative support base and an ideal population from which to recruit fighters.<sup>25</sup> These radical Islamist groups included al-Qaeda and affiliated groups such as Jabhat al-Nusra, also known as al-Nusra Front, and the Islamic State of Iraq

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<sup>17</sup> Max Fisher, *How Syria's Civil War Evolved, and Why It's So Complex*, N.Y. TIMES, Sept. 21, 2016, at A8.

<sup>18</sup> Hum. Rts. Council, Rep. of the Indep. Int'l Comm'n of Inquiry on the Syrian Arab Republic on Its Seventeenth Session, at 8, U.N. Doc. A/HRC/S-17/2/Add.1 (2011).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* ("On 8 November, OHCHR estimated that at least 3,500 civilians had been killed by State forces since March 2011. Thousands are also reported to have been detained, tortured and ill-treated.")

<sup>21</sup> Scott Wilson & Joby Warrick, *Assad Must Go, Obama Says*, WASH. POST (Aug. 18, 2011), [https://www.washingtonpost.com/politics/assad-must-go-obama-says/2011/08/18/gIQAelheOJ\\_story.html](https://www.washingtonpost.com/politics/assad-must-go-obama-says/2011/08/18/gIQAelheOJ_story.html).

<sup>22</sup> Anthony Shadid & Nada Bakri, *Assad Says He Rejects West's Calls to Resign*, N.Y. TIMES (Aug. 21, 2011), <https://www.nytimes.com/2011/08/22/world/middleeast/22syria.html>.

<sup>23</sup> Fisher, *supra* note 17.

<sup>24</sup> *Id.*

<sup>25</sup> 2014 UNHRC Report, *supra* note 10.

(ISI).<sup>26</sup> By April 2013, ISI had developed into a “well-organised, dominant armed force in control of large swathes of populated areas in Syria and Iraq, posing a significant threat to peace and stability in the region.”<sup>27</sup>

The ISI was initially founded by Abu Mu’sab al-Zarqawi, who began conducting terrorist attacks against U.S., Coalition, and Iraqi military personnel and civilians in Iraq in 2003.<sup>28</sup> Based on Zarqawi’s long-standing personal relationship with Osama bin Laden, he publically pledged allegiance to bin Laden and al-Qaeda in 2004 and renamed his terrorist organization al-Qaeda in Iraq (AQI).<sup>29</sup> Despite Zarqawi’s death in 2006 by a U.S. airstrike<sup>30</sup> and the withdrawal of U.S. and Coalition forces from Iraq in 2011, AQI continued to plot and conduct deadly attacks on U.S. military forces, civilians, and interests in Iraq and Syria.<sup>31</sup>

In February 2014, after months of internal fighting, al-Qaeda disavowed AQI, then headed by Abu Bakr al-Baghdadi,<sup>32</sup> for being too brutal and for indiscriminately killing Muslim civilians and fellow jihadist.<sup>33</sup> Al-Qaeda in Iraq, in turn, appropriated most of al-Nusra Front’s capabilities and manpower in Syria.<sup>34</sup> Now focused on creating its own “state” or “caliphate,” AQI formally changed its name to ISIS.<sup>35</sup> By taking advantage of the chaos created by the Syrian Civil War and prioritizing the capture of physical terrain over fighting the Syrian government, ISIS was able to overwhelm local opposition and take control of large swathes of land throughout Iraq and Syria.<sup>36</sup> From the safety of its physical caliphate, ISIS was able to terrorize civilians under its form of sharia law,<sup>37</sup> gain revenue through the illicit sale of oil, and plan and execute attacks on Western countries.<sup>38</sup>

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<sup>26</sup> *Id.* at 2.

<sup>27</sup> *Id.*

<sup>28</sup> WHITE HOUSE, REPORT ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES’ USE OF MILITARY FORCE AND RELATED NATIONAL SECURITY OPERATIONS 5–6 (2016) [hereinafter U.S. REPORT ON THE USE OF FORCE].

<sup>29</sup> *Id.*

<sup>30</sup> Fisher, *supra* note 17.

<sup>31</sup> U.S. REPORT ON THE USE OF FORCE, *supra* note 28.

<sup>32</sup> Fisher, *supra* note 17.

<sup>33</sup> *Al-Qaeda Disavows ISIS Militants in Syria*, BBC NEWS (Feb. 3, 2014), <https://www.bbc.com/news/world-middle-east-26016318>.

<sup>34</sup> 2014 UNHRC Report, *supra* note 10, at 2.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *See, e.g., id.*

<sup>38</sup> U.S. REPORT ON THE USE OF FORCE, *supra* note 28, at 6, 24.

In 2015, Kurdish and Arab militia groups in Northeastern Syria formed a cohesive and coordinated fighting force, called the SDF, to stop ISIS' advance and counter its brutality.<sup>39</sup> The SDF, commanded by General Mazlum Kobane, began with approximately thirty fighters and grew to a fighting force of over sixty thousand.<sup>40</sup> Under General Kobane's leadership and with support from the United States and other counter-ISIS coalition partners, the SDF had liberated all of the ISIS-controlled territory in Northeastern Syria by March 2019.<sup>41</sup>

The SDF's civilian governmental and political wing is the SDC.<sup>42</sup> Like the SDF, the SDC is Kurdish-led but inclusive and representative of Arab and other ethnic minority populations.<sup>43</sup> Currently, the primary governing entity in the SDF-liberated territories of Northeastern Syria are local civil councils.<sup>44</sup> However, in order to gain autonomy from the Syrian government and establish a federal system that protects minority rights, the SDC is unifying the civil councils under one overarching administration.<sup>45</sup> To further these goals, the SDC has also engaged the international community for continued military and humanitarian assistance and for protection from potential post-conflict oppression.<sup>46</sup>

Due to the protracted hostilities and their internal security functions, the SDF have detained hundreds, if not thousands, of surrendered or captured ISIS members.<sup>47</sup> The most dangerous and ideologically ingrained ISIS members are the foreign fighters who have left their home countries and

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<sup>39</sup> Garamone, *supra* note 5.

<sup>40</sup> Holly Williams, *What Remains to be Done in the Final Phase of America's War on ISIS*, CBS NEWS (Oct. 28, 2018), <https://www.cbsnews.com/news/what-remains-to-be-done-in-the-final-phase-of-america-war-on-isis-60-minutes>.

<sup>41</sup> Rukmini Callimachi, *ISIS Caliphate Crumbles as Last Village in Syria Falls*, N.Y. TIMES (Mar. 23, 2019), <https://www.nytimes.com/2019/03/23/world/middleeast/isis-syria-caliphate.html> ("A four-year military operation to flush the Islamic State from its territory in Iraq and Syria ended on Saturday as the last village held by the terrorist group was retaken, erasing a militant theocracy that once spanned two countries").

<sup>42</sup> *Kurdish-Led Council Deepens Authority Across Syrian North and East*, REUTERS (Sept. 6, 2018, 10:54 AM), <https://www.reuters.com/article/us-mideast-crisis-syria-council/kurdish-led-council-deepens-authority-across-syrian-north-and-east-idUSKCN1LM25I>.

<sup>43</sup> *See id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *See* Richard Hall, *'We Used to Trust the US': Syrian Kurds Fear Turkish Attack After Trump's Troop Withdrawal*, INDEPENDENT (Dec. 21, 2018, 6:48 PM), <https://www.independent.co.uk/news/world/middle-east/syria-trump-kurdish-isis-turkey-us-troop-withdrawal-mattis-a8695151.html>.

<sup>47</sup> Savage, *supra* note 3.

travelled to the conflict zone for the sole purpose of fighting for ISIS.<sup>48</sup> In fact, the core of the ISIS leadership structure is predominantly comprised of foreign fighters, despite the significant number of Syrian and Iraqi fighters whom ISIS has recruited.<sup>49</sup> At this time, the SDF have detained approximately two thousand foreign ISIS fighters<sup>50</sup> from forty-seven countries.<sup>51</sup> However, due to the differing judicial processes and political climates, the foreign fighters' countries of citizenship are unwilling to repatriate and prosecute them under domestic laws. Instead, these foreign fighters remain in SDF detention facilities with no clear path for long-term detention and adjudication.<sup>52</sup>

Therefore, as former Secretary of Defense Mattis stated, suitable alternative options for the detained foreign fighters must be identified to ensure "captured terrorists remain off the battlefield and off [ ]our streets."<sup>53</sup> One possible option discussed by the SDF and the international community is for the SDF, rather than the countries of citizenship, to prosecute and incarcerate the foreign ISIS fighters.<sup>54</sup> However, the SDF's detention and prosecution raises a number of legal issues because they are a collective non-state actor that the Syrian government has granted no domestic military or law enforcement authority. Thus, in order to ascertain whether this option is viable, the applicability of LOAC to the SDF must first be established. Once this is done, the lawfulness of the SDF's detention and prosecution of the foreign ISIS fighters can then be evaluated under international law rather than domestic Syrian law.

### III. Classifying the Belligerents and the Conflict

The first step in determining whether LOAC applies to the SDF is to classify the type of conflict in which the SDF are involved. This initial step establishes whether international law as a whole applies to the conflict and, if so, helps to refine the applicable bodies of law. For example, if the conflict between the SDF and ISIS is classified as banditry or criminal in nature

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<sup>48</sup> 2014 UNHRC Report, *supra* note 10, at 3.

<sup>49</sup> *Id.*

<sup>50</sup> Gordon & Faucon, *supra* note 4.

<sup>51</sup> Savage, *supra* note 3.

<sup>52</sup> *Id.*

<sup>53</sup> *Remarks by Secretary Mattis and Secretary-General Stoltenberg to the Defeat ISIS Coalition, Brussels, Belgium, supra* note 1.

<sup>54</sup> Schmitt, *supra* note 8; Wladimir van Wilgenburg, *Syrian Kurds Hold Hundreds of Foreign IS... and No One Wants Them Back*, MIDDLE E. EYE (Mar. 8, 2018, 3:08 PM), <https://www.middleeasteye.net/news/us-backed-syrian-forces-urge-europe-take-back-foreign-fighters-56015630>.

instead of as an armed conflict, international law, and consequently LOAC, may not be applicable at all.<sup>55</sup> Similarly, if one or more of the groups involved in the conflict is not organized enough to be considered a non-state armed group, then LOAC may not be applicable to that group or the conflict.<sup>56</sup> Therefore, the conflict must be analyzed and classified before determining whether LOAC is applicable. While this article primarily focuses on the conflict between the SDF and ISIS, the conflict between the SDF and the Syrian government is also relevant to the discussion. Therefore, both conflicts will be evaluated and classified.

#### A. The Conflict between the SDF and ISIS

While treaty law related to non-international armed conflicts (NIACs) generally contemplates situations in which state authorities engage in armed conflict against insurgent groups,<sup>57</sup> armed conflicts between two non-state actors can also be considered a NIAC. The appellate court in the *Prosecutor v. Tadić* interlocutory appeal decision held that “an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.”<sup>58</sup> The “or between such groups within a State” language clearly indicates that a NIAC can also arise out of sustained hostilities between non-state armed groups within a state’s territory.

The *Tadić* appellate court also outlined criteria for determining whether hostilities internal to a state’s territory rise to the level of a NIAC. The above-quoted text from *Tadić* identifies the two primary criteria on which the appellate court relied: (1) the intensity of the violence or the level

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<sup>55</sup> 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, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention I] (“In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties . . . .”); JEAN S. PICTET ET AL., INT’L COMM. OF THE RED CROSS, COMMENTARY: GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 50 (1952) (“The above criteria are useful as a means of distinguishing a genuine armed conflict from a mere act of banditry or an unorganized and short-lived insurrection.”).

<sup>56</sup> See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 1(1), June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II] (“This Protocol . . . shall apply to all armed conflicts . . . which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups . . .”).

<sup>57</sup> See *id.*; PICTET ET AL., *supra* note 55.

<sup>58</sup> *Prosecutor v. Tadić*, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).



of “protracted violence” between the groups and (2) the organization of the groups.<sup>59</sup> The U.S. Department of Defense (DoD) *Law of War Manual* relies on the *Tadić* criteria for distinguishing between NIACs and internal disturbances<sup>60</sup> and provides additional sub-factors for consideration.<sup>61</sup>

Using the factors outline in *Tadić*, the conflict between the SDF and ISIS can be classified as a NIAC. Regarding the first *Tadić* factor, the level and intensity of the violence between the SDF and ISIS has been significant and sustained since it began in 2015, leaving an estimated twelve thousand SDF and over twenty thousand ISIS members dead.<sup>62</sup> Thus, the first factor is readily satisfied.

Regarding the second factor, while the *Tadić* decision does not elaborate on the meaning of “organized armed groups,” other sources of international law provide additional factors which can be relied upon for this evaluation. First, Additional Protocol II to the 1949 Geneva Conventions defines “other organized armed groups” as those that are “under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.”<sup>63</sup> The discussion of Article 3 common to the 1949 Geneva Conventions (Common Article 3) in the *Commentary on Geneva Convention I*, which the International Committee for the Red Cross (ICRC) published in 1952, outlines similar factors for the insurgent group when evaluating whether internal strife constitutes an armed conflict:

- (a) That the insurgents have an organization purporting to have the characteristics of a State.
- (b) That the insurgent civil authority exercises *de facto* authority over persons within a determinate territory.
- (c) That the armed forces act under the direction of the organized civil authority and are prepared to observe the ordinary laws of war.
- (d) That the insurgent civil authority agrees to be bound by the provisions of the Convention.<sup>64</sup>

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<sup>59</sup> *Id.*

<sup>60</sup> OFF. OF GEN. COUNS., U.S. DEP’T OF DEF., DEPARTMENT OF DEFENSE LAW OF WAR MANUAL § 3.4.2.2 (2016) [hereinafter LAW OF WAR MANUAL].

<sup>61</sup> *Id.* at 84 n.76.

<sup>62</sup> Williams, *supra* note 40.

<sup>63</sup> Additional Protocol II, *supra* note 56.

<sup>64</sup> PICTET ET AL., *supra* note 55.

While these factors are specific to those bodies of law,<sup>65</sup> three common factors can be used to evaluate the groups in question are whether the group (1) is organized and under one common command, (2) exercises control over territory, and (3) is able to carry out sustained hostilities.<sup>66</sup>

Based on the factors identified above and specific to the ongoing hostilities in Syria, both the SDF and ISIS can be considered organized armed groups under *Tadić*'s second factor.<sup>67</sup> First, the SDF are organized under the command and control of General Mazlum Kobane, and they operate as one cohesive and organized entity comprised of approximately sixty thousand members.<sup>68</sup> Second, the SDF exercises control over significant portions of Northeastern Syria, which they liberated from ISIS<sup>69</sup> and continue to hold from the Syrian government.<sup>70</sup> Finally, the SDF have been conducting sustained military operations against ISIS since 2015.<sup>71</sup> Likewise, ISIS is organized under the command and control of a single individual,<sup>72</sup> with a leadership structure dominated by foreign fighters.<sup>73</sup> While ISIS recently lost its physical caliphate due to the SDF's successful military operations, it once controlled significant territory throughout

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<sup>65</sup> The factors outlined in Additional Protocol II must be met for the Protocol to apply to a conflict, notwithstanding its potential applicability as customary international law. On the other hand, the list of factors highlighted in the *Commentary to Geneva Convention I* is simply a guidepost, as Common Article 3 "should be applied as widely as possible." *Id.*

<sup>66</sup> See *Prosecutor v. Tadić*, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) (highlighting the requirement of "protracted armed violence" to determine that an armed conflict exists).

<sup>67</sup> Formal state recognition of the SDF or ISIS as belligerents to the conflict, and thus providing them with certain legal rights, is a separate and distinct decision. See LAW OF WAR MANUAL, *supra* note 60, § 3.3.3 ("For the purpose of applying humanitarian rules, recognition of the armed group as having belligerent rights is neither a prerequisite for nor a result of applying humanitarian rules.").

<sup>68</sup> Williams, *supra* note 40.

<sup>69</sup> Savage, *supra* note 3.

<sup>70</sup> Perry & Francis, *supra* note 6.

<sup>71</sup> Garamone, *supra* note 5.

<sup>72</sup> Rukmini Callimachi & Eric Schmitt, *ISIS Names New Leader and Confirms al-Baghdadi's Death*, N.Y. TIMES (Oct. 31, 2019), <https://www.nytimes.com/2019/10/31/world/middleeast/isis-al-baghdadi-dead.html> ("Days after the Islamic State's leader, Abu Bakr al-Baghdadi, and his heir apparent were killed in back-to-back attacks by United States forces in northern Syria, the group broke its silence on Thursday to confirm their deaths, announce a new leader and warn America: 'Do not be happy.'").

<sup>73</sup> 2014 UNHRC Report, *supra* note 10, at 3.

Northeastern Syria.<sup>74</sup> Finally, as previously mentioned, ISIS and the SDF have been engaged in sustained hostilities since 2015.<sup>75</sup>

Since the conflict between the SDF and ISIS in Syria involves sustained, intense violence between two organized armed groups, both *Tadić* factors are satisfied. Thus, the conflict can be classified as a NIAC.

#### B. The Conflict Between the SDF and the Syrian Government

In contrast, the conflict between the SDF and the Syrian government is more straightforward, as LOAC contemplates internal conflicts between states and insurgent groups.<sup>76</sup> Under the first *Tadić* factor, while the intensity of the violence between the SDF and Syrian government is lower than the violence between the SDF and ISIS, there has been “protracted armed violence between governmental authorities and organized armed groups”<sup>77</sup> in response to the SDF’s continued control over thirty percent of Syria’s territory.<sup>78</sup> Likewise, the Syrian government is a state entity and, as previously discussed, the SDF are a sufficiently organized armed group to satisfy *Tadić*’s second factor.<sup>79</sup> Thus, the conflict between the SDF and the Syrian government can also be considered a NIAC.

#### IV. The Application of LOAC to the SDF

Having established that the SDF and ISIS are engaged in a NIAC, the next issue to address is whether, and to what extent, international law is binding on non-state armed groups. The application of LOAC, a subset of international law that regulates the conduct of armed hostilities,<sup>80</sup> to the conflict between the SDF and ISIS is important for determining the legitimacy and lawfulness of the SDF’s ability to detain and prosecute foreign ISIS fighters. Further, determining the specific bodies of LOAC that apply to the SDF will establish the baseline international legal standards to which the SDF’s detention and prosecution operations must adhere.

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<sup>74</sup> Callimachi, *supra* note 41.

<sup>75</sup> Garamone, *supra* note 5.

<sup>76</sup> See Geneva Convention I, *supra* note 55; Additional Protocol II, *supra* note 56, art. 1.

<sup>77</sup> Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

<sup>78</sup> Sarah El Deeb, *Syrian Kurds Say US Seeking Deal to Prevent Turkish Attack After Withdrawal*, ASSOCIATED PRESS (Jan. 29, 2019), <https://www.militarytimes.com/flashpoints/2019/01/29/syrian-kurds-say-us-seeking-deal-with-turkey>.

<sup>79</sup> See Williams, *supra* note 40; Garamone, *supra* note 5.

<sup>80</sup> LAW OF WAR MANUAL, *supra* note 60, § 1.3.

While domestic Syrian law would apply to the SDF even if LOAC applied, LOAC provides a more appropriate rubric for evaluating the SDF's detention and prosecution operations due to the classification of the conflict as a NIAC. If only domestic Syrian law were relied on to evaluate the lawfulness of the SDF's detention and prosecution of foreign ISIS fighters, the Syrian government, from which the SDF seeks to gain autonomy,<sup>81</sup> would be the final decision authority. While there has been no official declaration by the Syrian government on this matter,<sup>82</sup> it is likely the Syrian government considers all SDF military operations and self-governance unlawful, as the SDF are not operating under an official Syrian government grant of authority. As such, the SDF's detentions, according to the Syrian government, would likely amount to kidnapping, hostage-taking, or a similar offense under the Syrian Criminal Code.<sup>83</sup> However, since the SDF and ISIS are engaged in a NIAC, the analysis does not stop with domestic Syrian law. The SDF's detention and prosecution of foreign ISIS fighters can, and should, be evaluated under LOAC.

Nonetheless, the applicability of LOAC to non-state armed groups, such as the SDF, is not entirely obvious. The plain reading of international treaties, which are primary sources of LOAC, generally does not articulate their applicability to non-state armed groups. This is because international treaties are created, entered into, and signed by states rather than non-state actors. Fortunately, there are a number of legal theories that extend LOAC protections and obligations to a non-state armed group when they are a party to a NIAC.<sup>84</sup> The most relevant theories applicable to the specific factual circumstances of the conflict between the SDF and ISIS are the customary international law (CIL) theory, the third-party consent theory, and the prescriptive (legislative) jurisdiction theory.<sup>85</sup> Taken together, these theories help to identify the specific LOAC principles that apply to

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<sup>81</sup> Perry & Francis, *supra* note 6.

<sup>82</sup> As of this writing, none have been translated into English and formally published as a matter of official government action. *But see* Joost Hiltermann, *The Kurds Once Again Face American Abandonment*, ATLANTIC (Aug. 30, 2018), <https://www.theatlantic.com/international/archive/2018/08/syria-kurds-assad-ypg-isis-iraq/569029> (“Bashar al-Assad . . . has repeatedly announced his intention to reclaim ‘every inch’ of Syrian territory. That includes the zone controlled by the YPG, an area that also comprises the majority-Kurdish region the Kurds call Rojava.”).

<sup>83</sup> *See generally* Syrian Arab Republic, *Decree No. 20 of 2013 on the Crime of Kidnapping and Due Penalties*, INT’L LABOUR ORG., [http://www.ilo.org/dyn/natlex/natlex4.detail?p\\_lang=en&p\\_isn=96554](http://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=96554) (last visited Feb. 9, 2021).

<sup>84</sup> *See* Daragh Murray, *How International Humanitarian Law Treaties Bind Non-State Armed Groups*, 20 J. CONFLICT & SEC. L. 101 (2015).

<sup>85</sup> *See id.* at 101–02.

this conflict and thus govern the SDF's detention and prosecution of foreign ISIS fighters.

#### A. Customary International Law Theory

The CIL theory provides strong support for the premise that LOAC applies to the conflict between the SDF and ISIS and is thus binding on both parties. However, reliance on this theory alone is not enough to identify all of the SDF's LOAC obligations. The CIL theory posits that "where international rights or obligations form part of customary international law, they bind armed opposition groups *qua* customary law, with or without their consent, and irrespective of any actions undertaken by the territorial state."<sup>86</sup> While it is generally accepted today that non-state armed groups can be bound by CIL, this has not always been the case.

States have historically been central to the development of CIL, which has presented problems when applying the CIL theory to non-state armed groups. Customary international law comes from a general acceptance of certain principles and consistent practice by states, which are followed out of a sense of legal obligation, also known as *opinio juris*.<sup>87</sup> This invariably puts state practice and state opinion at the center of creating CIL. The historic view of CIL provides that states are the only entities to which CIL applies, as they are the only entities involved in its creation.<sup>88</sup> Because the international community does not recognize the SDF or ISIS as independent sovereigns, neither is considered a state.<sup>89</sup> Consequently, under the historic view, this would mean that CIL is not applicable to either party.

A similar argument that stems from the historic view of CIL is that even if a non-state armed group could be bound by CIL, the binding law would likely be only those customary laws established by other non-state

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<sup>86</sup> *Id.* at 105.

<sup>87</sup> LAW OF WAR MANUAL, *supra* note 60, § 1.8.

<sup>88</sup> Murray, *supra* note 84, at 106.

<sup>89</sup> According to the Montevideo Convention, a "State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other States." Convention on Rights and Duties of States art. 1, Dec. 26, 1933, 49 Stat. 3097, 165 L.N.T.S. 19 (entered into force Dec. 26, 1934). While the SDF and the overarching semi-autonomous Kurdish regional government in Northern Syria have both a defined territory and a permanent population, they have neither a fully functioning and stable government across their entire territory nor the capacity to enter into relations with other states. Thus, the SDF and the Kurdish governing authorities would not be considered a state by the international community.

armed groups.<sup>90</sup> Further, “the historical conception of states as the exclusive subjects of international law . . . [means] it was assumed that the competence to create international law was a consequence of international legal personality.”<sup>91</sup> Therefore, under this view, a non-state armed group may still need an international personality for international law to apply and, even then, the only binding laws would be those CILs established by other non-state actors.

Despite the historic, state-centric nature of the CIL theory, in the post-World War II era, certain baseline CIL principles have been extended to non-state armed groups due to their very nature and wide acceptance.<sup>92</sup> Common Article 3 is a component of LOAC that embodies those universally accepted minimum standards. By its terms, Common Article 3 specifically applies its minimum protections to “each Party to the conflict” when the armed conflict is “not of an international character occurring in the territory of one of the High Contracting Parties.”<sup>93</sup> In addition, Common Article 3 has been held to be a “minimum yardstick” that reflects “elementary considerations of humanity”<sup>94</sup> that should be “applied as widely as possible.”<sup>95</sup> As such, Common Article 3 is generally regarded as CIL, applicable to all parties involved in both international armed conflicts and NIACs.<sup>96</sup>

Since NIACs are, by their nature, internal to a state, they generally involve a state actor and at least one non-state armed group. Consequently, in most NIACs, it would be unlikely that a non-state armed group would have a recognized international personality, especially in the early stages of hostilities. Thus, it would stand to reason there is no requirement for a non-state armed group to have an international personality for Common Article 3 to be binding. To state otherwise would mean Common Article 3 is only applicable to the state entity in a NIAC, which would render its minimum protections wholly irrelevant.

Further, international case law supports the proposition that Common Article 3 applies to non-state armed groups even when those groups do not

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<sup>90</sup> Murray, *supra* note 84, at 107.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> Geneva Convention I, *supra* note 55.

<sup>94</sup> Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶ 218 (June 27).

<sup>95</sup> PICTET ET AL., *supra* note 55.

<sup>96</sup> LAW OF WAR MANUAL, *supra* note 60, § 3.1.1.2.

have an international personality. In *Tadić*, the appellate court cited to Common Article 3 and the Hague Conventions in holding that “it cannot be denied that customary rules have developed to govern internal strife. These rules . . . cover such areas as protection of civilians from hostilities . . . as well as prohibition of means of warfare proscribed in international armed conflicts and ban of certain methods of conducting hostilities.”<sup>97</sup> The court went further by extending individual criminal liability to the non-state actors who committed LOAC violations in the territory of the former Yugoslavia.<sup>98</sup> Specifically, the court held that “[a]ll of these factors confirm that customary international law imposes criminal liability for serious violations of common Article 3 . . . and for breaching certain fundamental principles and rules regarding means and methods of combat in civil strife.”<sup>99</sup>

Further, the Appeals Chamber of the Special Court of Sierra Leone held in *Prosecutor v. Sam Hinga Norman* that non-state armed groups are bound by LOAC based on CIL.<sup>100</sup> In particular, the court stated that

it is well-settled that *all* parties to an armed conflict, whether states or non-state actors, are bound by international humanitarian law, even though only states may become parties to international treaties. Customary international law represents the common standard of behaviour within the international community, thus even armed groups hostile to a particular government have to abide by these laws.<sup>101</sup>

Therefore, it is well established in international case law that when non-state armed groups are a party to an armed conflict, they are bound by LOAC obligations that are considered CIL.

The United States also supports the view that CIL applies to non-state armed groups. The *Law of War Manual* explains that, “[a]s a consequence of the fewer treaty provisions applicable to non-international armed conflict, many of the rules applicable to non-international armed conflict are found

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<sup>97</sup> *Prosecutor v. Tadić*, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 127 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

<sup>98</sup> *Id.* ¶ 134.

<sup>99</sup> *Id.*

<sup>100</sup> *Prosecutor v. Norman*, Case No. SCSL-2004-14-AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), ¶ 22 (May 31, 2004), [http://www.rscsl.org/Documents/Decisions/CDF/Appeal/131/SCSL-04-14-AR72\(E\)-131.pdf](http://www.rscsl.org/Documents/Decisions/CDF/Appeal/131/SCSL-04-14-AR72(E)-131.pdf).

<sup>101</sup> *Id.* (citations omitted).

in customary international law.”<sup>102</sup> The *Manual* goes on to state that “customary law of war rules are binding on those parties to the armed conflict that intend to make war and to claim the rights of a belligerent, even if they are not States.”<sup>103</sup>

United States domestic case law reinforces this position. In *Kadic v. Karadžić*, the Second Circuit Court of Appeals held that the “law of nations” was not confined only to state action.<sup>104</sup> Instead, the court found that certain conduct could violate the “law of nations” even if undertaken by private individuals.<sup>105</sup> The court ultimately reversed the trial court’s dismissal of a civil suit against Radovan Karadžić, the leader of insurgent Bosnian-Serb Forces, which was brought by the victims of his war crimes under the Alien Tort Act.<sup>106</sup>

Even though neither ISIS nor the SDF have a recognized international personality, it is well settled that each is still bound by LOAC, specifically Common Article 3, given the classification of their conflict. The language of Common Article 3, coupled with international case law and the United States’ official position, lends credibility to this proposition. Further, the case is strengthened by the factual circumstances of the conflict. Both parties are sufficiently organized and have, at various times, controlled significant territory in Northeastern Syria.<sup>107</sup> In addition, the SDF have established a semi-autonomous government within their territory and continue to maintain international relations with a multitude of foreign governments.<sup>108</sup> While still not rising to the level of an officially recognized state or having an international personality, these factual circumstances provide additional indicia that both the SDF and ISIS are parties to the NIAC to which Common Article 3 applies.<sup>109</sup>

### B. Third-Party Consent Theory

The third-party consent theory also provides a strong, independent basis for binding the SDF to specific international treaties. This theory, as it applies to non-state armed groups, arises from the *pacta tertiis* principle<sup>110</sup>

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<sup>102</sup> LAW OF WAR MANUAL, *supra* note 60, § 17.2.2.

<sup>103</sup> *Id.* § 17.2.4.

<sup>104</sup> *Kadic v. Karadžić*, 70 F.3d 232, 239 (2d Cir. 1995).

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 237, 251.

<sup>107</sup> Williams, *supra* note 40.

<sup>108</sup> See El Deeb, *supra* note 80.

<sup>109</sup> Geneva Convention I, *supra* note 55.

<sup>110</sup> Murray, *supra* note 84, at 109.



found in Section 4 of Part III of the Vienna Convention on the Law of Treaties.<sup>111</sup> Specifically, Article 36 states that “[a] right arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to accord that right . . . to the third State . . . and the third State assents thereto.”<sup>112</sup> Drawing from this language, the third-party consent theory applies this principle to non-state armed groups by binding them to international treaties “if two conditions are met: first, that the drafters intended to bind armed opposition groups and, second, that the armed groups consented to be bound.”<sup>113</sup> By allowing non-state armed groups the freedom to choose the international treaties to which they are bound, based on the factual reality of the conflict and through their own consent, this theory ultimately encourages compliance with international law.<sup>114</sup> While this theory may not be applicable for all NIACs, the SDF, in an attempt to seek international support and legitimacy, have consented to be bound by certain international laws, making this theory particularly applicable.

The first requirement of *pacta tertiis* is that the drafters of the international treaty intended to bind non-state actors.<sup>115</sup> Since the conflict between the SDF and ISIS is a NIAC, the application of Common Article 3 to the SDF is of particular importance. As previously outlined, Common Article 3 specifically applies to “each Party to the conflict” in cases of “armed conflict not of an international character occurring in the territory of one of the High Contracting Parties.”<sup>116</sup> Based on the plain reading of this language, the drafters of the Conventions clearly differentiated between the parties to the NIAC: the non-state actors and a state entity, which is described as the “High Contracting Part[y].”<sup>117</sup> When conflicts “arise between two or more . . . High Contracting Parties,” according to Common Article 2 of the 1949 Geneva Conventions, the conflict is considered an international armed conflict.<sup>118</sup> Since every nation in the world is a High Contracting Party to the Geneva Conventions,<sup>119</sup> a NIAC, by the terms of

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<sup>111</sup> Vienna Convention on the Law of Treaties arts. 34–37, *opened for signature May 23, 1969*, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980).

<sup>112</sup> *Id.* art. 36.

<sup>113</sup> Murray, *supra* note 84, at 110.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> Geneva Convention I, *supra* note 55.

<sup>117</sup> *Commentary of 2016: Article 3: Conflicts Not of an International Character*, INT’L COMM. OF THE RED CROSS para. 393, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=59F6CDFA490736C1C1257F7D004BA0EC>.

<sup>118</sup> Geneva Convention I, *supra* note 55, art. 2.

<sup>119</sup> *Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949*, INT’L COMM. OF THE RED CROSS, <https://ihl->

Common Article 3, must involve non-state actors and no more than one High Contracting Party.

Further, the *Commentary on Geneva Convention I* explains the drafter's intent to bind non-state armed groups to Common Article 3.

The words "each Party" mark the great progress which the passage of a few years has sufficed to bring about in international law. For until recently it would have been considered impossible in law for an international Convention to bind a non-signatory Party—a Party, moreover, which was not yet in existence and which was not even required to represent a legal entity capable of undertaking international obligations.

Each of the Parties will thus be required to apply Article 3 by the mere fact of that Party's existence and of the existence of an armed conflict between it and the other Party.<sup>120</sup>

As such, it is clear the intent of the drafters of the 1949 Geneva Conventions was to bind both states and non-state armed groups involved in a NIAC to the minimum standards set forth in Common Article 3.

Similarly, the drafters of Additional Protocol II intended the treaty to be applicable to both states and non-state armed groups involved in a NIAC. Article 1 of Additional Protocol II provides "[t]his Protocol, which develops and supplements Article 3 . . . without modifying its existing conditions of application, shall apply to all armed conflicts . . . which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups . . . ."<sup>121</sup> The *Commentary on the Additional Protocols* further explains that "Protocol II and [C]ommon Article 3 are based on the principle of equality of the parties to conflict . . . [that is, the] rules grant the same rights and impose the same duties on both the established government and the insurgent party."<sup>122</sup> Thus, as an

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databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp\_viewStates=XPages\_NORMStatesParties &xp\_treatySelected=365 (last visited Feb. 9, 2021).

<sup>120</sup> PICTET ET AL., *supra* note 55, at 51.

<sup>121</sup> Additional Protocol II, *supra* note 56, art. 1.

<sup>122</sup> CLAUDE PILLOUD ET AL., INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 para. 4442 (Yves Sandoz et al. eds., 1987).

extension of Common Article 3, the drafters of Additional Protocol II also intended to bind non-state armed groups.

The second requirement of the *pacta tertiis* principle on which the third-party consent theory is based, is the non-state armed group must consent to be bound by the international treaties.<sup>123</sup> While the SDF have not made an affirmative, public statement consenting to the application of Common Article 3 or Additional Protocol II, they have provided commitments to the United States to respect human rights and the rule of law. In accordance with its constitutional authority to regulate the expenditure of government funds, Congress included in section 1209 of the National Defense Authorization Act for Fiscal Year 2015 the following prerequisite for the U.S. military to provide financial and logistical support to the SDF for their counter-ISIS operations: “a commitment [by the SDF] . . . promoting the respect for human rights and the rule of law.”<sup>124</sup> Since the SDF are currently receiving financial and logistical support from the United States,<sup>125</sup> it is reasonable to conclude the SDF have provided the congressionally required commitments to U.S. Government officials.

Since the required commitments in section 1209 are not specific to a particular law or treaty, understanding the United States’ interpretation of the phrase “respect for human rights and the rule of law”<sup>126</sup> is important. As a state-party to the 1949 Geneva Conventions and the previously discussed view of CIL, the United States regards Common Article 3 as the minimum standard of treatment in both international and NIACs.<sup>127</sup> Similarly, while the United States has not ratified Additional Protocol II, it views the protections and obligations afforded to the parties under Additional Protocol II as “no more than a restatement of the rules of conduct with which U.S. military forces . . . comply as a matter of national policy, constitutional and legal protections, and common decency.”<sup>128</sup> Further, the United States

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<sup>123</sup> Murray, *supra* note 84, at 110.

<sup>124</sup> Carl Levin and Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 1209(e)(1)(B), 128 Stat. 3292, 3543 (2014).

<sup>125</sup> Savage, *supra* note 3 (“Since then, the American military has helped the S.D.F. upgrade security, spending about \$1.6 million.”).

<sup>126</sup> § 1209(e)(1)(B), 128 Stat. at 3543.

<sup>127</sup> See LAW OF WAR MANUAL, *supra* note 60, § 3.1.1.2.

<sup>128</sup> Letter from George P. Shultz, U.S. Sec’y of State, to Ronald Reagan, President of the U.S., (Dec. 13, 1986), in S. TREATY DOC. NO. 100-2, at VII, VIII (1987) (“With the above caveats, the obligations contained in Protocol II are no more than a restatement of the rules of conduct with which U.S. military forces would almost certainly comply as a matter of national policy, constitutional and legal protections, and common decency.”); LAW OF WAR MANUAL, *supra* note 60, at 1180 n.227 (“We have now completed a comprehensive interagency review of

views the applicability of Additional Protocol II more broadly than its stated scope; that is, the United States applies “the Protocol to all conflicts covered by Article 3 common to the 1949 Conventions (and only such conflicts), which will include all non-international conflicts as traditionally defined.”<sup>129</sup> Thus, the United States’ acceptance of the SDF’s commitments to promote respect for human rights and the rule of law means that those commitments will be viewed in light of those minimum standards set forth by both Common Article 3 and Additional Protocol II.

By providing these commitments, the SDF have consented to be bound by those international laws. This proposition is further supported by the SDF’s cooperation with international humanitarian organizations such as the ICRC<sup>130</sup> and the Geneva Call,<sup>131</sup> both of which encourage and monitor adherence to those international laws.<sup>132</sup> Consequently, by voluntarily consenting to and complying with Common Article 3 and Additional Protocol II, the SDF have gained international support and legitimacy for their operations, which is consistent with the third-party consent theory’s underlying purpose.

### C. Prescriptive (Legislative) Jurisdiction Theory

The final theory that applies LOAC to the conflict between the SDF and ISIS is the prescriptive (legislative) jurisdiction theory. Legislative jurisdiction is an American legal principle that provides that “the federal state has jurisdiction to legislate with respect to a specific area and any entities therein; i.e. it has the authority to ‘apply its law to create or affect legal interests.’”<sup>133</sup> In other words, a state may pass legislation and bind to it all persons and entities that are within that state’s territory or under the state’s control.

In international law, this principle is known as the prescriptive jurisdiction theory, which is “the right [of a state] to legislate vis-à-vis its

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Protocol II, and . . . assess it to be consistent with current military practice and beneficial to our national security and foreign policy interests.” (quoting Letter from Hillary Rodham Clinton, U.S. Sec’y of State & Robert Gates, U.S. Sec’y of Def., to John Kerry, U.S. Sen. & Richard Lugar, U.S. Sen. (Mar. 7, 2011)).

<sup>129</sup> Letter from George P. Shultz to Richard Nixon, *supra* note 128, at VIII.

<sup>130</sup> Schmitt, *supra* note 8.

<sup>131</sup> U.S. DEP’T OF STATE, SYRIA 2017 HUMAN RIGHTS REPORT 25 (2017).

<sup>132</sup> See *The ICRC’s Mandate and Mission*, INT’L COMM. OF THE RED CROSS, <https://www.icrc.org/en/mandate-and-mission> (last visited Feb. 9, 2021); *Mission*, GENEVA CALL, <https://www.genevacall.org/mission> (last visited Feb. 9, 2021).

<sup>133</sup> Murray, *supra* note 84, at 122 (citations omitted).

nationals, an authority derived from the fact of state sovereignty.”<sup>134</sup> On an international scale, a state is regarded as a “continuous entity” where internal changes do not affect the state’s international obligations.<sup>135</sup> Thus, the particular government or state agent who entered into the international agreement does not matter. Instead, once the international agreement is entered into, all persons and entities within that state are bound by the agreement, even if there is a subsequent transfer of state authority.<sup>136</sup>

The prescriptive jurisdiction theory’s relevance to non-state armed groups has broad support. Specifically, when discussing the applicability of Additional Protocol II and Common Article 3 to non-state armed groups, the *Commentary on the Additional Protocols* provides:

The question is often raised how the insurgent party can be bound by a treaty to which it is not a High Contracting Party. . . . [T]he commitment made by a State not only applies to the government but also to any established authorities and private individuals within the national territory of that State and certain obligations are therefore imposed upon them. The extent of rights and duties of private individuals is therefore the same as that of the rights and duties of the State.<sup>137</sup>

Thus, the drafters of the Additional Protocols to the Geneva Conventions both embraced the prescriptive jurisdiction theory and used it to apply the rights and obligations of those treaties to non-state actors.

Similarly, the United States has adopted the prescriptive jurisdiction theory in applying international law to non-state armed groups. Under the heading “Binding Force of the Law of War on Insurgents and Other Non-State Armed Groups,” the *Law of War Manual* explains that, “[a]s a practical matter, non-State armed groups would often be bound by their State’s treaty obligations due to the very fact that the leaders of those non-State armed groups would claim to be the State’s legitimate representatives.”<sup>138</sup> Thus, a non-state armed group that claims to have a degree of official state

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<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 124.

<sup>136</sup> *Id.*

<sup>137</sup> PILLOUD ET AL., *supra* note 122, para. 4444 (citation omitted).

<sup>138</sup> LAW OF WAR MANUAL, *supra* note 60, § 17.2.4.

or governmental authority would be bound by the state's pre-existing treaty obligations.

However, the prescriptive jurisdiction theory would only bind the SDF and ISIS to Common Article 3. The Syrian Arab Republic is a signatory only to the 1949 Geneva Conventions and Additional Protocol I.<sup>139</sup> Syria is not a signatory to Additional Protocol II.<sup>140</sup> Therefore, under the prescriptive jurisdiction theory, only Common Article 3 would apply to the NIAC between the SDF and ISIS, since it is ongoing in the Syrian Arab Republic.

#### D. Law of Armed Conflict Principles Applicable to the SDF

Taken together, these three theories identify two specific bodies of LOAC that are applicable to the SDF's detention and prosecution of foreign ISIS fighters. First is Common Article 3, which applies to the conflict as a whole and is thus binding on both the SDF and ISIS. Second, the SDF may also be obligated to abide by Additional Protocol II. However, the extent to which Additional Protocol II applies varies based on the theory relied upon and how strongly the international community views those principles as CIL. How these bodies of law apply to the SDF and the extent to which they are binding is discussed further below.

##### 1. Common Article 3

The first body of LOAC that is binding on the SDF and controlling during their detention and prosecution of foreign ISIS fighters is Common Article 3 of the 1949 Geneva Conventions. Since this position is supported by all three theories, Common Article 3 is the most clearly applicable body of law to the SDF.

First, under the CIL theory, as articulated in *Tadić*, Common Article 3 extends to non-state armed groups even if those groups do not have an international personality.<sup>141</sup> The United States also supports the position that Common Article 3 applies to non-state actors as a matter of CIL.<sup>142</sup> The *Law of War Manual* explains that “[t]reaty provisions that address non-

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<sup>139</sup> *Syrian Arab Republic*, INT'L COMM. OF THE RED CROSS, [https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountrySelected.xsp?xp\\_countrySelected=SY](https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountrySelected.xsp?xp_countrySelected=SY) (last visited Feb. 9, 2021).

<sup>140</sup> *Id.*

<sup>141</sup> *Prosecutor v. Tadić*, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 127, 134 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

<sup>142</sup> LAW OF WAR MANUAL, *supra* note 60, § 17.2.4.

international armed conflict provide that they apply not only to the State, but to each party to the conflict. In many cases, these treaty provisions would also be binding on non-State armed groups as a matter of customary international law.”<sup>143</sup> To support this proposition, the *Manual* cites in a footnote to a decision of the Special Court for Sierra Leone Appeals Chamber, an international court established by the United Nations, which explained that “a convincing theory is that [insurgents] are bound as a matter of international customary law to observe the obligations declared by Common Article 3 which is aimed at the protection of humanity.”<sup>144</sup> Therefore, both the United States and international courts view Common Article 3 as applicable to non-state armed groups as a matter of CIL.

Similarly, the third-party consent theory supports the application of Common Article 3 to the SDF. First, as previously discussed, the intent of the drafters of Common Article 3 was to apply its terms to non-state armed groups. Second, the SDF have consented to Common Article 3’s applicability through their commitments to the United States to respect human rights and the rule of law. Separately, the SDF have allowed the ICRC to access and assess the conditions of their detention facilities<sup>145</sup> and the SDF have publically claimed that “conditions in the camps meet international standards.”<sup>146</sup> These official actions by the SDF, coupled with their commitments to the United States, indicate the SDF’s intent to voluntarily adhere to Common Article 3’s minimum treatment standards. Thus, the SDF have satisfied both requirements under the third-party consent theory, binding them to Common Article 3.

Finally, under the prescriptive jurisdiction theory, the SDF are also bound by Common Article 3. Since the Syrian Arab Republic is a party to the 1949 Geneva Conventions,<sup>147</sup> the SDF, composed of Syrian nationals, are bound by the state’s pre-existing treaty obligations. This is further strengthened by the SDF’s apparent role, though not internationally accepted, as a semi-official state entity within the Syrian territory they control. The SDF and SDC have taken on both internal governing and international engagement functions.<sup>148</sup> Therefore, by holding themselves out as a semi-

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<sup>143</sup> *Id.* (citations omitted).

<sup>144</sup> Prosecutor v. Kallon, Case No. SCSL-2004-15-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, ¶47 (Mar. 13, 2004), *quoted in* LAW OF WAR MANUAL, *supra* note 60, at 1039 n.64.

<sup>145</sup> Schmitt, *supra* note 8.

<sup>146</sup> *Id.*

<sup>147</sup> *Syrian Arab Republic*, *supra* note 139.

<sup>148</sup> *See* Seligman, *supra* note 7.

official state entity, the SDF would be bound by all treaty obligations contained in the 1949 Geneva Conventions, to include Common Article 3.

## 2. *Additional Protocol II*

Unlike Common Article 3, Additional Protocol II does not apply to the conflict between the SDF and ISIS; however, the SDF may still be required to comply with certain portions of Additional Protocol II. First, the prescriptive jurisdiction theory provides no support for applying Additional Protocol II to the conflict between the SDF and ISIS. Even though Additional Protocol II acts as an expansion of Common Article 3, it remains a separate treaty that requires separate ratification. And, importantly, the Syrian Arab Republic is not a signatory to Additional Protocol II.<sup>149</sup> According to the ICRC,

Additional Protocol II is only applicable in armed conflicts taking place on the territory of a State that has ratified it. . . . In these non-international armed conflicts [that occur in states that have not ratified Additional Protocol II], common Article 3 of the four Geneva Conventions often remains the only applicable treaty provision.<sup>150</sup>

Thus, under the prescriptive jurisdiction theory, neither the SDF nor ISIS is bound by Additional Protocol II's protections and obligations.

Likewise, the CIL theory provides little support for applying Additional Protocol II to the conflict between the SDF and ISIS. While a state may view Additional Protocol II as CIL, that position is typically articulated in a manner that extends only to the state's own actions and operations.<sup>151</sup> Thus, the applicability of Additional Protocol II, as a matter of CIL, to non-state armed groups is not clearly defined when looking to official state positions. In addition, international case law does not support the position that Additional Protocol II is CIL applicable to NIACs. Therefore, the

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<sup>149</sup> *Syrian Arab Republic*, *supra* note 139.

<sup>150</sup> *Customary IHL: Introduction*, INT'L COMM. OF THE RED CROSS, [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_in](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_in) (last visited Feb. 9, 2021).

<sup>151</sup> While the United States has not explicitly stated that it views Additional Protocol II as customary international law, it is the consistent practice of the United States to apply the same protections and obligations afforded by the Protocol to all military operations out of a sense of legal obligation. *E.g.*, Letter from George P. Shultz to Richard Nixon, *supra* 128, at VIII (“[T]he obligations contained in Protocol II are no more than a restatement of the rules of conduct with which U.S. military forces would almost certainly comply as a matter of national policy, constitutional and legal protections, and common decency.”).



current state of CIL does not appear to extend Additional Protocol II to the NIAC between the SDF and ISIS.

The third-party consent theory, however, provides the most compelling argument for extending Additional Protocol II to the SDF. While the United States has not ratified Additional Protocol II, it does view its protections and obligations, subject to certain reservations, as “no more than a restatement of the rules of conduct with which” the United States abides.<sup>152</sup> Further, the United States views Additional Protocol II as applicable “to all conflicts covered by [Common] Article 3 . . . which will include all non-international armed conflicts as traditionally defined.”<sup>153</sup> Therefore, the United States’ standard for humane treatment in a NIAC is framed by the standards set forth in Common Article 3 and Additional Protocol II. Thus, under the third-party consent theory, when the SDF provided the United States “a commitment . . . to promoting the respect for human rights and the rule of law,”<sup>154</sup> the SDF consented to the applicability of both Common Article 3 and Additional Protocol II to their operations.

While the extent to which the SDF are bound by Additional Protocol II remains unclear, based primarily on the third-party consent theory, the SDF are likely bound, at a minimum, to Articles 4, 5, and 6. These Articles provide the primary minimum treatment standards for individuals not taking part in hostilities and those no longer taking part in hostilities.<sup>155</sup> These Articles are also the most relevant to the SDF’s military operations and the detention and prosecution of ISIS fighters for which the SDF are receiving financial and logistical support from the United States.<sup>156</sup> Therefore, the United States will likely view the SDF’s commitments through the lens of Articles 4, 5, and 6, making those Articles the most likely to be binding on the SDF.

### *3. Article 75 of Additional Protocol I*

Article 75 of Additional Protocol I may also be applicable to the SDF’s detention and prosecution of foreign ISIS fighters, though this position does not have strong support. Additional Protocol I, by its terms, applies to international armed conflicts and those “situations referred to in Article 2

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<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> Carl Levin and Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 1209(e)(1)(B), 128 Stat. 3292, 3543 (2014).

<sup>155</sup> Additional Protocol II, *supra* note 56, arts. 4–6.

<sup>156</sup> § 1209(e)(1)(B), 128 Stat. at 3543.

common to [the Geneva Conventions of 12 August 1949].”<sup>157</sup> Unlike Additional Protocol II, the Syrian Arab Republic is a signatory to Additional Protocol I.<sup>158</sup> Therefore, under the prescriptive jurisdiction theory, Syrian parties to an international armed conflict would be bound by Article 75. However, since the conflict between the SDF and ISIS is a NIAC, Additional Protocol I is not applicable under this theory.

Despite Additional Protocol I’s specific applicability, the U.S. Supreme Court held in *Hamdan v. Rumsfeld* that Article 75 of Additional Protocol I was “indisputably part of the customary international law.”<sup>159</sup> The Court then used the protections afforded by Article 75 as the standard for determining whether the United States’ use of military commissions to prosecute captured al-Qaeda members complied with Common Article 3’s humane treatment obligation.<sup>160</sup> While Article 6 of Additional Protocol II provides similar fundamental guarantees that are specifically tailored to NIACs,<sup>161</sup> the Court instead chose to apply the protections afforded by Article 75 of Additional Protocol I to the United States’ NIAC with al-Qaeda.<sup>162</sup>

Despite the Supreme Court’s statement that Article 75 of Additional Protocol I is CIL applicable to both international and NIACs, this position is not shared across the U.S. Government. The DoD, through the *Law of War Manual*, specifically states, “the fundamental guarantees reflected in Article 75 of API [are the] minimum standards for the humane treatment of all persons detained *during international armed conflict*.”<sup>163</sup> Similarly, a White House fact sheet that accompanied former President Barack Obama’s issuance of Executive Order 13567 stated that “[t]he U.S. Government will therefore choose out of a sense of legal obligation to treat the principles set forth in Article 75 as applicable to any individual it detains *in an international armed conflict*, and expects all other nations to adhere to these

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<sup>157</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 1(3), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I].

<sup>158</sup> *Syrian Arab Republic*, *supra* note 139.

<sup>159</sup> *Hamdan v. Rumsfeld*, 548 U.S. 557, 634 (2006).

<sup>160</sup> *Id.* at 633; Geoffrey S. Corn, *Hamdan, Fundamental Fairness, and the Significance of Additional Protocol II*, ARMY LAW., Aug. 2006, at 2.

<sup>161</sup> Additional Protocol II, *supra* note 56, art. 6.

<sup>162</sup> *Hamdan*, 548 U.S. at 634.

<sup>163</sup> LAW OF WAR MANUAL, *supra* note 60, § 4.19.3.1 (emphasis added); *see id.* §§ 3.1.1.2, 8.1.4.2.

principles as well.”<sup>164</sup> The fact sheet further provides that “Additional Protocol II . . . contains detailed humane treatment standards and fair trial guarantees *that apply in the context of non-international armed conflicts*” and “that United States military practice is already consistent with the Protocol’s provisions.”<sup>165</sup> Therefore, even though the Supreme Court has extended Article 75 of Additional Protocol I to NIACs as a matter of CIL, the Executive Branch, “as the sole organ of the federal government in the field of international relations,”<sup>166</sup> has declined such a broad application of Article 75.

However, despite internal disagreement within the U.S. Government on the applicability of Article 75, the SDF may still be obligated to abide by the general principles outlined by Article 75 under the third-party consent theory. Since there is precedence in U.S. jurisprudence to extend Article 75 of Additional Protocol I to NIACs as a matter of CIL, the United States may, in certain circumstances, evaluate adherence to Common Article 3’s humane treatment obligation through the lens of Article 75’s treatment standards. As such, when the SDF provided the United States “a commitment . . . to promoting the respect for human rights and the rule of law,” in accordance with the § 1209(e)(1)(B) of the National Defense Authorization Act for Fiscal Year 2015,<sup>167</sup> the SDF consented to be bound by those fundamental minimum treatment standards the United States views as applicable in NIACs, regardless of whether those standards are codified in Common Article 3; Article 75 of Additional Protocol I; or Articles 4, 5, and 6 of Additional Protocol II.

Nevertheless, due to the ambiguity of Article 75’s applicability to NIACs, this article relies on Common Article 3 and Additional Protocol II as the primary sources of LOAC applicable to the SDF’s detention and prosecution of foreign ISIS fighters.

#### V. The SDF’s Legal Authority to Detain Foreign ISIS Fighters

Having established that the SDF and ISIS are non-state armed groups engaged in a NIAC to which LOAC applies, the next step is to evaluate the SDF’s legal authority to detain foreign ISIS fighters. This evaluation

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<sup>164</sup> OFF. OF THE PRESS SEC’Y, THE WHITE HOUSE, FACT SHEET: NEW ACTIONS ON GUANTÁNAMO AND DETAINEE POLICY (2011) (emphasis added).

<sup>165</sup> *Id.* (emphasis added).

<sup>166</sup> *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936).

<sup>167</sup> Carl Levin and Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 1209(e)(1)(B), 128 Stat. 3292, 3543 (2014).

becomes especially important when states, such as the United States, seek to provide the SDF with logistical and financial support for their detention operations.<sup>168</sup> If the SDF's detention operations are deemed illegitimate or unlawful, foreign support to the SDF may become legally or politically untenable.<sup>169</sup> In addition, if the SDF do not have a proper legal basis to detain, the Syrian government or the international community may force them to release detained ISIS fighters. Either situation would be counter-productive to the fight against ISIS.

The analysis to determine the SDF's legal authority to detain presents an additional complexity because, unlike a state, they do not have domestic detention authority. For a state, once there is a proper *jus ad bellum* international legal justification to enter into an armed conflict, the authority to detain individuals on the battlefield is derived from both LOAC<sup>170</sup> and domestic law.<sup>171</sup> However, a state "would only authorize its own agents ([e.g.,] police/military forces) to carry out [detention operations]. Therefore, at least *prima facie*, [non-state armed groups] could never detain individuals *legally* in a NIAC."<sup>172</sup> Unsurprisingly, under domestic Syrian law, the SDF are not considered official state agents. Rather, the SDF are a militia force that holds territory without the consent of the Syrian government.<sup>173</sup> Therefore, under Syrian law, any detention by the SDF would likely be considered an unlawful criminal act, such as kidnapping or hostage taking.<sup>174</sup>

As such, the SDF's ability to conduct detention operations turns solely on whether LOAC provides detention authority to non-state armed groups.

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<sup>168</sup> Savage, *supra* note 3.

<sup>169</sup> See, e.g., 10 U.S.C. § 362 (prohibiting the use of DoD funds for training, equipping, or assisting a unit of a foreign security force if there is credible information that the unit has committed gross violations of human rights).

<sup>170</sup> E.g., Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 42, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV] ("The internment or placing in assigned residence of protected persons may be ordered only if the security of the Detaining Power makes it absolutely necessary.").

<sup>171</sup> See, e.g., U.S. DEP'T OF DEF., DIR. 2310.01E, DoD DETAINEE PROGRAM 12 (19 Aug. 2014) (C2, 18 Sept. 2020) ("In addition to the responsibilities in section 8 of this enclosure, the Combatant Commanders: a. Plan, execute, and oversee Combatant Command detainee operations in accordance with this directive and implementing issuances.").

<sup>172</sup> Ezequiel Heffes, *Detentions by Armed Opposition Groups in Non-International Armed Conflicts: Towards a New Characterization of International Humanitarian Law*, 20 J. CONFLICT & SEC. L. 229, 230 (2015).

<sup>173</sup> Perry & Francis, *supra* note 6.

<sup>174</sup> See generally Syrian Arab Republic, *Decree No. 20 of 2013 on the Crime of Kidnapping and Due Penalties*, *supra* note 83.

However, LOAC does not explicitly provide detention authority to parties in NIACs as it does for parties in international armed conflicts.<sup>175</sup> While both Common Article 3 and Additional Protocol II discuss protections for detained persons, there is no specific language authorizing a non-state armed group to detain individuals in contravention of the governing domestic law. In fact, Common Article 3 states that “[t]he application of the preceding provisions shall not affect the legal status of the Parties to the conflict.”<sup>176</sup> This caveat has been viewed as an explicit statement that LOAC does not provide a non-state armed group with any additional authorities beyond their domestic legal authorities and any action beyond what is provided by domestic law is *per se* illegal.<sup>177</sup>

Alternatively, there are two different, but complementary, premises under which the SDF may properly detain foreign ISIS fighters under LOAC. The first premise is that LOAC does not prohibit the SDF from detaining individuals captured on the battlefield.<sup>178</sup> The second is that, while not explicitly stated, LOAC provides inherent detention authority to non-state armed groups.<sup>179</sup> As explained below, these two premises provide the SDF with the requisite international legal authority to properly detain foreign ISIS fighters despite not having been granted the domestic legal authority by the Syrian government.

#### A. The Law of Armed Conflict Does Not Prohibit SDF Detention Operations

The first premise that allows the SDF to lawfully detain foreign ISIS fighters is simply that detention by non-state armed groups is not prohibited by LOAC. Neither Common Article 3 nor Additional Protocol II explicitly prohibit the parties to a NIAC from detaining individuals encountered on the battlefield. Instead, both authorities recognize that detention occurs during armed conflict and provide protections for those persons whose

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<sup>175</sup> Heffes, *supra* note 172, at 231–33.

<sup>176</sup> Geneva Convention I, *supra* note 55, art. 3(2).

<sup>177</sup> *Mohammed v. Ministry of Defence* [2014] EWHC (QB) 1369 [243] (Eng.), *quoted in* Heffes, *supra* note 172, at 233 (“Such detention may be lawful under the law of the state on whose territory the armed conflict is taking place, or under some other applicable law; or it may be entirely unlawful. There is nothing in the language of CA3 or AP2 to suggest that those provisions are intended to authorise or themselves confer legality on any such detentions.”).

<sup>178</sup> Heffes, *supra* note 172, at 238–39.

<sup>179</sup> *Id.* at 239–40.

liberties have been restricted.<sup>180</sup> In addition, both bodies of law apply to both state and non-state actors,<sup>181</sup> yet neither body of law prohibits a non-state actor from detaining.<sup>182</sup> Therefore, regardless of the legality under domestic Syrian law, SDF detention of foreign ISIS fighters would not violate LOAC.

However, since the application of LOAC to an armed conflict does “not affect the legal status of the Parties to the conflict,”<sup>183</sup> the Syrian government may still prosecute members of the SDF under domestic law for conducting unlawful detentions. This means that while a non-state armed group may detain individuals without violating LOAC, they are not afforded any greater legal status under domestic law or special legal protections, such as combatant immunity. Therefore, “a State may use not only its war powers to combat non-State armed groups, but it may also use its domestic law, including its ordinary criminal law, to combat non-State armed groups.”<sup>184</sup>

Even though the SDF may not be violating LOAC by detaining foreign ISIS fighters, the ability to derive from LOAC a positive authority to detain would provide the SDF with greater legitimacy. Further, having a legitimate legal authority to detain would increase the likelihood that the international community would recognize and support the SDF’s detention operations.

#### B. The Law of Armed Conflict Authorizes SDF Detention Operations

While Common Article 3 and Additional Protocol II do not explicitly authorize detention, it can be argued that the authority to detain in a NIAC is inherent in both legal authorities.<sup>185</sup> Due to this inherent authority, non-state armed groups would not need a domestic legal basis to lawfully detain enemy belligerents. Thus, regardless of the Syrian government’s stance on the domestic legal status of the SDF, the SDF could rely on the inherent authority provided by LOAC to detain foreign ISIS fighters.

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<sup>180</sup> See Geneva Convention I, *supra* note 55; Additional Protocol II, *supra* note 56, art. 5; PILLOUD ET AL., *supra* note 122, para. 4567 (“Taken together, these rules—Article 4 (*Fundamental guarantees*) and Article 5, paragraph 1—express the basic standard to which anyone whose liberty has been restricted for reasons related to the conflict is entitled, i.e., combatants who have fallen into the power of the adverse party as well as civilians.”).

<sup>181</sup> See discussion *supra* Part IV.

<sup>182</sup> See Geneva Convention I, *supra* note 55; Additional Protocol II, *supra* note 56, arts. 4–6.

<sup>183</sup> Geneva Convention I, *supra* note 55.

<sup>184</sup> LAW OF WAR MANUAL, *supra* note 60, § 17.4.1.

<sup>185</sup> Heffes, *supra* note 172, at 239–40.

The recognition of the inherent authority to detain in a NIAC stems from the enumerated detention authority provided by the Geneva Conventions in international armed conflicts. Specifically, Geneva Convention III of the 1949 Geneva Conventions authorizes the taking of prisoners of war during hostilities.<sup>186</sup> Based on this explicit authorization,

[i]t is generally uncontroversial that the Third Geneva Convention provides a sufficient legal basis for POW internment and that an additional domestic law basis is not required. The detaining State is not obliged to provide review, judicial or other, of the lawfulness of POW internment as long as active hostilities are ongoing because POWs are considered to pose a security threat *ipso facto*.<sup>187</sup>

Similarly, Geneva Convention IV provides authority for states to intern foreign civilians who are in the territory of a Party to the conflict.<sup>188</sup> Therefore, in international armed conflicts, states are afforded significant authority under LOAC to detain various groups of individuals on the battlefield and do not require a domestic legal basis to do so.

Likewise, parties to a NIAC are afforded many of the same detention authorities under LOAC. When the law pertaining to NIACs is silent to a specific issue, the law of international armed conflicts can be used to provide further insight.<sup>189</sup> For example, in analyzing the Common Article 3 requirement to prosecute captured al-Qaeda members in a “regularly constituted court,” the U.S. Supreme Court in *Hamdan* looked to Geneva Convention IV and Additional Protocol I, which are applicable only to international armed conflicts.<sup>190</sup> Neither Common Article 3 nor Additional Protocol II enumerate the detention authority applicable in NIACs. However, both authorities provide specific protections for individuals who are detained by parties to the conflict.<sup>191</sup> Considering the enumerated detention authority provided to states in an international armed conflict and

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<sup>186</sup> Geneva Convention Relative to the Treatment of Prisoners of War art. 21, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

<sup>187</sup> INT’L COMM. OF THE RED CROSS, *INTERNMENT IN ARMED CONFLICT: BASIC RULES AND CHALLENGES* 4 (2014).

<sup>188</sup> Geneva Convention IV, *supra* note 170, art. 43.

<sup>189</sup> Heffes, *supra* note 172, at 232 (“Indeed, some commentators have explained that when the law of NIACs does not provide an answer in certain situation, the law of IACs may be applied by analogy, but this has to be permitted by the nature of the provision.”).

<sup>190</sup> *Hamdan v. Rumsfeld*, 548 U.S. 557, 631–35 (2006).

<sup>191</sup> See Geneva Convention I, *supra* note 55; Additional Protocol II, *supra* note 56, arts. 4–5.

the fact that both Common Article 3 and Additional Protocol II contemplate detentions, the parties to a NIAC may therefore have inherent detention authority.

Inherent detention authority in a NIAC is further supported by the *Commentary on the Additional Protocols* and by the international legal community. The *Commentary* identifies a clear distinction between individuals being detained as a result of the armed conflict and those being detained under domestic law, a circumstance not covered by Additional Protocol II.<sup>192</sup> Through this distinction, the *Commentary* acknowledges that individuals may be detained for security purposes pursuant to LOAC during a NIAC, which then triggers Common Article 3 and Additional Protocol II protections.<sup>193</sup> On the other hand, a state's domestic law would authorize and regulate criminal law detentions that are unrelated to the armed conflict.

Similarly, the ICRC recognizes the inherent detention authority that Common Article 3 and Additional Protocol II provide. In an opinion paper on internments in armed conflicts, the ICRC explained “that both customary and treaty [international humanitarian law] contain an inherent power to intern and may in this respect be said to provide a legal basis for internment in NIAC.”<sup>194</sup> Likewise, after acknowledging the opposing viewpoint, the ICRC's commentary on Common Article 3 states, “another view, shared by the ICRC, is that both customary and international humanitarian treaty law contain an inherent power to detain in non-international armed conflict.”<sup>195</sup> Therefore, as an impartial advocate of the Geneva Conventions and their Additional Protocols,<sup>196</sup> the ICRC also supports the position that LOAC provides inherent detention authority to non-state armed groups in a NIAC.

Finally, based on the restrictions in the Hague Conventions, Common Article 3, and Additional Protocol II, LOAC must provide inherent

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<sup>192</sup> See PILLOU ET AL., *supra* note 122, para. 4568 (“The term ‘deprived of their liberty for reasons related to the armed conflict’ is taken from Article 2 . . . . It covers both persons being penally prosecuted and those deprived of their liberty for security reasons, without being prosecuted under penal law. However, there must be a link between the situation of conflict and the deprivation of liberty; consequently prisoners held under normal rules of criminal law are not covered by this provision.” (citation omitted)).

<sup>193</sup> Heffes, *supra* note 172, at 240.

<sup>194</sup> INT'L COMM. OF THE RED CROSS, *supra* note 187, at 7.

<sup>195</sup> *Commentary of 2016: Article 3: Conflicts Not of an International Character*, *supra* note 117, para. 728.

<sup>196</sup> LAW OF WAR MANUAL, *supra* note 60, § 4.26.3; PICTET ET AL., *supra* note 55, at 11.



detention authority to all parties to a NIAC.<sup>197</sup> The Hague Conventions and Regulations, which regulate the means and methods of warfare, are considered CIL and are equally applicable to non-state armed groups in a NIAC.<sup>198</sup> The Fourth Hague Regulation makes it “especially forbidden . . . [t]o kill or wound an enemy who, having laid down his arms, or having no longer means of defence, has surrendered at discretion; . . . [and to] declare that no quarter will be given.”<sup>199</sup> This prohibition is also contained in Additional Protocol II which states that “[i]t is prohibited to order that there shall be no survivors.”<sup>200</sup> In other words, based on the CILs governing the means and methods of warfare, the enemy must be allowed to surrender. If a non-state armed group does not have the authority to detain under LOAC, those same laws only provide two options for dealing with surrendering combatants: release them or kill them. One option is unrealistic and the other is illegal. Therefore, in order to comply with the laws and customs of war as articulated by The Hague, LOAC must be read to inherently authorize detention.

Based on this inherent, affirmative detention authority provided by LOAC, the SDF may lawfully detain foreign ISIS fighters captured on the battlefield, including those who surrender. This authority is provided purely by LOAC and is based solely on the SDF’s status as a party to a NIAC. As such, this authority would exist regardless of the SDF’s domestic detention authority or the SDF’s legal status in the eyes of the Syrian government.

### C. Recognition of Inherent Detention Authority

While there is persuasive support for the position that LOAC provides inherent detention authority to parties in a NIAC, this area of international law is far from settled. The ICRC has noted that “[t]he question of whether [LOAC] provides inherent authority or power to detain is, however, still

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<sup>197</sup> Heffes, *supra* note 172, at 246–48.

<sup>198</sup> *E.g.*, Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 118 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995). (“[T]here exist general principles governing the conduct of hostilities (the so-called ‘Hague Law’) applicable to international and internal armed conflicts”); *id.* ¶ 127 (“Notwithstanding these limitations, it cannot be denied that customary rules have developed to govern internal strife. These rules, as specifically identified in the preceding discussion, cover such areas as . . . prohibition of means of warfare proscribed in international armed conflicts and ban of certain methods of conducting hostilities.”).

<sup>199</sup> Regulations Respecting the Laws and Customs of War on Land art. 23(c)–(d), Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631 (entered into force Jan. 26, 1910) [hereinafter Hague IV Regulations].

<sup>200</sup> Additional Protocol II, *supra* note 56, art. 4(1).

subject to debate.”<sup>201</sup> An *International Review of the Red Cross* report recounting a meeting of experts further drew attention to this debate, stating, “as treaty [LOAC] does not offer an explicit legal basis for any of the parties to a NIAC, the question as to how a non-State actor can exercise the inherent right to intern under [LOAC] remains unanswered.”<sup>202</sup> While the experts recognized “that non-State actors party to a NIAC . . . have an inherent ‘qualified *right* to intern’ under [LOAC], it remains unclear how this right could be translated into an actual *legal basis* to intern.”<sup>203</sup>

The debate on the inherent LOAC authority to detain is further highlighted in the United Kingdom case of *Serdar Mohammed v. Secretary of State for Defence*. The *Mohammed* court rejected the U.K. government’s argument that the United Kingdom had the inherent authority to detain enemy combatants in Afghanistan during a NIAC on three grounds.<sup>204</sup> First, the court rejected the “outdated” position that the absence of a prohibition in international law equates to a positive authority.<sup>205</sup> Second, the court determined the current development of CIL does not provide the “authority to detain in a non-international armed conflict.”<sup>206</sup> Finally, the court rejected the premise that Common Article 3 and Additional Protocol II provide positive detention authority since they do not expressly authorize detention.<sup>207</sup> While the U.K. Supreme Court ultimately overruled the Court of Appeals in this case, the Supreme Court derived the United Kingdom’s positive detention authority from a United Nations Security Council Resolution, leaving the inherent LOAC detention authority debate unresolved.<sup>208</sup>

Therefore, despite support for the premise that LOAC provides inherent detention authority to all parties involved to a NIAC, this view has not been

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<sup>201</sup> *Commentary of 2016: Article 3: Conflicts Not of an International Character*, *supra* note 117, para. 727.

<sup>202</sup> Els Debuf, *Expert Meeting on Procedural Safeguards for Security Detention in Non-International Armed Conflict: Chatham House and International Committee of the Red Cross, London, 22–23 September 2008*, 91 INT’L REV. RED CROSS 859, 870 (2009).

<sup>203</sup> *Id.* (emphasis added).

<sup>204</sup> *Mohammed v. Ministry of Defence* [2015] EWCA (Civ) 843 [246] (Eng.).

<sup>205</sup> *Id.* para. 197.

<sup>206</sup> *Id.* para. 242.

<sup>207</sup> *Id.* para. 219.

<sup>208</sup> *Mohammed v. Ministry of Defence* [2017] UKSC 2 [14] (Eng.) (“Lord Reed has dealt fully in his judgment with the question whether the detention of members of the opposing armed forces is sanctioned by customary international law in a non-international armed conflict. He concludes that as matters stand it is not, and I am inclined to agree with him about that. But for reasons which will become clear, I regard it as unnecessary to express a concluded view on the point.”).

fully recognized or accepted by the international community. However, even if their inherent detention authority is not universally recognized, the SDF may still rely on the premise that international law does not prohibit detention in a NIAC and thus remain on firm legal ground when detaining foreign ISIS fighters.

#### VI. The Law of Armed Conflict Authorizes SDF Prosecutions of Foreign ISIS Fighters

Having established that LOAC applies to the SDF and that the SDF may detain enemy combatants in compliance with LOAC, the crux of the problem facing the SDF must now be addressed: how to adjudicate detained foreign ISIS fighters. While the SDF and the United States are encouraging countries to take custody of their citizens for adjudication, many of these countries face significant legal and political hurdles to do so.<sup>209</sup> Further, the establishment of an international criminal court in Syria to prosecute detained fighters would undoubtedly present its own complexities, including logistical difficulties, international resistance, and the current inability of the United Nations to effectively address any aspect of the Syrian Civil War.<sup>210</sup> Consequently, the SDF are left detaining two thousand foreign ISIS fighters under LOAC with no viable option for post-conflict adjudication by the international community.<sup>211</sup>

Long-term LOAC detention creates two problems for the SDF and, ultimately, the international community. First, there is a significant logistical burden placed on the SDF due to the enduring security and life support requirements for the detainees, which cannot fall below the humane treatment standards provided by Common Article 3 and Additional Protocol II. Second, once the armed conflict ceases, the SDF's ability to indefinitely detain foreign ISIS fighters under LOAC (and without due process) becomes much more difficult.<sup>212</sup> This is because security detentions are

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<sup>209</sup> Fisher, *supra* note 17.

<sup>210</sup> See generally Simon Tisdall, *The Epic Failure of Our Age: How the West Let Down Syria*, GUARDIAN (Feb. 10, 2018, 5:00 PM), <https://www.theguardian.com/world/2018/feb/10/epic-failure-of-our-age-how-west-failed-syria>.

<sup>211</sup> Gordon & Faucon, *supra* note 4.

<sup>212</sup> "In general, law of war rules for the conduct of hostilities cease to apply when hostilities have ended." LAW OF WAR MANUAL, *supra* note 60, § 3.8; see PILLOUD ET AL., *supra* note 122, para. 4492 ("Logically this means that the rules relating to armed confrontation are no longer applicable after the end of hostilities . . ."). This means the SDF's authority under LOAC to continue to detain foreign ISIS fighters without due process may cease at some point in the future. Therefore, indefinite detention under LOAC is likely not a viable long-term solution.

“conceived and implemented as a preventative measure and therefore may not be used to punish a person for earlier criminal acts.”<sup>213</sup> Thus, once the armed conflict ceases, it is much more difficult to articulate permissible grounds for continued security detentions, which would then require the release of those detainees.

The establishment of an SDF venue to prosecute foreign ISIS fighters could solve both problems. Syrian Democratic Forces criminal trials could provide the ISIS detainees with due process and provide the SDF with the requisite legal grounds for long-term, post-conflict detention. Further, foreign governments would not have to expend domestic political capital trying to repatriate ISIS fighters for prosecution. Instead, those governments could simply provide the SDF with funding, training, and logistical support for the prosecution and detention of those ISIS fighters. In turn, this option could provide the SDF with enduring funding and support and greater international legitimacy and engagement. However, the viability of this option turns on whether LOAC permits a non-state armed group to prosecute individuals captured on the battlefield.

#### A. The SDF’s Authority to Prosecute Enemy Combatants

In order to determine the appropriate venue to adjudicate foreign ISIS fighters, the SDF’s authority to prosecute enemy combatants under LOAC must first be established. Unsurprisingly, the Syrian government has not afforded the SDF any domestic law enforcement or prosecutorial authority. However, like the authority to detain, the SDF can also derive their authority to prosecute from LOAC.

Both Common Article 3 and Additional Protocol II recognize that parties to a NIAC can prosecute enemy combatants for crimes related to the armed conflict. Common Article 3 prohibits “the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court . . . .”<sup>214</sup> Similarly, Article 6 of Additional Protocol II “applies to the prosecution and punishment of criminal offences related to the armed conflict.”<sup>215</sup> Therefore, the plain reading of both sources of law indicates that prosecution of combatants by the parties to a NIAC are authorized, so long as certain conditions are met.

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<sup>213</sup> Debuf, *supra* note 202, at 865.

<sup>214</sup> Geneva Convention I, *supra* note 55, art. 3(1)(d).

<sup>215</sup> Additional Protocol II, *supra* note 56, art. 6(1).

The authority to prosecute equally applies to state and non-state actors involved in a NIAC. The *Commentary on the Additional Protocols* supports this view by specifying that “like common Article 3, [Additional] Protocol II leaves intact the right of the established authorities to prosecute, try and convict members of the armed forces and civilians who may have committed an offence related to the armed conflict . . . .”<sup>216</sup> The *Commentary* further explains that Article 6 of Additional Protocol II expands upon the Common Article 3 protections with “principles of universal application which every responsibly organized body must, and can, respect.”<sup>217</sup> It specifically identifies that “every responsibly organized body”<sup>218</sup> includes “[d]issident armed forces and organized armed groups . . . which are opposed to the government in power . . . .”<sup>219</sup> Thus, Common Article 3 and Additional Protocol II provide both states and non-state armed groups with the authority to prosecute civilians and combatants<sup>220</sup> who have committed crimes related to the armed conflict,<sup>221</sup> provided that the prosecutions comply with the minimum standards set forth in those sources of law.

#### B. Potential Issues with SDF Prosecutions of Foreign ISIS Fighters

While LOAC permits the SDF to prosecute detained foreign ISIS fighters, there are a number of issues that need to be addressed in order to comply with Common Article 3 and Additional Protocol II. First, SDF prosecutions would need to be conducted in a “regularly constituted court.”<sup>222</sup> Second, the SDF would need to rely on criminal laws that were in effect prior to the commission of the alleged offense.<sup>223</sup> Both of these

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<sup>216</sup> PILLOUD ET AL., *supra* note 122, para. 4597

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> *Id.* at 1397 n.3.

<sup>220</sup> *Id.* para. 4599 (“This paragraph lays down the scope of application of the article by confining it to offences related to the armed conflict . . . . Article 6 is quite open and applies equally to civilians and combatants who have fallen in the power of the adverse party and who may be subject to penal prosecutions.”).

<sup>221</sup> Specifically, those crimes that are “serious violations of common Article 3, as supplemented by other general principles and rules on the protection of victims of internal armed conflict, and for breaching certain fundamental principles and rules regarding means and methods of combat in civil strife.” *Prosecutor v. Tadić*, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 134 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

<sup>222</sup> Geneva Convention I, *supra* note 55, art. 3(1)(d).

<sup>223</sup> Additional Protocol II, *supra* note 56, art. 6(2)(c).

protections present potential hurdles the SDF would need to overcome in order to lawfully prosecute the foreign ISIS fighters.

### *1. Regularly Constituted Court*

The first issue the SDF will face by prosecuting foreign ISIS fighters is the Common Article 3 requirement for an individual to be tried in a “regularly constituted court.”<sup>224</sup> Specifically, Common Article 3 prohibits “[t]he passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”<sup>225</sup> Article 6 of Additional Protocol II expands on Common Article 3 by requiring that “a conviction [be] pronounced by a court offering the essential guarantees of independence and impartiality.”<sup>226</sup> While Additional Protocol II further articulates the “essential guarantees,”<sup>227</sup> there is no further explanation of the “regularly constituted court” requirement.<sup>228</sup>

This is where the problem for the SDF resides. Even if the SDF were to establish a court that provides the “essential guarantees,” the requirement for a “regularly constituted court” could present a problem for a non-state actor who, presumably, did not have the authority to establish their own courts prior to the armed conflict. This conundrum is acknowledged by the *Commentary on the Additional Protocols*, which ultimately resulted in the removal of the “regularly constituted court” requirement during the drafting of Additional Protocol II.<sup>229</sup> However, the Common Article 3 requirement, which the United States views as CIL applicable to non-state actors,<sup>230</sup> still

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<sup>224</sup> Geneva Convention I, *supra* note 55, art. 3(1)(d).

<sup>225</sup> *Id.*

<sup>226</sup> Additional Protocol II, *supra* note 56, art. 6(2).

<sup>227</sup> *See id.* art. 6(2).

<sup>228</sup> Geneva Convention I, *supra* note 55, art. 3(1)(d).

<sup>229</sup> PILLOUD ET AL., *supra* note 122, para. 4600 (“The term ‘regularly constituted court’ is replaced by ‘a court offering the essential guarantees of independence and impartiality.’ In fact, some experts argued that it was unlikely that a court could be ‘regularly constituted’ under national law by an insurgent party. Bearing these remarks in mind, the ICRC proposed an equivalent formula taken from Article 84 of the Third Convention, which was accepted without opposition.” (citation omitted)).

<sup>230</sup> *E.g.*, LAW OF WAR MANUAL, *supra* note 60, § 17.2.4 (“Similarly, customary law of war rules are binding on those parties to the armed conflict that intend to make war and to claim the rights of a belligerent, even if they are not States. . . . In many cases, these treaty provisions would also be binding on non-State armed groups as a matter of customary international law.” (citations omitted)).

exists and thus must be addressed to ensure SDF prosecutions are lawful under LOAC.

The often-cited definition of “regularly constituted court” is derived from *Hamdan*, in which the U.S. Supreme Court addressed the “regularly constituted court” question in relation to the U.S. military commissions prosecutions of al-Qaeda members.<sup>231</sup> Since Common Article 3 and the *Commentary on Geneva Convention I* are silent as to the meaning of this requirement, the Supreme Court looked to the *Commentary on Geneva Convention IV* for insight.<sup>232</sup> Specifically, Article 66 of Geneva Convention IV requires an Occupying Power to prosecute those accused of criminal offenses in “properly constituted, non-political military courts.”<sup>233</sup> In defining “properly constituted,” the *Commentary on Geneva Convention IV* states, “[t]he courts are to be ‘regularly constituted.’ This wording definitely excludes all special tribunals. . . . Such courts will, of course, be set up in accordance with the recognized principles governing the administration of justice.”<sup>234</sup> Based on this definition and a further explanation provided by an ICRC treatise,<sup>235</sup> the Supreme Court held the “regularly constituted court” requirement means the court is “established and organized in accordance with the laws and procedures already in force in a country.”<sup>236</sup>

While the Supreme Court’s definition of a “regularly constituted court” is consistent with the ICRC’s, it is not the only viewpoint. Using *Hamdan*’s definition as a starting point, yet approaching the analysis from a different perspective, “it has been suggested that whether a court of an armed group is regularly constituted should not be ‘construed too literally’ . . . . Rather, the test should be one of appropriateness, ‘whether the appropriate authorities, acting under appropriate powers, created the court according to

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<sup>231</sup> *Hamdan v. Rumsfeld*, 548 U.S. 557, 631–32 (2006).

<sup>232</sup> *Id.* at 632.

<sup>233</sup> Geneva Convention IV, *supra* note 170, art. 66.

<sup>234</sup> JEAN S. PICTET ET AL., INT’L COMM. OF THE RED CROSS, COMMENTARY: GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 340 (1958).

<sup>235</sup> JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, INT’L COMM. OF RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: VOLUME I: RULES 355 (2009) (“Whereas common Article 3 of the Geneva Conventions and Article 75 of Additional Protocol I require a ‘regularly constituted’ court, human rights treaties require a ‘competent’ tribunal, and/or a tribunal ‘established by law.’ A court is regularly constituted if it has been established and organised in accordance with the laws and procedures already in force in a country.” (citations omitted)).

<sup>236</sup> *Hamdan*, 548 U.S. at 632 (quoting HENCKAERTS & DOSWALD-BECK, *supra* note 235).

appropriate standards.”<sup>237</sup> This approach is consistent with the intent of the drafters of Additional Protocol II, who specifically removed the “regularly constituted court” requirement in favor of the universally applicable “essential guarantees” language due to the complications the former caused when applied to insurgent groups.<sup>238</sup>

Using the appropriateness test, a less state-centric view of *Hamdan*’s “laws and procedures already in force in a country”<sup>239</sup> requirement is taken. In other words, a non-state actor would be allowed to establish courts in accordance with its own “laws and procedures already in force.”<sup>240</sup> Thus, Common Article 3 would not require that the court itself be established prior to the start of hostilities or that the court be established by a state entity but rather the court could be established in accordance with the non-state actor’s appropriately promulgated laws and procedures.

Accordingly, in order for the SDF to prosecute foreign ISIS fighters, appropriate criminal courts would need to be established in accordance with the SDF or Kurdish “laws and procedures already in force” within their territory. The current judicial system in operation in SDF-liberated territory was formed out of the Peace and Consensus Committees, which are quasi-judicial councils that settle civil and criminal cases.<sup>241</sup> Some of these Committees were originally formed in the 1990s and were operating underground until the Syrian Civil War began in 2012.<sup>242</sup> As the SDF liberated territory from ISIS and kept the Syrian government out, these Peace and Consensus Committees were used in place of the rejected Syrian government’s justice system.<sup>243</sup>

As more territory was liberated, regional Justice Councils were established to implement a broader and more organized justice system.<sup>244</sup> At the lowest, communal level, the Peace and Justice Committees still adjudicate minor criminal offenses.<sup>245</sup> The Justice Councils then established

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<sup>237</sup> Sandesh Sivakumaran, *Courts of Armed Opposition Groups: Fair Trials or Summary Justice?*, 7 J. INT’L CRIM. JUST. 489, 499 (2009) (citing James E. Bond, *Application of the Law of War to Internal Conflicts*, 3 GA. J. INT’L & COMP. L. 345, 372 (1973)).

<sup>238</sup> PILLOUD ET AL., *supra* note 122, para. 4600.

<sup>239</sup> *Hamdan*, 548 U.S. at 632 (quoting HENCKAERTS & DOSWALD-BECK, *supra* note 235).

<sup>240</sup> See Sivakumaran, *supra* note 237, at 499–500.

<sup>241</sup> Ercan Ayboğa, *Consensus is Key: The New Justice System in Rojava*, NEW COMPASS (Oct. 13, 2014), <http://new-compass.net/articles/consensus-key-new-justice-system-rojava>.

<sup>242</sup> *Id.*

<sup>243</sup> *Id.*

<sup>244</sup> *Id.*

<sup>245</sup> *Id.*



people's courts for larger population centers, regional courts for higher-level cases, appellate courts, and a constitutional court that acts as an appellate review for judicial and governmental decisions.<sup>246</sup>

Using this appropriateness test in conjunction with the *Hamdan* definition, the SDF could comply with the “regularly constituted court” requirement by prosecuting foreign ISIS fighter in courts established under the current Kurdish judicial system. While much of Northeastern Syria is newly liberated, the Kurdish justice system has been operational in some capacity since the 1990s.<sup>247</sup> These Peace and Consensus Committees ultimately formed the foundation for the current Kurdish justice system in Northeastern Syria.<sup>248</sup> In addition, the Justice Councils have been empowered to establish higher-level courts since July 2012.<sup>249</sup> As such, the Kurdish criminal courts appear to be established in accordance with appropriately promulgated laws and procedures that have been in force for some time. Therefore, these courts can be considered “regularly constituted” for the purposes of Common Article 3.<sup>250</sup> Thus, in compliance with LOAC, the SDF can prosecute foreign ISIS fighters in an existing Kurdish criminal court or in a separate court established by the Justice Council, if the Council is empowered to do so under current Kurdish laws.

While the Common Article 3 requirement may be met, the courts used by the SDF may also have to provide the “essential guarantees” outlined in Additional Protocol II,<sup>251</sup> to the extent that it applies under the third-party consent or CIL theories. The “essential guarantees” ensure a fair and impartial trial for an individual accused of committing a crime.<sup>252</sup> Likewise, Article 75 of Additional Protocol I, to the extent that it is considered CIL, also provides similar fair trial and due process rights to those deprived of their liberty in armed conflicts.

Further, the prevailing view of many nations is that international human rights law (IHL), which provides additional law-enforcement type

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<sup>246</sup> *Id.*

<sup>247</sup> *Id.*

<sup>248</sup> *Id.*

<sup>249</sup> *Id.*

<sup>250</sup> *Commentary of 2016: Article 3: Conflicts Not of an International Character, supra* note 119, para. 692 (“[T]o give effect to this provision, it may be argued that courts are regularly constituted as long as they are constituted in accordance with the ‘laws’ of the armed group. Alternatively, armed groups could continue to operate existing courts applying existing legislation.” (citation omitted)).

<sup>251</sup> Additional Protocol II, *supra* note 56, art. 6.

<sup>252</sup> *Id.*

protections, continues to apply during NIACs.<sup>253</sup> These nations generally look to IHRL rules when LOAC is silent or lacks specificity, which usually occurs in the areas of detention and prosecution.<sup>254</sup> Even though IHRL “in the current state of international law—can only be said to be binding directly on States,”<sup>255</sup> this premise is rapidly changing. The ICRC has noted that, “[a]t a minimum, it seems accepted that armed groups that exercise territorial control and fulfil[] government-like functions thereby incur responsibilities under human rights law.”<sup>256</sup> While the United States’ view is that LOAC supplants IHRL during armed conflict,<sup>257</sup> LOAC obligations, which are binding on all parties to the conflict, are “similar in some of their purposes and on many points of substance” to many IHRL obligations.<sup>258</sup> As such, it would be incumbent on the international community to provide the SDF with assistance and oversight to help ensure any criminal trials of foreign ISIS fighters provide the requisite due process rights to comply with LOAC and any other potential IHRL obligations.

## 2. Law Used to Prosecute Foreign ISIS Fighters

The second issue that SDF prosecution of foreign ISIS fighters could raise is the specific law used to charge the accused ISIS members. One of the “essential guarantees” provided by Article 6(2)(c) of Additional Protocol II is the principle of non-retroactivity,<sup>259</sup> which states that

no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under the law, at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.<sup>260</sup>

Practically speaking, this means the criminal law used to charge foreign fighters would need be in effect prior to the date of the alleged crime. Since

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<sup>253</sup> Debuf, *supra* note 202, at 861.

<sup>254</sup> *Id.* at 863.

<sup>255</sup> *Id.* at 861.

<sup>256</sup> *Commentary of 2016: Article 3: Conflicts Not of an International Character*, *supra* note 117, para. 517.

<sup>257</sup> LAW OF WAR MANUAL, *supra* note 60, § 1.6.3.1.

<sup>258</sup> Debuf, *supra* note 202, at 861.

<sup>259</sup> PILLOUD ET AL., *supra* note 122, para. 4604.

<sup>260</sup> Additional Protocol II, *supra* note 56, art. 6(2)(c).

the SDF only began to liberate territory in 2012, at which time it began to independently govern outside of Syrian governmental control, there is a very real possibility that ISIS fighters will be charged with crimes that were promulgated after the alleged crime occurred. For a non-state armed group who has captured hundreds of foreign ISIS fighters on the battlefield over the last seven years, ensuring that the date of the alleged offense occurred after the newly enacted law may present an impossible task. Thus, the use of alternative, legally permissible laws to criminally charge the foreign fighters may be required.

The first option would be for the SDF to charge the foreign ISIS fighters with crimes under the Syrian Criminal Code and use Kurdish criminal courts and sentencing rules. The use of Syrian laws is not new or novel for the newly autonomous Kurdish judicial system.<sup>261</sup> As the Justice Councils implement the new justice system throughout the SDF-liberated territory, the courts continue to use and “refer to existing Syrian laws, since the new laws don’t yet cover everything.”<sup>262</sup> While the Syrian judicial system has been scrutinized for its inconsistency with human rights,<sup>263</sup> the SDF have taken measures to correct these deficiencies.<sup>264</sup> These measures include the abolishment of the death penalty, a focus on rehabilitation instead of punishment, and the inclusion of women’s councils in the justice system to ensure that women are treated equally.<sup>265</sup> Thus, the use of existing Syrian criminal laws to charge foreign ISIS fighters while applying the protections afforded by the current Kurdish justice system would likely comply with LOAC.

A second option for the SDF would be to charge the foreign ISIS fighters with violations of LOAC. The ability to charge violations of LOAC in domestic criminal trials has been upheld by the U.S. Supreme Court and was encouraged by the drafters of the Additional Protocols. Similarly, the *Tadić* appellate court held that violations of LOAC, specifically Common Article 3 and the Hague Conventions, can impose individual criminal liability.<sup>266</sup> Since Common Article 3 and the Hague Conventions have been

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<sup>261</sup> Ayboğa, *supra* note 241.

<sup>262</sup> *Id.*

<sup>263</sup> *See generally*, JOSEPH WILLIAMS & STELLA YARBROUGH, VANDERBILT UNIV. L. SCH. JUSTICE FOR SYRIA: A HUMAN RIGHTS REVIEW OF THE SYRIAN PENAL CODE (2013).

<sup>264</sup> Ayboğa, *supra* note 241.

<sup>265</sup> *Id.*

<sup>266</sup> *Prosecutor v. Tadić*, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 129 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

in effect for the duration of ISIS' existence, charging individual foreign ISIS fighters with war crimes for violating LOAC would be permissible.

The U.S. Supreme Court addressed the use of LOAC as a basis for domestic prosecutions of enemy combatants in *Ex parte Quirin*.<sup>267</sup> This case stemmed from the capture of eight German saboteurs who were found in the United States, disguised as civilians, during the height of World War II.<sup>268</sup> The eight Germans were ultimately prosecuted by a military tribunal for spying, corresponding and giving intelligence to the enemy, violating the law of war, and conspiracy to commit the aforementioned offenses.<sup>269</sup>

In upholding the convictions, the Supreme Court first found that under the law of war, “[u]nlawful combatants are . . . subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.”<sup>270</sup> The Supreme Court then held that the act of sneaking into the United States and discarding their uniforms with the intent to commit hostile acts rendered the eight German saboteurs unlawful combatants who were thus punishable under the law of war.<sup>271</sup> Finally, the Court stated,

[t]his precept of the law of war has been so recognized in practice both here and abroad, and has so generally been accepted as valid by authorities on international law that we think it must be regarded as a rule or principle of the law of war by this Government by its enactment of the Fifteenth Article of War.<sup>272</sup>

Therefore, while Congress had not specifically promulgated criminal laws codifying LOAC into U.S. domestic law, the military commissions were nonetheless able to use LOAC as a basis for domestic criminal prosecutions of enemy combatants.

Further, the *Commentary on the Additional Protocols* encourages charging violations of LOAC in domestic criminal prosecutions. The *Commentary* notes that during the drafting of Additional Protocol II, the words “under national and international law” were proposed to be included

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<sup>267</sup> *Ex parte Quirin*, 317 U.S. 1 (1942).

<sup>268</sup> *Id.* at 23.

<sup>269</sup> *Id.*

<sup>270</sup> *Id.* at 31.

<sup>271</sup> *Id.* at 35.

<sup>272</sup> *Id.* at 35–36.

in the principle of non-retroactivity.<sup>273</sup> But, due to the ambiguity of “national law” as it pertains to insurgent groups, the more general phrase “under the law” was chosen.<sup>274</sup> Despite choosing to use more vague language, the *Commentary* clarifies the drafters’ intent by explaining that “[a] breach of international law should not go unpunished on the basis of the fact that the act or omission (failure to act) concerned was not an offence under the national law at the time it was committed.”<sup>275</sup> Thus, the drafters of Additional Protocol II made it clear that even if violations of LOAC cannot be charged under domestic law, LOAC can still be used as a basis for domestic criminal prosecutions.

Finally, the appellate court in *Tadić* held that violations of LOAC, even if committed in a NIAC, can establish individual criminal liability.<sup>276</sup> Neither Common Article 3 nor Additional Protocol II contain an “explicit reference to criminal liability for violations of [their] provisions.”<sup>277</sup> Despite the lack of an explicit reference, the international appellate court nonetheless determined that violations of “[p]rinciples and rules of humanitarian law [that] reflect ‘elementary considerations of humanity’ [which are] widely recognized as the mandatory minimum for conduct in armed conflicts of any kind” can impose individual criminal responsibility “regardless of whether they [were] committed in internal or international armed conflicts.”<sup>278</sup> Therefore, the SDF can hold individual ISIS members criminally liable for violations of Common Article 3, the Hague Regulations, and other CIL.

While there are many suitable options for dealing with the detained foreign ISIS fighters,<sup>279</sup> the international community has been slow to address the issue.<sup>280</sup> Thus, the SDF may be left with little choice but to prosecute those foreign fighters themselves. Therefore, having a viable and legally permissible venue for criminal prosecutions becomes imperative for the SDF. Fortunately, the SDF have the authority to prosecute foreign ISIS fighters under LOAC. And, provided the SDF comply with the protections outlined in Common Article 3 and Additional Protocol II, those criminal

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<sup>273</sup> PILLOUD ET AL., *supra* note 122, para. 4604.

<sup>274</sup> *Id.* paras. 4604–4607.

<sup>275</sup> *Id.* para. 4607.

<sup>276</sup> Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 134 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

<sup>277</sup> *Id.* ¶ 128.

<sup>278</sup> *Id.* ¶ 129.

<sup>279</sup> These options could include repatriating the foreign ISIS fighters to their countries of citizenship for follow-on domestic prosecutions or the establishment of an International Criminal Tribunal.

<sup>280</sup> Savage, *supra* note 3.

trials would be legally permissible, despite the SDF being a non-state actor with no domestically recognized law enforcement or prosecutorial authority.

## VII. Conclusion

The Syrian Civil War and the resulting establishment of ISIS' physical caliphate across Iraq and Syria has created a multitude of problems for the international community. From combating terrorism to state-on-state aggression and humanitarian and refugee crises, the Syrian Civil War continues to challenge the world's powers. Despite the number of issues facing the international community, the SDF's detention of approximately two thousand foreign ISIS fighters has garnered significant attention from the highest levels of the U.S. Government. While two thousand detained individuals may not appear to be a major concern in the grand scheme of the conflict, these fighters represent the most hardcore, ideologically driven ISIS members.<sup>281</sup> Thus, their release, without adjudication, would present a clear danger to the international community.

As attention is drawn to the SDF's detention of foreign ISIS fighters and options for prosecuting those fighters are explored, understanding the legal framework that applies to the SDF becomes important. This framework provides a lens through which the SDF can be evaluated by the international community and ultimately highlights a potentially viable option for prosecuting the detained fighters. While there are a number of possible ways for the international community to address the foreign ISIS fighter problem, every option presents significant hurdles that may be difficult or impossible to overcome. Thus, the ability for the SDF to detain and prosecute foreign ISIS fighters themselves becomes a realistic and feasible solution, provided they have the authority and international support to do so.

Consequently, the only way for the SDF to legally detain and prosecute foreign ISIS fighters is if LOAC applies the armed conflict between the SDF and ISIS. As a non-state armed groups operating inside a sovereign state's territory, a potential view would be that only domestic Syrian law applies to the this conflict.<sup>282</sup> Reliance on this view would likely mean that all SDF operations are considered unlawful since the SDF have not been granted domestic law enforcement or military authority by the Syrian government. Fortunately, LOAC does apply to the SDF's armed conflict with ISIS,

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<sup>281</sup> 2014 UNHRC Report, *supra* note 10, at 3.

<sup>282</sup> Heffes, *supra* note 172, at 230, 233.

which ultimately allows the SDF to detain and prosecute foreign ISIS fighters.

The three separate but related legal theories that bind non-state armed groups to international law identify the specific bodies of law that are applicable to the SDF. All three theories support the position that Common Article 3 applies to the conflict between the SDF and ISIS, thus establishing a minimum set of standards applicable to the SDF's detention and prosecution operations. In addition, the third-party consent theory establishes that Additional Protocol II is applicable to the SDF, further expanding their LOAC obligations.

Since both Common Article 3 and Additional Protocol II apply to the SDF, their authority to detain foreign ISIS fighters can be derived from LOAC rather than domestic law. Since neither of these sources of law explicitly prohibits detention by a non-state armed group, the SDF may detain the foreign ISIS fighters without violating LOAC.

Going a step further, international law may actually provide the SDF the affirmative authority to detain enemy combatants. While Common Article 3 and Additional Protocol II do not explicitly authorize detention, based on the prohibitions set forth by the Hague Regulations, LOAC implicitly authorizes detention by non-state armed groups. This LOAC detention authority persists and prevails even if the non-state armed group does not have the domestic legal authority to detain. Thus, the SDF are permitted and are ultimately authorized by Common Article 3, Additional Protocol II, and the Hague Regulations to detain the foreign ISIS fighters despite not having been granted any domestic legal authority from the Syrian government.

In the same manner that the SDF are authorized to detain foreign ISIS fighters, they are authorized to prosecute them. Both Common Article 3 and Additional Protocol II authorize the prosecution of enemy combatants for crimes related to the armed conflict, subject to certain protections and "essential guarantees." However, despite having the authority, prosecutions conducted by a non-state actor raise additional legal issues.

First, in order for the SDF to comply with the Common Article 3 requirement for the prosecutions to occur in a "regularly constituted court" the SDF would need to ensure the court adjudicating the cases is properly established under current Kurdish law. Second, the SDF must ensure the criminal law used for the prosecutions is not retroactively applied to acts

that occurred before the criminal law was enacted.<sup>283</sup> Thus, the SDF should either use the Syrian Criminal Code, which was in effect prior to the SDF's conflict with ISIS, or charge foreign ISIS fighters with war crimes for violations of LOAC. Use of either set of laws would be permissible under Common Article 3 and Additional Protocol II.

While the best option for dealing with foreign ISIS fighters is to heed former Secretary of Defense Mattis's advice to have countries take custody of their citizens for further disposition, there is another suitable option the international community can support. The SDF are on solid legal ground if they are required to continue to detain, and ultimately prosecute, foreign fighters. However, due to the logistical requirements associated with long-term detention and the potential legal minefield of prosecuting ISIS members in compliance with LOAC, the SDF will require significant and continued support from the international community. If properly implemented and appropriately supported by coalition partners, SDF detention and prosecution of foreign ISIS fighters could serve as a realistic and legally supportable option to ensure violent terrorists remain off the battlefield and off our streets.

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<sup>283</sup> Additional Protocol II, *supra* note 56, art. 6(2)(c).