CONDUCTING UNCONVENTIONAL WARFARE IN COMPLIANCE WITH THE LAW OF ARMED CONFLICT

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> *[Unconventional Warfare] operations involve many unique and often unsettled legal matters, including authority to conduct operations, funding, legal status of personnel, and a host of other issues. The legal parameters of [Unconventional Warfare] are rarely clear and depend on the specifics of a particular mission, campaign, or conflict. [Special Forces] should know the potential that individual and small-unit [Unconventional Warfare] operations have to affect matters on the international level.*[1]

I. Introduction

The Islamic State of Iraq and Syria (ISIS) is one of the cruelest and most feared terrorist organizations in the world.[2] Throughout 2014 and early 2015, its forces raced across Syria and Iraq proclaiming itself as the vanguard of a new Islamic caliphate, claiming Raqqa as its capital; exploiting the security vacuum, it later seized Mosul in northern Iraq.[3] Its

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[1] U.S. DEP'T OF ARMY, TRAINING CIRCULAR 18-01, SPECIAL FORCES UNCONVENTIONAL WARFARE para. 3-84 (Jan. 2011) [hereinafter T.C. 18-01].

[2] Rukmini Callimachi, *The Horror Before the Beheadings*, N.Y. TIMES, Oct. 25, 2014, at A1.

[3] Ian Fisher, *In Rise of ISIS, No Single Missed Key but Many Strands of Blame*, N.Y. TIMES, Nov. 19, 2015, at A1; *see also* Nancy A. Youssef, *The Time Has Arrived, U.S. Warns ISIS Capital: Get out Now*, Daily Beast (May 20, 2016 4:12 PM), http://www.thedailybeast.com/articles/2016/05/20/u-s-warns-isis-capital-get-out-now.html.

treatment of enemies was brutal. Men were decapitated and burned alive.[4] Women were sold into sexual slavery.[5] In October of 2014, its forces were massed outside the Syrian town of Kobane.[6] The situation in Kobane seemed hopeless, but its citizens were prepared to resist.[7] The border behind Kobane was closed, with Turkish troops seemingly content to watch Kobane fall.[8] However, members of a Kurdish militia group, the People's Protection Committees (known as the YPG) were committed to defending the city.[9] Over the next few weeks the YPG, with extensive U.S. air support,[10] fought a block-by-block battle for Kobane.[11] While experts had expected the city to fall,[12] by January of 2015 the YPG had prevailed with U.S. support.[13] After the battle of Kobane, the YPG continued to succeed, pushing ISIS out of significant portions of northern Syria.[14]

While the story of the YPG's defense of Kobane is inspiring, its legality, and the legality of U.S. support, is a more complex question. Despite its successes against ISIS, the Democratic Union Party (PYD), which controls the YPG, is not the recognized government of Syria,[15] and the United States' actions in Syria are not taken with the consent of the Syrian government.[16]

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[4] Callimachi, *supra* note 2, at A1; Rod Nordland & Ranya Kadri, *Jordanian Pilot's Death, Shown in ISIS Video, Spurs Jordan to Execute Prisoners*, N.Y. TIMES, Feb. 3, 2015, at A1.
[5] Rukmini Callimachi, *ISIS Enshrines a Theology of Rape*, N.Y. TIMES, Aug. 13, 2015, at A1.
[6] Dexter Filkins, *When Bombs Aren't Enough*, NEW YORKER (Oct. 9, 2014), http://www.newyorker.com/news/daily-comment/turkey-kurds-battle-isis-kobani.
[7] *Id.*
[8] *Id.*
[9] Mark Landler et al., *Turkish Inaction on ISIS Advance Dismays the U.S.*, N.Y. TIMES (Oct. 7, 2014), http://nyti.ms/1EogjL7.
[10] Eric Schmitt & Karim Faheem et al., *U.S. Steps Up Strikes on Embattled Syrian Town, Aided by Data From Kurds*, N.Y. TIMES, Oct. 15, 2014, at A13.
[11] Anne Barnard, *Reinforcements Enter Besieged Syrian Town via Turkey, Raising Hopes*, N.Y. TIMES (Oct. 29, 2014), http://nyti.ms/1tPKqrS.
[12] Filkins, *supra* note 6.
[13] Anne Barnard & Karam Shoumali, *Kurd Militia Says ISIS Is Expelled From Kobani*, N.Y. TIMES, Jan. 26, 2015, at A8.
[14] John Davison, *U.S.-Backed Syrian Fighters Say Advance Against Islamic State in Raqqa Province*, N.Y. TIMES, 4 Jan., 2016, http://nyti.ms/22HamFp.
[15] HUMAN RIGHTS WATCH, UNDER KURDISH RULE: ABUSES IN PYD-RUN ENCLAVES OF SYRIA 52 (2014) (noting that the Democratic Union Party (PYD) is a non-state entity in de facto control of portions of northern Syria).
[16] Stephen Preston, DoD General Counsel, Speech at the Annual Meeting of the American Society of International Law: The Legal Framework for the United States' Use of Military Force Since 9/11 (Apr. 10, 2015).

United States support to the YPG is only one part of the United States' activities in Syria. Overall, the United States has two goals: The first is ISIS' defeat.[17] Second, the United States believes that there must be a "political transition" from the Assad regime.[18] To achieve both goals, the United States appears to have embarked upon two related campaigns: First, the United States has trained, equipped, and supported the YPG in an effort to defeat the Islamic State on the ground in Syria.[19] Second, according to publicly available reports, the United States has participated in the training and arming of anti-Assad rebel groups,[20] likely in an effort to prevent the Assad regime from controlling all of Syria, and to coerce the Assad regime into negotiations.[21] According to media reports it is the Central Intelligence Agency, not the Department of Defense that is involved in this second, anti-Assad campaign.[22] Notably, both campaigns are occurring inside Syria without the support of the Syrian government.[23]

Support to resistance movements like the YPG and the anti-Assad rebels is called "unconventional warfare".[24] Unconventional warfare has a long history dating back to the resistance movements supported by the United States' Office of Strategic Services (OSS) and the British government's Special Operations Executive (SOE) during World War II.[25]

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[17] Barack Obama, President of the United States, Statement by the President on ISIL (Sept. 10, 2014).

[18] John Kerry, United States Secretary of State, Remarks at the Press Availability at the International Syria Support Group in Munich, Germany (Feb. 12, 2016).

[19] Davison, *supra* note 14; Barbara Starr, *Special Ops Forces in Syria Doing More Than Raids, Ash Carter Says*, CNN (Jan. 20, 2016), http://www.cnn.com/2016/01/20/politics/ashton-carter-syria-special-operations-forces/; *U.S. Ground Troops Set for Syria Deployment*, DEUTSCHE WELLE (Oct. 30, 2015), http://dw.com/p/1GxU8; Rukmini Callimachi, *Inside Syria: Kurds Roll Back ISIS, but Alliances Are Strained*, N.Y. TIMES, Aug. 10, 2015, at A1.

[20] Michael R. Gordon, *Kerry Says U.S. Backs Mideast Efforts to Arm Syrian Rebels*, N.Y. TIMES, Mar. 5, 2013, at A7; Anne Barnard, *Knowing the Risks, Some Syrian Rebels Seek a Lift From Turks' Incursion*, N.Y. TIMES, Aug. 29, 2016, at A4; Mark Landler & Mark Mazzetti, *U.S. Presses for Truce in Syria, With Its Larger Policy on Pause*, N.Y. TIMES, Sept. 4, 2016, at A1.

[21] *See* Anne Barnard & Karam Shoumali, *U.S. Weaponry Is Turning Syria Into Proxy War With Russia*, N.Y. TIMES, Oct. 13, 2015, at A1.

[22] *Id.*

[23] Kia Makarechi, *Are U.S. Strikes on Syria Legal Under International Law?*, VANITY FAIR (Sept. 23, 2014), http://www.vanityfair.com/news/politics/2014/09/us-strikes-syria-international-law; *Syria: US Begins Air Strikes on Islamic State Targets*, BBC NEWS (Sept. 23, 2014), http://www.bbc.com/news/world-middle-east-29321136.

[24] JOINT CHIEFS OF STAFF, JOINT PUB. 3-05, SPECIAL OPERATIONS, at GL-12 (16 July 2014).

[25] M.R.D. FOOT, SOE IN FRANCE (rev. ed. 2004). In fact, the People's Protection Committees (known as the YPG) and the Democratic Union Party (PYD) originated as

Despite this long history, unconventional warfare campaigns require careful legal analysis because resistance movements are not recognized by the state in which they operate and generally violate the domestic law of the host nation.

While the legality of U.S. airstrikes has been discussed,[26] the two unconventional warfare campaigns have not. This underscores the lack of systematic, scholarly legal evaluation of unconventional warfare. Legal analysis is especially urgent given the recent battlefield successes of the YPG, which already controls significant Syrian territory and is poised to make significant battlefield gains in Raqqa province.[27]

This article will demonstrate that while unconventional warfare remains viable under modern international law, the law creates both legal risks and opportunities, both of which must be understood in order to wage an effective campaign. The article will highlight those risks and opportunities as they apply to the unconventional warfare campaigns the United States is currently conducting in Syria.

The article begins, in sections II and III, by describing the Syrian conflict and outlining the basics of unconventional warfare. The article then turns to the two main bodies of international law governing unconventional warfare: the rules governing the use of force in international relations, known as *jus ad bellum*,[28] and the rules governing the parties' conduct within armed conflict, known as *jus in bello*.[29]

Jus ad bellum rules regulate an unconventional warfare campaign's initiation, governing whether it may take place and, if it does, whether it creates a particular kind of armed conflict.[30] In section IV, this article will analyze both campaigns' compliance with *jus ad bellum* rules and will conclude that both campaigns are currently supported by international law

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clandestine resistance movements similar to those supported by the United States' Office of Strategic Services (OSS) and the British government's Special Operations Executive (SOE). *See* INTERNATIONAL CRISIS GROUP, FLIGHT OF ICARUS? THE PYD'S PRECARIOUS RISE IN SYRIA 12 (2014).

[26] Preston, *supra* note 16.

[27] Davison, *supra* note 14; Eric Schmitt, *U.S.-Backed Militia Opens Drive on ISIS Capital in Syria*, N.Y. TIMES, Nov. 7, 2016, at A8.

[28] INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, LAW OF ARMED CONFLICT DESKBOOK 8 (2015).

[29] *Id.* at 8.

[30] *Id.*

and that neither has created an international armed conflict between the United States and the Assad regime.

In section V, the article will turn to *jus in bello* rules, which challenge the viability of unconventional warfare more generally, testing whether support may be provided to non-state partner forces under modern international law.[31] Unconventional warfare campaigns will again pass the test, though the article will identify risks, recommend necessary safeguards, and discuss available remedies should violations occur.

This article aims to comprehensively review the legality of unconventional warfare campaigns under modern international law. While helpful new literature exists,[32] much of it is not comprehensive, and the comprehensive sources that do exist are aging.[33] With this in mind, the article's analysis of unconventional warfare will incorporate the newly released Department of Defense (DoD) Law of War Manual.[34]

II. Unconventional Warfare: The Basics

Before discussing the law of unconventional warfare, this article must first define it. The DoD defines unconventional warfare as "activities that are conducted to enable a resistance movement or insurgency to coerce, disrupt, or overthrow a government or occupying power by operating through or with an underground, auxiliary, and guerrilla force in a denied

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[31] *See id.*

[32] Michael N. Schmitt & Andru E. Wall, *The International Law of Unconventional Statecraft*, 5 HARV. NAT'L SEC. J. 349 (2014); Kevin Jon Heller, *Disguising a Military Object as a Civilian Object: Prohibited Perfidy or Permissible Ruse of War?*, 91 INT'L L. STUD. 517 (2015); Gregory Raymond Bart, *Special Operations Forces and Responsibility for Surrogates' War Crimes*, 5 HARV. NAT'L SEC. J. 513 (2014); Todd C. Huntley & Andrew D. Levitz, *Controlling the Use of Power in the Shadows: Challenges in the Application of Jus in Bello to Clandestine and Unconventional Warfare Activities*, 5 HARV. NAT'L SEC. J. 461 (2014).

[33] Major R.L. Braun, *Guerrilla Warfare Under International Law*, 1952 JAG J. 3; Joseph B. Kelly, *Assassination in War Time*, 30 MIL. L. REV. 101 (1965); Richard R. Baxter, *So-Called "Unprivileged Belligerency": Spies, Guerrillas, and Saboteurs*, 1975 MIL. L. REV. 487, 502 (1975); W. Hays Parks, *Memorandum of Law: Executive Order 12333 and Assassination*, ARMY LAW., Dec. 1989; Arthur John Armstrong, *Mercenaries and Freedom Fighters: The Legal Regime of the Combatant Under Protocol Additional To The Geneva Convention Of 12 August 1949, And Relating To The Protection Of Victims Of International Armed Conflicts (Protocol I)*, 30 JAG J. 125 (1978).

[34] U.S. DEP'T OF DEF., DOD LAW OF WAR MANUAL (June 2015, updated May 2016) [hereinafter DOD LAW OF WAR MANUAL].

area."[35] The following section will begin by focusing on the groups involved in unconventional warfare, and will then discuss the phases of an unconventional warfare campaign.

A. The Groups Involved

Unconventional warfare is conducted by a resistance movement and, when the United States is involved, United States Special Operations Forces (SOF), who generally serve as advisors. The resistance movement consists of three components: The underground, the auxiliary, and the guerrilla force.[36]

The underground is a clandestine, cellular organization that is the first part of the resistance movement to form.[37] The underground usually includes the resistance movement's overall leadership and a shadow government.[38] The underground will also include extensive networks for intelligence collection, counterintelligence, propaganda, weapons manufacture, and sabotage.[39] Because the underground protects itself by operating in cells separated by intermediaries and by operating out of uniform, it can carry out activities in enemy-controlled cities or territories.[40]

The auxiliary is not a true group—it consists of any individual who clandestinely supports the underground or the guerrilla force.[41] Members of the auxiliary are generally isolated from the broader resistance movement by intermediaries, and auxiliary members may know very little about the overall structure of the organization.[42] However, auxiliary members carry out many important tasks, such as recruiting new members, managing safe houses, acquiring and distributing supplies, collecting intelligence, moving personnel, and communicating.[43] Finally, the resistance movement includes the guerrilla force, which consists of armed

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[35] JOINT CHIEFS OF STAFF, JOINT PUB. 3-05, SPECIAL OPERATIONS, at GL-12 (16 July 2014).
[36] T.C. 18-01, *supra* note 1, para. 2-32.
[37] *Id.* para. 2-32 to 2-33.
[38] *Id.* para. 2-42, 2-44.
[39] *Id.* para. 2-33.
[40] *Id.* para. 2-33, 2-34.
[41] *Id.* para. 2-36.
[42] *Id.* para. 2-36, 2-37.
[43] *Id.* para. 2-36.

members who overtly engage the enemy in combat.[44] Guerrillas avoid decisive engagements and attack only where they have relative superiority, allowing them to maintain an advantage over better trained and equipped government forces.[45]

B. The Phases of Unconventional Warfare

The United States conducts unconventional warfare in seven phases: preparation, initial contact, infiltration, organization, buildup, employment, and transition.[46] The first six phases reflect escalating SOF involvement in the resistance movement.[47] These phases begin with initial planning, expand to clandestine efforts to contact and strengthen the resistance, and culminate with full-scale operations.[48] During these phases, U.S. SOF advisors will perform a broad spectrum of activities with the resistance movement, in many cases exercising a great deal of control over their operations.[49] During each phase U.S. advisors will assess, vet, and organize the resistance movement.

How the resistance movement is employed will vary widely depending upon the goals of the resistance movement and the campaign plan created with U.S. SOF advisors.[50] The resistance movement may seize territory, clear the way for invading conventional forces, or even begin a military campaign to overthrow the government.[51] However, it is important to remember that not all resistance movements seek to overthrow a government. They may simply be trying to coerce, disrupt, or destroy a non-state occupying power.[52]

The final phase is transition, which occurs after the resistance movement achieves its objectives. During transition, the resistance movement begins to demobilize or shift its focus to supporting the new

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[44] *Id.* para. 2-38.
[45] *Id.* para. 2-38.
[46] *Id.* para. 1-44; *see also* Huntley & Levitz, *supra* note 32, at 469-76 (providing an overview of U.S. unconventional warfare doctrine).
[47] T.C. 18-01, *supra* note 1, para. 3-6–3-38.
[48] *Id.*
[49] *Id.* para. 3-15, 3-18–3-21, 3-29–3-31, 3-35–3-36.
[50] *Id.* para. 3-30 to 3-38.
[51] *Id.* para. 3-30.
[52] JOINT PUB. 3-05, SPECIAL OPERATIONS, *supra* note 24, at GL-12.

government.[53] The original SOF teams may remain in place or may be replaced by conventional forces or civil affairs elements.[54]

Because many phases of unconventional warfare are clandestinely conducted in enemy-controlled territory, they will violate (or appear to violate) some body of law. This could be the law of the host nation government or the rules enforced by a non-state occupying power. An unconventional warfare campaign's legal advisor must be able to navigate this complex legal environment to successfully apply binding legal rules.

III. Background of the Syrian Conflict

To determine whether the United States' two unconventional warfare campaigns are legal, it is important to understand the history of the conflict. The Syrian conflict began in March of 2011 when the Syrian government opened fire on protesters demonstrating against the arrest of teenagers.[55] Widespread riots followed. By 2012, the situation escalated into civil war.[56] Rebels formed paramilitary brigades, and the death toll rose to approximately 90,000 by June 2013.[57] In the chaos, militant Islamist groups such as the Nusra Front and the Islamic State (ISIS), formerly known as al-Qaeda in Iraq (AQI), found room to survive and expand.[58] The Islamic State became the most prominent and successful, expanding throughout northern and eastern Syria and into Iraq, overrunning Ramadi, Tikrit, and Mosul.[59] As more territory fell to ISIS, the United States, along with a coalition of other nations, began to intervene in both Syria and Iraq in an effort to stop the brutality and protect

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[53] T.C. 18-01, *supra* note 1, para. 3-39–3-40.
[54] *Id.* para. 3-41.
[55] Lucy Rodgers et al., *Syria: The Story of the Conflict*, B.B.C. NEWS (Oct. 9 2015), http://www.bbc.com/news/world-middle-east-26116868; *Middle East Unrest: Three Killed at Protest in Syria*, B.B.C. NEWS (Mar. 18 2011), http://www.bbc.com/news/world-middle-east-12791738.
[56] Rodgers et al., *supra* note 55; *Syrian President Bashar al-Assad: Facing Down Rebellion*, B.B.C. NEWS (Oct. 21 2015), http://www.bbc.com/news/10338256.
[57] Rodgers et al., *supra* note 55.
[58] Ian Fisher, *In Rise of ISIS, No Single Missed Key but Many Strands of Blame*, N.Y. TIMES, Nov. 19, 2015, at A1.
[59] Sergio Peçanha & Derek Watkins, *ISIS' Territory Shrank in Syria and Iraq This Year*, N.Y. TIMES (Dec. 22, 2015), http://nyti.ms/1TbIxP7.

the nascent Iraqi government.[60] While the Iraq conflict is noteworthy in its own right,[61] the focus of this article is the U.S. intervention in Syria.[62]

While U.S. intervention in Syria has been dynamic and complex, the United States appears to be conducting two unconventional warfare campaigns in Syria. First, the United States has provided support to armed groups fighting ISIS in Syria.[63] Originally, this included an effort to train and equip non-Kurdish rebels to fight ISIS, but that effort largely ended, shifting instead to a mission to train "spotters."[64] This first campaign now appears to exclusively consist of support to the Kurdish PYD and its military wing, the YPG, alongside limited allied groups.[65] Support appears to consist of United States SOF advisors[66] and extensive coalition air support.[67]

The United States is also reportedly conducting a second unconventional warfare campaign against the Syrian government, in

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[60] Fisher, *supra* note 58, at A1.

[61] Tim Arango & Falih Hassan, *Mosul Is Breached by Iraqi Forces, Heralding a New, Complex Phase*, N.Y. TIMES, Nov. 2, 2016, at A8.

[62] In addition to its activities in Syria, the United States has conducted anti-ISIS operations in Iraq with the consent of the Iraqi government. Preston, *supra* note 16. Because most U.S. assistance to Iraq could not properly be considered unconventional warfare, and because it is undertaken with Iraq's consent, this paper will not cover it in any depth, focusing instead on U.S. activities in Syria.

[63] Peter Baker et al., *Obama Sends Special Operations Forces to Help Fight ISIS in Syria*, N.Y. TIMES, Oct. 30, 2015, at A1; Liz Sly, *A Mini World War Rages in the Fields Of Aleppo*, WASH. POST (Feb. 14, 2016), http://wpo.st/CvGD1; Peter Baker & Eric Schmitt, *Discordant Verdicts on U.S. Forces in Syria: Too Much, or Too Little*, N.Y. TIMES, Oct. 31, 2015, at A6.

[64] Michael D. Shear et al., *Obama Administration Ends Effort to Train Syrians to Combat ISIS*, N.Y. TIMES, Oct. 10, 2015, at A1; Mark Hensch, *Rebooted Pentagon Program Trained Fewer Than 100 Syrians*, HILL: BRIEFING ROOM (June 27, 2016), http://thehill.com/blogs/blog-briefing-room/news/285106-pentagon-has-trained-fewer-than-100-syrians (citing Missy Ryan, *Revamped U.S. Training Program, With New Goals, Has Trained Fewer Than 100 Syrians So Far*, WASH. POST (June 27, 2016), http://wpo.st/0mSw1).

[65] Ben Hubbard, *New U.S.-Backed Alliance to Counter ISIS in Syria Falters*, N.Y. TIMES, Nov. 2, 2015, at A1; HUMAN RIGHTS WATCH, *supra* note 15, at 1–5; Tim Arango, *Kurds Fear the U.S. Will Again Betray Them, in Syria*, N.Y. TIMES, Sept. 1, 2016, at A4.

[66] Peter Baker et al., *supra* note 63, at A1; Michael R. Gordon & Eric Schmitt, *Obama's Stark Options on ISIS: Arm Syrian Kurds or Let Trump Decide*, N.Y. Times, Jan. 17, 2017, https://nyti.ms/2jAt6rp.

[67] Steven Erlanger & Stephen Castle, *British Jets Hit ISIS After Parliament Authorizes Airstrikes*, N.Y. TIMES, Dec. 2, 2015, at A16; Tim Lister & Clarissa Ward, *Meet the Men Fighting ISIS with Hunting Rifles and Homemade Mortars*, CNN.COM (Oct. 28, 2015), http://www.cnn.com/2015/10/27/middleeast/inside-syria-front-line-against-isis/.

addition to its unconventional warfare campaign against ISIS.[68] Unlike the rebels fighting ISIS, these rebels fight the Syrian government itself.[69] The United States' support reportedly includes anti-tank missiles[70] and small arms.[71] The support—especially the anti-tank missiles—appears to have been crucial for rebel advances against the Syrian government.[72]

While the United States has not explained all of its activities in Syria, U.S. officials have made comments about the overall legal framework for its operations. The United States considers itself to be in a non-international armed conflict[73] (NIAC) with ISIS,[74] but despite its aid to anti-Syrian-regime rebel forces, there is no evidence that the United States considers itself to be in an international armed conflict[75] (IAC) with the Syrian government.[76]

IV. *Jus ad Bellum* and Unconventional Warfare

International law regulates when states may interfere in another state's territory.[77] This body of law is called *jus ad bellum*.[78] Not only do *jus ad bellum* rules regulate when states may conduct activities, they also define

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[68] Gordon, *supra* note 20, at A7.
[69] Barnard & Shoumali, *supra* note 21, at A1; Barnard, *supra* note 20, at A4;
[70] *Id.*
[71] Mark Mazzetti et al., *U.S. Is Said to Plan to Send Weapons to Syrian Rebels*, N.Y. TIMES, June 13, 2013, at A1.
[72] Barnard & Shoumali, *supra* note 21, at A1.
[73] "Non-international armed conflicts are those armed conflicts that are not between States." U.S. DEP'T OF DEF., DOD LAW OF WAR MANUAL para. 17.1 (June 2015, updated May 2016) [hereinafter DOD LAW OF WAR MANUAL].
[74] *See* Preston, *supra* note 16 (noting that the conflict with ISIS is being carried out pursuant (in part) to the 2001 Authorization for the Use of Military Force, and that the United States believes IS to be an associated force with Al-Qaeda). *See also* Hamdan v. Rumsfeld, 548 U.S. 557, 630–31 (2006) (holding that the conflict with Al-Qaeda authorized by the 2001 Authorization for the Use of Military Force is a NIAC governed by Common Article 3).
[75] An international armed conflict is a conflict between states. YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 26–28 (2nd ed. 2010).
[76] *See* Brian J. Egan, State Department Legal Adviser, Speech at the Annual Meeting of the American Society of International Law: International Law, Legal Diplomacy, and the Counter-ISIL Campaign (Apr. 1, 2016).
[77] U.N. Charter art. 2(4); YORAM DINSTEIN, WAR, AGGRESSION, AND SELF-DEFENCE 83–88 (4th ed. 2005).
[78] YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 3–4 (2d ed. 2010).

when certain conflicts begin to exist as a matter of law.[79] This affects unconventional warfare in two ways. First, states must comply with the rules before embarking on a particular unconventional warfare campaign. Second, once a campaign is underway states seek to avoid unintentionally creating a new type of conflict that may include new and undesired parties.

To understand these concepts, the next section will begin with a general discussion of the *jus ad bellum* rules governing unconventional warfare activities. The section will show that unconventional warfare activities may be carried out in the absence of armed conflict, in non-international armed conflict, and in international armed conflict, and that a carefully-designed campaign may be conducted without necessarily triggering a particular type of conflict. The section will then analyze both of the U.S. campaigns in Syria to discuss whether each complies with *jus ad bellum* rules, and whether they appropriately manage the risk of triggering an unwanted type of conflict.

A. Proper Justification

To determine whether an unconventional warfare campaign is lawful under *jus ad bellum* rules, it is essential to know whether it will amount to a "use of force" and, if so, whether force will be directed against a state or against a non-state armed group.

1. Justification for Activities That Do Not Amount to a "Use of Force"

Certain unconventional warfare activities may be conducted without triggering an armed conflict. For example, a state may assist "insurgent forces in hopes of toppling an unfriendly government" without providing "support that would trigger an armed conflict as a matter of law."[80] Commentators have suggested calling such activities "unconventional statecraft" to emphasize that they are traditional unconventional warfare activities that take place outside armed conflict.[81] When seeking to conduct "unconventional statecraft" and avoid armed conflict, policymakers must consider two legal principles: the principle of non-

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[79] *See id*. at 26–29.
[80] Schmitt & Wall, *supra* note 32, at 352.
[81] *Id.*

intervention and the prohibition on the "threat or use of force" in international relations.[82]

The principle of non-intervention "involves the right of every sovereign State to conduct its affairs without outside interference."[83] In particular, intervention is prohibited when it uses coercive methods with regard to "matters in which each State is permitted, by the principle of State sovereignty, to decide freely."[84] Commentators differ on whether the principle of non-intervention is distinct from Article 2(4) of the U.N. Charter, which prohibits the threat or use of force.[85] While language in the judgments of the International Court of Justice suggests that the principle may have some independent significance,[86] in practice the principle merges with Article 2(4)'s prohibition on the "threat or use of force."[87] In fact, some manuals discuss the principle of non-intervention as an "integral aspect" of Article 2(4).[88] To the extent that the principle of non-intervention is distinct from Article 2(4), available remedies are likely political rather than legal.

This leaves a single rule for unconventional warfare planners seeking to operate below the armed conflict threshold: their activities must not amount to the threat or use of force.[89] But applying this standard can be difficult. Begin with Article 15 of the U.N. Charter, which recognizes that

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[82] *Id.* at 353–58.

[83] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 202 (June 27).

[84] *Id.* ¶ 205; Schmitt & Wall, *supra* note 32, at 354 ("The key to the prohibition is the requirement of coercion[.]").

[85] Schmitt & Wall, *supra* note 32, at 355; U.N. Charter art. 2(4).

[86] Military and Paramilitary Activities in and Against Nicaragua, 1986 I.C.J. Rep. 14, ¶ 247.

[87] Military and Paramilitary Activities in and Against Nicaragua, 1986 I.C.J. Rep. 14, ¶ 188; YORAM DINSTEIN, WAR, AGGRESSION, AND SELF-DEFENCE 81, 87 (3d ed. 2002) ("In the *Nicaragua* proceedings, both parties were in agreement that 'the principles as to the use of force incorporated in the United Nations Charter correspond, in essentials, to those found in customary international law.'"); Schmitt & Wall, *supra* note 32, at 355. Context matters when discussing the *Nicaragua* case, because in *Nicaragua* the Court was jurisdictionally prohibited from deciding the case under the U.N. Charter or other multilateral treaties. Military and Paramilitary Activities in and Against Nicaragua, 1986 I.C.J. Rep. 14, ¶ 43–46. The Court's logic is focused on its ability to decide the case based on customary international law.

[88] INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, JA 422, OPERATIONAL LAW HANDBOOK 1–2 (2015).

[89] Both the U.N. Charter and customary international law prohibit the "threat or use of force" in international relations. U.N. Charter art. 2(4); DINSTEIN, *supra* note 93, at 85–95.

a state may respond to an "armed attack."[90] In *Military and Paramilitary Activities in and Against Nicaragua*, the International Court of Justice (ICJ) discussed the type of activity that would constitute an "armed attack" in international law.[91] While the Court's decision is not universally seen as binding,[92] in a widely referenced and persuasive portion of its opinion,[93] the Court held that an armed attack would consist of "the sending by a State of armed bands to the territory of another State, if such an operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces."[94] The Court also held that an armed attack includes "assistance to rebels in the form of the provision of weapons or logistical or other support."[95]

The United States, referencing the same U.N. Resolution as did the Nicaragua Court, has recognized that states have a duty to "refrain from supporting non-State armed groups in hostilities against other States," and "take all reasonable steps to ensure that their territory is not used by non-State armed groups for purposes of armed activities—including planning, threatening, perpetrating, or providing material support for armed attacks—against other States and their interests."[96]

This leaves unconventional warfare planners with some general guidelines. Intelligence collection activities that do not result in

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[90] U.N. Charter art. 51.

[91] Military and Paramilitary Activities in and Against Nicaragua, 1986 I.C.J. Rep. 14, ¶ 195.

[92] State Department, *Text of U.S. Statement on Withdrawal from Case Before World Court*, N.Y. TIMES (Jan. 19, 1985), http://www.nytimes.com/1985/01/19/world/text-of-us-statement-on-withdrawal-from-case-before-the-world-court.html.

[93] U.S. DEP'T OF DEF., DOD LAW OF WAR MANUAL, para. 1.11.5.2 (June 2015) [hereinafter DOD LAW OF WAR MANUAL]; YORAM DINSTEIN, WAR, AGGRESSION, AND SELF-DEFENCE 201–04 (4th ed. 2005).

[94] Military and Paramilitary Activities in and Against Nicaragua, 1986 I.C.J. Rep. 14, ¶ 195.

[95] *Id.* Support to non-State armed groups implicates the doctrine of state responsibility, discussed below. *See infra* note 130 and accompanying text.

[96] DOD LAW OF WAR MANUAL, *supra* note 34, para. 17.18.1 (citing *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, annex to U.N. GENERAL ASSEMBLY RESOLUTION 2625 (XXV), U.N. Doc. A/RES/2625(XXV) (1970)). The *Nicaragua* court referenced the same resolution in its discussion. Military and Paramilitary Activities in and Against Nicaragua, 1986 I.C.J. Rep. 14, ¶ 191 (citing *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, annex to U.N. GENERAL ASSEMBLY RESOLUTION 2625 (XXV), U.N. Doc. A/RES/2625(XXV) (1970)).

destruction of property will not amount to an armed attack,[97] nor will humanitarian assistance, leadership training, or other "nonlethal" aid.[98] Also, the ICJ has indicated that "mere supply of funds" is not a threat or use of force.[99] However, certain activities are generally considered an "armed attack."[100] In particular, political assassination would be considered an armed attack,[101] as would providing targeting intelligence to an armed group, providing lethal training, and providing direct logistical support to military activities.[102]

If the unconventional warfare campaign does not amount to an armed attack, planners will have a final question: is there a gap between activities that amount to the threat or use of force but do not rise to the level of an armed attack? In its famous *Nicaragua* opinion, the ICJ indicated that there was a gap between a "use of force" that would violate Article 2(4) of the U.N. Charter, and an "armed attack" that would allow a state to respond in self-defense.[103] Such a gap would be extremely important for an unconventional warfare campaign, because there would be a higher threshold of possible activity before a state need fear an armed response. When responding to a mere use of force, the *Nicaragua* Court noted, states would be limited merely to "countermeasures" that could not be taken collectively.[104]

However, the United States has consistently rejected the notion that there is a gap between the use of force and an armed attack that would justify self-defense.[105] For planners of unconventional warfare campaigns, this means that any activities amounting to a use of force or amounting to

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[97] *See* Simon Chesterman, *The Spy Who Came in From the Cold War*, 27 MICH. J. INT'L L. 1071, 1073, 1077–93 (2006) (describing the limit as espionage that causes property damage or involves territorial incursion with aircraft). *But see* Craig Forcese, *Spies Without Borders: International Law and Intelligence Collection*, 5 J. NAT'L SECURITY L. & POL'Y 179, 198–205 (2011) (noting that commentators are divided on the legality of extraterritorial spying).

[98] Schmitt & Wall, *supra* note 32, at 361–63.

[99] Military and Paramilitary Activities in and Against Nicaragua, 1986 I.C.J. Rep. 14, ¶ 228.

[100] U.N. Charter art. 51.

[101] W. MICHAEL REISMAN & JAMES E. BAKER, REGULATING COVERT ACTION 69–71 (1992).

[102] Schmitt & Wall, *supra* note 32, at 362–63.

[103] Military and Paramilitary Activities in and Against Nicaragua, 1986 I.C.J. Rep. 14, ¶¶ 230, 247–49.

[104] REISMAN & BAKER, *supra* note 101, at 97–98.

[105] *Text of U.S. Statement on Withdrawal from Case Before World Court*, *supra* note 92; DOD LAW OF WAR MANUAL, *supra* note 34, para. 1.11.5.2.

an armed attack must be justified in self-defense or as part of a Chapter VII enforcement action.[106]

2. Unconventional Warfare as a Non-International Armed Conflict

Even unconventional warfare campaigns that involve the use of force will not always trigger an international armed conflict. This is true because unconventional warfare need not be carried out against a state actor.[107] A terrorist or other non-state armed group may control large portions of a state's territory.[108] In such a situation, force may be used against the non-state group, even without host nation consent, if the group threatens another state and the host nation is unable or unwilling to prevent the use of its territory by the group.[109]

When this occurs, the victim state (the state acting in self-defense against a threat from another state's territory) is not in an IAC with the territorial state (the state in which the non-state group operates).[110] While the victim state is in an armed conflict, the armed conflict is a NIAC with

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[106] U.N. Charter art. 39-44. *See infra* Section IV.A.3 for further discussion of *Jus ad Bellum* justifications for the use of force and armed attack.

[107] T.C. 18-01, *supra* note 1, para. 2-32, 2-40; JOINT PUB. 3-05, SPECIAL OPERATIONS, *supra* note 24, at GL-12 (noting that unconventional warfare may be carried out against a "government or occupying power").

[108] Eric Schmitt, *U.S. Commandos Kill Midlevel ISIS Leader in Syria*, N.Y. TIMES (Jan. 10, 2017), https://nyti.ms/2k8Jaxj.

[109] Ashley S. Deeks, *"Unwilling or Unable": Toward a Normative Framework for Extraterritorial Self-Defense*, 52 VA. J. INT'L L. 483, 499–503 (2012). *See also* Preston, *supra* note 16.

[110] Deeks, *supra* note 109, at 494–95.

> In the interstate context, a victim state considering whether force is necessary generally will be contemplating the use of force on the territory of the state that originally attacked it. In contrast, an attack by a nonstate actor almost always is launched from the territory of a state with which the victim state is not in conflict.

Id.; DINSTEIN, *supra* note 87, at 15–17. Because of their clarity, the terms "victim state" and "territorial state" will be used throughout. Both terms were coined by Professor Deeks. Deeks, *supra* note 109.

the armed group,[111] not the territorial state.[112] In fact, interference by the territorial state could itself constitute an armed attack.[113] However, the victim state certainly risks conflict with the territorial state, and if such conflict does occur, it would be characterized as an IAC.[114]

In order to rely on the "unable or unwilling" principle, several things must be true. First, there must be an imminent or actual armed attack from the non-state armed group that entitles the victim state to act in self-defense.[115] This calls for a straightforward application of the law of self-defense.[116] Second, the victim state must assess whether the territorial state has the capability to stop the actual or imminent armed attack.[117] If the territorial state has the capability, the victim state must also assess whether the territorial state is willing to act against the armed group.[118] If the territorial state is unable or unwilling to stop the armed attack, the victim state may use force.[119]

3. Justification for Activities That Amount to a "Use of Force"

Despite these alternatives, unconventional warfare campaigns will frequently involve the use of force against another state. Because states are generally prohibited from using force against other states, [120]

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[111] While some commentators reject the concept of a non-international armed conflict between a state and a non-state armed group, the U.S. government position is that a non-international armed conflict would exist. DOD LAW OF WAR MANUAL, *supra* note 34, at 1.11.5.4; Preston, *supra* note 16.

[112] Deeks, *supra* note 109, at 494–95; Michael Schmitt, *Counter-Terrorism and the Use of Force in International Law*, 79 INT'L L. STUD. 1, 40 (2003).

[113] Schmitt, *supra* note 106, at 40; DINSTEIN, *supra* note 93, at 268 ("For instance, if Utopia conducts a legitimate operation of extra-territorial law enforcement against terrorists or armed bands ensconced within the territory of Arcadia, this is an act of self-defence in which Arcadia has to acquiesce . . . there is no self-defence against self-defence"). Because the territorial state is not (due to lack of ability or lack of will) addressing the threat emanating from within its borders, it lacks the legal right to interfere when victim states act in self-defense. *Id.*

[114] Geneva Convention Relative to the Treatment of Prisoners of War art. 2, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III].

[115] Deeks, *supra* note 109, at 487–88.

[116] *See infra* Section IV.A.3 for further discussion of *Jus ad Bellum* self-defense principles.

[117] *Id.*

[118] *Id.*

[119] *Id.*

[120] U.N. Charter art. 2(4); DINSTEIN, *supra* note 87, at 78–91 (discussing the Kellogg-Briand pact, article 2(4) of the U.N. Charter, and the prohibition on the use of force in customary international law).

unconventional warfare that involves the use of force must have a specific legal basis in international law. There are two generally recognized bases for the use of force. First, use of force may be authorized by the U.N. Security Council under Chapter VII of the U.N. Charter.[121] Second, use of force may be authorized in individual or collective self-defense pursuant to Article 51 of the Charter.[122]

The U.N. Security Council, acting pursuant to Chapter VII, may authorize the use of force.[123] Because one of the primary purposes of unconventional warfare is to prepare the environment for or to support a conventional military campaign,[124] there are many situations where unconventional warfare could be conducted in a Chapter VII enforcement action. Such situations provide the clearest example of proper *jus ad bellum* authority.

In situations where the Security Council does not act pursuant to Chapter VII, a state may still conduct unconventional warfare in individual or collective self-defense. A state has the right to act in self-defense when it is the victim of an armed attack,[125] or when an imminent threat of armed attack exists.[126] The state's use of force must be necessary, proportional, and immediate.[127] The key is that these are the same rules that govern a state's use of conventional military force.

B. Unintended Legal Escalation

While standard *jus ad bellum* rules govern unconventional warfare campaigns, when embarking upon an unconventional warfare campaign

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[121] U.N. Charter art. 39-44; STEPHEN DYCUS ET AL., NATIONAL SECURITY LAW 212–15 (5th ed. 2011).

[122] U.N. Charter art. 51; DYCUS ET AL., *supra* note 121, at 215.

[123] U.N. Charter art. 39–50.

[124] FOOT, *supra* note 25; JOINT PUB. 3-05, SPECIAL OPERATIONS, *supra* note 24, at II-4; T.C. 18-01, *supra* note 1, para. 1-34.

[125] U.N. Charter art. 51; Deeks, *supra* note 109, at 491–92.

[126] Deeks, *supra* note 109, at 491–92.

[127] *Id.* at 493–924; Sangjae Lee, *Inherent Right of Self-Defense Through the Lens of the 2010 Chenoan Attack*, 216 MIL. L. REV 212, 212–13 (2013) (citing DINSTEIN, *supra* note 93, at 208). The law of self-defense has been analyzed and debated at length elsewhere, and a full analysis is beyond the scope of the article's discussion. *See* DYCUS ET AL., *supra* note 121, at 210–33; Mark V. Vlasic, *Assassination & Targeted Killing—A Historical and Post-Bin Laden Legal Analysis*, 43 GEO. J. INT'L L. 259 (2012); *and* DINSTEIN, *supra* note 93. *See also* John Yoo, *Using Force*, 71 U. CHI. L. REV. 729 (2004).

states often consider the law in a slightly different way. As discussed above, a state will—and must—consider whether it has a legal justification for the type of activity it wishes to conduct. But because unconventional warfare is often limited warfare, states will also consider the law in a second way: They will work to avoid unintentionally escalating the legal status of the conflict. In other words, a state may have a legal basis to act, but may not wish to fundamentally alter the conflict's legal status, generally by transforming it into an IAC.

In these situations, a state's primary concern will be twofold: First, to avoid turning a NIAC against a non-state armed group into an IAC against the territorial state. Second, to conduct limited unconventional warfare activities against a state without triggering armed conflict at all. Because the United States operates in Syria without the Syrian government's consent, the United States' unconventional warfare campaigns in Syria raise precisely these concerns.

1. Preventing NIAC from becoming IAC: United States Support to the YPG

Without proper controls, the United States unconventional warfare campaign against ISIS risks becoming an IAC with the Syrian government. To manage this risk, campaign planners must ensure that their use of force is solely directed against the armed group (ISIS), not against the territorial state (Syria). Recall the general rule that where the territorial state is unable or unwilling to act, and the victim state intervenes, the territorial state and the victim state are not in an armed conflict.[128] However, the victim state must not use force against the territorial state without a separate, sufficient justification.[129]

The key concern for the U.S. government in Syria is that if the partner force—the YPG—should attack the Syrian government, the United States could be responsible under the doctrine of state responsibility.[130] Under this doctrine, where a partner force acts "on behalf [of] the State, having been charged by some competent organ of [the State] to carry out a specific

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[128] Deeks, *supra* note 109, at 494–95; Schmitt, *supra* note 112, at 40.
[129] U.N. Charter art. 2(4).
[130] Alison Elizabeth Chase, *Legal Mechanisms of the International Community and the United States Concerning State Sponsorship of Terrorism*, 45 VA. J. INT'L L. 41, 93–94 (2004).

operation," the sending state is responsible under international law.[131] Also, the sending state will become responsible where they ratify the partner force's actions by taking advantage of them or approving them.[132]

In its support to the YPG and in its earlier program to support other anti-ISIS rebel groups, the United States has taken many precautions to avoid conflict with the Syrian government itself. In particular, the United States has avoided airstrikes that target regime forces.[133] The United States has also refused to overtly train and equip militant groups that fight the Syrian government as well as ISIS.[134] Where militant groups are trained, controls have been adopted (at significant cost)[135] to ensure that the groups do not target Syrian government forces.[136] While these controls do not appear to include a pledge not to attack the Syrian government,[137] the United States has indicated that it will monitor funded groups and reduce or eliminate support if they attack the Syrian government.[138]

Controls have been adequate in the past. There have been no reports that the United States has directed the YPG or another anti-ISIS group to attack the Syrian regime. In fact, the United States has warned rebel forces that they will incur significant costs should they conduct attacks.[139] Congress has also required DoD to account for "any misuse or loss of provided training and equipment," and describe "how such misuse or loss is being mitigated."[140] However, as the situation develops, additional safeguards may be necessary. For example, while the PYD currently maintains an uneasy ceasefire with the regime, battlefield gains may tempt the PYD to seize additional, non-ISIS-controlled territory in an effort to

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131 Chase, *supra* note 130, at 100 (quoting Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), Judgment, 1980 I.C.J. Rep. 3, ¶ 58 (May 24)).

132 Chase, *supra* note 130, at 100–01 (quoting Case Concerning United States Diplomatic and Consular Staff in Tehran, 1980 I.C.J. Rep. 3, ¶ 74).

133 Baker & Schmitt, *supra* note 63, at A6.

134 Shear et al., *supra* note 64, at A1; Anne Barnard & Eric Schmitt, *Rivals of ISIS Attack U.S.-Backed Syrian Rebel Group*, N.Y. TIMES, Aug. 1, 2015, at A1.

135 Roy Gutman, *How the US 'train and equip' program in Syria collapsed*, STARS & STRIPES (Dec. 23, 2015), http://www.stripes.com/news/middle-east/how-the-us-train-and-equip-program-in-syria-collapsed-1.385552.

136 Karam Shoumali et al., *Abductions Hurt U.S. Bid to Train Anti-ISIS Rebels in Syria*, N.Y. TIMES, July 30, 2015, at A1.

137 *Id.*

138 *Id.*

139 *Id.*

140 Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 1209(d)(5).

enlarge its de facto state.[141] The PYD may also be tempted to seize territory controlled by other states in the region, such as Turkey. In fact, the PYD has clashed with Turkish forces operating within Syria.[142]

Should controls fail and the PYD attack regime forces or the forces of another state, the United States could likely avoid legal responsibility by refusing to support any PYD elements involved in the attack or incursion. So long as the United States did not direct the attack, legally it would need only avoid ratifying or taking advantage of the attack.[143] Further partnership with other PYD elements directed solely at defeating ISIS would not likely be considered "taking advantage of the attack," and would not put the United States government in breach of its international obligations.[144]

2. Remaining Below the Armed Conflict Threshold: United States Support to Anti-Assad Rebels

The United States' support to anti-Assad rebels also risks triggering IAC with the Syrian government. While it is possible to conduct unconventional warfare activities without triggering IAC, such campaigns are generally limited to intelligence collection activities that do not result in destruction of property, humanitarian assistance, leadership training, and "nonlethal" aid.[145] Where this is accomplished, IAC will not occur.

In its support to the anti-Assad rebels, the United States appears to be taking precautions to remain below the armed conflict threshold. In particular, the actual arms appear to be provided by various countries in the region, with the United States' role limited to facilitation of flights and vetting of recipients.[146] However, there are reports that many of the anti-

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141 *See* INTERNATIONAL CRISIS GROUP, *supra* note 25, at 4–22 (describing the PYD's struggle to establish Rojava, a Kurdish-controlled region in Syria).

142 Tim Arango et al., *Turkey's Military Plunges Into Syria, Enabling Rebels to Capture ISIS Stronghold*, N.Y. TIMES, Aug. 24, 2016, https://nyti.ms/2jMajZG.

143 Chase, *supra* note 130, at 100–01 (quoting Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), Judgment, 1980 I.C.J. Rep. 3, ¶ 74 (May 24)).

144 *See id.*

145 *See supra* Section IV.A.

146 C.J. Chivers & Eric Schmitt, *Arms Airlift to Syria Rebels Expands, With Aid From C.I.A.*, N.Y. TIMES, Mar. 24, 2015, at A1; Gordon, *supra* note 20, at A7.

Syrian-government militias have received training from the United States.[147]

Again the question is whether these precautions are sufficient to remain below the threshold of armed conflict. Recall that an armed attack will not occur based only on intelligence collection activities that do not result in destruction of property,[148] humanitarian assistance, leadership training, or nonlethal aid.[149] However, provision of targeting intelligence, lethal training, and direct logistical support to military activities is considered an armed attack.[150]

While no definitive conclusion can be reached (given the program's secrecy), the United States' program has likely been successfully crafted to remain just below the threshold of armed conflict. However, there are identifiable risk factors. The first risk factor is the training curriculum. While there is little clarity concerning what constitutes impermissible "lethal training,"[151] training tailored to operations in Syria or specific Syrian targets would potentially cross the threshold. The second risk factor is the logistical plan. The United States' cooperation in exfiltration of rebels from Syria for training, or infiltration back into Syria after training, would also likely cross the threshold. Finally, the countries providing the weapons likely have crossed the threshold into an armed conflict with the Syrian government, and close cooperation on the overall program could simply make the United States a co-belligerent.[152]

V. *Jus in Bello* and Unconventional Warfare

Establishing that modern international law does not prevent a state from embarking on an unconventional warfare campaign is only the beginning of the analysis, as *jus ad bellum* rules are only the first of two

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147 Anne Barnard, *Syrian Rebels Say Russia Is Targeting Them Rather Than ISIS*, N.Y. TIMES, Oct. 1, 2015, at A14.

148 *See* Simon Chesterman, *The Spy Who Came in From the Cold War*, 27 MICH. J. INT'L L. 1071, 1073, 1077–93 (2006) (describing the limit as espionage that causes property damage or involves territorial incursion with aircraft). *But see* Craig Forcese, *Spies Without Borders: International Law and Intelligence Collection*, 5 J. NAT'L SECURITY L. & POL'Y 179, 198–205 (2011) (noting that commentators are divided on the legality of extraterritorial spying).

149 Schmitt & Wall, *supra* note 32, at 361–63.

150 *Id.*

151 *Id.*

152 DINSTEIN, *supra* note 93, at 201–04.

bodies of law regulating unconventional warfare. This section will consider the second body of law, *jus in bello*, concluding that such a campaign can be conducted under modern rules.

The *jus in bello* rules of modern international law pose two challenges to an unconventional warfare campaign: First, they pose a direct challenge to some of the unique ways in which a resistance movement is employed, making it difficult to select proper targets, hold and try detainees, gather supplies, and recruit personnel. Second, because *jus in bello* rules are designed to promote reliance on conventional military forces, they challenge an unconventional warfare commander's ability to fight in various statuses (such as out of uniform or in a non-standard uniform). Despite these difficulties, unconventional warfare campaigns can be conducted lawfully. The commander can successfully employ the force and effectively manage the force's legal status.

A. Employment of the Force

Employing resistance forces raises many legal issues, from the unique targets they are called upon to attack, their lack of a recognized government, their relative lack of supplies, to their lack of regularly organized armed forces. While this makes an unconventional campaign legally complex, a resistance movement may successfully and lawfully employ the auxiliary, the underground, and the guerrillas.

1. Selecting Lawful Targets

Unconventional warfare is governed by the same targeting rules that govern conventional warfare. However, unconventional warfare forces have historically been used to attack unique sets of targets, all of which pose unique legal difficulties.[153]

The first challenge is the duty to positively identify partner force targets. Because unconventional warfare advisors work through or with a partner force,[154] they are often further removed from the fight, and may be forced to rely on others for information. This often makes it more difficult

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[153] *E.g.* JOHN KENNETH KNAUS, ORPHANS OF THE COLD WAR 222-33 (1999) (describing a mission to destroy "trucks carrying borax from the local mines").

[154] JOINT PUB. 3-05, SPECIAL OPERATIONS, *supra* note 24, at GL-12.

for a commander to determine whether a potential target is subject to attack under the laws of war. While unconventional warfare makes a commander's task more difficult, the standard remains the same: Commanders must "make a good faith assessment of the information that is available to them at that time."[155] This can include information presented by the partner force.[156] While the law does not require the commander to delay a decision to gather more information,[157] the commander must fairly weigh the reliability of the information received in light of the overall credibility of the partner force.[158] The commander cannot rely in bad faith on information known to be unreliable. Commanders should also be aware that, while it is not the U.S. view, there is some support for the idea that a commander could be held liable where they are reckless (even if they act in good faith).[159]

In Syria, the United States reportedly relies on YPG-supplied data when selecting targets for air attack.[160] The YPG units use radios to report ISIS locations to a YPG controller, who uses chat programs and satellite imagery to report Global Positioning System (GPS) grid coordinates to U.S. forces.[161] This system presents both a tactical issue of how the attacking aircrew will identify the correct target (called correlation in Close Air Support terminology)[162] and a more strategic issue of ensuring the YPG is directing attacks only at ISIS. While civilian casualty numbers are disputed and difficult to verify,[163] there have not been reports of systematic failures in YPG-derived information at the tactical level. Integration of multiple sources of intelligence[164] can address both problems, but commanders must remain alert for both correlation failures and the risk that the YPG will shift its targets away from ISIS.

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155 DOD LAW OF WAR MANUAL, *supra* note 34, para. 5.4.
156 *Id.* para. 5.4.1–5.4.2.
157 *Id.*
158 *Id.* para. 5.4.2 (citing United States v. List, et al. ((The Hostage Case), XI TRIALS OF WAR CRIMINALS BEFORE THE NMT 1295–96).
159 Brian Finucane, *Partners and Legal Pitfalls*, 92 INT'L L. STUD. 407, 413-14 (2015).
160 Callimachi, *supra* note 19, at A1.
161 *Id.*
162 JOINT CHIEFS OF STAFF, JOINT PUB. 3-09.3, CLOSE AIR SUPPORT, at III-47–III-50 (25 Nov. 2014).
163 Bryan Schatz, *The Pentagon Says It Has Killed 20,000 ISIS Fighters—and Just 6 Civilians*, MOTHER JONES (Dec. 23, 2015), http://www.motherjones.com/politics/2015/12/united-states-isis-bombing-civilian-deaths.
164 JOINT CHIEFS OF STAFF, JOINT PUB. 2-0, JOINT INTELLIGENCE (22 Oct. 2013).

In addition to these precautions, commanders should mitigate the risk that a "recklessness" standard might be used to judge their actions under a future legal regime.[165] If applied, the recklessness standard would make a commander liable if they continued to provide assistance to a force knowing that force systematically failed to comply with LOAC and that LOAC violations were likely in the future.[166] Even under this standard, compliance is possible even in an aggressive unconventional warfare campaign. Recall that the standard prohibits assistance where partner force failures are unaddressed and future violations are likely. Commanders can fix the problem by ensuring that the campaign is responsive to LOAC violations—that they are reported, investigated (which can be done in at least some fashion even in a resource-constrained environment), and corrected. This type of campaign should avoid violating the law even under a more-restrictive recklessness standard.[167]

While a commander's duty to properly identify a target is a classic *jus in bello* decision, unconventional warfare adds a *jus ad bellum* component. As discussed above, states have a duty to refrain from charging a partner force to carry out a specific operation against a state that is not a party to the armed conflict.[168] This creates a critical legal risk for the advisor, who may erroneously direct (or be manipulated by the partner force into directing) the partner force to attack a non-party state's forces. While the advisor would not be criminally liable (applying the *jus in bello* standard discussed above), the attack risks creating an enduring international armed conflict.

Initially, the victim of the partner force's attack would have a right to respond in self-defense.[169] The United States' position is that the right to respond in self-defense does not depend on the specific intent of the attacker,[170] meaning that the victim state's unit would be legally entitled to fight to repel the erroneous attack. However, by immediately ceasing an attack when the error is discovered, and credibly communicating that

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165 *See supra* Section V.A.1 for a discussion of the recklessness standard.
166 Finucane, *supra* note 159 at 422-24.
167 *See id*. at 425-30 (discussing risk mitigation measures in greater detail).
168 Chase, *supra* note 130, at 100 (quoting Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), Judgment, 1980 I.C.J. Rep. 3, ¶ 58 (May 24)).
169 *See supra* Section IV.A.3 for the rules regarding self-defense.
170 William H. Taft IV, *Self-Defense and the Oil Platforms Decision*, 29 YALE J. INT'L L. 295, 302–03 (2004).

the attack was in error, advisors would limit or eliminate the victim unit's justification for continued actions in self-defense.[171]

While the United States would likely be liable in international law for the attack,[172] a prompt apology and immediate cessation of the attack would terminate a victim state's justification for further acts of self-defense and end any legal justification for further conflict.[173] The most important way to mitigate this risk is to maintain some form of communication with the territorial state.

While sabotage raises unique legal issues, it is a classic unconventional warfare activity and is often a primary goal of an unconventional warfare campaign.[174] It is generally conducted by members of the underground or auxiliary operating out of uniform.[175] While it is permissible to employ saboteurs,[176] there are several limits on sabotage. First, because they operate out of uniform, saboteurs will not receive combatant immunity and may be tried by the territorial state.[177] Second, because both the saboteur and the weapons used are concealed, sabotage raises special perfidy concerns,[178] especially with regard to booby-traps and other concealed explosive devices.[179] Also, concealed explosive devises are regulated by treaty. The Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices of May 3, 1996 (Protocol II to the 1980 CCW Convention), which the United States has ratified,[180] prohibits disguising booby traps or explosive devices as, among other things, children's toys or "internationally recognized protective emblems, signs or signals."[181] Also, such devices may not be emplaced in a "city, town, village or other area containing a similar concentration of civilians in which combat between ground forces is not taking place or does not appear

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171 DINSTEIN, *supra* note 93, at 224 (noting that to be lawful, an act of self-defense must be necessary).
172 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 901 (AM. LAW. INST. 1986); DINSTEIN, *supra* note 93, at 208–10.
173 DINSTEIN, *supra* note 93, at 224.
174 FOOT, *supra* note 25, at 380–91.
175 *See* T.C. 18-01, *supra* note 1, para. 2-33–2-37.
176 DOD LAW OF WAR MANUAL, *supra* note 34, para. 4.17.
177 *Id.* para. 4.17.3.
178 Heller, *supra* note 32.
179 *Id.* (citing Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, May 3, 1996, 2048 U.N.T.S. 93 [hereinafter Protocol II to the 1980 CCW Convention]).
180 DOD LAW OF WAR MANUAL, *supra* note 34, para. 6.12.
181 Protocol II to the 1980 CCW Convention, *supra* note 179, art. 7.

to be imminent."[182] The only exceptions are when the devices are "placed on or in the close vicinity of a military objective" or when "measures are taken to protect civilians from their effects, for example, the posting of warning sentries, the issuing of warnings or the provision of fences."[183]

Commanders can readily comply with Protocol II's requirements. Many sabotage activities will be exempt because despite being conducted clandestinely they target traditional military objectives (such as bases and other military facilities). These operations fall squarely within Protocol II's exception for devices placed near military objectives. Other attacks may not be so straightforward. Booby traps used to attack enemy key leaders away from the front lines, for example, would not fall within Protocol II's exception.[184] In these situations the attacking force can still comply with Protocol II so long as they take steps (such as command detonation and overwatch) to protect civilians.

However, saboteurs must still consider the risk of perfidy. This risk will exist any time sabotage is conducted by resistance forces operating out of uniform, and will be thoroughly discussed in Section B.

While sabotage raises legal issues as a method of warfare, resistance forces are also challenged by types of targets they are asked to attack. Historically, resistance forces have focused on hard-to-access, high payoff targets such as dams and power stations.[185] These targets may be attacked, but pose special proportionality concerns and are subject to two disputed rules of international law.

Dams, power stations, and similar targets containing dangerous forces are given special protection, but the two rules that do so are disputed and do not reflect customary international law. The first disputed rule is Article 56 of Additional Protocol I[186] Article 56 protects "[w]orks or installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations" from attack where the attack could cause

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[182] *Id.*
[183] *Id.*
[184] Heller, *supra* note 32, at 517–18 (discussing an operation that was allegedly carried out by the Central Intelligence Agency and Israel to kill Imad Mughniyah, a key Hezbollah leader).
[185] KNUT HAUKELID, SKIS AGAINST THE ATOM (1989).
[186] DOD LAW OF WAR MANUAL, *supra* note 34, para. 5.13.

"severe losses among the civilian population."[187] Article 56 provides very limited exceptions, such as when the "work" provides "regular, significant and direct support of military operations and if such attack is the only feasible way to terminate such support."[188] The second disputed rule is Article 35 of Additional Protocol I, which prevents means or methods of warfare which "are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment."[189] However, the United States and other nations have consistently objected to these rules, at least in IAC,[190] and it is unlikely that either rule would be considered customary international law given state practice.[191]

Even without a categorical rule, works containing dangerous forces are heavily protected by the general rule of proportionality[192] and require extensive precautions in the attack.[193] Because of the potentially large collateral effects, commanders should expect that decisions to attack such targets will rightfully be subjected to heavy scrutiny.

2. Detainee Operations and Trials: Prisoners taken by the Partner Force

While modern international law imposes strict guidelines for the care of detainees, it is possible for a resistance movement such as the YPG to take—and even try—prisoners without violating international law. However, the standards will be different depending on whether the unconventional warfare campaign occurs in a NIAC or in IAC. After identifying the general rules, this section will consider the YPG's trial of ISIS detainees during the NIAC in Syria.

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[187] Protocol Additional to the Geneva Conventions of 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 56, 8 June 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I].
[188] *Id.* art. 56.
[189] *Id.* art. 35.
[190] *Id.* art. 35; DOD LAW OF WAR MANUAL, *supra* note 34, para. 5.13.1 (noting the objections of the United States, the United Kingdom, and France to Article 56); DOD LAW OF WAR MANUAL, *supra* note 34, para. 6.10.3.1 (noting the objections of the United States and France to Article 35(3)); *see also* Michael N. Schmitt, *Humanitarian Law and the Environment*, 28 DENV. J. INT'L L. & POL'Y 265 (2000). *But see* DOD LAW OF WAR MANUAL, *supra* note 34, para. 17.7.1 (noting that the United States has not objected to AP II art. 15 in NIAC).
[191] Schmitt, *supra* note 190.
[192] DOD LAW OF WAR MANUAL, *supra* note 34, para. 5.12.
[193] *Id.* para. 5.13.

Before trying a detainee, the resistance movement must determine whether the detainee merits treatment as a prisoner of war under the Third Geneva Convention. In international armed conflict, detainees captured by the resistance movement will be entitled to prisoner of war status so long as the detainees meet the requirements of Article 4(A)(2) of the Third Geneva Convention.[194]

While prisoners of war may not be tried for warlike acts, it is lawful for the resistance movement to try prisoners of war for war crimes.[195] It is also lawful to try unprivileged belligerents.[196] However, such trials are subject to strict rules. In particular, they are governed by Articles 82 through 108 of the Third Geneva Convention, and by Article 75 of Additional Protocol I.[197] These articles pose several key obstacles to trials by a resistance movement.

The first obstacle is that Article 75 of Additional Protocol I requires that all trials be performed by a "regularly constituted court."[198] This would be a significant obstacle for a resistance movement, especially early in the conflict. However, it would be possible for the resistance movement to set up new courts, yet have them be "regularly constituted" for purposes of the Convention. In determining whether a court is "regularly constituted," judges look not to whether the court is new, but whether it is established pursuant to generally applicable rules and procedures.[199] In the United States, this means that any differing rules must be justified by "some practical need [that explains] deviations from court-martial practice."[200] The resistance movement could show that new courts are "regularly constituted" by establishing common rules and using the same

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[194] While the resistance movement could claim that it is not a party to the 1949 Geneva convention, in an IAC, Article 75 of Additional Protocol I embodies the rules of customary international law. DOD LAW OF WAR MANUAL, *supra* note 34, para. 8.1.4.2; Hamdan v. Rumsfeld, 548 U.S. 557, 633 (2006). In addition, a resistance movement's acknowledgement that it belongs to a party to the conflict is a prerequisite for the resistance movement's own forces meriting prisoner of war protections, and such an acknowledgement will bind the resistance movement to the requirements of the Third Geneva Convention. Geneva Convention III, art. 4.

[195] Yoram Dinstein, *Unlawful Combatancy*, 79 INT'L L. STUD. 151, 156–59 (2003).

[196] *Id.* at 153–55.

[197] Geneva Convention III, arts. 82–108.

[198] Additional Protocol I, art. 75.

[199] *Hamdan*, 548 U.S. 557 at 631–33; Khadr v. Obama, 724 F. Supp. 2D 61, 66–68 (D.D.C. 2010).

[200] *Hamdan*, 548 U.S. at 632–33.

courts to try members of its own force.[201] So long as the courts' rules are generally applicable and follow the procedural requirements of Articles 82 through 108 of the Third Geneva Convention and Article 75 of Additional Protocol I, even new courts could be considered "regularly constituted."[202]

Another obstacle of Article 75 is that it requires the application of international or national law in force at the time of the offense.[203] Because a resistance movement is unlikely to have implemented a legal code within its territory (if it controls territory at all), trials would be limited to offenses against the territorial state's legal code or international law.[204] However, given that most states have a legal code that punishes rape, murder, and other similar crimes, and because the courts could try prisoners of war or other detainees for war crimes, resistance movement courts could likely try the most urgent cases at a minimum.

Trials must meet a similar standard to be acceptable in a NIAC. Additional Protocol II Article 6, which applies in NIAC, imposes similar requirements that all trials be before regularly constituted courts applying international or national law in force at the time of the offense.[205]

The PYD[206] controls territory in Syria and has established courts and a legal system based on reformed Syrian law.[207] While this system will, in principle, allow trials that comply with Additional Protocol II Article 6,[208] in practice the system is has problems, including uneven publishing of new laws, questionable Syrian laws that remain on the books, and allegations of politicization and lack of independence.[209] While these are serious issues, it appears that the PYD/YPG courts are, in fact, regularly constituted. Regularly constituted courts need not be perfect, they need

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[201] With some exceptions, trials of prisoners of war must occur in a military court. Geneva Convention III, art. 84.

[202] Geneva Convention III, arts. 82–108; Additional Protocol I art. 75. *See also* The Trial of Sergeant-Major Shigeru Ohashi and Six Others, V U.N. L. REP. 25, 30–31 (Australian Military Court, Rabaul, Mar. 20–Mar. 23, 1948).

[203] Additional Protocol I art. 75.

[204] *Id. See also* DOD LAW OF WAR MANUAL, *supra* note 34, para. 18.19.

[205] Protocol Additional to the Geneva Conventions of 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977, art. 6, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II].

[206] The YPG is the military wing of the PYD. HUMAN RIGHTS WATCH, *supra* note 15, at 1.

[207] *Id.* at 22.

[208] Additional Protocol II, *supra* note 205, art. 6.

[209] HUMAN RIGHTS WATCH, *supra* note 15, at 22–25.

only provide minimum procedural protections and be properly set up under the law.[210] The defects of PYD/YPG courts, while significant, are not of this kind, and the courts likely comply with Additional Protocol II Article 6. To clarify matters, U.S. commanders assisting YPG forces should insist that YPG courts publicly clarify which criminal law they intend to apply when trying ISIS detainees. Commanders should also act promptly to investigate any allegations that YPG courts lack independence or are unduly focused on YPG or PYD political opponents. To account for the limited number of U.S. personnel, such efforts should first focus on any courts trying detainees from partner force operations. This will minimize the risk that U.S. forces might participate in the execution of unlawful sentences.[211]

3. Supplying the Force: Requisitioning Supplies from the Civilian Population

Historically, many resistance movements have been poorly supplied.[212] This means that many resistance movements (and their advisors) obtain support by capturing enemy property. In IAC, the general rule is that "[a]ll property located in enemy territory is regarded as enemy property regardless of its ownership."[213] Enemy real property may be utilized or destroyed so long as the use is justified by "imperative military necessity," which is a lower standard than that required to make the property a lawful target for purposes of attack.[214]

However, movable property is treated differently. In general, enemy public, movable property may be taken, but private movable property may only be taken if it is "susceptible to direct military use."[215] Private property not susceptible to direct military use may only be taken if the taking would be lawful during an occupation.[216] Occupation law permits private movable property to be "requisitioned," which is the forcible

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[210] *Hamdan*, 548 U.S. 557 at 631–35.
[211] *See infra* notes 240-53 and accompanying text for a discussion of liability for partner force abuses.
[212] John Lee Anderson, Guerrillas: Journeys in the Insurgent World 87 (2d ed. 2004).
[213] DOD LAW OF WAR MANUAL, *supra* note 34, para. 5.17.1.
[214] *Id.* para. 5.17.2.1; U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE para. 56–59 (18 Jul. 1956) [hereinafter FM 27-10 (1956)].
[215] DOD LAW OF WAR MANUAL, *supra* note 34, para. 5.17.3; FM 27-10 (1956), *supra* note 214, para. 59.
[216] DOD LAW OF WAR MANUAL, *supra* note 34, para. 5.17.3.1; FM 27-10 (1956), *supra* note 214, para. 59.

taking of property for the support of the armed force.[217] However, this is limited to property needed to support the force, and no property may be taken for private gain.[218] Also, the needs of the civilian population must be considered when food and medical supplies are requisitioned.[219] Finally, requisition requires the payment of fair compensation.[220] This means that military supplies such as ammunition may be taken, but that other supplies, such as food and medical items, must be paid for and the needs of civilians must be considered when the items are requisitioned.

While the legal issues of supply may seem pedestrian, this area of the law has resulted in some of the most serious criticisms of the YPG. The YPG has been accused of illegal destruction and seizure of property, including demolition of villages, forced displacement from villages, and politically motivated displacement of people and destruction of homes.[221] The YPG has responded by claiming that civilians were moved based on military necessity, including protection from mines, protection from fighting, and the need to isolate the population from ISIS supporters.[222]

While the facts are hotly disputed, the YPG's actions are permissible so long as destruction or seizure is justified by "imperative military necessity."[223] Advisors must pay close attention to supply issues and seizure of property, ensuring that any takings are justified by a compelling and legitimate military purpose. While it would not be practical for a small number of advisors to monitor every member of the partner force for petty theft, advisors can focus on large-scale clearing operations. These should receive close intelligence analysis. Advisors can also ensure that partner force commanders are aware of the rules for gathering supplies, and the need to pay compensation.

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[217] DOD LAW OF WAR MANUAL, *supra* note 34, para. 11.18.7; FM 27-10 (1956), *supra* note 214, para. 412.
[218] DOD LAW OF WAR MANUAL, *supra* note 34, para. 5.17.3.2, 5.17.4; FM 27-10 (1956), *supra* note 214, para. 398.
[219] DOD LAW OF WAR MANUAL, *supra* note 34, para. 11.14.2.
[220] *Id.*; FM 27-10 (1956), *supra* note 214, para. 412.
[221] *"We Had Nowhere Else to Go": Forced Displacement and Demolitions in Northern Syria*, AMNESTY INTERNATIONAL (Oct. 2015), http://www.aina.org/reports/aiwhnetg.pdf.
[222] AMNESTY INTERNATIONAL, *supra* note 221, at 28–29.
[223] DOD LAW OF WAR MANUAL, *supra* note 34, para. 5.17.2.1.

4. War Crimes Committed by the Partner Force

A key concern for unconventional warfare SOF advisors will be liability for war crimes committed by the partner force. There are two ways in which advisors could be held liable; command responsibility or actual participation.[224] Command responsibility means that a commander will be held criminally liable if they fail "to take necessary and reasonable measures to ensure that their subordinates do not commit violations of the law of war."[225] Command responsibility generally has three elements: "(1) a superior/subordinate relationship; (2) knowledge, actual or constructive, by the superior of the crimes committed by the subordinate; and (3) failure by the superior to halt, prevent, or punish the subordinate."[226] In unconventional warfare, the most important question will be whether the advisors have "effective control" over the partner force.[227] Effective control does not require a formal command relationship, which will almost certainly not exist for SOF advisors.[228] What it does require is functional similarity to command, such as the ability to discipline subordinates and the ability to issue orders.[229] While SOF advisors will generally not have this authority,[230] they must be aware that if they exercise command authority, they must use it to prevent war crimes. They must also be aware that they will be judged on whether they "should have known" of abuses, not whether they actually knew of abuses.[231]

Regardless of whether command responsibility exists, SOF advisors will be liable if they actually participate in war crimes. Unlike command authority, which allows prosecution based on a "should have known" standard,[232] actual participation requires that the advisor know of the crimes and act with some form of intent to further the crime.[233] In general,

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[224] Bart, *supra* note 32, at 515–16, 521, 524–27; DOD LAW OF WAR MANUAL, *supra* note 34, para. 18.23.4 to 18.23.6.
[225] DOD LAW OF WAR MANUAL, *supra* note 34, para. 18.23.3.1. *See* Application of Yamashita, 327 U.S. 1, 13–15 (1946).
[226] Bart, *supra* note 32, at 517.
[227] *Id.* at 517–22. *But see* Finucane, *supra* note 159, at 416 (discussing the lower—but less accepted—"overall control" standard). Note that the "overall control" standard is relevant to state responsibility, not individual criminal liability. *Id.*
[228] Bart, *supra* note 32, at 519–20.
[229] *Id.* at 522–23.
[230] *Id.* at 524.
[231] DOD LAW OF WAR MANUAL, *supra* note 34, para. 18.23.3; Bart, *supra* note 32, at 525.
[232] DOD LAW OF WAR MANUAL, *supra* note 34, para. 18.23.3; Bart *supra* note 32, at 525.
[233] DOD LAW OF WAR MANUAL, *supra* note 34, para. 18.23.4–18.23.6.

this means that the advisor would have to be an aider and abettor to the actual crime, or be a co-conspirator in the criminal conspiracy.[234] Aiding and abetting would require the advisor to "aid or encourage" the person who committed the war crime, and to "consciously share in the actual perpetrator's criminal intent."[235] Conspiracy would require an agreement to commit a war crime.[236] So long as SOF advisors follow DoD policy requiring them to report and prevent war crimes,[237] they will avoid criminal liability. All such efforts should be documented by the advisors.

5. Suitability of the Partner Force: Past Law of War Violations

Advisors must evaluate the history of the partner force. While the United States has many legal and policy rules governing assistance to forces with a history of law of war or human rights violations,[238] this section will deal primarily with international law on the subject.

States have an affirmative duty to search for and try those who have committed grave breaches of the Geneva conventions,[239] as well as to suppress all breaches of the Geneva conventions, regardless of whether they are grave breaches.[240] This obligation applies both to grave breaches of the Geneva conventions in IAC and to grave breaches of Common Article 3 in NIAC.[241]

However, SOF advisors should be able to readily comply with these obligations. Under U.S. doctrine, SOF advisors will be gathering information on the resistance movement during the second phase of unconventional warfare, initial contact.[242] Also, advisors will be continuously evaluating the personnel for security and reliability

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234 Bart, *supra* note 32, at 525–26.

235 U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGE'S BENCHBOOK para. 7-1-1 (10 Sept. 2014). *But see* Finucane, *supra* note 169, at 420–24 (arguing that advisors could be liable if they act with the knowledge that their actions will assist the crime, even absent a desire that the crime occur).

236 *Military Judge's Benchbook, supra* note 235, para. 3-5-1.

237 U.S. DEP'T OF DEF., DIR. 2311.01E, DOD LAW OF WAR PROGRAM (9 May 2006).

238 22 U.S.C. § 2378d; Michael J. O'Connor, *Bangladesh Rapid Action Battalion: Satisfying the Requirements of the Leahy Amendment with a Rule of Law Approach*, 215 MIL. L. REV. 182 (2013).

239 DOD LAW OF WAR MANUAL, *supra* note 34, para. 18.9.3.

240 *Id.* para 18.9.3.3.

241 *Id.* para 18.9.3.2.

242 T.C. 18-01, *supra* note 1, para. 3-9–3-10.

reasons.[243] So long as this aggressive information gathering is paired with a duty to report past breaches of the Geneva conventions, and so long as those reports are acted upon by the U.S. government as a whole, SOF advisors will be complying with their portion of the United States' obligations under the convention.

B. Legal Status of the Force

So far, modern international law has posed no obstacle to unconventional warfare campaigns. Section IV established that the rules governing when force may be used—*jus ad bellum*—allow unconventional warfare activities to be conducted in IAC, NIAC, and even in the absence of armed conflict. After showing when campaigns could be initiated, the article turned to the *jus in bello* rules—those governing conduct during the conflict itself—and found that the modern rules governing employment of the force (targeting, supply, etc.) posed no obstacle to an unconventional warfare campaign. This section now turns to the final subset of *jus in bello*, the rules governing a force's status, to determine whether modern laws governing uniforms and combatant immunity would prevent waging an effective unconventional warfare campaign.

Much of the law of armed conflict (LOAC) is related to a force's status—how a force dresses and acts on the battlefield can determine its treatment under the law, and can even determine what activities the force may lawfully conduct.[244] Because unconventional warfare relies on stealth,[245] modern rules on a force's legal status pose the second major challenge for an unconventional warfare campaign. This section will again show that unconventional warfare survives scrutiny, and that an effective campaign may be conducted under modern rules governing a force's legal status.

When conducting an unconventional warfare campaign, a commander considers the legal status of the force in two ways: First, what does a force have to do to receive lawful combatant status? This is important because when a force is recognized as lawful combatants, their authority is at its maximum—they receive full prisoner of war protections and may operate

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[243] *See id.* para. 3-6 to 3-41.
[244] DOD LAW OF WAR MANUAL, *supra* note 34, para. 4.1
[245] T.C. 18-01, *supra* note 1, para. 2-21 to 2-26.

to the maximum extent permitted by the LOAC rules discussed above.[246] Second, the commander also considers when the force may operate without lawful combatant status. It is not a violation of international law for resistance movements to operate as unprivileged belligerents.[247] Caution must be employed, however, because in addition to losing combatant immunity, a force so operating will incur more restrictions on what it can and cannot do—restrictions ranging from the prohibitions on perfidy and treachery to the LOAC's prohibition of assassination.

1. Privileged Belligerency: When is a Force Legally Protected?

The question of combatant immunity is one where modern international law—even as interpreted by the United States—provides an advantage to an unconventional warfare campaign. In fact, modern international law provides many situations where members of the resistance movement will be able to maintain combatant immunity. Even without combatant immunity, captured members of the resistance force are entitled to many substantive legal protections. This is important even when the enemy state does not follow the law, because an astute commander can impose significant diplomatic and information operations costs for every violation.

In international armed conflict, the LOAC provides substantial protections for members of a resistance movement. Certain portions of the force will qualify for combatant immunity, and even those who do not qualify for combatant immunity are entitled to significant protection. In particular, unprivileged members of a resistance movement may not be executed or punished without a fair trial, and torture or mistreatment of unprivileged belligerents is a war crime.[248]

Historically, this was not always the case. Prior to 1949, it was unclear whether members of a resistance movement were entitled to international legal protections or combatant immunity, especially when operating in occupied territory.[249] Under the Hague Convention of 1907, irregular

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[246] *See supra* Section V.A.
[247] *See infra* Section V.B.2.
[248] Trial of Gerhard Friedrich Ernst Flesch, SS Obe. Sturmbannführer, Oberregierungsrat, VI U.N. L. REP. 111, 115-17 (Frostating Lagmannsrett, Nov.–Dec., 1946, Supreme Court of Norway, Feb., 1948).
[249] Braun, *supra* note 33, at 5.

forces could attain the status of "belligerents" if they met four (now classic) requirements:

> 1. To be commanded by a person responsible for his subordinates;
>
> 2. To have a fixed distinctive emblem recognizable at a distance;
>
> 3. To carry arms openly; and
>
> 4. To conduct their operations in accordance with the laws and customs of war.[250]

Scholars also included an "implied requirement" that the hostilities be conducted "on behalf of a government of some kind."[251] Once belligerent status was obtained, a member of an irregular force obtained the rights of a combatant, including prisoner of war status under the 1929 Geneva Convention.[252]

Despite the language of the treaties, before World War II it was unclear whether irregulars operating in occupied territory could obtain belligerent status or receive substantive legal protections.[253] The 1940 edition of the United States law of war manual, for example, stated that those taking up arms against the occupying military force in occupied territory were "war rebels" committing the offense of "war treason."[254] However, the language of the manual was far from clear, and did not explicitly address whether such "war rebels" could be treated as belligerents if they complied with the Hague Convention requirements.

After World War II, war crimes tribunals were forced to squarely address this question. In many cases, Nazi or Japanese soldiers had executed members of resistance forces either without trial or after

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[250] Annex to the Hague Convention of 1907, Regulations Respecting The Laws And Customs Of War On Land art 1, Oct. 18, 1907, 36 Stat. 2277, T.S. 539.
[251] Braun, *supra* note 33, at 5.
[252] *Id.*
[253] *Id.* at 3–5.
[254] U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, RULES OF LAND WARFARE para. 349 (1 Oct. 1940). *See also id.* para. 205–14.

summary trials.[255] In their defense, the Axis officials argued that they were merely trying and executing unprivileged belligerents for acts of "war treason."[256] While the language of pre-war manuals may have been ambiguous, Allied war crimes tribunals reached several clear holdings. First, they held that irregular forces who met the requirements of the 1907 Hague Convention were entitled to combatant immunity and should have been treated as prisoners of war, even when they operated in occupied territory.[257] Second, while Allied war crimes tribunals acknowledged that unprivileged belligerents could be tried and executed,[258] their holdings recognized that even an unprivileged belligerent was entitled to a fair trial, and the tribunals proved quite willing to examine the details of the trial to determine whether it was fair.[259]

For example, in 1946 Sergeants Major Shigeru Ohashi and Yoshifumi Komoda were accused of murdering several resistance members on New Britain (now part of Papua New Guinea).[260] In their defense, the two Sergeants Major claimed that they had executed the resistance members after a trial.[261] While the evidence showed that there had been a trial, it lasted only about fifty minutes, no defense counsel or spokesperson was appointed, and the resistance members were executed about an hour after the verdict.[262] This trial was held to be inadequate, and the Sergeants Major were convicted.[263] Notably, the court members were instructed to look beyond the trial rules provided under Japanese military law, and the

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[255] The Trial of Sergeant-Major Shigeru Ohashi and Six Others, V U.N. L. REP. 25, 28, 30 (Australian Military Court, Rabaul, Mar. 20–Mar. 23, 1948); The Trial of Captain Eitaro Shinohara and Two Others, V U.N. L. REP. 32, 34 (Australian Military Court, Rabaul, Mar. 30–Apr. 1, 1946); The Trial of Karl Buck and Ten Others, V U.N. L. REP. 39, 43–44 (British Military Court, Wuppertal, Germany, May 6–May 10, 1946).

[256] Trial of Captain Eikichi Kato, V U.N. L. REP. 37 (Australian Military Court, Rabaul, May 7, 1946).

[257] The Trial of Sergeant-Major Shigeru Ohashi and Six Others, V U.N. L. REP. 25, 28, 30 (Australian Military Court, Rabaul, Mar. 20–Mar. 23, 1948).

[258] *Id.* at 27–28.

[259] The Trial of Captain Eitaro Shinohara and Two Others, V U.N. L. REP. 32, 34 (Australian Military Court, Rabaul, Mar. 30–Apr. 1, 1946). *See also* The Trial of Karl Buck and Ten Others, V U.N. L. REP. 39, 43–44 (British Military Court, Wuppertal, Germany, May 6–May 10, 1946); The Trial of Karl Adam Golkel and Thirteen Others, V U.N. L. REP. 45, 51–53 (British Military Court, Wuppertal, Germany, May 15–May 21, 1946); and The Trial of Werner Rohde and Eight Others, V U.N. L. REP. 54, 57–58 (British Military Court, Wuppertal, Germany, May 29–June 1, 1946).

[260] The Trial of Sergeant-Major Shigeru Ohashi and Six Others, *supra* note 290.

[261] *Id.*

[262] *Id.*

[263] *Id.* at 30–31.

members were instructed that certain minimum standards must be met before the proceeding counted as a trial.[264]

Lastly, the tribunals punished torture and other mistreatment of unprivileged belligerents as a war crime.[265] The end result was a legal regime that, even before the 1949 Conventions, held that belligerents (even irregulars) could be entitled to prisoner of war protections, that even unprivileged belligerents could not be executed or punished without a fair trial, and that torture or mistreatment of unprivileged belligerents was a war crime.

The 1949 Geneva Conventions significantly improved the situation of members of resistance movements in IAC. In contrast to the ambiguous requirements of World War II, the Geneva Conventions expressly stated that members of irregular forces would be treated as prisoners of war even if they operated in occupied territory.[266] Article 4 granted prisoner of war status to the following:

> Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:
>
> (a) that of being commanded by a person responsible for his subordinates;
>
> (b) that of having a fixed distinctive sign recognizable at a distance;
>
> (c) that of carrying arms openly;
>
> (d) that of conducting their operations in accordance with the laws and customs of war.[267]

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[264] *Id.*; *see also* Trial of Captain Eikichi Kato, *supra* note 289.
[265] Trial of Gerhard Friedrich Ernst Flesch, SS Obe. Sturmbannführer, Oberregierungsrat, VI U.N. L. REP. 111, 115–17 (Frostating Lagmannsrett, Nov.–Dec., 1946, Supreme Court of Norway, Feb., 1948).
[266] Braun, *supra* note 33, at 6–9.
[267] Geneva Convention III, art. 4.

This language was adopted over the objections of some nations, who would have inserted a requirement that irregular forces operating in occupied territory must control territory of their own and be able to send and receive communications.[268]

In addition to granting prisoner of war status to organized guerrillas in occupied territory, the 1949 conventions also expanded protections for unprivileged guerrillas not entitled to combatant immunity.[269] The Geneva Convention Relative to the Protection of Civilian Persons in Time of War (GCIV) applied to even those unprivileged belligerents operating within occupied territory, and intended to protect them from the worst abuses seen during World War II.[270] Even unprivileged guerrillas became entitled to significant procedural and substantive protections.[271] The 1949 conventions settled the question of whether resistance forces in occupied territory could obtain combatant immunity, and even today they lay out the key rules for obtaining privileged belligerent status: the adoption of at least a non-standard uniform and the requirement that the resistance group belong to a party to the conflict.

In a classic article, W. Hays Parks discussed the non-standard uniform, defining it as "a hat, a scarf, or an armband—any device recognizable in daylight with unenhanced vision at a reasonable distance."[272] The DoD law of war manual clarifies this description by stating that "the sign suffices if it enables the person to be distinguished from the civilian population,"[273] and providing the examples of a "helmet or headdress that makes the silhouette of the individual readily distinguishable from that of a civilian . . . , a partial uniform (such as a uniform jacket or trousers), load bearing vest, armband, or other device . . . ."[274] In addition to the device, arms must be carried openly.[275] This does not mean that concealed weapons are categorically forbidden, but some weapons must be visible.[276] Therefore, as long as the other Article 4 requirements are met, advisors and members of the resistance movement may conduct combat operations

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[268] Braun, *supra* note 33, at 7.
[269] *Id.* at 7–8.
[270] *Id.*
[271] *Id.* at 7–9.
[272] W. Hays Parks, *Special Forces' Wear of Non-Standard Uniforms*, 4 CHI. J. INT'L L. 493, 517 (2003).
[273] DOD LAW OF WAR MANUAL, *supra* note 34, para. 4.6.4.1.
[274] *Id.* para. 4.6.4.1.
[275] *Id.* para. 4.6.5.
[276] *Id.*; Dinstein, *supra* note 195, at 162.

in a non-standard uniform without risking committing perfidy or risking loss of combatant immunity.[277]

However, there is less clarity on how long the non-standard uniform must be worn, despite the importance of this question for guerrilla forces and their advisors. In general, the "fixed distinctive emblem must be worn throughout every military operation against the enemy in which the combatant takes part (throughout means from start to finish, namely, from the beginning of deployment to the end of disengagement), and the emblem must not be deliberately removed at any time in the course of the operation."[278] However, "combatants are not bound to wear the distinctive emblem when discharging duties not linked to military operations (such as training or administration)."[279] The key is that the force must wear the emblem and carry weapons openly come what may, and may not adopt a tactic of hiding weapons and signs upon the approach of the enemy.[280]

While many states supported relaxing these requirements in Additional Protocol 1,[281] the United States' position is more restrictive, and compliance with the United States' view will necessarily comply with Additional Protocol 1.[282] Finally, under the United States' view, customary international law requires the armed group as a whole to fulfill the Article 4 criteria, meaning that commanders cannot gain protection by complying for merely one specific operation.[283]

In addition to wearing some form of uniform, members of the resistance group must belong to a party to the conflict.[284] Because state authority may be granted orally, members of a resistance movement sponsored by a state's unconventional warfare campaign could easily belong to a party to the conflict.[285] This allows them to obtain combatant

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277 DOD LAW OF WAR MANUAL, *supra* note 34, para. 4.6.
278 Dinstein, *supra* note 195, at 161.
279 *Id.*
280 DOD LAW OF WAR MANUAL, *supra* note 34, para. 4.6.4–4.6.5.
281 Additional Protocol I; Memorandum from Joint Chiefs of Staff to Secretary of Defense, subject: Review of the 1977 First Additional Protocol to the Geneva Conventions of 1949 (3 May 1985) at 31–40.
282 DOD LAW OF WAR MANUAL, *supra* note 34, para. 19.20; Memorandum from Joint Chiefs of Staff to Secretary of Defense, *supra* note 281, at 31–40.
283 DOD LAW OF WAR MANUAL, *supra* note 34, para. 4.2.1.1.
284 Geneva Convention III, art. 4; DOD LAW OF WAR MANUAL, *supra* note 34, para. 4.6.2; Dinstein, *supra* note 195, at 160. *See also* Huntley & Levitz, *supra* note 32, at 483–87.
285 DOD LAW OF WAR MANUAL, *supra* note 34, para. 4.6.2.

immunity and distinguishes them from private persons who engage in hostilities.[286]

The landscape shifts when unconventional warfare is conducted in a NIAC. Recall that unconventional warfare will generally be a NIAC when conducted inside a territorial state against a non-state armed group.[287] In such a situation, while the non-state armed group will generally lack legal authority to take action against the resistance movement,[288] the territorial state is in a different situation. The following section will consider the status of the force with respect to the territorial state.

Advisors, as members of a state's armed forces, will generally receive a form of immunity similar to—but broader than—combatant immunity. Combatant immunity is limited to IAC, and is only granted to forces meeting the Article 4 requirements of the Third Geneva Convention.[289] However, at least since the *Caroline* case, international law has recognized that a state may not prosecute agents of a foreign state who lawfully participate in a NIAC.[290] Because no law imposes a duty to wear a uniform

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[286] *Id.* para. 4.18.3.

[287] *See supra* sec. IV.A.2 for further discussion.

[288] DOD LAW OF WAR MANUAL, *supra* note 34, para. 17.17.2.

[289] Geneva Convention III, art. 4; OPERATIONAL LAW HANDBOOK, *supra* note 88, at 182.

[290] DOD LAW OF WAR MANUAL, *supra* note 34, para. 17.4.1.1 (citing Daniel Webster, *Letter to Mr. Fox*, Apr. 24, 1841, *reprinted in* THE DIPLOMATIC AND OFFICIAL PAPERS OF DANIEL WEBSTER, WHILE SECRETARY OF STATE 124 (1848)). The relevant text of the letter reads as follows:

> The government of the United States entertains no doubt that, after this avowal of the transaction, as a public transaction, authorized and undertaken by the British authorities, individuals concerned in it ought not, by the principles of public law, and the general usage of civilized states, to be holden personally responsible in the ordinary tribunals of law, for their participation in it. And the President presumes that it can hardly be necessary to say that the American people, not distrustful of their ability to redress public wrongs, by public means, cannot desire the punishment of individuals, when the act complained of is declared to have been an act of the government itself.

People v. McLeod, 1 HILL 377 (N.Y. Sup. Ct. 1841); JOHN FABIAN WITT, LINCOLN'S CODE: THE LAWS OF WAR IN AMERICAN HISTORY 113–17 (2012). While ex parte Quirin purports to impose a uniform requirement during armed conflicts, it is the *Caroline* case, not *ex parte Quirin*, that would apply. *Ex parte* Quirin, 317 U.S. 1, 12–16 (1942). In *Quirin*, the German saboteurs were carrying out their hostile activities against the territorial state, not against a non-state armed group that the territorial state itself had a duty to suppress. *Ex parte* Quirin, 317 U.S. 1, 12–16 (1942). The facts of the *Caroline* case are exactly on point,

in a NIAC, *Caroline* immunity is likely to be broader than the combatant immunity provided in a NIAC. This is supported by the principle that the territorial state has an obligation to prevent the use of its territory by the non-state armed group,[291] and the principle that the territorial state generally lacks the ability to interfere with another state's exercise of the right of self-defense.[292] Because advisors are not taking military action against the territorial state, and because the territorial state itself has an obligation to act against the non-state armed group, the territorial state is unlikely to be able to insist that advisors adopt certain distinctive insignia.[293]

This rationale would directly apply to the "expeditionary targeting force" that the United States has sent to assist the YPG in Syria.[294] Notably, they are in precisely the same situation as the British colonial militia involved in the *Caroline* incident, who crossed the border and entered the United States to engage a non-state armed group threatening British colonial authorities in Canada.[295] Like the militia in the *Caroline* incident, the targeting force members are exercising public authority on behalf of the government of the United States, not operating in their personal capacity.[296] Therefore, they have immunity for their official acts under international law.

Arguably, this same rationale would apply to other members of the resistance movement, including guerrillas, the auxiliary, and the underground, so long as they confine their activities to those directed against the non-state armed group. However, there is no precedent for such a radical expansion of *Caroline* immunity, and it is more likely that members of the resistance movement (as opposed to advisors) would be considered simply unprivileged belligerents subject to territorial state jurisdiction. In such a case, they would be entitled to the protections of Common Article III to the Geneva Conventions, as well as Additional

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and in *Caroline* the only question was whether the fighters acted pursuant to state authority, not whether they were in uniform. People v. McLeod, 1 HILL 377 (N.Y. Sup. Ct. 1841).

[291] DINSTEIN, *supra* note 87, at 214.

[292] *See* Deeks, *supra* note 109, at 494–95; Schmitt, *supra* note 112, at 40.

[293] Ian Henderson, *Civilian Intelligence Agencies and the Use of Armed Drones*, *in* 13 YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW 144 (M.N. Schmitt et al. eds., 2010).

[294] Missy Ryan, *In Intensified Islamic State Effort, U.S. to Send Elite Targeting Force to Iraq*, WASH. POST (Dec. 1, 2015), http://wpo.st/lEPF1.

[295] DOD LAW OF WAR MANUAL, *supra* note 34, para. 17.4.1.1 (citing Webster, *supra* note 290); Letter from Henry S. Fox (Jan. 8, 1838), *in* DOCUMENTS OF AMERICAN HISTORY 289–91 (6th ed., 1958).

[296] *See id*.

Protocol II.[297] In effect, this would leave them with protections similar to those of an unprivileged belligerent during international armed conflict. However, Article 6 of Additional Protocol II suggests that unprivileged members of resistance movements should generally be given "the broadest possible amnesty" after the conflict.[298] While this is not mandatory, it may provide significant diplomatic and public opinion support for imprisoned members of the resistance movement.

2. Unprivileged Belligerency: When Does Status Limit What a Force Can Do?

There will be times, especially during the early phases of unconventional warfare, when operational risk prevents the force from complying with the requirements for combatant immunity. There are also portions of the force, such as the underground and auxiliary, that conduct clandestine activities and are unlikely ever to meet the conditions for privileged belligerency. It is not an affirmative violation of international law for the force to operate out of uniform.[299] However, when operating in civilian clothes, the force will not receive prisoner of war status or combatant immunity, and the force incurs additional restrictions on how it may operate. These restrictions go beyond the general LOAC rules discussed above, and are uniquely tied to the force's status. They include the prohibition on perfidy and the law of armed conflict prohibition of assassination.

The first restriction is the prohibition on perfidy. While international law does not prevent guerrillas from fighting out of uniform,[300] it does

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[297] Geneva Convention III, art. 3; Additional Protocol II, art. 2.

[298] Additional Protocol II, art. 6.

[299] Yoram Dinstein, *The Distinction Between Unlawful Combatants and War Criminals*, *in* INTERNATIONAL LAW AT A TIME OF PERPLEXITY: ESSAYS IN HONOUR OF SHABTAI ROSENNE (Yôrām Dinšțein & Mala Tabory eds., 1989); Dinstein, *supra* note 195, at 154–55; Jelena Pejic, *The European Court of Human Rights' Al-Jedda judgment: the oversight of international humanitarian law*, 93 INT'L REV. RED CROSS 837, 846 (2011).

[300] Baxter, *supra* note 33, at 502; Kenneth Anderson, *Readings: Civilian Intelligence Agencies and the Use of Armed Drones by Ian Henderson*, LAWFARE (June 27, 2014 3:00 PM), https://www.lawfareblog.com/readings-civilian-intelligence-agencies-and-use-armed-drones-ian-henderson; Henderson, *supra* note 293, at 144. Despite pre-release controversy, the DoD's Law of War Manual has affirmed that this remains the state of the law. Hays Parks & Edwin Williamson, *Where is the Law of War Manual?*, WEEKLY STANDARD (July 22, 2013), http://www.weeklystandard.com/

prohibit killing or wounding by feigning a civilian, non-combatant status, or by feigning another protected status.[301] The test here is whether there is an intent to deceive the target and whether the deception "is the proximate cause of the killing . . . [or] wounding."[302] However, it is not perfidy to feign civilian status to commit sabotage or espionage.[303]

This means that a force will be more limited when enemy personnel must be directly engaged. Because sabotage is permissible even when feigning civilian status, a commander could order a member of the auxiliary or underground to clandestinely destroy enemy property without committing perfidy.[304] But when enemy personnel must be directly engaged, the guerrilla force is more limited. While it may infiltrate or exfiltrate from the target in civilian clothes and with concealed weapons, the force should adopt a distinctive sign and carry weapons openly during the attack itself.[305] While observance of these rules will not afford the force privileged status, they likely fulfill the force's duty under international law.

The second restriction is the LOAC prohibition on assassination.[306] However, the LOAC prohibition must be distinguished from several similar rules. First, there is a general prohibition of assassination in peacetime, where it is recognized that "[i]n peacetime, the citizens of a nation—whether private individuals or public figures—are entitled to immunity from intentional acts of violence by citizens, agents, or military forces of another nation."[307] Second, there is the United States executive

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where-is-the-law-of-war-manual/article/739267; DOD LAW OF WAR MANUAL, *supra* note 34, para. 4.17.4–4.17.5.

[301] Additional Protocol I, art. 37. While Article 37 prohibits capturing the enemy by feigning protected status, the United States does not believe that this reflects customary international law. DOD LAW OF WAR MANUAL, *supra* note 34, para. 5.22.2.1.

[302] Parks, *supra* note 272, at 519, 541–42. *But see* Huntley & Levitz, *supra* note 32, at 495–97 (arguing that the direct participation in hostilities standard "sheds light on which [surrogate] activities would require those conducting them to distinguish themselves from the civilian population . . ."). The DoD *Law of War Manual* states that sabotage is permissible out of uniform, lending strong support to W. Hays Parks' test. DOD LAW OF WAR MANUAL, *supra* note 34, paras. 4.17.3, 4.17.4, 5.22.2.

[303] DOD LAW OF WAR MANUAL, *supra* note 34, para. 5.22.2.

[304] *Id*. para. 4.17.5.

[305] *See supra* notes 339-41 and accompanying test for the prohibition on feigning civilian status where it is the proximate cause of killing or wounding.

[306] Michael N. Schmitt, *State Sponsored Assassination in International and Domestic Law*, 17 YALE J. INT'L L. 609, 628–32 (1992).

[307] Parks, *supra* note 33, at 4.

order's prohibition on assassination.[308] While important, the executive order is a matter of United States policy that falls outside the scope of this article.[309]

The LOAC rule on assassination has been said to prohibit the selective killing of the enemy by persons not in uniform.[310] Defined this way, the prohibition on assassination would be a significant limitation on resistance movement personnel operating out of uniform. However, the true scope of the rule is much narrower. It contains "two elements: the targeting of an individual, and the use of treacherous means."[311] The first element requires aiming the attack at a particular, selected individual, and is relatively straightforward.[312] The second element, the use of "treacherous means," is much more difficult. At a minimum, the element includes perfidious conduct.[313] This means that where the attackers feign protected status in the manner described above to attack a selected individual, the attack violates both the prohibition on assassination and the rule against perfidy.[314] However, treacherous conduct can be broader than perfidy, and includes offering a bounty for the killing of a particular person[315] or declaring that an offer of surrender will not be accepted.[316]

This leaves a relatively straightforward rule for unconventional warfare. Perfidy—the feigning of a protected status where the deception proximately causes death or injury—violates both the rule against perfidy and the rule against assassination, while offering a bounty or declaring that a person will receive no quarter violates the rule against assassination.

C. Managing Legal Status in Syria: The People's Protection Units (YPG)

The YPG is an example of a successful resistance movement operating against a non-state armed group that controls territory.[317] While the YPG

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[308] Exec. Order No. 12,333, 40 Fed. Reg. 59941, 59952 (1981).
[309] *See* Parks, *supra* note 33, at 4.
[310] Kelly, *supra* note 33, at 103, 106.
[311] Schmitt, *supra* note 306, at 632.
[312] Schmitt, *supra* note 306, at 632; Kelly, *supra* note 33, at 102–103.
[313] Schmitt, *supra* note 306, at 634–35.
[314] *Id.*
[315] *Id.* at 635.
[316] Parks, *supra* note 33, at 5.
[317] *See generally* Ben Hubbard, *On the Road in Syria, Struggle All Around*, N.Y. TIMES, Nov. 12, 2015, at A1; Yaroslav Trofimov, *Russian Intervention Emboldens Syrian Kurds*,

does not have combatant immunity, it has been able to manage its legal status effectively while generally complying with LOAC. However, this area of the law offers a critical opportunity—one that has not yet been taken—to secure better treatment for captured YPG fighters and force adversaries to bear the costs when they violate international law.

1. The YPG: Privileged Belligerents?

The YPG is one of the most effective fighting forces in Syria,[318] but determining whether its members are privileged belligerents requires analysis under Article 4 of the Third Geneva Convention. Open-source media frequently depicts YPG fighters carrying arms openly and wearing full military-style uniforms.[319] Reports depict a fairly rigid command structure that makes efforts to conduct its operations in compliance with the law of war.[320] Also, the YPG has an argument that it belongs to a party to the conflict given the significant support it receives from the United States.[321] However, the YPG would only become privileged belligerents if the Syrian conflict were to become an IAC, which would trigger the full protections of the 1949 Geneva convention.[322] In the absence of an IAC, YPG fighters remain unprivileged belligerents.[323]

2. The YPG: The Fair Trial Requirement

However, as discussed above, even unprivileged members of a resistance movement are entitled to significant protections under the LOAC. Most important is the requirement that any trial comply with the minimum standards of Common Article 3 and Additional Protocol II. This means that members of the territorial state government could be found criminally liable for carrying out punishment on captured YPG members

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WALL ST. J. (Jan. 14, 2016), http://www.wsj.com/articles/russian-intervention-emboldens-syrian-kurds-1452773070.

318 Gordon & Schmitt, *supra* note 66.

319 *Id*.

320 Letter from General Command of the People's Protection Units *to Human Rights Watch* (22 July, 2015), https://www.hrw.org/sites/default/files/supporting_resources/letter_from_ypg_to_human_rights_watch150722.pdf.

321 Davison, *supra* note 14.

322 Geneva Convention III, art. 4.

323 Agence France-Presse, *Dutch man suspected of killing Isis fighter could face murder charge*, GUARDIAN (Jan. 15, 2016), http://www.theguardian.com/world/2016/jan/15/dutch-man-suspect-killing-isis-fighter-arrest.

if trials were not conducted by regularly constituted courts applying international or domestic law in effect at the time of the offense,[324] or if the trials were not substantively fair.[325] In addition, should YPG members be tried by the territorial state, there is significant support for the position that they should be given broad amnesty after the conflict has ended.[326]

3. The YPG: Undue Interference by the Territorial State

Even in the absence of formal combatant immunity, there is a strong argument that Syrian government interference with the YPG could breach its duty to prevent attacks from its territory. Recall the broader context of U.S. support to the YPG: The United States is acting in self-defense and collective self-defense of Iraq pursuant to Article 51 of the U.N. Charter.[327] It is doing so because the Syrian government is unable or unwilling to prevent ISIS attacks from its territory.[328] While the Syrian government is not obligated to afford the YPG combatant immunity, systematic arrests and trials of YPG members for acts directed against ISIS (as opposed to the Syrian government) likely breaches Syria's duty to prevent ISIS from using its territory to conduct attacks. This is especially true if the Syrian government is not taking similar action against ISIS.

VI. Conclusion

From the liberation of Europe[329] to Kobane's stand against ISIS,[330] partisan fighters have a noble history of struggle against tyranny and

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[324] Additional Protocol II, art. 6.
[325] Trial of Captain Eikichi Kato, V U.N. L. REP. 37 (Australian Military Court, Rabaul, May 7, 1946).
[326] Additional Protocol II, art. 6.
[327] Preston, *supra* note 16.
[328] *Id.*
[329] FOOT, *supra* note 25 (describing United States and British support to the French resistance during World War II); PATRICK K. O'DONNELL, THE BRENNER ASSIGNMENT (2008) (describing Office of Strategic Services support to anti-fascist Italian partisans during World War II); HAUKELID, *supra* note 185 (describing Norwegian partisan attacks against the Nazi nuclear program); THOMAS GALLAGHER, ASSAULT IN NORWAY (Lyons Press ed. 2002) (describing Norwegian partisan attacks against the Nazi nuclear program); OFFICE OF STRATEGIC SERVICES, THE SECRET WAR REPORT OF THE OSS (Anthony Cave Brown ed., 1976) (describing United States support to resistance movements during World War II).
[330] Barnard & Shoumali, *supra* note 13, at A8.

oppression.[331] While international law has developed since the famous unconventional warfare campaigns of World War II, unconventional warfare can be carried out under the modern LOAC. This article has identified the legal rules governing unconventional warfare and applied them to the two unconventional warfare campaigns the United States is currently conducting in Syria, finding that both comply with the modern LOAC.

Applying international law's *jus ad bellum* rules to these unconventional warfare campaigns revealed several key insights. First, it is possible for unconventional warfare campaigns to avoid triggering armed conflict, though this will necessarily limit their scope. Second, unconventional warfare may be conducted in a NIAC without triggering IAC with the territorial state. Should mistakes occur due to confusion on the battlefield or manipulation by the partner force, it is possible to remedy the situation and avoid giving the territorial state legal justification for continued IAC.

Examination of *jus in bello* rules revealed a wide scope of permissible activities for United States-supported resistance movements and their SOF advisors. However, risks are present. While a partner force has expansive authority to attack targets, conduct detainee operations and trials, carry out sabotage operations, and requisition supplies, U.S. advisors must carefully monitor partner force conduct to prevent violations and report them if they occur. Finally, this article asserted that many resistance movements will be able to achieve lawful combatant status in IAC, and that even unprivileged members of the movement retain significant protections under the law of war. In particular, resistance fighters could operate out of uniform without affirmatively violating the law of war so long as they avoid perfidy and assassination.

Overall, unconventional warfare can be conducted under the modern law of war. While portions of the force may be subject to prosecution by a hostile power, a properly designed unconventional warfare campaign will comply with international law and the LOAC. This leaves the unconventional warfare campaigns pioneered by the partisans and resistance fighters of World War II as a viable option for forces struggling in conflicts against oppression today. Recognizing the lawfulness of

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[331] ANNE APPLEBAUM, IRON CURTAIN: THE CRUSHING OF EASTERN EUROPE 1944–1956 at 90–109 (2012) (describing anti-Nazi and anti-Soviet Polish partisans at the close of World War II).

unconventional warfare allows the United States to support properly organized and properly led partisans as they fight their own battles, liberate their own country, and establish their own government with the goal of a just and lasting peace.