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**An Investigation of the Relationship  
between International Law, International  
Politics and the State using Syria  
as a Case Study**

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## **DECLARATION OF ORIGINAL WORK**

I, Caroline Sweeney, hereby certify that neither this thesis nor any part thereof has been or is currently being submitted for any degree at any other university. I also certify that this is all of my own work and that the findings are the result of my own investigations, except where acknowledged and referenced.

Name: Caroline Sweeney

Date: 20 September 2018

## ABSTRACT

The thesis investigates the relationship between international law, international politics and the state using Syria as a case study. Syria was chosen because it has historically been the site of regional and international tussles for influence of which the post-Arab Spring proxy war is but the latest example. The research is interdisciplinary in that it utilises analytical tools from the international law and international relations disciplines. It initially examines the most prominent theoretical approaches to international law and international relations focussing on their treatment of the relationship between international law, international politics and the state. It then tests their respective assertions against Syria's actual experience from the late Ottoman period to mid-2018.

The thesis reveals that no one theoretical approach to international law or international relations has captured the precise contours of the relationship between international law, international politics and the state. Some of their assertions have been confirmed by Syria's experience, whereas other have been challenged. Three core themes emerge: (i) the threat that inequality and injustice pose to order; (ii) the repeated betrayal of Middle Eastern populations by Western actors; and (iii) the sense that, on balance, throughout history international law has operated to the detriment of the Syrian people.

The analysis resurrects many of the age-old controversies that have historically permeated the international relations and international law disciplines, most notably, the 'order versus justice' and 'realism versus idealism' dichotomies. These controversies need to be rigorously debated in order to determine whether international law can be effectively utilised for progressive ends or whether it is irreparably compromised by its structural bias towards the world's most powerful actors. Finally, the thesis demonstrates the importance of in-depth knowledge of the relevant historical, political and socio-economic context when responding to complex crises and the potential value of interdisciplinary approaches.

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## TABLE OF ABBREVIATIONS

### JOURNALS

AFLRev	Air Force Law Review
AmHistRev	The American Historical Review
AJIL	American Journal of International Law
AmJJuris	American Journal of Jurisprudence
AmPolSciRev	American Political Science Review
ASIL PROC	American Society of International Law Proceedings
Aust YBIL	Australian Yearbook of International Law
BYIL	British Yearbook of International Law
CalWInt'l LJ	California Western Law Journal
Case WResJInt'l L	Case Western Reserve Journal of International Law
ChiJInt'l L	Chicago Journal of International Law
Chinese JIL	Chinese Journal of International Law
ColumJTransnat'l L	Columbia Journal of Transnational Law
ColumLRev	Columbia Law Review
CompPolStud	Comparative Political Studies
ContempSecPol'y	Contemporary Security Policy
Coop& Conflict	Cooperation and Conflict
Cornell Int'l LJ	Cornell International Law Journal
CrimLF	Criminal Law Forum
DenvJInt'l L& Pol'y	Denver Journal of International Law and Policy
EJIL	European Journal of International Law
EJIR	European Journal of International Relations
EJIS	European Journal of International Studies
HRLRev	Human Rights Law Review
HumRtsQ	Human Rights Quarterly
ICLQ	International and Comparative Law Quarterly
IntCLR	International Criminal Law Review
Int'l JMidEStud	International Journal of Middle East Studies
Int'l Org	International Organization
Int'lLStud	International Law Studies Series (US Naval War College)
Int'lStudQ	International Studies Quarterly
Int'lStudRev	International Studies Review
IntRel	International Relations
JAAS	Journal of Asian and African Studies
JC&SL	Journal of Conflict and Security Law
JConflict Resol	Journal of Conflict Resolution
JEuropIntegration	Journal of European Integration
JICJ	Journal of International Criminal Justice

JPR	Journal of Peace Research
LJIL	Leiden Journal of International Law
LNOJ	League of Nations Official Journal
MelbJInt'l L	Melbourne Journal of International Law
MichStInt'l LRev	Michigan State International Law Review
Middle EJ	Middle East Journal
Middle EQ	Middle East Quarterly
Middle EPol'y	Middle East Policy
Middle EStud	Middle Eastern Studies
MilLRev	Military Law Review
NordJInt'l L	Nordic Journal of International Law
NYLSchLRev	New York Law School Law Review
NYUJInt'l L & Pol	New York University Journal of International Law and Politics
PolSciQ	Political Science Quarterly
RevInt'l Aff	Review of International Affairs
Round Table	The Round Table: the Commonwealth Journal of International Affairs
San Diego Int'l LJ	San Diego International Law Journal
Sec Dialogue	Security Dialogue
StanLRev	Stanford Law Review
StudCompInt'l Dev	Studies in Comparative International Development
Survival	Survival: Global Politics and Strategy
Transnat'l L& ContempProbs	Transnational Law & Contemporary Problems
TCLR	Trinity College Law Review
TWQ	Third World Quarterly
UCinLRev	University of Cincinnati Law Review
UNYBILC	United Nations Yearbook of the International Law Commission
VaJInt'l L	Virginia Journal of International Law
Yale LJ	Yale Law Journal
WldAff	World Affairs
WldPol	World Politics

#### **OTHER PRINCIPAL ABBREVIATIONS**

AI	Amnesty International
AKP	Justice and Development Party
AMUF	Authorization for Use of Military Force Against Iraq Resolution of 2002
AQI	Al Qaeda in Iraq
CAT	Committee Against Torture/Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

CCPR	Human Rights Committee
CDS	Council of Democratic Syria
CEDAW	Convention/Committee on the Elimination of All Forms of Discrimination Against Women
CERD	Committee on the Elimination of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CIA	US Central Intelligence Agency
CIL	Customary International Law
CRC	Convention on the Rights of the Child/Committee on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
CSP	Country Strategy Paper
CTS	Consolidated Treaty Series
CUP	Cambridge University Press
DFNS	Democratic Federation of Northern Syria
DMZ	demilitarised zone
ECHR	European Convention on Human Rights
ECOSOC	UN Economic and Social Council
ECtHR	European Court of Human Rights
EMP	European-Mediterranean Partnership
ENKS	Kurdish National Council
ENPI	European Neighbourhood and Partnership Instrument
EU	European Union
EUROPOL	The European Union Agency for Law Enforcement Cooperation
FARC	The Revolutionary Armed Forces of Colombia
FDI	foreign direct investment
FSA	Free Syrian Army
G77	Group of 77
GDP	gross domestic product
GONGO	government-sponsored non-governmental organisation
HDI	Human Development Index
HNC	High Negotiating Committee (of the Syrian opposition)
HST	Hegemonic Stability Theory
HTS	Hay'et Tahrir al Sham
HRW	Human Rights Watch
IAC	international armed conflict
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights

ICISS	The International Commission on Intervention and State Sovereignty
ICJ	International Court of Justice
ICJ Rep	Reports of the International Court of Justice
ICL	International Criminal Law
ICRC	International Committee of the Red Cross
ICT	International Criminal Tribunal for the Former Yugoslavia
IDF	Israel Defense Forces
IDI	Institut de Droit International
IDP	internally displaced person
IFI	international financial institution
IGO	intergovernmental organisation
IHDI	Inequality-Adjusted Human Development Index
IHL	International Humanitarian Law
IHRL	International Human Rights Law
ILC	UN International Law Commission
ILO	International Labour Organization
ILR	International Law Reports
IRGC	Islamic Revolutionary Guard Corps
ISI	Islamic State of Iraq
ISIL	Islamic State of Iraq and the Levant
ISIS	Islamic State of Iraq and al Sham
JAN	Jabhat al Nusra
JFS	Jabhat Fatah al-Sham
JIM	Joint Investigative Mechanism of the UN and the Organisation for the Prohibition of Chemical Weapons
KDP	Kurdish Democratic Party
KNC	Kurdish National Council
KRG	Kurdistan Regional Government
LCC	Local Coordination Committees of Syria
LNTS	League of Nations Treaty Series
MDG	Millennium Development Goal
MENA	Middle East North Africa
MNC	participating non-EU Mediterranean country in EMP
NAM	Non-aligned Movement
NATO	North Atlantic Treaty Organization
NCB	National Coordination Bureau for Democratic Change
NDF	National Defence Forces
NGO	non-governmental organisation
NIAC	non-international armed conflict
NIEO	New International Economic Order
NILP	New International Legal Process
NIP	National Indicative Programme
NPF	National Progressive Front

NSA	non-state actor
NTC	National Transitional Council of Libya
OHCHR	Office of the High Commissioner for Human Rights
OIC	Organization of the Islamic Conference
OP-CRPD	Optional Protocol to the Convention on the Rights of Persons with Disabilities
OPCW	Organisation for the Prohibition of Chemical Weapons
OPEC	Organization of Petroleum Exporting Countries
OUP	Oxford University Press
P5	five permanent members of the UN Security Council
PCIJ	Permanent Court of International Justice
PKK	Kurdish Workers Party
PLO	Palestine Liberation Organization
PMC	Permanent Mandates Commission
PPS	Syrian Social Nationalist Party
PRST	Presidential Statement
PUK	Patriotic Union of Kurdistan party
PYD	Democratic Union Party
RULAC	The Rule of Law in Armed Conflict Projects (at the Geneva Academy)
R2P	Responsibility to Protect
SCP	Syrian Communist Party
SDF	Syrian Democratic Forces
SNC	Syrian National Council
SOC	National Coalition of Syrian Revolutionary and Opposition Forces
TWAIL	Third World Approaches to International Law
TWJ	Tawhid wa'al-Jihad
UAR	United Arab Republic
UNCHR	UN Commission on Human Rights
UNCOI	Independent International Commission of Inquiry on the Syrian Arab Republic
UNDP	UN Development Programme
UNEF	UN Emergency Force
UNGA	UN General Assembly
UNHCHR	UN High Commissioner for Human Rights
UNHCR	UN High Commissioner for Refugees
UNHRC	UN Human Rights Council
UNICEF	UN Children's Fund
UP	University Press
UN	United Nations
UNSC	UN Security Council
UNSG	UN Secretary General
UNSMIS	UN Supervision Mission in Syria



UNTS	UN Treaty Series
USIP	United States Institute of Peace
VAT	Value Added Tax
WMD	Weapon of Mass Destruction
WTO	World Trade Organization
WWI	World War I
WWII	World War II
YPG	People's Protection Unit
YPJ	Women's Protection Unit

## TABLE OF CASES

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# PART I

## Chapter One: Introduction

### 1.1 Introduction to Research

The Syrian conflict, and the impunity that characterizes it, is breaking our world. Its unspeakable cruelty; the resulting massive displacement of victims to neighbouring countries and regions; the metastasizing involvement of outside powers, both directly and by proxy; and the failure of international institutions to take decisive measures to uphold international humanitarian and human rights law have shaken the Middle East, shifted the political landscape of other regions, set back decades of work to establish minimal standards of decency in warfare, and given rise to grave concerns regarding the future of human rights, peace and security, and development across the globe.<sup>1</sup>

The above statement was made by the UN High Commissioner for Human Rights (UNHCHR), Zeid Ra'ad Al Hussein, approximately seven years after the Arab Spring arrived in Syria. Since then, approximately half a million people have been killed in Syria's armed conflict,<sup>2</sup> over 5.6 million Syrians have fled the country<sup>3</sup> and approximately 6.6 million Syrians have been internally displaced.<sup>4</sup> The Syrian crisis has had major ramifications for states in the region and beyond, including through its contribution to a refugee crisis and rise in support for extremism both in the form of Islamist terrorism and

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<sup>1</sup> 'Briefing to the Security Council under Arria formula on the situation in the Middle East (Syria) Statement by UN High Commissioner for Human Rights Zeid Ra'ad Al Hussein' (*OHCHR*, 19 March 2018) <<https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=22851>> accessed 11 July 2018.

<sup>2</sup> The Syrian Observatory for Human Rights estimated that 511,000 people had been killed as of 12 March 2018. See 'Syrian Observatory says war has killed more than half a million' (*Reuters*, 12 March 2018) <<https://www.reuters.com/article/us-mideast-crisis-syria/syrian-observatory-says-war-has-killed-more-than-half-a-million-idUSKCN1GO13M>> accessed 11 July 2018.

<sup>3</sup> UNHCR recorded 5,617,119 registered Syrian refugees as of 5 July 2018. See <[https://data2.unhcr.org/en/situations/syria#\\_ga=2.64198127.1551489217.1531301353-168349240.1529494599](https://data2.unhcr.org/en/situations/syria#_ga=2.64198127.1551489217.1531301353-168349240.1529494599)> accessed 11 July 2018.

<sup>4</sup> As estimated by the UNHCR in July 2018. See <<http://www.unhcr.org/sy/internally-displaced-people>> accessed 11 July 2018.

right-wing nationalism. The predominantly securitised response to the Syrian crisis, particularly in the Western world, has led to a tightening of state boundaries and a revival of essentialist theories to the exclusion of more cosmopolitan perceptions of the global community.

The above statement by the UNHCHR captures four commonly cited refrains regarding the Syrian crisis: (i) the central role played by external actors in enabling and deepening the crisis, (ii) the perceived breakdown of respect for international law in Syria, (iii) the accountability deficit, and (iv) the ramifications of the crisis for regional and international order. These themes in turn provided the inspiration for the present research, which investigates the relationship between international law, international politics and the state using Syria as a case study.

Syria offers a fascinating case study not only because of its contemporary relevance to international politics but also because it has historically been the site of regional and international tussles for influence giving rise to the phrase ‘the struggle for Syria’ in the post-independence era. This phrase experienced a renaissance in the post-Arab Spring environment where the struggle for Syria played out on the domestic, regional and international levels. From a temporal perspective, the research covers the period from the late Ottoman era to mid-2018. It takes the late Ottoman period as its starting point as it was during this time that external actors began to interfere extensively in the Ottoman Empire’s internal affairs with significant ramifications for the future of the Middle East.

## **1.2 Methodology and Existing Literature**

The research is interdisciplinary in that it draws upon literature and analytical tools from both the international law and international relations disciplines.<sup>5</sup> By including perspectives from multiple disciplines, it attempts to offer a comprehensive, albeit not exhaustive, analysis of the relationship between

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<sup>5</sup> See eg ‘law and international relations’ approaches to international law in Rob Cryer and others, *Research Methodologies in EU and International Law* (Hart Publishing 2011) 78–83.

international law, international politics and the state. It takes Fawcett's argument that a 'flexible and inclusive theoretical framework'<sup>6</sup> is required to examine international relations in the Middle East as a starting point.<sup>7</sup> Accordingly, it critically appraises several approaches to international relations and international law at the outset paying particular attention to their treatment of the relationship between international law, international politics and the state. It then tests them against Syria's actual experience since the late Ottoman period. In this regard, it seeks to clarify the extent to which existing approaches reflect the relationship between international law, international politics and the state.

Overall, the thesis applies a classical approach to the study of international relations in the Middle East in that it relies upon historical analysis and reflection<sup>8</sup> rather than quantitative methods.<sup>9</sup> It applies a predominantly critical approach to international law in that it investigates the intersection between international law and international politics and seeks to reveal any inherent structural biases in international law. However, chapter seven utilises the traditional doctrinal method to examine compliance with the international legal rules concerning the use of force and conduct of hostilities in Syria since March 2011.

Within the respective international law and international relations disciplines there exist multiple underlying approaches, which have made

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<sup>6</sup> Louise Fawcett, 'Alliances and Regionalism in the Middle East' in Louise Fawcett (ed), *International Relations of the Middle East* (4th edn, OUP 2015) 201.

<sup>7</sup> *ibid.*

<sup>8</sup> Halliday and Fawcett argued that historical analysis is an essential entry point to the study of contemporary politics in the Middle East. See Fred Halliday, *The Middle East in International Relations: Power, Politics and Ideology* (CUP 2005) 2 and 13–17; Louise Fawcett, 'Introduction' in Fawcett (ed) (n6) 8 and 16.

<sup>9</sup> Regarding the various debates within the international relations disciplines concerning approaches, methods and methodologies, see Hedley Bull, 'International Theory: the Case for a Classical Approach' (1966) 18 *WldPol* 361; Scott Burchill and Andrew Linklater, 'Introduction' in Scott Burchill and others (eds), *Theories of International Relations* (3rd edn, Palgrave MacMillan 2005); Milja Kurki and Colin Wight, 'International Relations and Social Science' in Tim Dunne, Mikja Kurki and Steve Smith (eds), *International Relations Theories: Discipline and Diversity* (3rd edn, OUP 2013). These divides also permeate interdisciplinary work between the international law and international relations disciplines. See eg Robert Beck, 'International law and international relations scholarship' in David Armstrong (ed), *Routledge Handbook of International Law* (Routledge 2009) 27–28.

many diverging, and some converging, arguments regarding the relationship between international law and international politics. Within the international law discipline, these approaches include natural law theory,<sup>10</sup> international legal positivism,<sup>11</sup> liberal internationalism,<sup>12</sup> rationalism,<sup>13</sup> the policy-oriented approach<sup>14</sup> and critical scholarship,<sup>15</sup> including third world approaches (TWAAIL).<sup>16</sup> Within the international relations discipline, they include realism,<sup>17</sup> neoliberal institutionalism,<sup>18</sup> constructivism,<sup>19</sup> the English School<sup>20</sup> and postcolonialism.<sup>21</sup> Interdisciplinary work between the international law and international relations disciplines has increased since the end of the Cold War.<sup>22</sup> Symptomatic of the cross-over, edited volumes on the theory of international law now tend to include interdisciplinary perspectives.<sup>23</sup>

The literature surrounding authoritarian rule has also touched upon the relationship between international law, international politics and the state.

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<sup>10</sup> See eg Lon Fuller, *The Morality of Law* (Yale UP 1964).

<sup>11</sup> See eg John Gardner, 'Legal Positivism: 5 ½ myths' (1999) 46 *AmJJuris* 199; Jörg Kammerhofer, 'International Legal Positivism' in Anne Orford and Florian Hoffmann (eds), *The Oxford Handbook of the Theory of International Law* (OUP 2016).

<sup>12</sup> See eg Thomas M Franck, *Fairness in International Law and Institutions* (OUP 1998).

<sup>13</sup> Jack L Goldsmith and Eric A Posner, *The Limits of International Law* (OUP 2005).

<sup>14</sup> See eg Siegfried Wiessner and Andrew R Willard, 'Policy-Oriented Jurisprudence and Human Rights Abuses in Internal Conflict: Toward a World Public Order of Human Dignity' (1999) 93 *AJIL* 316.

<sup>15</sup> See eg Martti Koskenniemi, *The Politics of International Law* (Hart Publishing 2011).

<sup>16</sup> See eg Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP 2004).

<sup>17</sup> See eg Edward H Carr, *The Twenty Years' Crisis 1919–1939: An Introduction to the Study of International Relations* (2nd edn, Macmillan and Co Ltd 1946); Hans Morgenthau, *Politics among Nations: the Struggle for Power and Peace* (Alfred A Knopf Inc 1948).

<sup>18</sup> See eg Robert O Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (Princeton UP 1984).

<sup>19</sup> See eg Friedrich V Kratochwil, 'How Do Norms Matter?' in Michael Byers (ed), *The Role of Law in International Politics: Essays in International Relations and International Law* (OUP 2001); Christian Reus-Smit (ed), *The Politics of International Law* (CUP 2004).

<sup>20</sup> See eg Hedley Bull, *The Anarchical Society* (3rd edn, Palgrave 2002).

<sup>21</sup> See eg Edward Said, *Orientalism* (Penguin 2003).

<sup>22</sup> See eg Robert J Beck, Anthony Clark Arend and Robert D Vander Lugt (eds), *International Rules: Approaches from International Law and International Relations* (OUP 1996); 'Symposium on method in international law' (1999) 93 *AJIL* 291, 291–423; Byers (ed) n19; J Craig Barker, *International Law and International Relations* (Continuum 2000); Oona A Hathaway and Harold Hongju Koh (eds), *Foundations of International Law and Politics* (Carolina Academic Press 2000). For a complete overview of interdisciplinary work up to 2009, see Beck (n9) 13–43.

<sup>23</sup> See eg David Armstrong (ed) (n9); James Crawford and Martti Koskenniemi (eds), *The Cambridge Companion to International Law* (CUP 2012); Orford and Hoffmann (eds) (n11).



For example, Natasha Ezrow and Erica Frantz have discussed the contribution of external actors to the emergence and persistence of authoritarian rule.<sup>24</sup> Furthermore, several international law scholars and political scientists have examined why authoritarian regimes ratify human rights treaties and analysed the impact of ratification on their behaviour.<sup>25</sup>

Several regional specialists, including Fred Halliday and Louise Fawcett, have specifically analysed international relations in the Middle East.<sup>26</sup> Raymond Hinnebusch and Anoushiravan Ehteshami's edited compilation studied the foreign policies of Middle Eastern states and demonstrated the extent to which global, regional and domestic factors influence foreign policy formation in the region.<sup>27</sup> Some scholars have analysed regional events using specific international relations approaches. For example, Stephen Walt sought to explain alliance formation using a modified version of neorealism,<sup>28</sup> whereas Michael Barnett utilised a constructivist approach to explain the impact of ideological roles on the behaviour of Arab states.<sup>29</sup> Barry Buzan and Ana Gonzalez-Pelaez's edited volume examined international relations in the Middle East from an English School perspective.<sup>30</sup> Several scholars have examined the role that ideational factors, including identity, ideology and historical memory, play in foreign

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<sup>24</sup> Natasha M Ezrow and Erica Frantz, *Dictators and Dictatorships: Understanding Authoritarian Regimes and Their Leaders* (Bloomsbury 2011). See also Jason Brownlee, *Authoritarianism in an Age of Democratization* (CUP 2007).

<sup>25</sup> See eg Oona A Hathaway, 'Do Human Rights Treaties Make a Difference?' (2002) 111 Yale LJ 1935; James Raymond Vreeland, 'Political Institutions and Human Rights: Why Dictatorships Enter into the United Nations Convention Against Torture' (2008) 62 Int'l Org 65; James R Hollyer and B Peter Rosendorff, 'Why Do Authoritarian Regimes Sign the Convention Against Torture? Signaling, Domestic Politics and Non-Compliance' (2011) 6 Quarterly Journal of Political Science 275; Courtenay R Conrad, 'Divergent Incentives for Dictators: Domestic Institutions and (International Promises Not to) Torture' (2014) 58 JConflict Resol 34.

<sup>26</sup> Halliday (n8); Fawcett (ed) (n6).

<sup>27</sup> Raymond Hinnebusch and Anoushiravan Ehteshami (eds), *The Foreign Policies of Middle East States* (2nd edn, Lynne Rienner Publishers 2014). See also Halliday (n8) ch2.

<sup>28</sup> Stephen M Walt, *The Origins of Alliances* (Kindle edn, Cornell UP 1987).

<sup>29</sup> Michael Barnett, 'Institutions, Roles, and Disorder: The Case of the Arab States System' (1993) 37 Int'l Stud Q 271; Michael N Barnett, 'Sovereignty, Nationalism, and Regional Order in the Arab States' (1995) 49 Int'l Org 479.

<sup>30</sup> Barry Buzan and Ana Gonzalez-Pelaez (eds), *International Society and the Middle East: English School Theory at the Regional Level* (Palgrave MacMillan 2009).

policy formation in the region.<sup>31</sup> Many of these accounts challenge essentialist theories, such as Samuel Huntington's 'Clash of Civilizations' thesis,<sup>32</sup> which presuppose the inherent distinctiveness of the Middle East and its inhabitants.<sup>33</sup>

As regards Syria itself, numerous historians have discussed Syria's historical evolution and the role of external actors therein, including Albert Hourani,<sup>34</sup> Philip S. Khoury<sup>35</sup> and John McHugo.<sup>36</sup> Patrick Seale analysed the post-World War II struggle for power in Syria.<sup>37</sup> He also examined the emergence, consolidation and nature of authoritarian Ba'athist rule in Syria<sup>38</sup> along with van Dam,<sup>39</sup> Steven Heydemann,<sup>40</sup> Raymond Hinnebusch<sup>41</sup> and Radwan Ziadeh.<sup>42</sup> Heydemann and Hinnebusch specifically examined the authoritarian upgrading that occurred during Bashar al-Assad's first decade in power.<sup>43</sup> Flynt Leverett<sup>44</sup> and Carsten Wieland<sup>45</sup> also paid specific attention to Bashar's tenure.

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<sup>31</sup> See eg Shibley Telhami and Michael Barnett, *Identity and Foreign Policy in the Middle East* (Cornell UP 2002); Eric Davis, *Memories of State: Politics, History and Collective Identity in Modern Iraq* (University of California Press 2005); Raymond Hinnebusch, 'The Politics of Identity in Middle East International Relations' in Fawcett (ed) (n6); Marina Calculli and Matteo Legrenzi, 'Middle East Security Conflict and Securitization of Identities' in Fawcett (ed) (n6).

<sup>32</sup> Samuel Huntington, 'The Clash of Civilizations' (1993) 72 *Foreign Affairs* 22.

<sup>33</sup> See eg Said (n21) 329–354; Halliday (n8) 193–199; Fawcett, 'Introduction' (n8) 5–6; Fred H Lawson, 'International Relations Theory and the Middle East' in Fawcett (ed) (n6) 28.

<sup>34</sup> AH Hourani, *Syria and Lebanon: A Political Essay* (2nd impression, OUP 1946).

<sup>35</sup> Philip S Khoury, 'The Syrian Independence Movement and the Growth of Economic Nationalism in Damascus' (1987) 14 *Bulletin* (British Society for Middle Eastern Studies) 25; Philip S Khoury, 'Continuity and Change in Syrian Political Life: The Nineteenth and Twentieth Centuries' (1991) 96 *AmHistRev* 1374.

<sup>36</sup> John McHugo, *Syria: From the Great War to Civil War* (Kindle edn, Saqi Books 2014).

<sup>37</sup> Patrick Seale, *The Struggle for Syria* (Yale UP 1986).

<sup>38</sup> Patrick Seale, *Asad: the Struggle for the Middle East* (University of California Press 1995).

<sup>39</sup> Nikolaos van Dam, *The Struggle for Power in Syria* (4th edn, IB Tauris 2011).

<sup>40</sup> Steven Heydemann, *Authoritarianism in Syria: Institutions and Social Conflict, 1946–1970* (Cornell UP 1999).

<sup>41</sup> Raymond Hinnebusch, *Revolution from Above* (Routledge 2001).

<sup>42</sup> Radwan Ziadeh, *Power and Policy in Syria* (revised edn, IB Tauris 2013).

<sup>43</sup> Steven Heydemann, 'Upgrading Authoritarianism in the Arab World' (2007) Saban Center for Middle East Policy at the Brookings Institution Analysis Paper 13, October 2007 <<http://www.brookings.edu/wp-content/uploads/2016/06/10arabworld.pdf>> accessed 3 December 2014; Raymond Hinnebusch, 'Syria: from 'authoritarian upgrading' to revolution?' (2012) 88 *International Affairs* 95.

<sup>44</sup> Flynt Leverett, *Inheriting Syria: Bashar's Trial by Fire* (The Brookings Institution 2005).

<sup>45</sup> Carsten Wieland, *Syria—A Decade of Lost Chances: Repression and Revolution from Damascus Spring to Arab Spring* (Kindle edn, Cune Press 2012).

Several analysts, including Bassam Haddad<sup>46</sup> and Volker Perthes,<sup>47</sup> have discussed Syria's political economy. Others, including Lisa Wedeen, examined the Assad regime's manipulation of ideational factors to consolidate its rule.<sup>48</sup> Hourani,<sup>49</sup> Benjamin White,<sup>50</sup> Kathleen Cavanaugh and Joshua Castellino,<sup>51</sup> Nikolaos van Dam<sup>52</sup> and Julie Gauthier<sup>53</sup> explored Syria's ethno-sectarian composition, whereas Hannah Batatu<sup>54</sup> considered socio-economic differences and the rural-urban divide. Thomas Pierret<sup>55</sup> focussed on the role of Islam in Syrian politics, whereas Wieland,<sup>56</sup> Raphaël Lefèvre<sup>57</sup> and Ignacio Alvarez-Ossorio<sup>58</sup> examined Syria's opposition and civil society movement. International NGOs<sup>59</sup> and UN treaty monitoring bodies<sup>60</sup> in turn have evaluated Syria's human rights record under the Assad regime.

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<sup>46</sup> Bassam Haddad, *Business Networks in Syria: The Political Economy of Authoritarian Resilience* (Kindle edn, Stanford UP 2012).

<sup>47</sup> Volker Perthes, 'The Syrian Private Industrial and Commercial Sectors and the State' (1992) 24 *Int'l JMidEstud* 207; Volker Perthes, 'The Syrian Economy in the 1980s' (1992) 46 *Middle EJ* 37.

<sup>48</sup> Lisa Wedeen, *Ambiguities of Domination: Politics, Rhetoric and Symbols in Contemporary Syria* (revised edn, The University of Chicago Press 2015).

<sup>49</sup> AH Hourani, *Minorities of the Arab World* (OUP 1947).

<sup>50</sup> Benjamin Thomas White, *The Emergence of Minorities in the Middle East: the Politics of Community in French Mandate Syria* (Edinburgh UP 2011).

<sup>51</sup> Kathleen Cavanaugh and Joshua Castellino, *Minority Rights in the Middle East: A Comparative Legal Analysis* (OUP 2013)

<sup>52</sup> Van Dam, *The Struggle for Power* (n39).

<sup>53</sup> Julie Gauthier (Diana V Galbraith tr), 'Events in al-Qamishli: Has the Kurdish question erupted in Syria?' in Fred H Lawson (ed), *Demystifying Syria* (Kindle edn, Saqi 2012).

<sup>54</sup> Hanna Batatu, *Syria's Peasantry, the Descendants of its Lesser Rural Notables, and Their Politics* (Princeton UP 1999). See also Volker Perthes, 'The Bourgeoisie and the Baath: a Look at Syria's Upper Class' (1991) 21 *Middle East Report* 31.

<sup>55</sup> See eg Thomas Pierret, 'Sunni Clergy Politics in the Cities of Ba'thi Syria' in Lawson (ed) (n53).

<sup>56</sup> Wieland (n45).

<sup>57</sup> Raphaël Lefèvre, *Ashes of Hama: the Muslim Brotherhood in Syria* (OUP 2013).

<sup>58</sup> Ignacio Alvarez-Ossorio, 'Syria's Struggling Civil Society' (2012) 19 *Middle EQ* 23, 23–24.

<sup>59</sup> See generally Amnesty International (AI) World Reports from 1970 to 2000; Human Rights Watch (HRW) World Reports 1989–2000. All HRW World Reports referred to in this thesis were accessed at <<https://www.hrw.org/previous-world-reports>> on 31 May 2017. All AI World Reports referred to in this thesis were accessed at <<http://onlinebooks.library.upenn.edu/webbin/serial?id=aireport>> on 31 May 2017. From here on in only the relevant report is referred to.

<sup>60</sup> For UN treaty monitoring body reports on Syria, see <<https://www.ohchr.org/EN/Countries/MENARRegion/Pages/SYIndex.aspx>> accessed 16 July 2018.

Several scholars, including Hinnebusch<sup>61</sup> and Bassel F. Salloukh,<sup>62</sup> have analysed Syria's foreign policy. Some scholars focussed on the Assad regime's relationships with particular external actors. For example, Jubin Goodarzi<sup>63</sup> and Roy Allison<sup>64</sup> examined the regime's alliances with Iran and Russia respectively, whereas Fred H. Lawson analysed its rapprochement with Turkey.<sup>65</sup> Sami Moubayed<sup>66</sup> and Leverett<sup>67</sup> considered the regime's relationship with the US, whereas Hinnebusch,<sup>68</sup> Jörg Michael Dostal<sup>69</sup> and Anja Zorob<sup>70</sup> discussed Syria's economic links with the EU.

Numerous researchers have examined the post-Arab Spring context in Syria, including Hinnebusch and Tina Zintl,<sup>71</sup> Christopher Phillips,<sup>72</sup> Samer N. Abboud,<sup>73</sup> Emile Hokayem,<sup>74</sup> van Dam,<sup>75</sup> David Lesch,<sup>76</sup> Michael Weiss

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<sup>61</sup> Raymond Hinnebusch, 'The Foreign Policy of Syria' in Hinnebusch and Ehteshami (eds) (n27).

<sup>62</sup> Bassel F Salloukh, 'Demystifying Syrian Foreign Policy under Bashar al-Asad' in Lawson (ed) (n53).

<sup>63</sup> Jubin M Goodarzi, *Syria and Iran: Diplomatic Alliance and Power Politics in the Middle East* (2nd edn, IB Tauris 2009).

<sup>64</sup> Roy Allison, 'Russia and Syria: explaining alignment with a regime in crisis' (2013) 89 *International Affairs* 795.

<sup>65</sup> Fred H Lawson, 'The Beginning of a Beautiful Friendship: Syrian–Turkish relations since 1998' in Lawson (ed) (n53). See also Bülent Aras and Rabia Karakaya Polat, 'From Conflict to Cooperation: Desecuritization of Turkey's Relations with Syria and Iran' (2008) 39 *Sec Dialogue* 495; Carolyn C James and Ozgur Ozdamar, 'Modelling Foreign Policy and Ethnic Conflict: Turkey's Policies Towards Syria' (2009) 5 *Foreign Policy Analysis* 17; Ömer Taspınar, 'Turkey's Strategic Vision and Syria' (2012) 35 *TWQ* 127, 136–137.

<sup>66</sup> Sami Moubayed, *Syria and the USA: Washington's Relations with Damascus from Wilson to Eisenhower* (IB Tauris 2012).

<sup>67</sup> Leverett (n44).

<sup>68</sup> Raymond Hinnebusch, 'Globalization and Generational Change: Syrian Foreign Policy between Regional Conflict and European Partnership' (2003) 3 *RevInt'l Aff* 190; Raymond Hinnebusch, 'Europe and the Middle East: From Imperialism to Liberal Peace?' (2012) 4 *Review of European Studies* 18.

<sup>69</sup> Jörg Michael Dostal, 'The European Union and Economic Reform in Syria' (2009) 1 *Syria Studies* 5 <<https://ojs.st-andrews.ac.uk/index.php/syria/article/view/711/607>> accessed 24 June 2018.

<sup>70</sup> Anja Zorob, 'Partnership with the European Union: Hopes, risks and challenges for the Syrian economy' in Lawson (ed) (n53).

<sup>71</sup> Raymond Hinnebusch and Tina Zintl (eds), *Syria from Reform to Revolt: Volume I* (Kindle edn, Syracuse UP 2015).

<sup>72</sup> Christopher Phillips, *The Battle for Syria: International Rivalry in the New Middle East* (Yale UP 2016).

<sup>73</sup> Samer N Abboud, *Syria* (Kindle edn, Polity 2016).

<sup>74</sup> Emile Hokayem, *Syria's Uprising and the Fracturing of the Levant* (Kindle edn, Routledge 2013).

<sup>75</sup> Nikolaos van Dam, *Destroying a Nation: The Civil War in Syria* (Kindle edn, IB Tauris 2017).

<sup>76</sup> David W Lesch, *The Fall of the House of Assad* (Updated edn, Yale UP 2013).

and Hassan Hassan,<sup>77</sup> and Stephen Starr.<sup>78</sup> Themes discussed include the causes and evolution of the Syrian uprising, the Syrian opposition, the resilience of the Assad regime, the role played by external actors in the Syrian crisis and the rise of extremism in Syria and the region. The Independent International Commission of Inquiry on the Syrian Arab Republic (UNCOI) has provided periodic reporting on the human rights situation in Syria since March 2011.<sup>79</sup> Finally, several international law scholars have examined the lawfulness of the various external interventions in Syria since 2011 from a *jus ad bellum* perspective.<sup>80</sup>

### 1.3 Research Area, Rationale and Original Contribution

The core aim of the thesis is to enhance the existing knowledge base surrounding the relationship between international law, international politics and the state using Syria as a case study. In undertaking this investigation, the thesis also seeks to uncover the extent to which existing theoretical approaches to international law and international relations accurately reflect this relationship.

Several recurrent and overlapping themes have arisen in the existing research (outlined above), including the relationship between the domestic and international domains,<sup>81</sup> and between the theory and practice of international relations and international law.<sup>82</sup> Another theme concerns the

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<sup>77</sup> Michael Weiss and Hassan Hassan, *ISIS: Inside the Army of Terror* (Regan Arts 2015).

<sup>78</sup> Stephen Starr, *Revolt in Syria: Eyewitness to the Uprising* (Hurst and Company 2012).

<sup>79</sup> To access these reports, see <<https://www.ohchr.org/en/hrbodies/hrc/iicisyria/pages/independentinternationalcommission.aspx>> accessed 16 July 2018.

<sup>80</sup> See eg Carsten Stahn, 'Syria and the Semantics of Intervention, Aggression and Punishment: On 'Red Lines' and 'Blurred Lines'' (2013) 11 JICJ 955; Paul R Williams, J Trevor Ulbrick and Jonathan Worboyst, 'Preventing Mass Atrocity Crimes: the Responsibility to Protect and the Syria Crisis' (2012) 45 Case WResJInt'l L 473; Tom Ruys, 'Of Arms, Funding and "Non-lethal Assistance"—Issues Surrounding Third-State Intervention in the Syrian Civil War' (2014) 13 ChiJInt'l L 13; Michael N Schmitt, 'Legitimacy versus Legality Redux: Arming the Syrian Rebels' (2014) 7 Journal of National Security Law & Policy 139; Karine Bannelier-Christakis, 'Military Interventions against ISIL in Iraq, Syria and Libya, and the Legal Basis of Consent' (2016) 29 LJIL 743; Christopher M Ford, 'Syria: A Case Study in International Law' (2017) 85 UCinLRev 185.

<sup>81</sup> David Armstrong, 'Introduction' in D Armstrong (ed) (n9) 2; Beck (n9) 27; Fawcett, 'Introduction' (n8) 16.

<sup>82</sup> Martti Koskeniemi, *From Apology to Utopia: the Structure of International Legal Argument* (Reissue, CUP 2005) 1–5; Beck (n9) 25.

challenge posed by non-state actors and processes to the traditional ‘state-centric’ character of international law and the international system.<sup>83</sup> A related theme surrounds the fragmentation of international law as a result of the proliferation of decentralised functional regimes. These regimes have raised concerns with regard to representation, transparency, accountability and legitimacy, and generated a backlash against the deformatisation of international law.<sup>84</sup> Nevertheless, several international relations and international law scholars have acknowledged the resilience of the state as the primary political unit for ordering global relations.<sup>85</sup> Another prominent theme concerns the effectiveness, or perhaps ineffectiveness, of international law as a result of its inherent indeterminacy and lack of mandatory and centralised enforcement mechanisms.<sup>86</sup> A related theme highlights the tension between international law’s role in maintaining international order, as reflected in the international legal principles of sovereignty and non-intervention, and its role in promoting justice, as reflected in human rights and the notion of internal self-determination.<sup>87</sup>

This thesis seeks to address these overarching themes and also to clarify the peculiar role that international law and international politics have

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<sup>83</sup> Armstrong (n81) 2 and 9; Beck (n9) 25–27; James Crawford and Martti Koskenniemi, ‘Introduction’ in Crawford and Koskenniemi (eds) (n23) 8; Frédéric Mégret, ‘International Law as law’ in Crawford and Koskenniemi (eds) (n23) 65–66; Karen Knop, ‘Statehood: territory, people, government’ in Crawford and Koskenniemi (eds) (n23) 108–112; Antonio Cassese, ‘Introduction’ in A Cassese (ed), *Realizing Utopia: the Future of International Law* (OUP 2012) xix; Fawcett, ‘Introduction’ (n8) 5–8.

<sup>84</sup> See Beck (n9) 27; Martti Koskenniemi, ‘Carl Schmitt, Hans Morgenthau, and the Image of Law in International Relations’ in Byers (ed) (n19) 29–34; Andreas Paulus, ‘International law and international community’ in Armstrong (ed) (n9) 45–46 and 50–53; Friedrich Kratochwil, ‘Legal theory and international law’ in Armstrong (ed) (n9) 64–66; Martti Koskenniemi, ‘International Law in the World of Ideas’ in Crawford and Koskenniemi (eds) (n23) 57; Mégret (n83) 85–86; Knop (n83) 110–112; Anne Orford, ‘Constituting Order’ in Crawford and Koskenniemi (eds) (n23) 284–286; BS Chimni, ‘Legitimizing the international rule of law’ in Crawford and Koskenniemi (eds) (n23) 297–300; Thomas Pogge, ‘Divided Against Itself: aspiration and reality of International Law’ in Crawford and Koskenniemi (eds) (n23) 392.

<sup>85</sup> See eg Paulus (n84) 53; Crawford and Koskenniemi (n83) 7–8 and 16; Susan Marks, ‘Human Rights in Disastrous Times’ in Crawford and Koskenniemi (eds) (n23) 319–320; Cassese, *Realizing Utopia* (n83) xix; Fawcett, ‘Introduction’ (n8) 5–6.

<sup>86</sup> Armstrong (n81) 9; Beck (n9) 25; Mégret (n83) 73; Cassese, *Realizing Utopia* (n83) xix–xx. See also Gerry Simpson, ‘International Law in Diplomatic History’ in Crawford and Koskenniemi (eds) (n23) 25–26.

<sup>87</sup> Koskenniemi, *From Apology to Utopia* (n84) 22–24; Bull (n20) 65–67, 139 and 146; Armstrong (n81) 5 and 9; Crawford and Koskenniemi (n83) 15–16; Koskenniemi, ‘Carl Schmitt’ (n84) 56 and 58; Orford (n84) 281; Cassese, *Realizing Utopia* (n83) xix–xx.

played in phenomena including state formation, authoritarian regime resilience, recurring armed conflict and social inequality in Syria and the wider region. The quotation cited at the start of this chapter reflects the liberal internationalist school. It suggests that the failure of international law to provide an adequate response to the Syrian crisis reflects a failure of implementation on the part of the international community rather than any inherent deficiency in international law itself. It implicitly assumes that international law can: operate as a benchmark against which the legitimacy of international behaviour can be measured, be collectively enforced, and help achieve international justice, peace and development. This thesis tests these assumptions. It examines the extent to which international law, as one manifestation of international politics, has contributed to Syria's social problems and the emergence of the current crisis. However, it also investigates whether international law could potentially be utilised to achieve normative goals and equitable solutions to global problems.

#### **1.4 Structure**

The thesis is divided into three core parts. Part I comprises chapters one and two. It introduces the research and analyses the most prominent theoretical approaches to international law and international relations. The analysis is necessarily brief due to restrictions relating to the word count requirements. Accordingly, it cannot hope to exhaustively capture the breadth of diverging perspectives within the individual approaches themselves. Instead, it pays particular attention to their treatment of the relationship between international law, international politics and the state. The theories and approaches discussed in chapter two are subsequently used as interpretative tools to help explain how international law and international politics impacted developments in Syria since the late Ottoman period with ramifications for the present day.

Part II, comprised of chapters three to five, focuses on the pre-Arab Spring context. Chapter three examines developments in Syria and the Middle East from the mid-19th century up until 1970. It analyses the role played by external actors and international law in the consolidation of the post-World

War I regional system, Syria's battle for independence and the post-independence struggle for Syria at the regional and international levels. Chapter four examines developments within Syria and the region during the period from Hafez al-Assad's Corrective Movement in 1970 until his son Bashar's hereditary succession in 2000, whereas chapter five considers domestic and regional developments from Bashar's succession up until the Arab Spring. Domestic developments discussed include Syria's human rights record, authoritarian regime consolidation, economic policy and the Syrian opposition. Regional developments discussed include the Arab-Israeli armed conflicts and peace process, Syria's involvement in Lebanon, the 1991 Gulf war and the 2003 military intervention in Iraq. Chapters four and five help explain both the Assad regime's vulnerability to the initial Arab Spring protests and the resilience that it has since demonstrated. They also reveal how the foundations of the current proxy wars in Syria were constructed and how the actions of certain external actors increased the propensity for sectarianism and extremism in the region.

Part III, comprised of chapters six to eight, focuses on the post-Arab Spring context. Chapter six analyses the triggers for the protests, the composition of the protest movement and the initial response of both the Assad regime and the international community. It also examines regime resilience and critically appraises the various peace initiatives that have been undertaken since 2011. Chapter seven assesses compliance with the international legal rules concerning the use of force and conduct of hostilities in Syria since March 2011. In performing this analysis, it tests the assumption, arguably inherent in liberal internationalism, international legal positivism and some constructivist thinking,<sup>88</sup> that international law is sufficiently determinate to operate as a benchmark against which the legitimacy of international behaviour can be measured. It also tests the liberal assumption that international law can restrain state behaviour and help secure justice. Finally, chapter eight seeks to elucidate the findings of the thesis, its

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<sup>88</sup> See eg Anthony Clark Arend, 'Do Legal Rules Matter' (1999) 38 *VaJInt'l L* 107, 142–146.



implications and practical relevance, and its contribution to the existing research. It also seeks to identify possible avenues for future research.

### **1.5 Limits and Challenges**

The use of an interdisciplinary perspective and the temporal scope of the case study posed challenges. As the author's background was in international law, the international relations terminology at first appeared somewhat foreign. However, this initial lack of familiarity was overcome by extensive background research into the main theoretical approaches to international relations. From a temporal perspective, the fact that the Syrian crisis was ongoing as the research was being performed meant that the situation on the ground was constantly evolving. This challenge sometimes necessitated reliance upon blogs, newspapers and political magazines as the relevant journals and books were not up to date with the most recent developments. It also required the identification of a cut off point for the research of mid-2018.

The broad scope of the thesis rendered it difficult to adhere to the wordcount. Consequently, the factual detail supporting analytical arguments had to be substantially edited in places. However, the extensive footnotes and bibliography should ensure that readers have access to adequate supplementary material should they require it. Due to language limitations, the author was unable to utilise Arabic sources which would no doubt have added further insight. As has been well-documented, the Syrian armed conflict contributed to a major refugee crisis. Unfortunately, a critical appraisal of the international response to this crisis, the compliance of relevant third-party states with their obligations under international refugee law and the challenges associated with the return of refugees to Syria as the armed conflict winds down was beyond the scope of this study.

### **1.6 Definitions and Terminology**

The thesis adopts Fawcett's definition of the Middle East as including 'the Arab states of West Asia and North Africa (members of the Arab League)

and the non-Arab states of Iran, Israel, and Turkey'<sup>89</sup> whilst also perhaps adding Afghanistan to this grouping.<sup>90</sup> This definition is equally applicable to any references to the Middle East North Africa (MENA) region in this thesis. Fawcett indicated that states in this geographical area may be classified as a distinct unit/subsystem as they tend to share certain political, economic and cultural traits, including an authoritarian form of rule, a rentier economy, an Arab/Islamic majority population and a common security dilemma.<sup>91</sup> At the same time, she cautioned that the absence of meaningful cooperation between Middle Eastern states, the dearth of durable regional institutions and continuing inter-regional divisions also renders the idea of the Middle East as a coherent region somewhat 'general and artificial'.<sup>92</sup>

The thesis accepts Hinnebusch's definition of identity, namely, 'a normative 'soft power', both instrumentally used by elites in their power contests and a constraint on their options'.<sup>93</sup> It does not adopt a particular definition of international law, international relations or international politics at the outset. Instead, it acknowledges that these concepts are perceived differently depending on which approach to international law or international relations is utilised. Nevertheless, perhaps as a result of the author's background in international law, the thesis tends to reject a purely instrumentalist conception of international law that completely collapses the distinction between binding legal rules and non-binding norms. It also accepts Halliday's contention that international relations concerns issues including:

... the relation of particular states, and regions, to global structures of power; the pattern of relations between regional states; the causes of war and of co-operation; the impact of domestic factors on the foreign policy of states; the role of transnational or 'non-state' forces in international relations;

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<sup>89</sup> Fawcett, 'Introduction' (n8) 3.

<sup>90</sup> In accordance with the definition of the Middle East provided in Amos N Guiorat, 'Intervention in Libya, Yes; Intervention in Syria, No: Deciphering the Obama Administration' (2011) 44 *Case WResJInt'l L* 251, 258; Cavanaugh and Castellino (n51) 5.

<sup>91</sup> Fawcett, 'Introduction' (n8) 3.

<sup>92</sup> Fawcett, 'Alliances and Regionalism' (n6) 202–203.

<sup>93</sup> Hinnebusch, 'The Politics of Identity' (n31) 163.

and the place of ideologies and belief in relations between states and societies.<sup>94</sup>

When defining the ‘state’ under international law, recourse is often had to the 1933 Montevideo Convention. It defined a state as a person of international law possessing a permanent population, a defined territory, a government and the capacity to enter into relations with other states.<sup>95</sup> Unlike the notion of a nation-state, this definition does not necessarily require that the permanent population possess a unifying characteristic, such as a shared language, race, ethnicity, religion, historical memory or commitment to democratic government.<sup>96</sup> This is significant as the populations of many former colonies, including in the Middle East, lacked a unifying characteristic and consequently suffered from high levels of irredentism in the post-independence era.<sup>97</sup> Nevertheless, once established, even artificially created states tended to demonstrate a considerable degree of resilience, including in the Middle East.<sup>98</sup>

The core attribute of statehood under international law is sovereignty. External sovereignty includes the right to ratify international treaties and enter into binding relations with other states. Internal sovereignty encompasses the right to exercise the legislative, executive, judicial and coercive functions of state within a defined territory to the exclusion of all other states.<sup>99</sup>

Significantly, the Montevideo definition does not presuppose any social contract between the government and the population or require that the government enjoy democratic legitimacy.<sup>100</sup> Rather, as Knop observed, ‘The

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<sup>94</sup> Halliday (n8) 13.

<sup>95</sup> Montevideo Convention on the Rights and Duties of States (adopted 26 December 1933, entered into force 26 December 1934) 165 LNTS 19, art 1.

<sup>96</sup> Knop (n83) 101.

<sup>97</sup> Irredentism has been defined as ‘dissatisfaction with the incongruity between territorial borders and “imagined communities”’. See Raymond Hinnebusch, ‘Foreign Policy in the Middle East’ in Hinnebusch and Ehteshami (eds) (n27) 10.

<sup>98</sup> Fawcett, ‘Introduction’ (n8) 5–6. See also Knop (n83) 103.

<sup>99</sup> James Crawford, ‘Sovereignty as a Legal Value’ in Crawford and Koskenniemi (eds) (n23) 120–121.

<sup>100</sup> Mégret (n83) 65; Knop (n83) 101.

state is defined in terms of power: effective control by a government over a population and territory'.<sup>101</sup> State practice largely supports this definition and suggests that regard is still primarily had to effective control of territory and international recognition, rather than democratic legitimacy, when identifying the government of a state under international law.<sup>102</sup> The Montevideo definition has been criticised for enabling repressive authoritarian rule.<sup>103</sup> It exists in uneasy tension with certain other international legal doctrines including human rights and the right to self-determination if one interprets that right to include the right of a people to freely choose their own form of government.<sup>104</sup>

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<sup>101</sup> Knop (n83) 101. See also James Crawford (n99) 129–130.

<sup>102</sup> Tom Ruys and Luca Ferr, 'Weathering the storm: legality and legal implications of the Saudi-led military intervention in Yemen' (2016) 65 ICLQ 61, 81–82. See also James Crawford (n99) 131–132.

<sup>103</sup> Crawford (n99) 127; Pogge (n84) 386.

<sup>104</sup> Knop (n83) 101.

## Chapter Two: Overview of Theoretical Approaches

### 2.1 Introduction

This chapter critically analyses the prominent theoretical approaches to international law and international relations paying particular attention to their observations regarding the relationship between international law, international politics and the state. The approaches to international law examined include natural law theory, international legal positivism, liberal internationalism, the rationalist approach, the policy-oriented approach and third world approaches (TWAAIL). The approaches to international relations analysed include realism, neorealism, neoliberal institutionalism, constructivism, the English School, the Frankfurt School, postcolonialism and poststructuralism. Given the authoritarian character of the Assad regime, the chapter also discusses the literature surrounding authoritarian rule. Shibley Telhami and Michael Barnett once remarked, ‘No student of Middle Eastern international politics can begin to understand the region without taking into account the ebb and flow of identity politics’.<sup>1</sup> Accordingly, the impact of ideational factors on international relations and domestic politics in the region is also examined.

### 2.2 Natural Law

Naturalism encompasses ‘theories of international law which locate the binding force of international norms in some source outside sovereignty, which precedes the sovereign, or can be implied from the nature of a community of sovereigns’.<sup>2</sup> It enjoyed a prominent position in legal jurisprudence from the 3<sup>rd</sup> century BC until the 19<sup>th</sup> century.<sup>3</sup> Inspired by Greek stoicism, the Romans identified a universally applicable natural law

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<sup>1</sup> Shibley Telhami and Michael Barnett, *Identity and Foreign Policy in the Middle East* (Cornell UP 2002) 2.

<sup>2</sup> D Kennedy, ‘International Law and the Nineteenth Century: History of an Illusion’ (1996) 65 *NordJInt'l L* 385, 398. See also Frédéric Mégret, ‘International Law as law’ in James Crawford and Martti Koskenniemi (eds), *The Cambridge Companion to International Law* (CUP 2012) 75.

<sup>3</sup> Malcolm N Shaw *International Law* (7th edn, CUP 2014) 12–13.

derived from human nature.<sup>4</sup> Medieval scholastics later posited that a complete, eternal, objective and universal divine law could be identified in authoritative texts.<sup>5</sup> However, in the 16<sup>th</sup> century religious dogmas were deemed subjective.<sup>6</sup> Nevertheless, Hugo Grotius asserted that a universal natural law could still be derived from the inclination of humans to live together peacefully coupled with the ‘fact of interdependence’.<sup>7</sup> He differentiated between the natural and positive law of nations, which together formed the *jus gentium*.<sup>8</sup>

The 17<sup>th</sup> century realist, Thomas Hobbes, asserted that natural law merely asserted a right of self-preservation, and that sovereign authority and the law of nations derived from the wilful acts of man.<sup>9</sup> However, Samuel von Pufendorf posited that a natural law did exist between states, which originated from the human desire to live sociably together.<sup>10</sup> At the same time, he acknowledged that, in the absence of a global hegemon, it could only be interpreted and enforced in a decentralised and subjective manner.<sup>11</sup> Early Enlightenment jurists, including Christian Thomasius and Jacob von Gundling, observed that states tended to breach natural law rules to further their own interests.<sup>12</sup> They asserted that, as states were unable to trust each other, natural law required the maintenance of a balance of power between states.<sup>13</sup> Emer de Vattel, an early classical scholar, regarded the balance of

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<sup>4</sup> Randall Lesaffer, ‘Roman Law and the Intellectual History of International Law’ in Anne Orford and Florian Hoffmann (eds), *The Oxford Handbook of the Theory of International Law* (OUP 2016) 44–45; Martti Koskenniemi, ‘Transformation of Natural Law: Germany 1648–1815’ in Anne Orford and Florian Hoffmann (eds), *The Oxford Handbook of the Theory of International Law* (OUP 2016) 79.

<sup>5</sup> Lesaffer (n4) 46–50; Koskenniemi, ‘Transformation of Natural Law’ (n4) 79.

<sup>6</sup> Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Reissue with new Epilogue, CUP 2005) 77.

<sup>7</sup> Koskenniemi, ‘Transformation of Natural Law’ (n4) 60; Geoff Gordon, ‘Natural Law in International Legal Theory: Linear and Dialectical Presentations’ in Orford and Hoffmann (eds) (n4) 283–284. See also Edward Keene, ‘The age of Grotius’ in David Armstrong (ed), *Routledge Handbook of International Law* (Routledge 2009) 126–140.

<sup>8</sup> Lesaffer (n4) 55.

<sup>9</sup> Harold Hongju Koh, ‘Why Do Nations Obey International Law?’ (1997) 106 Yale LJ 2599, 2608; Koskenniemi, ‘Transformation of Natural Law’ (n6) 79–80; Anne Orford, ‘Constituting Order’ in Crawford and Koskenniemi (eds) (n2) 273–276; Gordon (n7) 286–287.

<sup>10</sup> Koskenniemi, ‘Transformation of Natural Law’ (n4) 61–62.

<sup>11</sup> Gordon (n7) 289.

<sup>12</sup> Koskenniemi, ‘Transformation of Natural Law’ (n4) 64–65.

<sup>13</sup> *ibid* 66.

power as the primary means of maintaining world peace between sovereign, free and equal states.<sup>14</sup> He differentiated between a necessary ‘natural’ law between states, which included the sovereignty and self-preservation of states, and a voluntary law comprised of the rules to which sovereigns had voluntarily consented.<sup>15</sup>

During the 19<sup>th</sup> century, natural law was increasingly considered utopian – unable to prove why its norms were objectively correct – or apologist – a disguise for the subjective preferences of the sovereign Prince.<sup>16</sup> However, it enjoyed a resurgence in the late 19<sup>th</sup> and early 20<sup>th</sup> century.<sup>17</sup> During the 1960s, Lon Fuller devised a natural law inspired theory of law, which posited that legal rules acquire their distinctiveness and legitimacy by satisfying a strong test of ‘internal morality’, namely, by demonstrating clarity, generality, promulgation, non-retroactivity, non-contradiction, constancy, congruence (between rules and practice) and feasibility.<sup>18</sup> Fuller suggested that a weak test of ‘external morality’ also exists as evident in legitimacy-based arguments regarding the fairness, justice and equality of laws.<sup>19</sup> He observed that law’s internal and external moralities may conflict when determining the appropriateness of proposed changes to the law. Internal morality, with its emphasis on foreseeability, tends to favour the status quo, whereas external morality, with its emphasis on justice, is inclined toward change.<sup>20</sup> Fuller suggested that laws lacking internal and/or external morality are unlikely to be perceived as legitimate and consequently, less likely to be complied with.<sup>21</sup>

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<sup>14</sup> *ibid* 68 and 71; Emmanuelle Tourme-Jouannet, ‘The Critique of Classical Thought during the Interwar period: Vattel and Van Vollenhoven’ in Orford and Hoffmann (eds) (n4) 111, 115–116 and 120. The balance of power principle was given practical effect in treaties between sovereign European states. See Orford (n9) 279.

<sup>15</sup> Gordon (n7) 289; Tourme-Jouannet (n14) 112–114.

<sup>16</sup> Koskenniemi, *From Apology to Utopia* (n6) 106–107.

<sup>17</sup> Gordon (n7) 290–291 and 300.

<sup>18</sup> J Brunnée and S Toope, ‘International Law and Constructivism’ (2000–01) 39 *ColumJTransnatl L* 19, 52 and 54–55 referring to Lon Fuller, *The Morality of Law* (Yale UP 1964) 46–91 and 155.

<sup>19</sup> Brunnée and Toope (n18) 56–57 referring to Fuller (n18) 47, 153, 168, 210 and 211.

<sup>20</sup> Brunnée and Toope (n18) 59.

<sup>21</sup> *ibid* 67–68.

Natural law theory continues to exert an influence on contemporary international law. For example, positivist arguments about consent implicitly metamorphose into naturalist ones through mechanisms such as tacit consent.<sup>22</sup> Significantly, through social contract theory, natural law theorists helped to naturalise the sovereign state as the primary mechanism for organising human interaction. Many rules of contemporary international law, such as the notion of inalienable human rights,<sup>23</sup> can be traced back to natural law. However, natural law has been criticised for promoting an individualist conception of international law that enabled the imperial project,<sup>24</sup> for its utilitarian assumption that the individual good naturally coincides with the communitarian good, and for its inability to objectively prove the supposed naturalness of its rules.<sup>25</sup>

### 2.3 International Legal Positivism<sup>26</sup>

International legal positivism acquired prominence in the 19<sup>th</sup> century due to the perceived subjectivity of natural law. International legal positivists sought to disprove deniers of international law, including John Austin, who argued that international law was not law but positive morality as it lacked coercive enforcement mechanisms.<sup>27</sup> Hans Kelsen asserted that international law does have coercive enforcement mechanisms albeit primarily decentralised ones.<sup>28</sup> H.L.A. Hart concurred with Austin that international law lacked effective coercive mechanisms but questioned whether they were actually a necessary component of law.<sup>29</sup>

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<sup>22</sup> Koskenniemi, *From Apology to Utopia* (n6) 131–132.

<sup>23</sup> See eg Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A (III) (UDHR) Preamble.

<sup>24</sup> Natural law's recognition of differing levels of civilisation and its identification of the individual rights to trade and own private property were relied upon to legitimise colonial exploitation. See Gordon (n7) 284 and 296–299.

<sup>25</sup> Koskenniemi, *From Apology to Utopia* (n6) 105; Koskenniemi, 'Transformation of Natural Law' (n4) 67, 69, 76, 79 and 81.

<sup>26</sup> See generally Jörg Kammerhofer, 'International Legal Positivism' in Orford and Hoffmann (eds) (n4) 407–427.

<sup>27</sup> Austin argued that the only valid laws were sovereign commands to inferior subjects that were enforceable by force. See Koskenniemi, *From Apology to Utopia* (n6) 125; Rob Cryer and others, *Research Methodologies in EU and International Law* (Hart Publishing 2011) 39.

<sup>28</sup> Kelsen also argued that the UN's collective security system reflected components of a centralised enforcement mechanism. See Hans Kelsen, *General Theory of the Law and State* (Anders Wedberg tr, 3rd edn, Harvard UP 2009).

<sup>29</sup> Hedley Bull, *The Anarchical Society* (3rd edn, Palgrave 2002) 127–128.



According to Rob Cryer and others, legal positivists perceive law as ‘the observable phenomenon of legislation, custom, adjudication by courts and other legal institutions’.<sup>30</sup> Different strains of legal positivism and international legal positivism exist. Consequently, Jörg Kammerhofer warned, ‘It may be impossible to construct a coherent set of arguments encompassing all legal positivisms’.<sup>31</sup> Similarly, Koskenniemi observed that ‘the very term “positivism” is ambiguous’.<sup>32</sup>

International legal positivism should not be simply equated with pure formalism.<sup>33</sup> Early ‘pure’ formalists viewed international law as an objective language capable of rational and uniform application free of subjective beliefs.<sup>34</sup> They posited that legal decision-makers should never have regard to norms external to formal rules as the international legal system was determinate and complete.<sup>35</sup> Later formalists conceded that minor lacunae in international law exist; however, they argued that subjectivism was restrained by the application of ‘second order’ residual legal rules, including the Lotus principle.<sup>36</sup> The Lotus principle indicated that, in the absence of a valid legal rule prohibiting state action in a given area, the state’s freedom to act was, by virtue of the doctrine of state sovereignty, assumed to be unlimited.<sup>37</sup> However, the Lotus principle was later criticised as apologist and proved unable to resolve conflicts that arose when one state’s liberty to act under international law conflicted with another’s.<sup>38</sup>

John Gardner suggested that most contemporary international legal positivists accept that where lacunae arise or conflicts of liberties occur,

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<sup>30</sup> Cryer and others (n27) 38. See also Mégret (n2) 68.

<sup>31</sup> Kammerhofer (n26) 408 (emphasis in original).

<sup>32</sup> Koskenniemi, *From Apology to Utopia* (n6) 131 fn258.

<sup>33</sup> Kammerhofer (n26) 408–410. See also *ibid.*

<sup>34</sup> Martti Koskenniemi, ‘Case Analysis: Faith, Identity, and the Killing of the Innocent: International Lawyers and Nuclear Weapons’ (1997) 10 LJIL 137, 140 and 161.

<sup>35</sup> Koskenniemi, *From Apology to Utopia* (n6) 32, 190 and 194.

<sup>36</sup> *ibid.* 40–41 and 255.

<sup>37</sup> *The Case of the S.S. “Lotus” (France v Turkey)* (Judgment) [1927] PCIJ Rep Series A No 10, 18–19 and 29–31; Koskenniemi, *From Apology to Utopia* (n6) 45 and 255–256. However, see also Kammerhofer (n26) 412–413.

<sup>38</sup> Koskenniemi, *From Apology to Utopia* (n6) 45, 257–258; Friedrich V Kratochwil, ‘How Do Norms Matter?’ in Michael Byers (ed), *The Role of Law in International Politics: Essays in International Relations and International Law* (OUP 2001) 39–40.

judges may have regard to the merits and balance competing claims against each other using concepts such as reasonableness.<sup>39</sup> According to this position, the element of judicial discretion involved in balancing is limited by the obligation to employ legal reasoning.<sup>40</sup> Furthermore, Bruno Simma and Andreas L. Paulus II suggested that most contemporary positivists accept that non-state actors may influence, and be subjects of, international law.<sup>41</sup>

According to Gardner, despite their differences, all legal positivists accept that the legal validity of a norm derives from its source<sup>42</sup> not its merits.<sup>43</sup> Positivists distinguish between a law's legal validity and its morality.<sup>44</sup> For positivists, the fact that a law requires certain behaviour does not presuppose its normative status or infer that an individual or state necessarily *ought* to comply with it because valid law is not necessarily just.<sup>45</sup> Gardner suggested that once a norm's validity (lawfulness) has been ascertained one might proceed to evaluate it according to its form (clarity, determinacy, generality and prospectiveness) and/or its substance (merits, morality and social function).<sup>46</sup>

On the one hand, the formalism associated with international legal positivism has been praised for transforming the marginalised into legal subjects capable of demanding their private preferences as legal rights, mediating the egoism of powerful international actors, facilitating inter-state cooperation and providing a benchmark against which state behaviour can be

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<sup>39</sup> John Gardner, 'Legal Positivism: 5 ½ myths' (1999) 46 *AmJuris* 199, 212–213. See also Koskenniemi, *From Apology to Utopia* (n6) 33–34, and 259–261.

<sup>40</sup> Leslie Green, 'Legal Positivism', *The Stanford Encyclopaedia of Philosophy* (Fall edn, 2009) <<https://plato.stanford.edu/archives/fall2009/entries/legal-positivism/>> accessed 17 January 2017. The radical constructivist, Friedrich Kratochwil, made a similar argument. See Kratochwil, 'How Do Norms Matter?' (n38) 47.

<sup>41</sup> Bruno Simma and Andreas L Paulus II, 'The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View' (1999) 93 *AJIL* 303, 305.

<sup>42</sup> Article 38 (1) of the Statute of the International Court of Justice contains the formal sources of international law. See Statute of the International Court of Justice (adopted 24 June 1945, entered into force 24 October 1945) 3 *Bevans* 1153 (ICJ Statute).

<sup>43</sup> Gardner (n39) 199–200.

<sup>44</sup> HLA Hart, *The Concept of Law* (2nd edn, OUP 1994) 228–230.

<sup>45</sup> *ibid*; Kammerhofer (n26) 410.

<sup>46</sup> Gardner (n39) 209–211.

evaluated.<sup>47</sup> On the other hand, it has been criticised for perpetuating privilege and promoting apathy.<sup>48</sup> Furthermore, Koskenniemi argued that, due to its inherent indeterminacy, positive international law is incapable of objectively resolving political conflicts.<sup>49</sup> He inferred that lawyers and states have hidden behind legal formalism to relieve themselves of responsibility for the adverse consequences of their legal arguments.<sup>50</sup>

## 2.4 Liberal internationalism<sup>51</sup>

Liberal internationalism advocates ‘the adaptation of broadly liberal political principles to the management of the international system’<sup>52</sup> and the creation of an international society of sovereign democracies. Through its promotion of interdependence and universal human rights, it accepts that individuals may be subjects of international law. In its view, a global community of individuals and non-state actors exists albeit alongside, rather than in place of, the international community of states.<sup>53</sup>

Deriving inspiration from Hobbes, early liberal theorists, including John Locke, Jean-Jacques Rousseau and Immanuel Kant, developed social contract theory, which, when applied at the international level, suggests that states are free, equal and autonomous actors who associate in an international community and sacrifice certain sovereign prerogatives thereto in return for

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<sup>47</sup> Martti Koskenniemi, *The Politics of International Law* (Hart Publishing 2009) 256, 257 and 260. Douglas Cassel identified several benefits of the codification of international human rights law: common language, transforms claims into rights, reinforces universality of rights, signals the perceived will of the international community, juridical precision, enhances expectations of compliance, enhances enforcement, generates stigma surrounding human rights violations and combats moral relativism. See Douglass Cassel, ‘Does International Human Rights Law Make a Difference’ (2001) 2 *ChiJInt'l L* 121.

<sup>48</sup> Koskenniemi, *The Politics of International Law* (n47) 257.

<sup>49</sup> Koskenniemi, ‘Case Analysis’ (n34) 160.

<sup>50</sup> *ibid.* See also David Kennedy, ‘Lawfare and Warfare’ in Crawford and Koskenniemi (eds) (n2) 181.

<sup>51</sup> See eg Daniel Joyce, ‘Liberal Internationalism’ in Orford and Hoffmann (eds) (n4) 471–487. Regarding liberalism in international relations theory, see Scott Burchill, ‘Liberalism’ in Scott Burchill and others (eds), *Theories of International Relations* (3rd edn, Palgrave MacMillan 2005) 55–58; Bruce Russett, ‘Liberalism’ in Tim Dunne, Mikja Kurki and Steve Smith (eds), *International Relations Theories: Discipline and Diversity* (3rd edn, OUP 2013) 94–113.

<sup>52</sup> Chris Brown and Kirsten Ainley, *Understanding International Relations* (3rd edn, Palgrave Macmillan 2005) 21.

<sup>53</sup> See eg Thomas M Franck, *Fairness in International Law and Institutions* (OUP 1998) 12–13.

membership benefits, most notably international order, peace and security.<sup>54</sup>

Liberal internationalism infers that capitalism ensures the most efficient allocation of resources within any given society.<sup>55</sup> 19<sup>th</sup> century legal professionals, inspired by liberal political theory,<sup>56</sup> argued that free trade would create economic disincentives for war by fostering economic interdependence.<sup>57</sup> They also argued that it would dilute the appeal of nationalist ideologies by increasing interaction between states and cultivating global communal values.<sup>58</sup> The liberal ‘harmony of interests’ doctrine assumed that the state’s freedom of action coalesced with both the general interest of the international community and the individual interests of its underlying members.<sup>59</sup> In other words, ‘In pursuing his own interest, the individual pursues that of the community, and in promoting the interest of the community he promotes his own’.<sup>60</sup> World War I (WWI) challenged these assumptions.

After WWI, liberal internationalists suggested that international peace could be achieved through the establishment of democratic governments at the domestic level and the progressive codification of international law at the international level.<sup>61</sup> According to the realist, Edward Carr, this argument was based on two false assumptions: (i) that international law was separate from international politics and capable of restraining it; and (ii) that every nation had a shared interest in the maintenance of peace because the cost of war always outweighed the gains.<sup>62</sup> Whilst the latter assumption might have been true for the WWI victors, who were able to mould the post-war settlement in

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<sup>54</sup> *ibid* 27–28.

<sup>55</sup> Joyce (n51) 476; Burchill (n51) 55; Koskenniemi, *From Apology to Utopia* (n6) 144.

<sup>56</sup> Burchill (n51) 59.

<sup>57</sup> *ibid* 58–59.

<sup>58</sup> *ibid* 63.

<sup>59</sup> Martti Koskenniemi, ‘The Politics of International Law’ (1990–91) 1 *EJIL* 4, 5–6; Koskenniemi, *From Apology to Utopia* (n6) 143–145, 148–149 and 153.

<sup>60</sup> Edward H Carr, *The Twenty Years’ Crisis 1919–1939: An Introduction to the Study of International Relations* (2nd edn, Macmillan and Co Ltd 1946) 43.

<sup>61</sup> Kratchowil (n38) 40; Brown and Ainley (n52) 21–22; Gerry Simpson, ‘International Law in Diplomatic History’ in Crawford and Koskenniemi (eds) (n2) 36–37.

<sup>62</sup> Carr (n60) 51.

accordance with their interests, it was not necessarily true for the vanquished nations.<sup>63</sup>

Liberal internationalism was criticised by realists at the dawn<sup>64</sup> and dusk<sup>65</sup> of World War II (WWII) as utopian and apologist to power. Nevertheless, due to the triumph of the Allies, it continued to permeate the post-WWII international system. The new international financial institutions (IFIs) promoted economic liberalism and the UN Charter incorporated the principles of sovereign equality, non-intervention, self-determination, human rights and rule of law. However, in acknowledgement of *realpolitik*, the IFIs utilised a weighting voting system, which was biased in favour of industrialised states, and the Great Powers retained control of matters of international peace and security through their permanent membership of the UNSC and veto power. Thus, the international system itself was far from democratic despite the ostensible equality of states.

After the Cold War, some liberal internationalists predicted the emergence of an international society of democracies.<sup>66</sup> However, when the negative effects of globalisation became apparent, liberal internationalism was accused of exacerbating global inequality and fuelling extremism. Furthermore, the 9/11 attacks, the War on Terror and the 2008 global financial crisis resulted in a dilution of liberal principles within liberal democracies themselves. Authoritarian states in turn were able to exploit the threat posed by Islamist extremism to justify the repression of legitimate political opponents and consolidate their own rule.

Liberal internationalism has been criticised by realists for presupposing a harmony of interests between the interests of the international community and the interests of individual states, and by TWAIL and Marxist scholars for failing to consider questions of distributive justice and for

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<sup>63</sup> *ibid* 51–52 and 82–83.

<sup>64</sup> See *eg* *ibid*.

<sup>65</sup> See *eg* Hans Morgenthau, *Politics among Nations: the Struggle for Power and Peace* (Alfred A Knopf Inc 1948).

<sup>66</sup> Burchill (n51) 56.

enabling imperialism.<sup>67</sup> Furthermore, Koskenniemi traced many of the inherent tensions in international law to its genesis in liberalism, which seeks to reconcile individualism and cosmopolitanism.<sup>68</sup> Individualism is reflected in the sovereign equality and non-intervention principles, whereas cosmopolitanism is reflected in *erga omnes* obligations and *jus cogens* norms.<sup>69</sup> Individualism attempts to obviate the risks of utilitarianism and hegemony disguised as universalism associated with cosmopolitanism, whereas cosmopolitanism attempts to offset the risk of totalitarianism associated with individualism.

#### 2.4.i Franck's Legitimacy and Fairness Theses

Thomas Franck argued that international legal rules that are perceived as legitimate are more likely to be complied with. In his 'Legitimacy' thesis, he argued that rules exert an inherent 'compliance pull' when they satisfy four criteria: determinacy, symbolic validation, coherence and adherence to right process during their creation and application.<sup>70</sup> However, his definition of legitimacy was criticised for omitting considerations of distributive justice (substantive fairness).<sup>71</sup> In response, his 'Fairness' thesis suggested that a legal rule which is perceived to be substantively fair may also exert a compliance pull because 'most people think it is *right* to act justly'.<sup>72</sup>

International law seeks to guarantee both procedural and substantive fairness.<sup>73</sup> However, their requirements often conflict as procedural fairness is inclined toward the maintenance of order, whereas substantive fairness

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<sup>67</sup> Koskenniemi, *From Apology to Utopia* (n6) 121 and 156.

<sup>68</sup> Ibid 74–89. See also Christian Reus-Smit, 'The Politics of International Law' in Christian Reus-Smit (ed), *The Politics of International Law* (CUP 2004) 32–35.

<sup>69</sup> Antonio Cassese, *International Law* (2nd edn, OUP 2005) 14–17; Gerry J Simpson, 'Imagined Consent: Democratic Liberalism in International Legal Theory' (1994) 15 *Aust YBIL* 103, 113

<sup>70</sup> Thomas M Franck, 'Legitimacy in the International System' (1988) 82 *AJIL* 705, 711–713, 718–721, 724–726, 741–743, 750 and 752. Kratochwil concurred with Franck that legal norms that are perceived as legitimate, where legitimacy is defined in procedural terms, develop their own compliance pull. See Kratochwil, 'How Do Norms Matter?' (n38) 57.

<sup>71</sup> Fernando R Téson, 'The Kantian Theory of International Law' (1992) 92 *ColumLRev* 53, 93–99.

<sup>72</sup> Franck, *Fairness* (n53) (emphasis in original).

<sup>73</sup> Ibid 7 and 23.

tends to demand progressive change.<sup>74</sup> Franck suggested that fairness discourse is the medium through which this conflict is mediated.<sup>75</sup> It permeates the international legal system through concepts such as equity.<sup>76</sup> Franck indicated that, if successful, fairness discourse ‘should lead to an agreed formula located at a conceptual intersection between various plausible formulas for allocation’<sup>77</sup> or what John Rawls termed ‘an overlapping consensus’.<sup>78</sup> Franck observed that many individuals and groups, including disenfranchised minorities within existing state borders, are often denied the opportunity to participate in fairness discourse due to the state-centric character of most international institutions.<sup>79</sup> Consequently, he advocated the establishment of a democratic global forum to represent individual members of global society.<sup>80</sup>

#### 2.4.ii Democratic Peace Theory

Democratic peace theory suggests that world peace could be achieved if the world was composed entirely of liberal, democratic states.<sup>81</sup> It is based on the Kantian assumption that representative governments are less likely to wage costly inter-state wars as citizens are unlikely to consent to them.<sup>82</sup> Liberalism also infers that democracies are less prone to civil war than autocracies as representative governments are less likely to engage in divisive rent-seeking.<sup>83</sup> Democratic peace theory implies that only liberal democratic governments are legitimate<sup>84</sup> and suggests that international law should

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<sup>74</sup> *ibid* 22–24 and 477. This conflict between procedural and substantive fairness reflects the tension that Fuller identified between law’s internal and external moralities.

<sup>75</sup> *ibid* 7.

<sup>76</sup> *ibid* 47–48, 79, and 478.

<sup>77</sup> *ibid* 11–14.

<sup>78</sup> John Rawls, *Political Liberalism* (Columbia UP 1993) 133–172. The Chayeses’ viewed the international legal system as a discursive process. See Koh (n9) 2642.

<sup>79</sup> Franck, *Fairness* (n53) 477–484.

<sup>80</sup> Franck, *Fairness* (n53) 483–484.

<sup>81</sup> Susan Marks, ‘International Law, Democracy, and the End of History’ (1997) 3 *EJIL* 449, 467.

<sup>82</sup> Immanuel Kant, *Perpetual Peace: A Philosophical Sketch* (1795). See also Wouter Werner and Geoff Gordon, ‘Kant, Cosmopolitanism, and International Law’ in Orford and Hoffmann (eds) (n4).

<sup>83</sup> Andrew Moravcsik, ‘Taking Preferences Seriously: A Liberal Theory of International Politics’ (1997) 51 *Int’l Org* 513, 517–518 and 530–533.

<sup>84</sup> Michael W Doyle, ‘Liberalism and World Politics’ (1986) 80 *AmPolSciRev* 1151, 1162; Marks (n81) 465.

distinguish between liberal and non-liberal states for the purposes of predicting state behaviour,<sup>85</sup> determining access to international development assistance and trade benefits,<sup>86</sup> and/or determining eligibility to participate in international institutions<sup>87</sup> and legal capacity to ratify international treaties.

Empirical research suggests that since at least the 18<sup>th</sup> century liberal democracies, unlike autocracies, have refrained from fighting each other.<sup>88</sup> However, they have engaged in armed conflicts with non-democracies. Nevertheless, democratic peace theorists argue that democracies only initiate conflicts for *liberal purposes*, including the promotion of democracy and human rights.<sup>89</sup> Anne-Marie Slaughter argued that a ‘zone of law’ prevails between democracies, which makes them more inclined to resolve disputes by peaceful means.<sup>90</sup> Empirical evidence does exist which indicates that when diplomatic disputes erupt, democratic rulers are less likely than dictators to initiate or escalate the use of violence.<sup>91</sup> Empirical evidence also exists which suggests that democracies are more likely than autocracies to uphold their obligations under international human rights treaties.<sup>92</sup>

Nevertheless, from a TWAIL perspective the distinction that democratic peace theory draws between liberal and non-liberal states is reminiscent of the distinction that colonial powers drew between civilised and non-civilised nations. It suggests that liberal states may violate international law with impunity so long as they claim to be acting in furtherance of

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<sup>85</sup> Anne-Marie Slaughter, ‘A liberal theory of international law’ (2000) 94 ASIL PROC 240, 249.

<sup>86</sup> Marks (n81) 476.

<sup>87</sup> Tésou (n71) 100. Notably, upon the recommendation of the UNSC, the UNGA may suspend and/or expel a persistent violator of UN principles. See Charter of the United Nations (adopted 25 June 1945, entered into force 24 October 1945) 1 UNTS XVI, arts 5 and 6. Furthermore, the UNGA may by a two thirds majority suspend the membership of a UNHRC member ‘that commits gross and systematic violations of human rights’. See UNGA Res 60/251 ‘Human Rights Council’ (15 March 2006) UN Doc A/RES/60/251, para 8.

<sup>88</sup> Doyle, ‘Liberalism’ (n84). See also Russett (n51) 103–105.

<sup>89</sup> Doyle, ‘Liberalism’ (n84) 1162. See also Russett (n51) 101.

<sup>90</sup> Doyle, ‘Liberalism’ (n84) 1162; Marks (n81) 465.

<sup>91</sup> Russett (n51) 103–105.

<sup>92</sup> Oona A Hathaway, ‘Do Human Rights Treaties Make a Difference?’ (2002) 111 Yale LJ 1935, 2001 and 2019; Eric Neumayer, ‘Do International Human Rights Treaties Improve Respect for Human Rights?’ (2005) 49 JConflict Resol 925, 930.



democratic principles and cosmopolitan ideals.<sup>93</sup> Hence, TWAIL scholars are wary of concepts such as failed and rogue states, humanitarian intervention and the responsibility to protect.<sup>94</sup> Koskenniemi cautioned that meta-narratives, such as democratic peace theory, which indicate that there is only one correct way of ordering social life may enable totalitarianism.<sup>95</sup>

Democratic peace theory has been criticised for affording legitimacy to repressive authoritarian governments that practice ‘cosmetic democracy’ and for reducing peace to the absence of armed conflict.<sup>96</sup> Susan Marks observed that systemic inequalities within and between states may reflect a form of structural violence that contravenes the supposed democratic peace.<sup>97</sup> Finally, as democratising states are more likely to engage in armed conflict than either autocracies or stable democracies,<sup>98</sup> José Alvarez warned, ‘We should not sell democratization as a recipe for “peace” when it may provoke considerable conflict, both within states and between them.’<sup>99</sup>

#### 2.4.iii Slaughter’s Positivist Liberal Approach

Slaughter advanced a liberal approach to international law based upon Andrew Moravcsik’s positivist liberal theory of international relations.<sup>100</sup> Moravcsik conceived of international politics as interactions between individuals and functionally differentiated government agencies rather than interactions between states.<sup>101</sup> Slaughter traced the origins of most international problems to the domestic level, namely to conflicting individual and group preferences or the misrepresentation of those preferences by

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<sup>93</sup> Antony Anghie, ‘On Critique and the Other’ in Anne Orford (ed), *International Law and its Others* (CUP 2006) 395; BS Chimni, ‘Legitimizing the international rule of law’ in Crawford and Koskenniemi (eds) (n2) 301.

<sup>94</sup> Mégret (n2) 84; Chimni (n93) 301. See also James Crawford, ‘Sovereignty as a Legal Value’ in Crawford and Koskenniemi (eds) (n2) 127.

<sup>95</sup> Koskenniemi, *From Apology to Utopia* (n6) 559.

<sup>96</sup> Marks (n81) 470–473 and 475; Slaughter (n85) 253. See also Fred Halliday, *The Middle East in International Relations: Power, Politics and Ideology* (CUP 2005) 159–160.

<sup>97</sup> Marks (n81) 472–473. See also Slaughter (n85) 253 (Alvarez’s response); Chimni (n93) 298.

<sup>98</sup> See generally Edward Mansfield and Jack Snyder, ‘Democratization and War’ (1995) 74 *Foreign Affairs* 79.

<sup>99</sup> Slaughter (n85) 253.

<sup>100</sup> *ibid*; Moravcsik (n83). See also Andreas Paulus, ‘International law and international community’ in Armstrong (ed) (n7) 48.

<sup>101</sup> Slaughter (n85) 241.

governmental representatives.<sup>102</sup> Consequently, she suggested that a voluntary transnational law, directly created by and targeted at individuals and non-state actors, could address global problems more effectively than existing public international law.<sup>103</sup> However, Koskenniemi cautioned that decentralised functional regimes undermine sovereign equality and implicitly prioritise particular interests as they tend to be disproportionately influenced by powerful trans-global networks.<sup>104</sup> Furthermore, the proliferation of competing functional regimes in areas such as human rights and security has undermined the coherence of international law.<sup>105</sup>

## 2.5 Theory Surrounding Authoritarian Rule

This section discusses themes including the emergence, consolidation and persistence of authoritarian regimes and their adherence to international human rights law (IHRL).

### 2.5.i Origins, Types, Consolidation and Persistence

Poverty, inequality and a history of colonial subjugation have all been shown to contribute to the emergence of authoritarian rule.<sup>106</sup> Colonial administrators often deliberately impeded the consolidation of national identities by imposing artificial borders and manipulating identity-based politics as part of divide and rule policies.<sup>107</sup> Consequently, post-independence rulers often inherited weak governing institutions and divided societies.<sup>108</sup> Furthermore, colonial powers frequently engineered the installation of friendly authoritarian monarchies in power in newly independent former colonies.<sup>109</sup>

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<sup>102</sup> *ibid* 246.

<sup>103</sup> *ibid* 242–246.

<sup>104</sup> Martti Koskenniemi, 'The Politics of International Law –20 Years Later' (2009) 20 EJIL 7, 10–11; Koskenniemi, *The Politics of International Law* (n47) 248. See also Slaughter (n85) 251 (Alvarez's response).

<sup>105</sup> Koskenniemi, '20 Years Later' (n104) 10 and 12–13.

<sup>106</sup> Natasha M Ezrow and Erica Frantz, *Dictators and Dictatorships: Understanding Authoritarian Regimes and Their Leaders* (Bloomsbury 2011) 39–62.

<sup>107</sup> *ibid* 55–57.

<sup>108</sup> *ibid*.

<sup>109</sup> Lisa Anderson, 'Absolutism and the Resilience of Monarchy in the Middle East' (1991) 106 PolSciQ 1, 3–4.

Authoritarian regimes have been differentiated depending on whether control over policy-making and access to elite positions is concentrated in the hands of a group of military elites (military/indirect military rule), an individual (personalist), a hegemonic party (single-party), a royal family (monarchic), a circumscribed group (oligarchic) or a combination of these elite actors (hybrid).<sup>110</sup> Authoritarian rulers consolidate their rule by acquiring the loyalty of an inner circle and the support, or at least acquiescence, of a large segment of the general population.<sup>111</sup> They provide their inner circle with incentives to stay loyal, for example, by ignoring their corruption, and disincentives to defect, for example, by generating a fear of retribution should the regime collapse.<sup>112</sup> They seek to maintain the acquiescence of the general population through a mixture of co-optation (provision of incentives) and coercion.<sup>113</sup>

Authoritarian regimes learn from each other and occasionally cooperate to combat shared threats. The creation of nominally democratic institutions may enhance the durability of authoritarian regimes.<sup>114</sup> Political parties are useful instruments for managing conflict among regime elites, distributing patronage to supporters and incorporating the masses.<sup>115</sup> Furthermore, parliamentary elections and legislatures may be utilised to manage and distribute benefits to regime elites, regulate societal discontent,

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<sup>110</sup> See generally Barbara Geddes, 'What do we know about democratization after twenty years?' (1999) 2 *Annual Review of Political Science* 115; Barbara Geddes, Joseph Wright and Erica Frantz, 'Autocratic Breakdown and Regime Transitions: A New Data Set' (2014) 12 *Perspectives on Politics* 313.

<sup>111</sup> Bruce Bueno de Mesquita and others, *Logic of Political Survival* (MIT Press 2005) 41–57; Ezrow and Frantz (n106) 28.

<sup>112</sup> Ezrow and Frantz (n106) 26–28.

<sup>113</sup> Beatriz Magaloni, *Voting for Autocracy: Hegemonic Party Survival and its Demise in Mexico* (CUP 2006) 23.

<sup>114</sup> Jason Brownlee, *Authoritarianism in an Age of Democratization* (CUP 2007) 2; Jennifer Gandhi and Adam Przeworski, 'Authoritarian Institutions and the Survival of Autocrats' (2007) 40 *CompPolStud* 1279. These institutions are generally democratic in name only. See Stephen Levitsky and Lucan Way, 'Elections without Democracy: the Rise of Competitive Authoritarianism' (2002) 13 *Journal of Democracy* 51, 52; Steven Heydemann, 'Upgrading Authoritarianism in the Arab World' (2007) Saban Center for Middle East Policy at the Brookings Institution Analysis Paper 13, October 2007, 10–12 <<http://www.brookings.edu/wp-content/uploads/2016/06/10arabworld.pdf>> accessed 3 December 2014; Ezrow and Frantz (n106) 22–23.

<sup>115</sup> Brownlee (n114) 10–12; Gandhi and Przeworski (n114) 1182–1183.

acquire foreign aid and co-opt opponents.<sup>116</sup> External actors may also directly and indirectly enhance the longevity of authoritarian regimes. The US and Russia have propped up authoritarian regimes in the Middle East for decades with military, financial and diplomatic support. The US has also indirectly bolstered radical authoritarian regimes through its pro-Israeli policies. For example, the Assad regime has instrumentalised its Arab nationalist ideology and foreign policy of resistance to secure domestic legitimacy.

Heydemann asserted that most authoritarian Arab regimes engaged in ‘authoritarian upgrading’ in the post-Cold War era.<sup>117</sup> Accordingly, they added new authoritarian strategies to their toolkit, including the appropriation of civil society functions, limited political liberalisation, selective economic reform and the diversification of external alliances.<sup>118</sup> However, authoritarian upgrading generated its own problems, including significant increases in corruption and inequality, and the exclusion of former populist constituencies and regime insiders from newly reconstituted patronage networks.

### 2.5.ii Authoritarian Regimes and IHRL

Authoritarian regimes in post-colonial states sometimes ratify international treaties and establish cosmetic judicial mechanisms to signify their states’ external sovereignty and juridical statehood.<sup>119</sup> Oona Hathaway performed a quantitative analysis of the impact of treaty ratification on state practice in 166 states from 1960 to 1999.<sup>120</sup> Her results suggest that the human rights performance of authoritarian states may actually deteriorate following ratification of human rights treaties.<sup>121</sup> She concluded that the worst human rights violators ratify human rights treaties merely to obtain the rewards that

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<sup>116</sup> Ezrow and Frantz (n106) 78–81; Brownlee (n114) 8.

<sup>117</sup> See generally Heydemann, ‘Upgrading Authoritarianism’ (n114).

<sup>118</sup> Heydemann, ‘Upgrading Authoritarianism’ (n114) 5–25.

<sup>119</sup> Reinoud Leenders, ‘Prosecuting Political Dissent Courts and the Resilience of Authoritarianism in Syria’ in Steven Heydemann and Reinoud Leenders (eds), *Middle East Authoritarianisms: Governance, Contestation, and Regime Resilience in Syria and Iran* (Stanford UP 2013) 182–184.

<sup>120</sup> Hathaway’s study focussed on five human rights areas: genocide, torture, fair and public trials, civil liberties and political representation of women. See Hathaway, ‘Do Human Rights Treaties Make a Difference?’ (n92) 1935.

<sup>121</sup> *ibid* 1940 and 1999; Oona A Hathaway, ‘The Cost of Commitment’ (2003) 55 *StanLRev* 1821, 1841.

accrue from ratification without ever intending to comply with their obligations thereunder.<sup>122</sup> Nevertheless, she suggested that treaty ratification may have a positive impact on the enjoyment of human rights over the long-term as it may constitute a first step in a long and gradual process of norm internalisation.<sup>123</sup>

Hathaway hypothesised that when deciding whether to ratify a human rights treaty, states calculate both the costs of compliance *and* the likelihood of those costs actually materialising.<sup>124</sup> The costs of compliance may be very high for authoritarian regimes who rely on repression to stay in power.<sup>125</sup> However, those costs may be unlikely to materialise given the weakness of the associated monitoring and enforcement mechanisms.<sup>126</sup> Human rights treaties have weak in-built enforcement mechanisms. Treaty monitoring bodies have no powers of enforcement and individual communications procedures, which allow treaty monitoring bodies to receive communications from individuals alleging violations of their rights, are entirely optional. Treaty monitoring bodies can publicise human rights violations potentially giving rise to reputational costs.<sup>127</sup> However, states have proven reluctant to incur the political costs of publicly criticising human rights violations in other states and/or imposing sanctions in response thereto.<sup>128</sup> Furthermore, internal monitoring and reporting of human rights violations is often minimal in authoritarian states due to the pervasive repression of independent activists.<sup>129</sup> Hence, authoritarian regimes are less likely to suffer domestic costs for failing

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<sup>122</sup> Hathaway, 'Do Human Rights Treaties Make a Difference?' (n92) 2009. For a further discussion of the signalling function of ratification and the associated benefits, see James Raymond Vreeland, 'Political Institutions and Human Rights: Why Dictatorships Enter into the United Nations Convention Against Torture' (2008) 62 *Int'l Org* 65; James R Hollyer and B Peter Rosendorff, 'Why Do Authoritarian Regimes Sign the Convention Against Torture? Signaling, Domestic Politics and Non-Compliance' (2011) 6 *Quarterly Journal of Political Science* 275; Courtenay R Conrad, 'Divergent Incentives for Dictators: Domestic Institutions and (International Promises Not to) Torture' (2014) 58 *JConflict Resol* 34.

<sup>123</sup> Hathaway, 'Do Human Rights Treaties Make a Difference?' (n92) 2003–2004 and 2021–2022. See also Neumayer (n92) 951.

<sup>124</sup> Hathaway, 'The Cost of Commitment' (n121) 1835.

<sup>125</sup> Neumayer (n92) 927–928.

<sup>126</sup> Hathaway, 'Do Human Rights Treaties Make a Difference?' (n92) 2020.

<sup>127</sup> *ibid* 1951.

<sup>128</sup> *ibid* 1951.

<sup>129</sup> *ibid* 2012–2015. See also Hathaway, 'The Cost of Commitment' (n121) 1837.

to uphold their human rights obligations than democratically elected governments.<sup>130</sup>

Hathaway's analysis suggests that the states with the worst human rights records are the least likely to ratify human rights instruments with effective monitoring and enforcement mechanisms.<sup>131</sup> Hence, they are unlikely to opt into individual communications and inquiries procedures in international human rights treaties.<sup>132</sup> Of relevance for Syria, Eric Neumayer identified a strong link between derogation regimes and increases in human rights violations.<sup>133</sup> Overlapping somewhat with democratic peace theory, Hathaway suggested that the introduction of membership criteria, tiered membership, probation periods and mechanisms for ejecting gross violators may help boost compliance.<sup>134</sup> However, these types of reforms could also cause violators to opt out of human rights treaty regimes altogether.<sup>135</sup>

## 2.6 Realism<sup>136</sup>

Realism is based upon the following assumptions: the international system is an anarchic self-help system, states are the key actors in international relations, and states pursue their own self-interest defined primarily in terms of material power.<sup>137</sup> Realists view international politics as an inevitable struggle for power and assert that the balance of power system is the primary means of maintaining international order. It does so by preventing any one state from becoming so powerful that it could potentially destroy the

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<sup>130</sup> Hathaway, 'The Cost of Commitment' (n121) 1837; Oona A Hathaway, 'Why Do Countries Commit to Human Rights Treaties?' (2007) 51 *JConflict Resol* 588, 592–595. See also Neumayer (n92) 950; Emilie M Hafner-Burton, Kiyoteru Tsutsui and John W Meyer, 'International Human Rights Law and the Politics of Legitimation: Repressive States and Human Rights Treaties' (2008) 23 *International Sociology* 115, 128; Vreeland (n122) 70 and 73.

<sup>131</sup> Hathaway, 'The Cost of Commitment' (n121) 1841, 1847–1848.

<sup>132</sup> Hathaway, 'Do Human Rights Treaties Make a Difference?' (n92) 1982, 1999–2000 and 2011–2016.

<sup>133</sup> Neumayer (n92) 941 and 949–950.

<sup>134</sup> Hathaway, 'Do Human Rights Treaties Make a Difference?' (n92) 2024.

<sup>135</sup> As Hathaway herself conceded. See *ibid* 2025; Hathaway, 'The Cost of Commitment' (n121) 1857–1858; Hathaway, 'Why Do Countries Commit' (n130) 611–613.

<sup>136</sup> This section concentrates on the work of the classical realists, Hans Morgenthau and Edward Carr.

<sup>137</sup> Morgenthau, *Politics* (n65) 13.

others.<sup>138</sup> According to this system, whenever a state or bloc of states increases its power, thereby threatening the balance of power, an opposing state/bloc will ‘balance’ against the ascendant state/bloc. States balance by either increasing their own power, for example, by reinforcing their military and/or strengthening/forming an alliance, or by decreasing the power of the ascendant state/bloc, for example, by inciting internal unrest in the ascendant state.<sup>139</sup> The global balance of power system has underlying, interrelated regional sub-systems, which each preserve their own internal balance.<sup>140</sup>

Some classical realists, including Hobbes, Reinhold Niebuhr and Hans Morgenthau, viewed the inter-state struggle for power as a by-product of human nature and the insatiable human desire for power.<sup>141</sup> However, for Carr it reflected a conflict between the haves, who sought to maintain the status quo, and the have-nots, who sought to revise it, in a world defined by material scarcity.<sup>142</sup>

Realists concede that international legal norms and ideological and moral principles are not irrelevant in international politics. They argue that leaders often rely on these norms and principles to justify self-interested policies as they render the international struggle for power more morally digestible for domestic audiences.<sup>143</sup> Realists view international law as a matter of political expediency: international law emerges in areas where states have complementary interests and international order depends upon the stability that it provides.<sup>144</sup> However, realists submit that international law exerts little independent influence on states save in technical areas.<sup>145</sup> Some

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<sup>138</sup> Hans Morgenthau, *Politics among Nations: The Struggle for Power and Peace* (6th edn, McGraw Hill 1985) 237, 241 and 242.

<sup>139</sup> *ibid* 242–243.

<sup>140</sup> *ibid* 251.

<sup>141</sup> Morgenthau, *Politics* (n65) 17; Brown and Ainley (n52) 29; Richard Ned Lebow, ‘Classical Realism’ in Dunne, Kurki and Smith (eds) (n51) 61–62. However, the poststructuralist scholar, Michel Foucault, argued that there is no such thing as a ‘human nature’ common to all individuals as every individual’s nature is the product of power. See David Campbell, ‘Poststructuralism’ in Dunne, Kurki and Smith (eds) (n51) 233.

<sup>142</sup> Brown and Ainley (n52) 26.

<sup>143</sup> Carr (n60) 78–80; Morgenthau, *Politics* (n65) 49 and 61.

<sup>144</sup> Carr (n60) 177 and 179; Morgenthau, *Politics* (6th edn) (n138) 296–297.

<sup>145</sup> Morgenthau, *Politics* (6th edn) (n138) 298; Reus-Smit, ‘The Politics of International Law’ (68) 16.

realists suggest that national authorities may in fact be obliged to subordinate legal norms and moral principles to the national interest, particularly if the state's survival is at stake.<sup>146</sup>

Realists assert that most states voluntarily comply with international law most of the time because they calculate that compliance is in their interest.<sup>147</sup> However, they argue that powerful states will ignore international law when it conflicts with their vital interests.<sup>148</sup> In support of this argument, they observe that international law is frequently violated during crises, which are usually settled by political means.<sup>149</sup> Realists note that since the crystallisation of the legal prohibition of war, no lawful mechanism has existed for affecting changes to the international order either in response to changes in the balance of power or demands for distributive justice. Consequently, one of their foremost critiques of international law is its alleged bias toward the status quo and the interests it serves.<sup>150</sup>

Realists are critical of liberal internationalists who suggest that international order may be achieved purely through international law.<sup>151</sup> Realists believe that law binds because it can be coercively enforced not because of its legal pedigree or supposed moral content.<sup>152</sup> They argue that due to the decentralised nature of the international system, international law cannot be coercively enforced without the connivance of powerful states and thus cannot be regarded as binding of itself.<sup>153</sup> They assert that a powerful state can violate the rights of a weak state with impunity unless another powerful state determines that it is in its interest to help the weak state to defend itself.<sup>154</sup> Hence, the enforcement of international law is dependent

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<sup>146</sup> Carr (n60) 159–160; Hans Morgenthau, *Politics among Nations: The Struggle for Power and Peace* (7th edn, McGraw Hill 2005) 14.

<sup>147</sup> Morgenthau, *Politics* (6th edn) (n138) 312–313.

<sup>148</sup> Reus-Smit, 'The Politics of International Law' (n68) 16.

<sup>149</sup> Koskenniemi, *From Apology to Utopia* (n6) 180.

<sup>150</sup> Carr (n60) 191; Martti Koskenniemi, 'Carl Schmitt, Hans Morgenthau, and the Image of Law in International Relations' in Byers (ed) (n38) 17, 21, 26 and 29.

<sup>151</sup> Morgenthau, *Politics* (6th edn) (n138) 295–296.

<sup>152</sup> Koskenniemi, 'Carl Schmitt' (n150) 17 and 23 citing Hans Morgenthau, *American Foreign Policy* (New York: Knopf, 1951), 35.

<sup>153</sup> Reus-Smit, 'The Politics of International Law' (n68) 16.

<sup>154</sup> Carr (n60) 176; Morgenthau, *Politics* (6th edn) (n138) 312.



upon political calculations.<sup>155</sup> Realists assert that collective security systems have failed to overcome this shortcoming.<sup>156</sup> As Morgenthau observed, the veto power afforded to the UNSC's five permanent members (the P5) effectively decentralises the UN's collective security system.<sup>157</sup> Consequently, collective enforcement is only possible against weak states that are not aligned with one of the P5 and in circumstances where such action will not affect the balance of power.<sup>158</sup>

Realism has been criticised for its state-centric orientation. Koskenniemi suggested that realism does not provide an adequate explanation for the extent to which international law *does* in fact influence state behaviour.<sup>159</sup> The constructivist scholar, Christian Reus-Smit, contended that realism cannot account for the manner in which weak states have utilised international law to promote their interests.<sup>160</sup> He also suggested that the tendency of states to attempt to justify their actions under international law is an implicit acknowledgment that violations have costs.<sup>161</sup> Jack Donnelly argued that the fear of retribution and power of public opinion help ensure compliance.<sup>162</sup> Hathaway argued that the ratification of human rights treaties can have an independent impact on state practice contrary to realist expectations; however, she suggested that the impact of ratification is likely to differ depending on the political ordering principle of the ratifying state.<sup>163</sup>

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<sup>155</sup> Morgenthau, *Politics* (6th edn) (n138) 312.

<sup>156</sup> Regarding the League's collective security system, see *ibid* 249, 313–315 and 319. Regarding earlier collective security systems, including the Concert of Europe, see Cassese, *International Law* (n69) 25 and 28–30; Simpson (n61) 35–36.

<sup>157</sup> Morgenthau, *Politics* (6th edn) (n138) 325.

<sup>158</sup> *ibid* 324.

<sup>159</sup> Koskenniemi, *From Apology to Utopia* (n6) 200.

<sup>160</sup> Reus-Smit, 'The Politics of International Law' (n68) 17–18. See also Hathaway, 'Do Human Rights Treaties Make a Difference?' (n92) 1946–1947.

<sup>161</sup> Reus-Smit, 'The Politics of International Law' (n68) 282–284.

<sup>162</sup> Jack Donnelly, 'Realism' in Burchill and others (eds) (n51) 49.

<sup>163</sup> Hathaway, 'Do Human Rights Treaties Make a Difference?' (n92).

## 2.7 Neorealism

Neorealism was devised by Kenneth Waltz and seeks to identify the structural determinants of state behaviour.<sup>164</sup> It is based on the following assumptions: (i) the most powerful states are the key determiners of international politics, (ii) the ordering principle of the international system is anarchy, (iii) all states possess military capability, (iv) states can never be sure of each other's intentions, (v) the primary objective of every state is survival, and (vi) states are unitary and rational egoists.<sup>165</sup> Neorealists argue that, as the international system is a self-help system, it is logical for states to focus on the offensive capabilities of other states and to primarily seek material power in order to enable them to defend themselves and survive.<sup>166</sup> Neorealism abstracts from all of the underlying characteristics of states apart from their offensive capabilities. Consequently, it does not allow for a consideration of how transnational and domestic factors, such as political-ordering type, identity and public opinion, impact the behaviour of states at the international level.<sup>167</sup>

Neorealism maintains that states either 'balance against' or 'bandwagon' with ascendant powers. 'Bandwagoning' occurs when states align themselves with ascendant powers in the hope that alignment will save them from attack and/or enable them to share in the dominant state's success.<sup>168</sup> Neorealists argue that balancing is more common as states do not want to strengthen a powerful state that could potentially threaten their survival.<sup>169</sup> They argue that bandwagoning is generally only resorted to by materially inferior and geographically proximate states that have no allies who are willing or able to protect them.<sup>170</sup> Neorealists posit that structural

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<sup>164</sup> Kenneth N Waltz, *Theory of International Politics* (1979 McGraw-Hill).

<sup>165</sup> John J Mearsheimer, 'Structural Realism' in Dunne, Kurki and Smith (eds) (n51) 78–80. Waltz conceded that there may be rare circumstances in which survival is subordinated to other objectives, such as union with other states. See *ibid* 91. This occurred when Syria sought union with Egypt in 1958.

<sup>166</sup> Mearsheimer (n165) 80.

<sup>167</sup> However, Waltz conceded that neorealism should be accompanied by a theory of foreign policy to account for discontinuities in expected patterns of behaviour. See Waltz (n164) 71, 72, 122 and 123.

<sup>168</sup> Stephen M Walt, *The Origins of Alliances* (Kindle edn, Cornell UP 1990) ch2, lcn535–546 and 563–607.

<sup>169</sup> *ibid* ch2, lcn735–739; Mearsheimer (n165) 82.

<sup>170</sup> Walt (n168) ch2, lcn740–772.

pressures to balance help explain why erstwhile enemies have formed alliances.<sup>171</sup>

Neorealists assert that inter-state cooperation and collective action in furtherance of the common good is difficult, if not impossible, to achieve. First, it is hard to reach agreement as to what the common good actually constitutes or requires. Second, even where such agreement is reached, there is a risk of ‘free-riding’ and cheating given the absence of centralised mechanisms for monitoring and enforcing collective action.<sup>172</sup> States fear that cheaters and free-riders will benefit from collective goods without incurring any of the associated costs thereby potentially disrupting the balance of power. Neorealists maintain that international institutions, including presumably international law, are generally incapable of independently constraining state behaviour.<sup>173</sup> Like classical realists, they infer that most international institutions reflect the interests of dominant states and will only have an autonomous impact on state behaviour in peripheral technical areas.<sup>174</sup>

America’s hegemonic status since the end of the Cold War and increasing interdependence as a result of globalisation have challenged neorealism’s central tenets. Neorealism has been criticised for its state-centricity, conservatism, reductionism and tendency to reinforce the status quo.<sup>175</sup> Neorealism’s state-centricity is arguably out of touch with the contemporary environment. Constructivists rejected the neorealist assumptions that states are unitary, rational egoists and that their identities and interests are formed exogenous to their interactions at the international

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<sup>171</sup> Donnelly (n162) 36.

<sup>172</sup> ‘Free-riding’ occurs where states rely upon other states to tackle ascendant powers. See Walt (n168) ch2, lcn762–765.

<sup>173</sup> Anne-Marie Slaughter, ‘International Relations, Principal Theories’ in *Max Planck Encyclopaedia of Public International Law* (OUP, 2011 edn) <[https://scholar.princeton.edu/sites/default/files/slaughter/files/722\\_intrelprincipaltheories\\_slaughter\\_20110509zg.pdf](https://scholar.princeton.edu/sites/default/files/slaughter/files/722_intrelprincipaltheories_slaughter_20110509zg.pdf)> accessed 13 November 2017, para 6.

<sup>174</sup> Donnelly (n162) 47.

<sup>175</sup> Scott Burchill and Andrew Linklater, ‘Introduction’ in Burchill and others (eds) (n51) 21; Donnelly (n162) 52–54; Lebow (n141) 59.

level.<sup>176</sup> They asserted that neorealism cannot explain why even the world's most powerful states seek to explain their actions as in accordance with international law.<sup>177</sup> Liberals observed that neorealism overlooks the impact that domestic factors can have on state behaviour and adherence to international law.<sup>178</sup> Fawcett observed that neorealism struggled to explain the international behaviour of states in the Middle East where historic rivalries, identity politics, extra-regional influences and internal threats also play a part.<sup>179</sup>

### 2.7.i Modified Neorealism: Balance of Threat Theory

Walt's 'balance of threat' theory sought to remedy some of neorealism's shortcomings. Walt argued that states balance against threats rather than solely against material power and that threat perceptions are influenced by 'geographic proximity, offensive capabilities, and perceived intentions'.<sup>180</sup> Expanding upon Walt's theory, F. Gregory Gause III argued that Middle Eastern states prioritise threats originating from states that demonstrate aggressive intentions over threats based upon material power alone.<sup>181</sup> Walt asserted that ideological movements can pose as much of a threat to survival as military power, particularly in weak states whose rulers rely upon ideational manipulation for domestic legitimacy.<sup>182</sup> Weak states may balance against the threat posed by an ideological movement or bandwagon with it by exaggerating its ideological similarities and/or forming an alliance with its proponents.<sup>183</sup> However, Walt maintained that centralised ideological

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<sup>176</sup> John Gerard Ruggie, 'What Makes the World Hang Together? Neo-Utilitarianism and the Social Constructivist Challenge' (1998) 52 *Int'l Org* 855, 862–864 and 869; Anthony Clark Arend, 'Do Legal Rules Matter' (1999) 38 *VaJInt'l L* 107, 117. The same argument may be advanced against neoliberal institutionalism and rationalist approaches to international law.

<sup>177</sup> Reus-Smit, 'The Politics of International Law' (n68) 283.

<sup>178</sup> Hathaway, 'Why Do Countries Commit' (n130) 593.

<sup>179</sup> Louise Fawcett, 'Alliances and Regionalism in the Middle East' in Louise Fawcett (ed), *International Relations of the Middle East* (4th edn, OUP 2016) 198–199. Halliday made a similar observation. See Halliday (n96) 25.

<sup>180</sup> Walt (n168) ch2, lcn616–694.

<sup>181</sup> For example, by using hostile propaganda. See generally F Gregory Gause III, 'Balancing What? Threat Perception and Alliance Choice in the Gulf' (2003) 13 *Security Studies* 273.

<sup>182</sup> Walt (n168) ch2, lcn890–913, and 930–938.

<sup>183</sup> *ibid* ch2, lcn913–919.

alliances are often unstable as member states tend to compete for leadership.<sup>184</sup>

Walt argued that states generally prioritise strategic concerns over ideological affinities when forming alliances.<sup>185</sup> He suggested that foreign aid does not significantly impact alliance formation decisions or grant the provider significant leverage over the recipient unless the item provided is particularly valuable to the recipient, the recipient is dependent upon the provider for receipt of that item, and the provider is not co-dependent upon the recipient to the same degree.<sup>186</sup> The more important the recipient is to the provider the greater freedom the recipient will enjoy.<sup>187</sup>

### 2.7.ii Omnibalancing

Stephen David's omnibalancing theory suggests that neither realism nor neorealism can adequately explain the international behaviour or foreign policy formation of authoritarian post-colonial states as they do not take account of the impact of internal threats on elite decision-making and fail to differentiate between the 'national' and the 'regime' interest. David posited that authoritarian rulers prioritise the regime interest over the national interest.<sup>188</sup> He asserted that post-colonial rulers take account of both external *and* internal threats when making foreign policy choices and forming alliances.<sup>189</sup> He observed that the populations of post-colonial states may identify more closely with sub- and supra-national identities than national identities.<sup>190</sup> Consequently, their rulers tend to prioritise internal over external threats to regime security.<sup>191</sup> David argued that they may even

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<sup>184</sup> *ibid* ch2, lcn849–880.

<sup>185</sup> *ibid* ch2, lcn890–913.

<sup>186</sup> For example, where a recipient is completely dependent upon a provider for weapons supplies and, unlike the provider, faces an imminent threat to its survival. See *ibid* ch2, lcn866 and lcn968–1029.

<sup>187</sup> *ibid* ch2, lcn999–1000.

<sup>188</sup> Stephen R David, 'Explaining Third World Alignment' (1991) 43 *WldPol* 233, 236–237.

<sup>189</sup> *ibid* 234, 238, 243 and 244.

<sup>190</sup> *ibid* 239.

<sup>191</sup> F Gregory Gause III and Matteo Legrenzi reached a similar conclusion. See Gause III, 'Balancing What?' (n181) 279; Matteo Legrenzi and F Gregory Gause III, 'The International Politics of the Gulf' in Fawcett (ed) (n179) 311–312.

bandwagon with powerful external actors so as to enable them to concentrate all of their resources on combatting internal threats.<sup>192</sup>

## 2.8 Neoliberal Institutionalism

Neoliberal institutionalism combines elements of liberalism, complex interdependence theory<sup>193</sup> and neorealism. It accepts the neorealist assumptions that states are the primary actors in the international system; states are rational, unitary egoists; and the ordering principle of the international system is anarchy. However, unlike neorealism, it argues that states may feel sufficiently secure to cooperate to achieve absolute, as opposed to merely relative, gains as evident from the relations pertaining between industrialised democracies.<sup>194</sup> Neoliberal institutionalists argue that the hurdles to inter-state cooperation posed by anarchy can be overcome by the establishment of international regimes, namely, ‘networks of rules, norms, and procedures that regularize behaviour and control its effects’.<sup>195</sup> Regimes may be formally established in international treaties or operate informally between states.<sup>196</sup> Regimes institutionalise mutually agreed rules and procedures for the achievement of collective goals and help overcome fears of cheating, particularly where they include in-built enforcement mechanisms.<sup>197</sup> Neoliberal institutionalists assert that regimes help maintain international order and stability by increasing interdependence and thereby increasing the costs of armed conflict.

Neoliberal institutionalists conceive of international law ‘as a set of functional rules promulgated to solve co-operation problems under

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<sup>192</sup> David (n188) 235–236. See also discussion of omnibalancing strategies in Anoushiravan Ehteshami and others, ‘Authoritarian Resilience and International Linkages in Iran and Syria’ in Heydemann and Leenders (eds) (n119) 224–225; Raymond Hinnebusch, ‘Foreign Policy in the Middle East’ in Raymond Hinnebusch and Anoushiravan Ehteshami (eds), *The Foreign Policies of Middle East States* (2nd edn, Lynne Rienner Publishers 2014) 18 and 33–34.

<sup>193</sup> See eg Joseph S Nye and Robert O Keohane, *Power and Interdependence* (4th edn, Longman 2011).

<sup>194</sup> Burchill (n51) 64–66.

<sup>195</sup> Nye and Keohane (n193) 16. See also Krasner’s definition, Stephen Krasner, *International Regimes* (Cornell UP 1983) 2.

<sup>196</sup> Nye and Keohane (n193) 17.

<sup>197</sup> Reus-Smit, ‘The Politics of International Law’ (n68) 15 and 18; Jennifer Sterling-Folker, ‘Neoliberalism’ in Dunne, Kurki and Smith (eds) (n51).

anarchy'.<sup>198</sup> They suggest that states comply with international law because violations give rise to reputational costs and potentially the ejection of violating states from international regimes. However, this argument has been contested. As the constructivist, Friedrich Kratochwil, observed alleged violations are subject to competing interpretations.<sup>199</sup> Furthermore, states may have multiple reputational concerns and sometimes non-compliance may enhance a state's reputation in the eyes of its own population.<sup>200</sup>

The neoliberal assumption that international regimes contribute to international stability has also been contested. Michael Barnett observed that states may participate in two regimes that prescribe contradictory behavioural roles thereby generating conflicting expectations and uncertain outcomes.<sup>201</sup> Furthermore, neo-Marxists have blamed increasing global inequality on the prevailing neoliberal economic regime.<sup>202</sup> Neoliberal economic policies often disenfranchise disadvantaged societal groups thereby enhancing the potential for domestic unrest, which can have a knock-on effect on regional and international order. Critical scholars argued that international regimes inevitably reflect the interests of the most powerful states as evident, for example, in the IMF's weighted voting system. Fawcett suggested that neoliberal institutionalism would struggle to explain international relations in the Middle East where institutional development and inter-state cooperation have been impeded by regional instability, regime insecurity, competition for regional influence, competing identities and external interference.<sup>203</sup>

## 2.9 Rationalist Approach to International Law

Jack Goldsmith and Eric Posner advanced a state-centred rationalist account of international law.<sup>204</sup> They argued that incidents of compliance with international law are behavioural regularities between states that can be

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<sup>198</sup> Reus-Smit, 'The Politics of International Law' (n68) 15.

<sup>199</sup> Kratochwil, 'How Do Norms Matter?' (n38) 55.

<sup>200</sup> Jack L Goldsmith and Eric A Posner, *The Limits of International Law* (OUP 2005) 103.

<sup>201</sup> Michael Barnett, 'Institutions, Roles, and Disorder: The Case of the Arab States System' (1993) 37 *Int'l Stud Q* 271, 272 and 291.

<sup>202</sup> Sterling-Folker (n197) 129–130.

<sup>203</sup> Fawcett, 'Alliances and Regionalism' (n179) 196.

<sup>204</sup> Goldsmith and Posner (n200) 16.

explained by four models of rational, self-interested behaviour, namely, coincidence of interest, coercion, cooperation and coordination.<sup>205</sup> They differentiated their theory from neorealism by avoiding prior assumptions regarding the exact content of state interests.<sup>206</sup> They contended that compliance with international treaties occurs through bilateral cooperation between pairs of states (reciprocity).<sup>207</sup> They observed that the bilateral nature of enforcement means that powerful states may behave differently towards weak states than they do towards each other.<sup>208</sup> They argued that the vagueness of international law enables states to interpret their obligations in a manner that accords with their interests.<sup>209</sup> They rejected the suggestion that states owe cosmopolitan duties to individuals in third states inferring that compelling cosmopolitan sentiments do not presently exist and, even if they did, they are not easily reconcilable with the current state-centric international order.<sup>210</sup>

Rationalism has been criticised for its state-centricity<sup>211</sup> and for depicting international law as an ‘irrelevant decoration’ that may be ignored as soon as it diverges with a state’s interests based on a cost-benefit calculation.<sup>212</sup> Reus-Smit asserted that it struggles to explain international law’s binding character and the emergence of cosmopolitan norms, including human rights law.<sup>213</sup>

## **2.10 Policy-Oriented Approach**

The policy-oriented approach, also known as the New Haven School, is an instrumental approach to international law devised by Myres S. McDougal

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<sup>205</sup> *ibid* 11–12, 28 and 32.

<sup>206</sup> *ibid* 6–7.

<sup>207</sup> *ibid* 88.

<sup>208</sup> *ibid*.

<sup>209</sup> Eric A Posner, ‘Do States have a Moral Obligation to obey International Law’ (2003) 55 *StanLRev* 1901, 1914.

<sup>210</sup> Goldsmith and Posner (n200) 205–225.

<sup>211</sup> Koh (n9) 2649–2650.

<sup>212</sup> Martti Koskenniemi, ‘Miserable Comforters: International Relations as New Natural Law’ (2009) 15 *EJIR* 395, 410.

<sup>213</sup> Reus-Smit, ‘The Politics of International Law’ (n68) 20 and 29.



and Harold D. Lasswell.<sup>214</sup> Other instrumental approaches include legal realism<sup>215</sup> and New International Legal Process (NILP).<sup>216</sup> Instrumental approaches view international law as a social process that requires a purposive interpretation. They assert that extra-legal factors always play a part in legal decision-making and criticise international legal positivism for failing to reflect how international law operates in practice.

The policy-oriented approach derives inspiration from American legal realism<sup>217</sup> and collapses the distinction between international law and international policy.<sup>218</sup> It perceives international law not as a formal body of rules but as a ‘process of making choices that have consequences’.<sup>219</sup> It guides participants in international decision-making processes toward outcomes that enable the optimal realisation of the international community’s goals and values.<sup>220</sup> It indicates that the international community’s goals are the promotion of human dignity and optimum world order, whereas its values are power, enlightenment, wealth, well-being, skill, affection, respect and rectitude.<sup>221</sup> It maintains that the normativity of international legal rules derives from their effectiveness in achieving these goals and values rather than from their formal pedigree.<sup>222</sup>

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<sup>214</sup> For a discussion, see Siegfried Wiessner and Andrew R Willard, ‘Policy-Oriented Jurisprudence and Human Rights Abuses in Internal Conflict: Toward a World Public Order of Human Dignity’ (1999) 93 AJIL 316; Molly Land, ‘Reflections on the New Haven School’ (2013–2014) 58 NYLSchLRev 919; Hengameh Saberi, ‘Yale’s Policy Science and International Law: Between Legal Formalism and Policy Conceptualism’ in Orford and Hoffmann (eds) (n4) 427–451.

<sup>215</sup> See eg William J Novak, ‘Legal Realism and Human Rights’ (2011) 37 History of European Ideas 168; Daniel Bodansky, ‘Legal Realism and its Discontents’ (2015) 28 LJIL 267; Gregory Shaffer, ‘International Legal Theory International Law and Its Methodology: The New Legal Realist Approach to International Law’ (2015) 28 LJIL 189. For a critique of these approaches, see Jan Klabbers, ‘Whatever Happened to Gramsci? Some Reflections on New Legal Realism’ (2015) 28 LJIL 469.

<sup>216</sup> See eg Mary Ellen O’Connell, ‘New International Legal Process’ (1999) 93 AJIL 334.

<sup>217</sup> Wiessner and Willard (n214) 320.

<sup>218</sup> *ibid* 324.

<sup>219</sup> Land (n214) 921.

<sup>220</sup> *ibid* 920; Wiessner and Willard (n214) 322.

<sup>221</sup> Myres S McDougal and Harold D Lasswell, ‘The Identification and Appraisal of Diverse Systems of Public Order’ (1959) 53 AJIL 1, 9; Wiessner and Willard (n214) 318–319 and 324; Land (n214) 920.

<sup>222</sup> Kratochwil, ‘How Do Norms Matter?’ (n38) 41–42; Koskeniemi, *From Apology to Utopia* (n6) 184.

McDougal has been accused of both apologism and utopianism for subjectively identifying international society's values and suggesting that decision-makers may violate international legal rules that do not correspond therewith.<sup>223</sup> According to Kratochwil, his approach perceives international legal rules as mere indicators of past trends that can be discarded if they no longer satisfy present or future needs.<sup>224</sup> It has been criticised for conflating binding law with non-binding values<sup>225</sup> and for depriving international law of its distinctive ability to constrain powerful states.<sup>226</sup> Sceptics argue that purely instrumental approaches may simply enable the most powerful international actors to unilaterally determine the normative values of international society and the purposes of international law.<sup>227</sup> Consequently, international legal positivism tends to be favoured by the marginalised who depend upon international law to protect them from powerful external actors.<sup>228</sup> Some commentators have suggested that the policy-oriented approach is a thinly veiled instrument for furthering US interests.<sup>229</sup>

## 2.11 Constructivism

Constructivists do not form a coherent group.<sup>230</sup> Nevertheless, they agree that ideational factors, such as norms, identities and ideologies, can have an independent impact on international relations and are not merely instruments used to justify actions taken for purely strategic reasons. Constructivists maintain that the identities of states are socially constructed both through the

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<sup>223</sup> Kenneth W Abbott, 'International Relations Theory, International Law, and the Regime Governing Atrocities in Internal Conflicts' (1999) 93 AJIL 291, 361, 362 fn6; Kratochwil, 'How Do Norms Matter?' (n38) 41–42; Koskeniemi, *From Apology to Utopia* (n6) 206–207.

<sup>224</sup> Kratochwil, 'How Do Norms Matter?' (n38) 41.

<sup>225</sup> Simma and Paulus II (n41) 305. See also Bull (n29) 123–124 and 153.

<sup>226</sup> Oscar Schachter's Remarks, 'Symposium, McDougal's Jurisprudence: Utility, Influence, Controversy' (1985) 79 ASIL PROC 266, 267; Koh (n9) 2622–2623; Kratochwil, 'How Do Norms Matter?' (n38) 41.

<sup>227</sup> Koskeniemi, *The Politics of International Law* (n47) 252; Andrew Hurrell, 'International Law and the Changing Constitution of International Society' in Byers (ed) (n38) 347.

<sup>228</sup> Koskeniemi, *The Politics of International Law* (n47) 255–256.

<sup>229</sup> Oscar Schachter's Remarks (n226) 271; Koh (n9) 2622–2623; O'Connell (n216) 350.

<sup>230</sup> Regarding the different strains of constructivism, see Christian Reus-Smit, 'Constructivism' in Scott Burchill and others (eds) (n51) 199–201; Brown and Ainley (n52) 48–50; KM Fierke, 'Constructivism' in Dunne, Kurki and Smith (eds) (n51) 194–196; Filipe dos Reis and Oliver Kessler, 'Constructivism and the Politics of International Law' in Orford and Hoffmann (eds) (n4) 344–346; Fred H Lawson, 'International Relations Theory and the Middle East' in Fawcett (ed) (179) 22 and 30–31.

practices they engage in at the international level and the impact of ideational factors, such as religion, at the domestic level.<sup>231</sup> They argue that these socially constructed identities influence states' perceptions of their interests and those interests in turn influence their behaviour.<sup>232</sup> Constructivists assert that the international system itself is socially constructed as are the regimes and norms that regulate it. State behaviour is moulded by shared (intersubjective) understandings regarding the 'rules of the game'.<sup>233</sup> These understandings are constructed, acquire meaning and may potentially be transformed through human action. Consequently, Alexander Wendt rejected the neorealist assumption that the international system is necessarily a self-help system declaring that 'anarchy is what states make of it'.<sup>234</sup>

For constructivists, international regimes play a constraining and a constitutive role. For example, the international human rights regime both constrains state behaviour and impacts how states self-identify. Barnett observed that actors acquire socially constructed roles as a result of their participation in regimes.<sup>235</sup> He defined a role 'as how the individual (or state) participates in society according to a particular identity and comes to modify its behavior accordingly'.<sup>236</sup>

The constructivist approach to international law has been divided into a moderate/soft camp, which includes Reus-Smit and Kathryn Sikkink, and a radical/hard camp, which includes Kratochwil and Nicholas Onuf.<sup>237</sup> Moderates have examined the emergence of international legal norms and their impact on state behaviour. Sikkink and others devised the life cycle<sup>238</sup>

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<sup>231</sup> Alexander Wendt, 'Anarchy is What States Make of It: The Social Construction of Power Politics' (1992) 46 *Int'l Org* 391, 395; Ruggie (n176) 879.

<sup>232</sup> Reus-Smit, 'Constructivism' (n230) 197.

<sup>233</sup> Ruggie (n176) 862; Kratochwil, 'How Do Norms Matter?' (n38) 56.

<sup>234</sup> Wendt (n231).

<sup>235</sup> Michael N Barnett, 'Sovereignty, Nationalism, and Regional Order in the Arab States' (1995) 49 *Int'l Org* 479, 491.

<sup>236</sup> *ibid* 483.

<sup>237</sup> Dos Reis and Kessler (n230) 344–346.

<sup>238</sup> Martha Finnemore and Kathryn Sikkink, 'International Norm Dynamics and Political Change' (1998) 52 *Int'l Org* 887.

and spiral<sup>239</sup> models to explain the social process through which international and transnational norms come to be internalised by states. A norm is fully internalised when it is incorporated into domestic law and compliance becomes almost automatic.<sup>240</sup> Moderate constructivists have challenged state-centric conceptions of international law and international relations by revealing the role that individuals and non-state actors play in the emergence and crystallisation of international legal norms.<sup>241</sup> Accordingly, they tend to subscribe to a cosmopolitan view of global society, which includes states and non-state actors.<sup>242</sup>

Reus-Smit argued that international law and international actors are mutually constituted with international actors influencing the emergence, form and operation of international law, and international law influencing the behaviour of international actors, including ‘through its discourse of institutional autonomy, language and practice of justification, multilateral form of legislation, and structure of obligation’.<sup>243</sup> Anthony Clark Arend asserted that international law both influences the identity, interests and behaviour of states and constitutes the international system, including by offering a common language, membership criteria, rights, obligations, and a benchmark against which the legitimacy of international behaviour can be measured.<sup>244</sup>

Reus-Smit asserted that power ‘is legitimised and structured by the institution of international law’.<sup>245</sup> He posited that America, as the world’s most powerful democracy, acquires ‘soft power’ by adhering to international

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<sup>239</sup> Thomas Risse, Stephen Ropp and Kathryn Sikkink, *The Power of Human Rights: International Norms and Domestic Change* (CUP 1999).

<sup>240</sup> Finnemore and Sikkink (n238) 904.

<sup>241</sup> Regarding the role of NGOs in naming and shaming, see Margaret E Keck and Kathryn Sikkink, *Activists beyond Borders: Advocacy Networks in International Politics* (Cornell UP 1998).

<sup>242</sup> However, some constructivists continue to treat states as the core actors in international relations. See eg Wendt (n231) 424–425.

<sup>243</sup> Christian Reus-Smit, ‘Introduction’ in Reus-Smit (ed) (n68) 5; Reus-Smit, ‘The Politics of International Law’ (n68) 14.

<sup>244</sup> Arend (n176) 142–146. See also Stephen A Kocs, ‘Explaining the Strategic Behavior of States: International Law as a System Structure’ (1994) 28 *Int’l Stud Q* 535, 539.

<sup>245</sup> Christian Reus-Smit, ‘Society, power, and ethics’ in Reus-Smit (ed) (n68) 282.

law, which in turn is strongly flavoured with America's preferred liberal ideology.<sup>246</sup> Constructivists have alluded to the socialising function of international law in that states generally seek to articulate their interests in terms that are compatible therewith. Some constructivists suggested that the requirement to justify international behaviour in legal terms may, in certain circumstances, 'socialise' underlying motives.<sup>247</sup> The English School scholar, Hedley Bull, made a similar observation.<sup>248</sup> Arend asserted that international law's distinctive normative character is socially constructed through state practice, a shared belief that its rules are binding and the resulting adjustment of state behaviour in accordance with that belief.<sup>249</sup> Furthermore, the transnational legal process scholar, Harold Hongju Koh, argued that as a result of repeated obedience with international law, states attribute a certain value to compliance.<sup>250</sup> However, Gerry Simpson cautioned that whilst international law – as the language of statecraft – impacts official discourse, it does not necessarily follow that it impacts state behaviour.<sup>251</sup> Therefore, 'international law can seem marginal even when it is highly visible'.<sup>252</sup>

Kratochwil, a radical constructivist, has examined the impact of international legal norms on the actions of international actors by placing those actions within a broader context, engaging in counterfactual argumentation and providing justifications for explanations of behavioural choices.<sup>253</sup> Despite the potential for conflicting interpretations, Kratochwil concluded that international law was not hopelessly indeterminate.<sup>254</sup> He asserted that international law constrains subjects by defining classes of acceptable action and requiring legal decision-makers to justify their choices

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<sup>246</sup> *ibid* 282–284.

<sup>247</sup> Risse, Ropp and Sikkink (eds) (n239) ch1; Reus-Smit, 'The Politics of International Law' (n68) 22–23. See also Friedrich V Kratochwil, *Rules, Norms, and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (CUP 1989) 12.

<sup>248</sup> Bull (n29) 43.

<sup>249</sup> Arend (n176) 141.

<sup>250</sup> Koh (n9) 2634.

<sup>251</sup> Simpson (n61) 44.

<sup>252</sup> *ibid*.

<sup>253</sup> Kratochwil, 'How Do Norms Matter?' (n38) 64–67.

<sup>254</sup> *ibid* 42 and 49.

on non-idiosyncratic grounds through the use of legal reasoning.<sup>255</sup> Hence, he concluded that ‘the system of rules is *indeterminate* at the level of individual choice but *determinate* at the level of defining classes of actions’.<sup>256</sup> He argued that it is the peculiar style of legal reasoning associated with legal rules that affords them their distinctive character as opposed to their formal pedigree or supposed normative value.<sup>257</sup> Similarly, Reus-Smit suggested that where rules are indeterminate, the language of law offers a medium through which states can make and evaluate claims.<sup>258</sup>

### 2.11.i Transnational Legal Process

Koh’s transnational legal process theory overlaps with constructivism in that it also views international law as a social process.<sup>259</sup> Koh defined the transnational legal process as the ‘process of institutional *interaction* whereby global norms are not just debated and *interpreted*, but ultimately *internalized* by domestic legal systems’.<sup>260</sup> Koh suggested that transnational interactions give rise to an enunciation or interpretation of an applicable norm to govern said interactions.<sup>261</sup> He argued that following repeated interactions and applications of the norm, it is gradually internalised into the value systems of the affected parties, incorporated into their municipal legal and political systems, and ultimately considered binding in their future transnational interactions.<sup>262</sup> He posited that:

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<sup>255</sup> *ibid* 46–47 and 52.

<sup>256</sup> *ibid* 47 (emphasis in original).

<sup>257</sup> Kratochwil, *Rules, Norms, and Decisions* (n247) 42. Finnemore has questioned whether legal norms are in fact distinct. See Martha Finnemore, ‘Are Legal Norms Distinctive?’ (2000) 32 *NYUJInt’l L & Pol* 699.

<sup>258</sup> Reus-Smit, ‘Introduction’ (n243) 5. See also Arend (n176) 144; Marti Koskenniemi, ‘International Law in the World of Ideas’ in Crawford and Koskenniemi (eds) (n2) 59–61.

<sup>259</sup> Reus-Smit, ‘Society, power, and ethics’ (n245) 277–278. Other overlapping theories include Brunnée and Toope’s interactive theory of international law and Goodman and Jinks’ acculturation theory. Brunnée and Toope’s theory posits that legal norms are more likely to be complied with when they were created as a result of inclusive and interactive processes, are reconcilable with past social practice and norms, and reflect contemporary goals. See Brunnée and Toope (n18). Goodman and Jinks suggested that compliance with international law may be influenced by the social process of acculturation, namely, ‘the general process by which actors adopt the beliefs and behavioral patterns of the surrounding culture’. See Ryan Goodman and Derek Jinks, ‘How to influence states: socialization and international human rights law’ (2004) 54 *DukeLJ* 621, 626.

<sup>260</sup> Koh (n9) 2602 (emphasis in original).

<sup>261</sup> *ibid* 2646.

<sup>262</sup> *ibid*.

It is through this transnational legal process, this repeated cycle of interaction, interpretation, and internalization, that international law acquires its “stickiness,” that nation-states acquire their identity, and that nations come to “obey” international law out of perceived self-interest.<sup>263</sup>

Koh differentiated between social, political and legal internalisation of norms. A norm is socially internalised when it is obeyed because the public accepts its legitimacy, politically internalised when it is obeyed because political elites accept its legitimacy and adopt it as government policy, and legally internalised when it is directly incorporated into domestic law.<sup>264</sup> Goldsmith and Posner rejected Koh’s argument that government officials internalise international legal rules as a result of their participation in the transnational legal process.<sup>265</sup> Instead, they contended that states will invariably violate international law where it serves the national interest on the basis of an aggregate cost-benefit analysis.<sup>266</sup>

## 2.12 The English School<sup>267</sup>

English School scholars distinguish between an international society and an international system. According to Bull, an international system ‘is formed when two or more states have sufficient contact between them, and have sufficient impact on one another’s decisions to cause them to behave – at least in some measure – as parts of a whole’.<sup>268</sup> However, an international society exists:

...when a group of states, conscious of certain common interests and common values, form a society in the sense that they conceive themselves to be bound by a common set of rules in their relations with one another, and share in the working of common institutions.<sup>269</sup>

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<sup>263</sup> *ibid* 2654–2655.

<sup>264</sup> *ibid* 2656–2657.

<sup>265</sup> Goldsmith and Posner (n200) 104–106.

<sup>266</sup> *ibid*. See also Neumayer (n92) 930.

<sup>267</sup> Prominent English School scholars include Martin Wight, Hedley Bull, Tim Dunne, Nicholas Wheeler and Barry Buzan. This discussion focuses on Bull’s foundational text. See Bull (n29).

<sup>268</sup> Bull (n29) 9.

<sup>269</sup> *ibid* 13.

English School scholars argue that an international society currently exists, which originated in the post-Westphalia society of European states.<sup>270</sup> They assert that, despite the anarchic character of the international system, a significant level of order and cooperation pertains between states as evident from their participation in international institutions, including international law, the balance of power system, diplomacy, armed conflict and the Great Powers' managerial role as reflected in the UNSC.<sup>271</sup> Bull argued that the fact that states seek to portray their actions as in accordance with international law indicates that some universally agreed legal standards do in fact exist.<sup>272</sup> He inferred that legal rules enjoy greater normative force than moral rules due to their status as law.<sup>273</sup> Nevertheless, he opined that states do not necessarily comply with international law due to a sense of legal obligation, rather they comply because of habit, coercion, the expectation of reciprocity or because they perceive compliance to be in accordance with their values and interests.<sup>274</sup>

Bull, like realists, criticised international law for failing to offer an effective process through which unsatisfactory aspects of the prevailing international order can be altered.<sup>275</sup> He observed that international law may clash with other institutions directed toward the maintenance of international order, including the balance of power system.<sup>276</sup> He identified a potential conflict between the rules of coexistence that help maintain international order, for example, sovereign equality and non-interference, and rules directed toward the achievement of justice, for example, human rights.<sup>277</sup> He differentiated between inter-state justice – the notion that all states have equal rights and duties, individual justice – the notion that all individuals have equal

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<sup>270</sup> *ibid* 4–5, 16–19, 33, 35 and 37–38.

<sup>271</sup> *ibid* xxxv, 64, 71 and 89.

<sup>272</sup> *ibid* 130.

<sup>273</sup> *ibid* 137.

<sup>274</sup> *ibid* 133–137. See also Andrew Hurrell, 'International Society and the Study of Regimes: A Reflective Approach' in Volker Rittberger (ed), *Regime Theory and International Relations* (Clarendon Press 1993) 59.

<sup>275</sup> Bull (n29) 88.

<sup>276</sup> *ibid* 71 and 138.

<sup>277</sup> *ibid* 65–67, 139 and 146.



rights and duties, and cosmopolitan justice – the notion that all individuals belong to a world society whose common interest takes precedence over the interests of its underlying individual members.<sup>278</sup> He suggested that in the prevailing state-centric international society, where no universal agreement exists over what constitutes the global good or individual rights or how both should be pursued, justice can only be attained in a partial and selective fashion if at all.<sup>279</sup>

Bull observed that as the present international system serves the interests of industrialised states, they tend to stress the importance of maintaining international order. On the contrary, many developing states have highlighted the importance of attaining global justice even if this requires the disruption of international order.<sup>280</sup> Bull himself inferred that international order will be difficult to maintain without a radical redistribution of global wealth and power.<sup>281</sup> Indeed, the actions of irredentist and secessionist movements dissatisfied with externally imposed borders, transnational organisations dissatisfied with the global configuration of power, anti-austerity protesters disadvantaged by the neo-liberal orientation of the world economy, pro-democracy activists disenfranchised by authoritarian forms of government, and anti-Western protesters disillusioned by what they perceive to be double standards and cultural imperialism, all demonstrate that the absence of justice can jeopardise international order.

The English School itself is divided between pluralists and solidarists.<sup>282</sup> For pluralists, states are the primary members of international society. Pluralists perceive international society as a practical association:

...among those engaged in the pursuit of different and possibly incompatible purposes, and who are associated with one another, if at all, only in respecting certain restrictions on how

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<sup>278</sup> *ibid* 79 and 81.

<sup>279</sup> *ibid* 85.

<sup>280</sup> *ibid* xxxiii and 74.

<sup>281</sup> Andrew Linklater, 'The English School' in Burchill and others (n51) 101.

<sup>282</sup> See *ibid*; 93–98; Mégret (n2) 66–67; Tim Dunne, 'The English School' in Dunne, Kurki and Smith (eds) (n51) 141–142.

each may pursue his own purposes.<sup>283</sup>

Influenced by Vattel, pluralists argue that states should focus on maintaining international order as this is the only feasible goal for an international society whose underlying members have a plurality of perspectives regarding religion, culture and political organisation.<sup>284</sup> In their view, efforts to promote justice could bring divergences of opinion to the fore and undermine international order. Pluralists also fear that ‘justice’ and cosmopolitan ideals, such as human rights, could prove to be yet another tool for the strong to subjugate the weak. Consequently, they argue that international legal rules should be limited to the rules of co-existence that ensure the survival of the international system. They argue that states generally adhere to those rules because it is in their collective interest.<sup>285</sup>

For solidarists, both states *and* individuals are members of international society with rights and duties under international law. Solidarists assert that international society is beginning to demonstrate the qualities of a purposive association with common purposes and principles.<sup>286</sup> Inspired by Grotius, they emphasise the extent to which mutually agreed universal norms, such as human rights, already exist and restrain state behaviour.<sup>287</sup> They believe that international society should promote international order *and* principles of justice. Accordingly, they tend to advocate a right of humanitarian intervention and responsibility to protect.<sup>288</sup> Unlike pluralists, they believe that enough solidarity already exists or could potentially exist to collectively enforce international law.<sup>289</sup> For a fully solidarist version of society to emerge, states would need to be willing in certain circumstances to prioritise the interests of international society over their respective national interests.

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<sup>283</sup> Terry Nardin, *Law, Morality, and the Relations of States* (Princeton UP 1983) 9.

<sup>284</sup> Linklater (n281) 93–94.

<sup>285</sup> For a critique of the pluralist perspective, see Reus-Smit, ‘Society, power, and ethics’ (n245) 275–279.

<sup>286</sup> *ibid* 275–276.

<sup>287</sup> Dunne (n282) 142.

<sup>288</sup> See eg Nicholas Wheeler, *Saving Strangers: Humanitarian Intervention in International Society* (OUP 2002).

<sup>289</sup> Linklater (n281) 93.

A third ‘cosmopolitan’ conception of international society also exists. It reflects the Kantian tradition and postulates that a global society exists or is emerging in which states are no longer the primary actors and shared interests and values link all humankind.<sup>290</sup> It suggests that developments in communications technology are giving rise to transnational identities that challenge the primary importance of the state. It intimates that the rules of coexistence and cooperation, including those codified in international law, may be set aside in order to achieve the higher moral goal of replacing the existing system of states with a cosmopolitan society.<sup>291</sup> Cosmopolitans may be divided into political and ethical cosmopolitans. Political cosmopolitans advocate the removal or radical alteration of state borders in order to achieve a global representative mechanism.<sup>292</sup> Ethical cosmopolitans believe that all individuals – as citizens of the world – owe cosmopolitan duties to each other, although they do not necessarily demand the complete eradication of the present state system.<sup>293</sup>

### **2.13 The Frankfurt School and Poststructuralism**

Critical approaches to international relations, including the Frankfurt School, poststructuralism and post-colonialism, employ post-positivist interpretive methodological tools to uncover the deep meanings that underlie seemingly objective realities.<sup>294</sup>

Frankfurt School scholars have traced the historical development of social structures with a view to revealing how their structural characteristics enable inequality.<sup>295</sup> Andrew Linklater examined how the existing global order came into being and whose interests it serves.<sup>296</sup> His analysis revealed the extent to which inequality and domination are linked to an exclusionary

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<sup>290</sup> Bull (n29) 25–26; Dunne (n282) 146.

<sup>291</sup> Bull (n29) 25–26.

<sup>292</sup> Toni Erskine ‘Normative International Relations Theory’ in Dunne, Kurki and Smith (eds) (n51) 41–55.

<sup>293</sup> *ibid.*

<sup>294</sup> Milja Kurki and Colin Wight, ‘International Relations and Social Science’ in Dunne, Kurki and Smith (eds) (n51) 23. Regarding the difference between critical and radical interpretivism, see Reus-Smit, ‘Constructivism’ (n230) 193–194.

<sup>295</sup> Richard Devetak, ‘Critical Theory’ in Burchill and others (eds) (n51) 138–140.

<sup>296</sup> *Ibid*; Steven C Roach, ‘Critical Theory’ in Dunne, Kurki and Smith (eds) (n51) 172–176.

definition of community based on citizenship, which enables a differentiation to be drawn between the ethical obligations owed to citizens and non-citizens.<sup>297</sup> He suggested that a more cosmopolitan global order could be achieved through dialogical cosmopolitanism, an inclusionary approach based on Jürgen Habermas' discourse ethics.<sup>298</sup> It advocates the establishment of mechanisms that enable all of those affected by global decisions, including non-state actors and individuals, to participate in global decision-making.<sup>299</sup> In this regard, it overlaps with Franck's proposal to create a democratic global forum of global society<sup>300</sup> and the demand made by TWAAIL scholars for greater participation in the creation of international law.<sup>301</sup> However, it would still need to overcome the tendency of representative bodies to demonstrate a structural bias toward their most powerful members and lobbyists.

Poststructuralists have examined how 'reality' is constructed and disciplinary power is projected through discourse.<sup>302</sup> David Campbell defined discourse as 'a specific series of representations and practices through which meanings are produced, identities constituted, social relations established, and political and ethical outcomes made more or less possible'.<sup>303</sup> Constitutive discourse enables social constructs to stabilise over time and give off an impression of naturalness.<sup>304</sup> Poststructuralism's conception of discourse reveals how the foundationalist assumptions of conventional international relations theories help reproduce the existing international order.<sup>305</sup>

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<sup>297</sup> Devetak (n295) 146–149.

<sup>298</sup> *ibid* 156–159. Regarding discourse ethics, see Jürgen Habermas, *Moral Consciousness and Communicative Action* (Christian Lenhardt and Shierry Weber Nicholsen tr, MIT Press 1990).

<sup>299</sup> Devetak (n295) 156–159.

<sup>300</sup> Franck, *Fairness* (n53) 483–484.

<sup>301</sup> See eg Mégret (n2) 88.

<sup>302</sup> Campbell (n141) 234–237.

<sup>303</sup> *ibid* 234–235.

<sup>304</sup> *ibid* 235.

<sup>305</sup> *ibid* 226–227 and 236–237; Richard Devetak, 'Postmodernism' in Burchill and others (eds) (n51) 162–163.

The methodological tools used by poststructuralists include genealogy, double reading, deconstruction and the limit attitude. Genealogy demonstrates how historical narratives are constructed and utilised by powerful actors to further their interests and dictate the courses of action available in the present.<sup>306</sup> It offers counter-histories by revealing perspectives that were hidden when dominant narratives were constructed.<sup>307</sup> Double reading performs a similar function.<sup>308</sup> Jacques Derrida's deconstruction method reveals how the contemporary world order is constituted through exclusion.<sup>309</sup> It demonstrates that binary oppositions, for example, national versus non-national, are in fact mutually dependent and constituted by excluding the 'other'.<sup>310</sup> The opposed terms always exist in a hierarchical relationship in which the self is portrayed as safe and morally superior, whereas the other is portrayed as a threat.<sup>311</sup> Michel Foucault's 'limit attitude' seeks to identify the implicit limits that afford meaning and legitimacy to thoughts and actions with a view to contesting and exceeding those limits so as to emancipate individuals and groups excluded by them.<sup>312</sup> It reveals the assumptions and limits that have naturalised the prevailing international order.<sup>313</sup>

Poststructuralists have investigated how the state became the 'naturalised' form of political organisation.<sup>314</sup> They have revealed how national identities are constituted through conditioning practices that generate a sense of solidarity amongst nationals, including through the repression and exclusion of external (non-national) and internal (minorities) others.<sup>315</sup> Internal minorities, asylum seekers, refugees, immigrants and transnational movements pose challenges to what has been referred to as the 'totalizing

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<sup>306</sup> Devetak, (n305) 163–167.

<sup>307</sup> *ibid* 163–167.

<sup>308</sup> *ibid* 169–171.

<sup>309</sup> Campbell (n141) 234.

<sup>310</sup> *ibid* 234; Devetak (n305) 168–169.

<sup>311</sup> Devetak (n305) 168; Campbell (n141) 234.

<sup>312</sup> In this regard, it overlaps somewhat with the Frankfurt School. See Campbell (n141) 232.

<sup>313</sup> *ibid*.

<sup>314</sup> *ibid* 226; Devetak (n305) 171–181.

<sup>315</sup> Devetak (305) 177.

project' of the contemporary state.<sup>316</sup> Poststructuralism questions whether the state system is compatible with a world in which multiple identities exist, where globalisation brings gains and losses, where universal human rights involve duties to non-citizens and where technology enables the regionalisation and globalisation of dissent movements, such as the Arab Spring.

## 2.14 Ideational Factors and the Middle East

Essentialist approaches seek to explain international relations by reference to supposedly inherent differences in the identity and culture of the world's peoples. Huntington's 'Clash of Civilizations' thesis divides the world into civilisations where each 'civilisation' has a shared history, religion, language, culture, customs and/or institutions.<sup>317</sup> Huntington suggested that most armed conflicts are caused by differences among civilisations.<sup>318</sup> He inferred that the Islamic civilisation was the most prone to conflict and asserted that conflict had erupted between the Islamic and Western civilisations since the founding of Islam.<sup>319</sup> However, recent empirical research encompassing virtually all states between 1885 and 2001 suggests that membership of different civilisations has a negligible impact on the likelihood of a fatal dispute occurring between two states.<sup>320</sup> Said suggested that essentialist theories are part of a strategy for reproducing existing global power relations.<sup>321</sup> Fawcett<sup>322</sup> and Halliday have strenuously refuted essentialist discourses that assume the Middle East's uniqueness, imperviousness to change and incompatibility with representative forms of government.<sup>323</sup> As Halliday indicated, identity and culture are not natural facts but social constructs subject to 'change, struggle and multiple, instrumental definition'.<sup>324</sup>

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<sup>316</sup> *ibid* 182–183; Devetak (n295) 151.

<sup>317</sup> Samuel Huntington, 'The Clash of Civilizations' (1993) 72 *Foreign Affairs* 22, 24.

<sup>318</sup> *ibid* 25–29.

<sup>319</sup> *ibid* 29–35.

<sup>320</sup> Russett (n51) 104.

<sup>321</sup> See generally Edward Said, *Orientalism* (Penguin 2003) Afterword.

<sup>322</sup> Fawcett observed that the region's territorial disputes, armed conflicts, weak states and underdeveloped institutions are reflected in other post-colonial regions. See Louise Fawcett, 'Introduction' in Fawcett (ed) (n179) 5–6.

<sup>323</sup> Halliday (n96) 193–199. See also Lawson, 'International Relations Theory' (n230) 28.

<sup>324</sup> Halliday (n96) 195.

The influence of ideational factors is particularly strong in Middle Eastern states. The territorial boundaries imposed by imperial powers did not coincide with the dispersal of local populations.<sup>325</sup> Consequently, emergent national identities found themselves competing with surviving sub- (tribal, sectarian and kin-based) and supra-state (pan-Arabic and pan-Islamic) alternatives. The consolidation of inclusive national identities was further undermined by post-independence political actors who exploited ideational factors to secure support for contemporary objectives.

Power often determines which ideational factors matter.<sup>326</sup> Authoritarian rulers manipulate their control of the infrastructure of state to construct and reproduce ideologies, identities and historical memories that legitimate their authority, denigrate their enemies and boost their support base.<sup>327</sup> The more oppressive the ruling regime, the more likely it is to rely upon ideational claims.<sup>328</sup> A regime's ideational claims need to be measured against the reality of their actions as there often exists an inconsonance between what is said in theory and what is done in practice. Nowhere is this contradiction more apparent than in the strategic alliances between ideological antitheses in the Middle East.

Nonetheless, constructivists have asserted that ideologies and identities are not mere instruments as, once constructed, they can constrain a ruler's freedom of action by mobilising public opinion to an extent rulers cannot ignore.<sup>329</sup> In post-colonial states, it may be difficult to construct an identity, ideology and historical memory that fully transcends ethnic, sectarian and socio-economic differences. Eric Davis observed that in such

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<sup>325</sup> Fawcett, 'Introduction' (n322) 6.

<sup>326</sup> Halliday (n96) 197.

<sup>327</sup> Eric Davis, *Memories of State: Politics, History and Collective Identity in Modern Iraq* (University of California Press 2005) 5. See also *ibid* 309.

<sup>328</sup> Halliday (n96) 63.

<sup>329</sup> See eg Barnett, 'Institutions' (n201) 278–279; Barnett, 'Sovereignty' (n235) 485; James H Lebovic, 'Unity in Action: Explaining Alignment Behavior in the Middle East' (2004) 41 *JPR* 167, 169. Hinnebusch and Ehteshami's complex realism theory made a similar argument. See Raymond Hinnebusch and Anoushirvan Ehteshami, 'Foreign Policy Making in the Middle East: Complex Realism' in Fawcett (ed) (n179) 242. See also Walt (n168) ch6, lcn5303–5339.

circumstances, material benefits may help to buy the acquiescence of those excluded from the state-sponsored historical memory and ideology.<sup>330</sup> However, once the material benefits run out, counter-memories and opposition actors are more likely to gain traction.<sup>331</sup>

Sub- and supra-state identities may be difficult to reconcile with international legal norms, including territorial sovereignty and the right to non-intervention. Authoritarian regimes have securitised identities to consolidate their authority and justify violations of international law.<sup>332</sup> For example, Ba'athist regimes in Syria and Iraq depicted alternative identities as existential threats, which they then instrumentalised to justify derogations from their obligations under international human rights treaties.<sup>333</sup> Transnational extremist groups and liberal democracies have also exploited ideational factors to justify violations of international law.

### **2.15 Post-colonialism and Orientalism**

Post-colonial scholars have examined how post-colonial elites replicated the practices of their colonial forebears, including the use of divide and rule policies and the exploitation of natural resources for their own benefit.<sup>334</sup> As Antony Anghie observed, 'Ironically then, it is the supposed post-colonial society which is a site at which imperial relations are reproduced, this time in relation to indigenous peoples and minorities, among other groups'.<sup>335</sup>

Post-colonial scholars have also discussed how certain academic disciplines including anthropology and Orientalism enabled colonialism.<sup>336</sup> Said described Orientalism as a form of writing and thinking devised by Britain and France about a region they called the 'Orient' (meaning East of

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<sup>330</sup> Davis (n327) 272.

<sup>331</sup> *ibid* 10–11, 259–261, 272 and Conclusion generally.

<sup>332</sup> Marina Calculli and Matteo Legrenzi, 'Middle East Security Conflict and Securitization of Identities' in Fawcett (ed) (n179) 222.

<sup>333</sup> *ibid* 222 and 224.

<sup>334</sup> Antony Anghie, 'Imperialism and International Legal Theory' in Orford and Hoffmann (eds) (n4) 164 and 171–172.

<sup>335</sup> *ibid* 171–172.

<sup>336</sup> *ibid* 163–164. Regarding postcolonialism, see Siba N Grovogui, 'Postcolonialism' in Dunne, Kurki and Smith (eds) (n51).



Europe) and a people they called ‘Orientals’ as a means of controlling them.<sup>337</sup> Orientalism defined the Orient and the Occident in oppositional terms.<sup>338</sup> Orientals and their religion, Islam, were contrasted unfavourably with white, civilised Europeans and their religion, Christianity.<sup>339</sup> Inspired by 19<sup>th</sup> century biological determinism, Orientalism presupposed a racially determined ‘Oriental’ incapable of evolution.<sup>340</sup> According to Said, orientalist purveyed their subjective knowledge of the Orient as if it were objective.<sup>341</sup> The Oriental’s self-perception was considered irrelevant as no Oriental could possibly know himself as well as the intellectually superior Occidental.<sup>342</sup>

Said argued that Orientalism, aided and abetted by international law, was used to legitimise colonial rule in the Middle East by inferring that Orientals were destined to be ruled by Occidentals.<sup>343</sup> He posited that Orientalism justified Western intervention in the Arab world to secure oil supplies and trade routes by claiming that the inferior, undeserving and immoral Arabs were not entitled to imperil the superior, liberal, moral and democratic West.<sup>344</sup> Nevertheless, the British – by inciting the Arabs to revolt during WWI – revealed the Oriental’s agency. The proliferation of national liberation movements in the Middle East after WWI and the principle of self-determination further challenged Orientalism’s depiction of Orientals as passive subjects.<sup>345</sup>

The US succeeded Britain and France as the primary Western power in the Middle East during the 20<sup>th</sup> century. Nevertheless, Said argued that in contemporary Orientalism, the Middle East and the West continue to be

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<sup>337</sup> See generally Said (n321) Introduction and ch3.

<sup>338</sup> *ibid* 2–3, 5–6 and 252–253.

<sup>339</sup> *ibid* 58–73.

<sup>340</sup> *ibid* 205–208 and 232–234.

<sup>341</sup> *ibid* 205.

<sup>342</sup> *ibid* 205–208.

<sup>343</sup> For example, de Vattel inferred that European states were entitled to occupy territory inhabited by tribes and Westlake’s *Chapters on the Principles of International Law* (1894) suggested that ‘uncivilised’ regions of the world should be annexed or occupied by civilised powers. See *ibid* 206–207, 216 and 226–228,

<sup>344</sup> *ibid* 285–286.

<sup>345</sup> *ibid* 240–241.

constituted in oppositional terms whereby the superior West represents rationality, morality, development and progress, and the inferior Middle East represents irrationality, immorality, underdevelopment and stagnation.<sup>346</sup> The only way that the Orient can improve itself is by imitating the West, whereas its failure to do so merely ‘testifies to the incorrigibility of Orientals’.<sup>347</sup> Inspired by Foucault, Said asserted that Orientalism places limits on the scope of legitimate thought, knowledge and action regarding the Orient not only for Orientalists but also for so-called Orientals who are educated in American educational institutions imbued with Orientalism.<sup>348</sup>

Said’s *Orientalism* has been the subject of a divisive debate with many Western academics rejecting his hypothesis.<sup>349</sup> Halliday inferred that *Orientalism* itself may perpetuate essentialist theses, including by presenting a monolithic image of the ‘West’.<sup>350</sup> He remarked that:

In normative terms, we have, perhaps, allowed the discussion to be too inflected by relativism and doubt as to the validity of universal standards, in the face of a mistaken, and often self-interested, critique of imperialism and Western norms.<sup>351</sup>

As Augustus Richard Norton observed, individuals in Arab states may concurrently oppose America’s policies toward Israel and support its democratic values, educational system and technological achievements.<sup>352</sup>

## 2.16 Third World Approaches to International Law and Structuralism

Third World Approaches (TWAIL) examine how international law throughout the ages has operated as ‘a system of exclusion or oppression’<sup>353</sup> that enables the structural domination and exploitation of weak states and peoples. The origins of contemporary international law are usually traced to

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<sup>346</sup> *ibid* 284–328.

<sup>347</sup> *ibid* 321.

<sup>348</sup> *ibid* 322–325.

<sup>349</sup> Fred Halliday, ‘‘Orientalism’ and Its Critics’ (1993) 20 *British Journal of Middle Eastern Studies* 145, fn2. For Said’s defence, see Said (n321) Afterword.

<sup>350</sup> Halliday (n349) 161–163.

<sup>351</sup> *ibid* 163.

<sup>352</sup> Augustus Richard Norton, ‘The puzzle of political reform’ in Fawcett (ed) (n179) 136.

<sup>353</sup> Mégret (n2) 80 and 84. See also Cassese, *International Law* (n69) 11; Simpson (n61) 34.

the 1648 Peace of Westphalia.<sup>354</sup> The international legal system that emerged thereafter was a decidedly European project.<sup>355</sup> Only fully ‘civilised’ European states were treated as subjects of international law and full members of international society.<sup>356</sup> By restricting recognition of statehood to ‘civilised’ nations, European states were able to control the evolution of customary international law. They afforded themselves the role of preparing uncivilised nations for subjection to international law.<sup>357</sup>

The exact treatment of non-European regions under Euro-centric international law depended on their supposed level of civilisation.<sup>358</sup> James Lorimer divided humanity into ‘civilised’ European states, ‘savage’ extra-European peoples and an intermediate category of ‘barbarous’, semi-civilised states.<sup>359</sup> States falling in the intermediate category, including the Ottoman Empire, were subjected to capitulation treaties, which afforded non-reciprocal privileges to European (and subsequently American) residents.<sup>360</sup> ‘Savages’ were subjected to outright colonisation through treaties of cession, annexation and conquest.

International legal doctrines were devised to enable the colonial project.<sup>361</sup> The *terrae nullius* principle suggested that no sovereign title existed over territory outside of the Euro-centric society of states and consequently that territory was open to colonial conquest. The principle of

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<sup>354</sup> Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (CUP 2001). Although, according to Bederman, many of the basic rules of contemporary international law, including those concerning diplomatic immunity, the creation and enforcement of treaties, and the initiation and conduct of armed conflict, originated outside of Europe, most notably, in the ancient Near East. See David J Bederman, ‘International law in the ancient world’ in Armstrong (ed) (n7). See also Shaw (n3) 10–13. Before 1648, medieval legal theory and the *jus gentium* helped enable Western European imperialism. See Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP 2004) ch1; Orford (n9) 273–275.

<sup>355</sup> See generally Koskenniemi, *The Gentle Civilizer of Nations* (n354).

<sup>356</sup> Koskenniemi, *From Apology to Utopia* (n6) 144–145. See also Anghie, *Imperialism, Sovereignty* (n354) 35.

<sup>357</sup> Koskenniemi, *From Apology to Utopia* (n6) 147–148.

<sup>358</sup> Cassese, *International Law* (n69) 26.

<sup>359</sup> Umut Özsu, ‘The Ottoman Empire, the Origins of Extraterritoriality, and International Legal Theory’ in Orford and Hoffmann (eds) (n4) 133.

<sup>360</sup> *ibid* 123–137; Cassese, *International Law* (n69) 26–27; Karen Knop, ‘Statehood: territory, people, government’ in Crawford and Koskenniemi (eds) (n2) 97–98.

<sup>361</sup> Cassese, *International Law* (n69) 28; Simpson (n61) 34.

recognition stipulated that ‘recognition’ by the other members of the international society, namely Western states, was sufficient to secure external sovereignty.<sup>362</sup> The principle of effectiveness posited that de facto control of territory was sufficient to secure internal sovereignty.<sup>363</sup> Indigenous populations could attempt to forcefully defend their territory against colonial powers. However, this was ill-advised given their military inferiority and the fact that armed conflicts between colonial powers and indigenous populations were not subject to the humanitarian laws that governed wars between civilised states as ‘barbarians’ and ‘savages’ were deemed less vulnerable to injury.<sup>364</sup> The only other alternative for indigenous populations was to conclude unequal treaties with the colonial powers.<sup>365</sup>

In the 20<sup>th</sup> century, the USA and USSR displaced the Europeans as the foremost international powers. Despite their promotion of the right to self-determination, colonialism survived WWI. Indeed, the League of Nations bestowed a duty upon the mandate powers to ‘civilise’ the subjects of the mandate system.<sup>366</sup> WWII expedited the decolonisation process and the self-determination principle was included in the UN Charter.<sup>367</sup> However, the retention of a reference to the ‘general principles of law recognized by civilized nations’ in the Statute of the International Court of Justice was an implicit nod to international law’s colonial legacy.<sup>368</sup> Furthermore, the WWII victors were afforded a permanent position on the UNSC and a veto power. However, the UNGA was a more egalitarian organ, which former colonies were able to use to codify international legal principles conducive to their interests.<sup>369</sup>

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<sup>362</sup> Anghie, *Imperialism, Sovereignty* (n354) 75–80; Orford (n9) 277–278.

<sup>363</sup> The principle of effectiveness ‘provides that only those claims and situations which are effective can produce legal consequences’. See Cassese, *International Law* (n69) 12–13.

<sup>364</sup> *ibid* 28 and 32.

<sup>365</sup> *ibid* 28.

<sup>366</sup> Covenant of the League of Nations (entered into force 10 January 1920) 225 CTS 195, art 22.

<sup>367</sup> Cassese, *International Law* (n69) 40.

<sup>368</sup> ICJ Statute, art 38.1.c.

<sup>369</sup> Cassese, *International Law* (n69) 42; Koskenniemi, ‘International Law’ (n258) 56.

The independence of former colonies remained qualified by the pre-existing international economic order, which rendered them dependent upon industrialised nations.<sup>370</sup> In the 1970s, a coalition of developing states, the Group of 77 (G77), helped secure the adoption by the UNGA of a declaration and plan of action for the achievement of a New International Economic Order (NIEO).<sup>371</sup> However, the NIEO project subsequently lost momentum due to various factors including a debt crisis in the developing world, the perceived failure of socialism within developing states, growing inequality within the G77, and the formalist argument that UNGA resolutions were not legally binding.<sup>372</sup> The debt crisis forced many developing states to accept structural adjustment loans from Western-dominated IFIs.<sup>373</sup> The neoliberal conditionalities attached to these loans increased the dependency of recipient states and undermined their ability to push a transformative agenda.

Many TWAIL scholars interpret the term ‘third world’ to encompass not only post-colonial states but also the most disadvantaged peoples within all countries, including as a result of the negative effects of globalisation.<sup>374</sup> Chimni has investigated the link between capitalism, globalisation and imperialism. He suggested that a global class divide is displacing the traditional north–south divide and that an elite transnational capitalist class is now moulding functional transnational legal regimes and institutions in accordance with their interests.<sup>375</sup> From a TWAIL perspective, international law has contributed to global inequality by normalising practices that prevent the realisation of a more just world order.<sup>376</sup> TWAIL scholars argue that structural pressures emanating from the prevailing international economic

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<sup>370</sup> Simpson (n61) 34. See also Orford (n9) 283.

<sup>371</sup> Declaration on the Establishment of a New International Economic Order, UNGA Res 3201 (S-VI) (1 May 1974) UN Doc A/RES/S-6/3201. Calls for a NIEO overlapped with structural approaches to international relations. However, as the NIEO reforms did not require the overthrow of the capitalist world economy, they were not accepted by devoted structuralists. See Brown and Ainley (n52) 55–156; Anghie, ‘Imperialism and International Legal Theory’ (n333) 161–162.

<sup>372</sup> Brown and Ainley (n52) 156; Anghie, ‘Imperialism and International Legal Theory’ (n333) 162.

<sup>373</sup> Koskenniemi, ‘International Law’ (n257) 56.

<sup>374</sup> Anghie, ‘Imperialism and International Legal Theory’ (n334) 169.

<sup>375</sup> Chimni (n93) 294 and 302. See also Koskenniemi, ‘Carl Schmitt’ (n150) 29–34; Mégret (n2) 85; Anghie, ‘Imperialism and International Legal Theory’ (n334) 165–169.

<sup>376</sup> Simpson (n61) 27.

order restrict the options available to developing states and undercut their internal sovereignty.<sup>377</sup>

TWAIL scholars suggest that international law still reproduces the ‘civilising mission’ through mechanisms such as the International Criminal Court and the ‘Responsibility to Protect’. Nevertheless, TWAIL scholars acknowledge that international law is not solely an instrument of the strong. The sovereign equality principle means that the interests of weaker states must be accommodated to some extent, however limited, whilst the fact that even powerful states feel the need to legally justify their actions suggests that international law can constrain power to some degree.<sup>378</sup> Many former colonies value international law’s respect for pluralism as a means of defending their independence.<sup>379</sup> At the same time, authoritarian rulers in post-colonial states have exploited the legal principles of sovereignty and non-interference to legitimise their neo-imperial practices. All TWAIL scholars agree that if international law is to respond to contemporary global challenges, it will need to address demands for greater participation, distributive justice and non-selective enforcement.<sup>380</sup>

TWAIL overlaps somewhat with Marxist approaches to international law<sup>381</sup> and neo-Marxist structural approaches to international relations, including structuralism (core–periphery analysis).<sup>382</sup> Structuralism suggests that the structure of the international system enables dominant interests and classes located predominantly in the industrialised North (the core) to utilise their superior material and political power to exploit and control the underdeveloped South (the periphery).<sup>383</sup> Structural power is defined as ‘the ability to shape issues in such a way that outcomes are restricted before they actually come to the point of decision’.<sup>384</sup> Structuralism has been criticised

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<sup>377</sup> Orford (n9) 285; Chimni (n93) 301.

<sup>378</sup> Chimni (n93) 299–300.

<sup>379</sup> Mégret (n2) 87. See also Koskenniemi, *The Politics of International Law* (n47) 255–256.

<sup>380</sup> Mégret (n2) 88. See also Chimni (n93) 294–295 and 317.

<sup>381</sup> See eg Robert Knox, ‘Marxist Approaches to International Law’ in Orford and Hoffmann (eds) (n4) 306–326.

<sup>382</sup> Brown and Ainley (n52) 25 and 151–155.

<sup>383</sup> *ibid* 151–155.

<sup>384</sup> *ibid* 11.

for overlooking the extent to which elites in developing states are accomplices in their nations' under-development.<sup>385</sup> It could help reveal the impact of external dependency on alliance and policy formation in the Middle East.<sup>386</sup> Nevertheless, Halliday cautioned that it could potentially exaggerate the impact of external factors on policy formation.<sup>387</sup> Furthermore, not all states in the region necessarily belong to the periphery. Umut Özsu suggested that the Ottoman Empire belonged to the semi-periphery,<sup>388</sup> whereas in the contemporary era, Saudi Arabia, Iran and Turkey arguably form part of the core.<sup>389</sup>

### 2.17 Koskenniemi's Immanent Critique of International Law

Koskenniemi deconstructed international law and revealed it as a naturalised, but ultimately artificial, construct that is reliant upon contestable assumptions.<sup>390</sup> He demonstrated that international legal rules are often indeterminate, conflicting and subject to exceptions. International courts employ concepts such as equity and reasonableness to resolve hard cases and balance between conflicting norms.<sup>391</sup> However, Koskenniemi asserted that these mechanisms are themselves ambiguous and inescapably subjective.<sup>392</sup>

International lawyers seek to distinguish objective international law from both descriptions of the international order as it is (apologism) and normative prescriptions of how it should be (utopianism).<sup>393</sup> However, Koskenniemi demonstrated that in practice international law frequently lapses into both factual descriptions and aspirational conjectures as it must concurrently show itself to be both normative and concrete.<sup>394</sup> By normativity, he means that international law should be separate from international politics and capable of binding a legal subject that opposes its

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<sup>385</sup> *ibid* 155.

<sup>386</sup> Fawcett, 'Alliances and Regionalism' (n179) 200.

<sup>387</sup> Halliday (n96) 163–164 and 318–319.

<sup>388</sup> Özsu (n359) 126.

<sup>389</sup> Fawcett, 'Alliances and Regionalism' (n179) 201.

<sup>390</sup> Koskenniemi, *From Apology to Utopia* (n6) 12.

<sup>391</sup> Koskenniemi, 'International Law' (n258) 49.

<sup>392</sup> *ibid* 49; Koskenniemi, *From Apology to Utopia* (n6) 37–39 and 531.

<sup>393</sup> Koskenniemi, *From Apology to Utopia* (n6) 316.

<sup>394</sup> *ibid* 17.

application to themselves.<sup>395</sup> By concreteness, he means that international law must be verifiable by reference to actual state practice, independent of subjective beliefs as to what it should be.<sup>396</sup> An international law that was devoid of normativity would constitute a mere description of state practice, an apology for power. However, a purely normative law, which was completely divorced from the reality of state practice, would be utopian.<sup>397</sup> Ultimately, Koskenniemi concluded that the conflicting demands of normativity and concreteness cannot be concurrently satisfied.<sup>398</sup>

Koskenniemi suggested that international lawyers camouflage the irreconcilable foundations of international law by oscillating between descending and ascending patterns of justification for international obligations. Natural law inspired descending arguments suggest that international law binds states regardless of their consent or behaviour because of the requirements of justice, reasonableness and equity.<sup>399</sup> However, such notions are considered utopian and subjective as, in the absence of universal agreement, who is to say what the requirements of justice, equity or reasonableness actually are. Consequently, descending arguments are complemented by ascending arguments, which suggest that international law emerges from, and is dependent upon, state behaviour or interests.<sup>400</sup> However, ascending justifications are considered apologist as they depend upon the subjective consent of states thereby depriving international law of its normative ability to bind.<sup>401</sup>

Neither justificatory pattern is complete in itself thus international legal discourse attempts to reconcile the two through notions such as general agreement, social necessity and tacit consent.<sup>402</sup> However, these mechanisms have their own problems. The utilitarian notion of ‘general agreement of

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<sup>395</sup> *ibid* 17 and 513.

<sup>396</sup> *ibid*.

<sup>397</sup> *ibid* 17.

<sup>398</sup> *ibid* 513.

<sup>399</sup> *ibid* 59; Koskenniemi, ‘The Politics of International Law’ (n59) 21. See also Mégret (n2) 68–69.

<sup>400</sup> Koskenniemi, *From Apology to Utopia* (n6) 59.

<sup>401</sup> *ibid* 64.

<sup>402</sup> *ibid* 60 and 64.



states' contravenes the principle of sovereign equality, whereas social necessity<sup>403</sup> requires an accompanying, and ultimately subjective, theory of justice to explain why one norm should be elevated above others.<sup>404</sup> Tacit consent acknowledges that whilst subjective consent is required, it can be implicitly detected in the opposing state's past conduct (recognition, acquiescence, estoppel, failure to protest) despite the fact that the state is now denying that it provided such consent.<sup>405</sup> It seeks to justify the imposition of a norm on a denying state because 'it is 'just' or in accordance with reasonableness or good faith or because it protects legitimate expectations'.<sup>406</sup> Judges assume that certain acts are automatically binding based upon a reasonableness standard and irrespective of intent to become bound or reliance.<sup>407</sup> However, this introduces subjectivity regarding what is just and reasonable contrary to the initial purpose of consensualism.

Koskenniemi concluded that global problems cannot be resolved within the formal margins of international law because international law is inherently contradictory.<sup>408</sup> Consequently, the most contentious international disputes require extra-legal solutions either directly through political intervention or indirectly through judicial recourse to notions such as equity or reasonableness. In Koskenniemi's view, international law merely provides a language, precedents, principles and a formal structure for making interest and value-based arguments.<sup>409</sup> He used the phrase 'hegemonic contestation' to describe the competition that political actors engage in to have their own subjective and partial definition of international legal rules accepted as the universal and correct interpretation.<sup>410</sup> Attempts to portray subjective interest-

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<sup>403</sup> The social necessity argument is reflected in JL Brierly's observation that international law is binding upon states because man 'is constrained, in so far as he is a reasonable being, to believe that order and not chaos is the governing principle of the world'. See JL Brierly, *The Law of Nations* (6th edn, OUP 1963) 56.

<sup>404</sup> Koskenniemi, 'The Politics of International Law' (n59) 21.

<sup>405</sup> Koskenniemi, *From Apology to Utopia* (n6) 22 and 64.

<sup>406</sup> Koskenniemi, 'The Politics of International Law' (n59) 22.

<sup>407</sup> Koskenniemi, *From Apology to Utopia* (n6) 329–331.

<sup>408</sup> *ibid* 512.

<sup>409</sup> Koskenniemi, 'International Law' (n258) 59–61; Koskenniemi, *From Apology to Utopia* (n6) 69.

<sup>410</sup> Koskenniemi, *The Politics of International Law* (n47) 222.

driven claims and values as universal constitute part of this hegemonic struggle.<sup>411</sup>

Koskenniemi suggested that by revealing that international law's supposed objectivity is an illusion, critical legal scholarship liberates international lawyers to pragmatically discuss global issues on their merits.<sup>412</sup> A critical approach would require international lawyers to display, alongside impartiality and commitment, knowledge of the relevant social, historical, political and economic context.<sup>413</sup> International lawyers could no longer hide behind the law, as they would be required to recognise the moral and political consequences of their decisions.<sup>414</sup> Outcomes would be legitimate provided they were the result of transparent and un-coerced debate and would themselves be subjected to ongoing critique.<sup>415</sup> At the same time, outcomes would still need to adhere to the requirements of international legal positivism given the risks posed by purely instrumental approaches. Accordingly, Koskenniemi advocated purposive interpretations of international law within a culture of formalism.<sup>416</sup> Ultimately, he concluded that international law provides 'a promise of justice' albeit a justice that can never be fully realised.<sup>417</sup> He remarked that 'In the gap between positive law and justice lies the necessary (and impossible) realm of the politics of law. Without it law becomes pure positivity, its violence a mere fact of power'.<sup>418</sup>

## 2.18 Conclusion

Positivism gained prominence due to the apologist and utopian critiques lodged against 'subjective' natural law. Pure formalism asserted that legal-decision makers should decide cases solely by applying formal rules based on an assumption that the international legal system was determinate and complete. After this assumption was disproven, contemporary positivists

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<sup>411</sup> *ibid* 263.

<sup>412</sup> Koskenniemi, *From Apology to Utopia* (n6) 542–544.

<sup>413</sup> *ibid* 545.

<sup>414</sup> *ibid* 555–556.

<sup>415</sup> *ibid* 545.

<sup>416</sup> Koskenniemi, 'Case Analysis' (n34) 147 and 156.

<sup>417</sup> Koskenniemi, *The Politics of International Law* (n47) 266–267.

<sup>418</sup> *ibid* 267.

accepted that recourse could be had to extra-legal concepts, such as equity, to decide hard cases. They argued, like the liberal theorist Franck and the constructivist Kratochwil, that the international legal system was not hopelessly indeterminate as the element of subjectivity involved in the interpretation of international law was limited by the obligation to employ legal reasoning. Nevertheless, the critical theorist Koskenniemi observed that there was no external method for determining the objectivity of the interpretation provided.<sup>419</sup> He concluded that positivism could not explain how a rule could be opposed against a denying state without lapsing into natural law territory.

Koskenniemi traced many of the inherent tensions in contemporary international law to its genesis in liberal political theory, which attempts to reconcile cosmopolitanism and individualism, and concurrently ensure and restrain the freedom of action of states. The liberal harmony of interests doctrine posited that the binding force of international law derived from self-interest based on an assumption that the individual and communitarian interests coincide. However, the devastation wreaked by two World Wars undermined faith in this doctrine. Nonetheless, liberal internationalists still insisted that international law could restrain the arbitrary exercise of power based upon an assumption that international law was separate from, and superior to, international politics.<sup>420</sup> They inferred that world peace could be achieved in an international society of liberal democracies. However, critics asserted that democratic peace theory merely enabled powerful democracies to violate the rights of non-liberal states with impunity and afforded a veneer of legitimacy to repressive regimes that practiced ‘cosmetic democracy’.

Realists criticised liberal internationalism as both a dangerously naïve form of wishful thinking (utopianism) and hegemony veiled in the guise of universalism (apologism). They suggested that states merely instrumentalise international legal rules and ideational factors to justify actions taken for

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<sup>419</sup> Koskenniemi, *From Apology to Utopia* (n6) 531.

<sup>420</sup> Kratochwil, ‘How Do Norms Matter?’ (n38) 40.

purely self-interested reasons. They argued that international law is inherently political as it is dependent upon the connivance of powerful states for its enforcement. They suggested that international law exerts no independent influence on state behaviour in areas of high politics. They criticised its bias toward the status quo and failure to include an effective mechanism for affecting changes to the international order, including in response to demands for distributive justice. The English School scholar, Hedley Bull, made a similar observation.

Neorealism sought to identify the structural determinants of state behaviour. However, it was criticised for its reductionism, conservatism and failure to take account of the impact of domestic level factors on international behaviour. Balance of threat theory sought to rectify neorealism's shortcomings. It argued that states balance against threats rather than solely against material power where threat perceptions are influenced by geographic, proximity, offensive capacity and intentions. Omnibalancing theory in turn suggested that authoritarian regimes prioritise regime security over national security, internal threats over external threats, and the regional over the global balance of power.

Unlike neorealism, neoliberal institutionalism posited that states can engage in meaningful cooperation to achieve mutually beneficial goals by establishing international regimes that institutionalise mutually agreed rules and procedures. However, it was criticised for assuming that international regimes contribute to international stability. Barnett's constructivist analysis revealed that states sometimes participate in multiple regimes that prescribe conflicting behavioural roles giving rise to uncertainty. Furthermore, the international trade regime has been accused of deepening inequality both within and between states, which in turn poses a threat to international order. Neoliberal institutionalists argued that states comply with international law because they perceive it to be in their self-interest. However, like realists and neorealists, they conceded that states will violate international law if it conflicts with their vital interests. The rationalist approach made a similar

argument. However, it was criticised for suggesting that states may simply disregard international law when it no longer accords with their interests.

Instrumental approaches perceived international law as a social process that requires a purposive interpretation. However, instrumental approaches that completely collapsed the distinction between binding law and non-binding values, most notably the policy-oriented approach, were criticised for sacrificing international law's peculiar ability to constrain powerful states.

Constructivists and English School scholars suggested that the requirement to legally justify international behaviour could 'socialise' states to comply with international law. Similarly, Koh's transnational legal process theory asserted that international legal norms are gradually internalised into the value systems of states as a result of repeated interactions and applications at the international and transnational levels. However, Simpson cautioned that just because international law impacts official discourse, it does not necessarily follow that it impacts state behaviour.<sup>421</sup>

Essentialist approaches infer that international law does not impact the behaviour of international actors as their identities are predetermined by inherent and immutable characteristics. Multiple international relations scholars challenged essentialist approaches which presumed the novelty of the Middle East and its inevitable inhospitality to international law. However, they also recognised that socially constructed identities and ideologies can be exploited by ruling elites to further their political objectives and in certain circumstances may even exert an independent influence on state behaviour. Critical approaches to international relations offered methodological tools for challenging essentialist theses and dominant narratives and for denaturalising social constructs, such as the state.

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<sup>421</sup> Simpson (n61) 44.

TWAIL revealed international law's role in enabling the structural domination and exploitation of weak states and peoples. They are particularly pertinent in the Middle East where international law has historically been an accomplice in the imperial project. They suggest that in order to respond to contemporary challenges to international order, international law must ensure greater participation and representation of disenfranchised peoples and a more equitable distribution of the world's resources.

Koskenniemi's immanent critique of international law revealed that international law's supposed objectivity is an illusion. Koskenniemi suggested that his critical approach liberates international lawyers to pragmatically discuss global issues on their merits and forces them to take responsibility for their choices. In this latter regard, his approach overlaps with instrumental approaches; however, crucially, he advocates the retention of a culture of formalism in order to avoid transforming international law into a neo-imperial tool. Koskenniemi's approach overlaps with Gardner's suggestion that once a legal norm's validity (lawfulness) has been ascertained one might proceed to evaluate it according to its substance. It suggests that those involved in the interpretation, application or balancing of formal sources of international law should endeavour to achieve the outcome that corresponds most closely with the law's purpose.

## PART II

### Chapter Three: Ottoman Era to the Corrective Movement

#### 3.1 Introduction

Chapter three examines developments in Syria from the mid-19<sup>th</sup> century up until 1970, a period which had a profound impact on Syria's future trajectory. It analyses the role played by international law in the division of Greater Syria after WWI, the fight for independence in mandate Syria, and the post-independence struggle for Syria at the regional and international levels. This period is divided into the following eras: Ottoman era, WWI, mandate era, post-independence era, United Arab Republic and secessionist era, and radical Ba'ath rule.

#### 3.2 Ottoman Era

Prior to WWI, Syria was enclosed within a larger geographical region known as Greater Syria (*bilad al-Sham*), which today encompasses Syria, Lebanon, Jordan, Palestine, Israel and part of southern Turkey (Alexandretta). Greater Syria was divided into underlying districts (*Pashaliks*). According to Seale, it nevertheless remained 'in the minds of its inhabitants a whole, homogenous in culture, threaded with economic ties and known for centuries as *bilad al-Sham* 'the lands of Damascus''.<sup>1</sup>

Syria was historically subjected to inflows of conquerors and immigrants.<sup>2</sup> Consequently, it became a melting pot of cultures, ethnicities,

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<sup>1</sup> Patrick Seale, *Asad: the Struggle for the Middle East* (University of California Press 1995) 14. For a similar view, see AH Hourani, *Syria and Lebanon: A Political Essay* (2nd impression, OUP 1946) 5. Although White suggested that Seale's description presupposed 'a greater degree of territorial coherence in *bilad al-Sham*, a greater degree of separation of it and the rest of the former Ottoman territories, and a greater acceptance of Damascus as a natural centre and capital than is likely to have existed in the aftermath of World War I'. See Benjamin Thomas White, *The Emergence of Minorities in the Middle East: The Politics of Community in French Mandate Syria* (Edinburgh UP 2011) 83. See also Nikolaos van Dam, *Destroying a Nation: The Civil War in Syria* (Kindle edn, IB Tauris 2017) Introduction, len127–192.

<sup>2</sup> See Hourani, *Syria and Lebanon* (n1) 12–18; AH Hourani, *Minorities in the Arab World* (OUP 1947) 15–16.

languages and religions. The Ottoman Empire conquered Greater Syria in 1516 and, apart from a brief period of Egyptian rule, continued to control it until WWI.<sup>3</sup> Multiple ethnic, religious, linguistic and tribal groups lived in the Empire. The ethnic groups included Arabs, Kurds, Turks, Persians, Armenians and Europeans. Islam was the Empire's official religion and the majority of its Muslim inhabitants were Sunnis. However, it was also home to other Islamic sects, including Shias, Alawis (also known as Nusayris), Isma'ilis and Druzes, as well as Jews and multiple Christian sects. Communities were differentiated according to their religion.<sup>4</sup>

In accordance with the Qur'an and Pact of 'Umar, Christian and Jewish communities are entitled under Islam to tolerance and protection as 'People of the Book' (*Ahl al-Kitab*).<sup>5</sup> Under Ottoman law, Christian sects and Jews were recognised as semi-autonomous communities known as millets (*millah*).<sup>6</sup> The millet system predated the Ottoman Empire; however, the Ottomans formalised it via imperial edicts in the 19<sup>th</sup> century.<sup>7</sup> Jews and Christian sects were allowed to practice their own religion, have their own education system and regulate personal status issues in accordance with their own laws.<sup>8</sup> However, they were subjected to certain restrictions and were required to pay a religious tax (*jizya*) to the Islamic state.<sup>9</sup>

The non-Sunni Islamic sects were not officially subject to the millet system and the Sunni majority was reportedly less tolerant of them than they were of Christians and Jews.<sup>10</sup> Alawi peasants were allegedly amongst the

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<sup>3</sup> Hourani, *Syria and Lebanon* (n1) 23–24.

<sup>4</sup> Kathleen Cavanaugh and Joshua Castellino, *Minority Rights in the Middle East: A Comparative Legal Analysis* (OUP 2013) 257 and 272.

<sup>5</sup> Hourani, *Minorities* (n2) 20; Cavanaugh and Castellino (n4) 83.

<sup>6</sup> Cavanaugh and Castellino suggested that the millet system could be interpreted as an early example of minority rights law. See Cavanaugh and Castellino (n4) 268.

<sup>7</sup> Hourani, *Syria and Lebanon* (n1) 63. By 1914, 14 millets existed. The original three millets were Greek Orthodox Christian, Armenian Christian and Jewish. White, *The Emergence of Minorities* (n1) 48.

<sup>8</sup> Hourani, *Syria and Lebanon* (n1) 20; Hourani, *Minorities* (n2) 20–22; White, *The Emergence of Minorities* (n1) 164–166.

<sup>9</sup> For example, they were not allowed to bear arms, perform public service, testify against Muslims before a court of law or marry Muslim women. Hourani, *Syria and Lebanon* (n1) 20; Cavanaugh and Castellino (n4) ch2, 257–258 and 271.

<sup>10</sup> Hourani, *Minorities* (n2) 20.



most repressed of any group in the Empire.<sup>11</sup> Arabs, Kurds and Turks afforded their primary allegiance to the leaders of their respective clans and tribes who in turn exercised decentralised authority on behalf of Ottoman officials (*Pashas*) in the countryside.<sup>12</sup> This gave rise to vertical patron-client networks.<sup>13</sup> As a result of the millet system and the decentralised character of Ottoman rule, up until the 19<sup>th</sup> century many religious, ethnic and tribal communities in Greater Syria were able to order their own internal affairs, particularly the mountain-dwelling Alawis living around Latakia and the Druzes of Jebel Druze.<sup>14</sup> This helped maintain a sense of communal identity but also heightened inter-communitarian suspicion. Hourani suggested that the Empire's communities were closed and 'did not mingle with each other; each looked at the rest with suspicion and even hatred'.<sup>15</sup> However, Fuccaro claimed that some inter-communitarian mingling did take place.<sup>16</sup> Cavanaugh and Castellino suggested that the diverging accounts may derive from the 'temporal and geographic extent of the Ottoman period'.<sup>17</sup>

European states, in particular France, negotiated capitulation treaties with the Ottoman Empire under which they afforded themselves special privileges.<sup>18</sup> The Franco-Ottoman Concordat of 1535 granted French citizens who were resident in the Empire the right to practice their own religion. France subsequently appropriated for itself the role of protector of all European Catholics within the Empire and of the indigenous Maronite

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<sup>11</sup> Hanna Batatu, *Syria's Peasantry, the Descendants of its Lesser Rural Notables, and Their Politics* (Princeton UP 1999) 40; Raphaël Lefèvre, *Ashes of Hama: the Muslim Brotherhood in Syria* (OUP 2013) 64–65.

<sup>12</sup> Hourani, *Minorities* (n2) 64–67. See also Cavanaugh and Castellino (n4) 276.

<sup>13</sup> Philip S Khoury, 'Continuity and Change in Syrian Political Life: The Nineteenth and Twentieth Centuries' (1991) 96 *AmHistRev* 1374, 1377–1378.

<sup>14</sup> Hourani, *Syria and Lebanon* (n1) 30–31. See also Batatu (n11) 111; White, *The Emergence of Minorities* (n1) 48.

<sup>15</sup> Hourani, *Minorities* (n2) 22.

<sup>16</sup> See generally N Fuccaro, 'Ethnicity and the City: The Kurdish Quarter of Damascus between Ottoman and French Rule c.1724–1946' (2003) 30 *Urban History* 206.

<sup>17</sup> Cavanaugh and Castellino (n4) 258.

<sup>18</sup> Hourani, *Syria and Lebanon* (n1) 25, 26, 147, 148 and chX generally; Umut Özsü, 'The Ottoman Empire, the Origins of Extraterritoriality, and International Legal Theory' in Anne Orford and Florian Hoffmann (eds), *The Oxford Handbook of the Theory of International Law* (OUP 2016) 123–137; Eugene L Rogan, 'The Emergence of the Middle East into the Modern State System' in Louise Fawcett (ed), *International Relations of the Middle East* (4th edn, OUP 2016) 41.

Christian population.<sup>19</sup> The 1774 Treaty of Kutchuk Kainardji afforded Russia a right to protect Greek Orthodox Christians.<sup>20</sup> The Ottomans asserted that the capitulations were merely ‘unilateral privileges’ and sought to abrogate them after the Empire was nominally welcomed into international society under the 1856 Treaty of Paris.<sup>21</sup> Nevertheless, European states argued that the capitulations remained legally binding as their associated privileges had been incorporated into bilateral treaties.<sup>22</sup>

By the 19<sup>th</sup> century, the Ottoman Empire appeared to be on the verge of collapse. As this would alter the European balance of power, European powers began to interfere more intensively in the Empire’s internal administration.<sup>23</sup> They justified their interference by reference to their connections to the region’s religious communities: Maronite and Catholic Christians (France), Greek Orthodox Christians (Russia), Roman Catholics and Uniates (Italy and Austria), and Christians, Jews and Druzes (Britain).<sup>24</sup> In order to combat France’s expansionist ambitions and maintain the European balance of power, Britain, Austria, Prussia and Russia adopted a secret protocol in 1840 in which they agreed to maintain within their respective spheres of influence within the Empire.<sup>25</sup>

The Ottomans implemented the *Tanzimat* reforms during the 19<sup>th</sup> century to combat the threat posed by European infiltration.<sup>26</sup> The reforms included the introduction of administrative regions (*vilayets*), centralised state institutions, a European-style legal and education system, military conscription and land registration.<sup>27</sup> They inspired a counter-interest in Arab

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<sup>19</sup> Hourani, *Syria and Lebanon* (n1) 147 and 149.

<sup>20</sup> *ibid* 148.

<sup>21</sup> Özsu (n18) 127–130.

<sup>22</sup> The capitulations were only formally abolished during the 1922–1923 Conference of Lausanne. See *ibid* 127–136.

<sup>23</sup> Hourani, *Syria and Lebanon* (n1) 28; Özsu (n18) 128.

<sup>24</sup> Hourani, *Minorities* (n2) 23–24.

<sup>25</sup> Rogan (n18) 41.

<sup>26</sup> They included the ‘Gulhane’ decree of 1839, the 1840 Penal Code, the ‘Hatti Humayun’ edict of 1856, the 1858 Land Law, the 1864 Provincial Governance Law, the ‘Mecelle’ civil code (1870–76) and the 1876 Constitution.

<sup>27</sup> Hourani, *Minorities* (n2) 30; Rogan (n18) 42–43.

culture and pan-Arabism.<sup>28</sup> Initially pan-Arabism merely sought autonomy for Arabs within the Empire.<sup>29</sup> However, after the Young Turks revealed themselves to be unsympathetic to pan-Arabism, some clandestine Arab societies began demanding complete independence for Arab territories.<sup>30</sup> As this emergent Arab nationalism overlapped with Islam, it alarmed some Lebanese Arab Christians who formed their own separatist movement.<sup>31</sup>

The *Tanzimat* reforms and increasing European interference exacerbated sectarian tensions, including by affording equal civic rights and duties to non-Muslims. This change was resisted by many Christians and Jews, who feared a loss of autonomy, and many Sunnis, who opposed the perceived erosion of sacred rights.<sup>32</sup> The introduction of Western-style standardised education also prompted a backlash from Islamic elites.<sup>33</sup> Due to their business acumen<sup>34</sup> and familiarity with Western languages and customs, Christians and Jews acted as agents for European governments and companies, which increased their economic and trade links with the Empire around this time.<sup>35</sup> This generated resentment amongst Muslims.<sup>36</sup> Sectarian tensions were particularly pronounced between the Christian and Druze communities of Mount Lebanon due to demographic shifts, the deliberate incitement of sectarianism for political ends by local actors and external interference.<sup>37</sup> After Christians were massacred by Muslims in Damascus and Mount Lebanon in 1860, the *Règlement Organique* was agreed between

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<sup>28</sup> Philip S Khoury, *Syria and the French Mandate: The Politics of Arab Nationalism, 1920–1945* (Princeton UP 1989) 6.

<sup>29</sup> Hourani, *Syria and Lebanon* (n1) 39–40.

<sup>30</sup> *ibid* 39–40.

<sup>31</sup> Hourani, *Minorities* (n2) 30–31.

<sup>32</sup> Kathleen Cavanaugh and Joshua Castellino, *Minority Rights in the Middle East: A Comparative Legal Analysis* (OUP 2013) 258–9, 274 and 278–279.

<sup>33</sup> Khoury, ‘Continuity and Change’ (n13) 1382; Fatma Müge Göçek, ‘Ethnic Segregation, Western Education and Political Outcomes: Nineteenth Century Ottoman Society’ (1993) 14 *Poetics Today* 507, 519–522; Cavanaugh and Castellino (n4) 321.

<sup>34</sup> Due to their historic exclusion from public service, Christians and Jews tended to be well represented in the private sector. Cavanaugh and Castellino (n4) 321.

<sup>35</sup> Hourani, *Minorities* (n2) 25–26.

<sup>36</sup> John McHugo, *Syria: From the Great War to Civil War* (Kindle edn, Saqi Books 2014) ch1, lcn835–837; Özsu (n18) 137.

<sup>37</sup> France and Britain channelled arms to the Christians and Druzes respectively. Hourani, *Syria and Lebanon* (n1) 27 and 148–149; Hourani, *Minorities* (n2) 31.

France, Britain, Prussia, Russia Austria and the Ottoman Empire.<sup>38</sup> It transformed Mount Lebanon into a self-governing district (*sanjak*).

The *Tanzimat* reforms also exacerbated the urban-rural divide by shifting the balance of power more decisively to the towns.<sup>39</sup> The introduction of private property rights enabled local chieftains to acquire large estates and power became concentrated in the hands of a small number of wealthy, landowning and predominantly Sunni families.<sup>40</sup> These absentee landowners lived in towns whilst peasant sharecroppers worked the land on their behalf for a meagre share of the profits.<sup>41</sup>

### 3.2.i Theoretical Analysis of the Ottoman Era

The discussion of the Ottoman era helps explain how sub- and supra-national identities acquired such salience in Syria and the Middle East. Syria existed for centuries as part of *bilad al-Sham*. Hence, its arbitrary severance from that area was bound to generate a sense of irredentism amongst Syrians. Localism, tribalism and sectarianism were nurtured during this period as a result of the Ottomans' decentralised form of rule, the millet system and the exploitation of religious identity by European powers for political ends. These tendencies complicated the consolidation of a Syrian national identity and contributed to political factionalism in the post-independence era. The repression that Alawis endured during the Ottoman era may partially explain their later propensity to cluster together during times of crisis for self-preservation purposes. The increasing infiltration of Western norms during the 19<sup>th</sup> century contributed to the appeal of the supra-national ideologies of pan-Arabism and pan-Islam.

The balancing that European powers engaged in during the Ottoman era accords with realist expectations as does their exploitation of identity to legitimise their interference in the Empire's internal affairs. Cavanaugh and

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<sup>38</sup> Hourani, *Minorities* (n2) 28.

<sup>39</sup> Khoury, *Syria and the French Mandate* (n28) 7.

<sup>40</sup> *ibid* 8 and 13; Samer N Abboud, *Syria* (Kindle edn, Polity 2016) ch1, lcn517–539.

<sup>41</sup> Batatu (n11) 38–40.

Castellino even suggested that European powers deliberately undermined the consolidation of a unitary Ottoman citizenship as a divided society would be easier to manipulate.<sup>42</sup> As TWAIL would expect, the European powers utilised international law, including in the form of capitulation treaties, to further their interests and enhance their regional influence.

European interference enhanced sectarian tensions and contributed to the transformation of Mount Lebanon into an autonomous *sanjak* through the *Règlement Organique*, which in turn paved the way for Lebanon's future independent statehood. European interference and the *Tanzimat* reforms also laid the foundations for Syrian statehood.<sup>43</sup> The children of landowning elites were often educated in Istanbul where they learned about Western concepts, including secularism, constitutionalism and democracy.<sup>44</sup> The importation of liberal notions, such as political pluralism, democracy and freedom of expression, influenced ethno-nationalist movements, such as the Young Turks. The *Tanzimat* reforms also increased inequality and social tensions. They concentrated land ownership and power in the hands of a small group of predominantly Sunni urban-dwelling elites, reinforcing the so-called 'politics of notables' that would provide the impetus for the radical Ba'ath's revolution from above during the 1960s.

### 3.3 WWI to Mandate Era

In March 1915, Russia, France and Britain concluded the Constantinople Agreement in which they agreed to partition the Ottoman territories between themselves after WWI. The British Consul-General in Egypt, Lord Henry McMahon, subsequently convinced the Hashemite Sharif of Mecca, Hussein bin Ali, to lead an Arab army in revolt against the Ottomans.<sup>45</sup> In return, Hussein sought control of an independent Arab kingdom comprising Syria, Lebanon, Palestine and Iraq. The British agreed subject to the provision that

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<sup>42</sup> Cavanaugh and Castellino (n4) 259 and 278.

<sup>43</sup> Rogan (n18) 42–44; Abboud, *Syria* (n40) ch1, lcn514–517.

<sup>44</sup> Khoury, 'Continuity and Change' (n13) 1382; McHugo (n36) ch1, lcn800–802.

<sup>45</sup> At this point, Arab nationalists were divided as regards their political objectives and the desirability of accepting external assistance to achieve them. Hourani, *Syria and Lebanon* (n1) 41.

‘the districts of Mersin and Alexandretta, and portions of Syria lying to the west of the districts of Damascus, Homs, Hama and Aleppo, cannot be said to be purely Arab and must on that account be excepted’.<sup>46</sup> Hussein did not acquiesce to this proviso thus the exact borders of the promised Arab Kingdom were not decisively defined in advance of the Arab revolt.<sup>47</sup>

In contravention of the McMahon-Hussein agreement, Britain secretly signed the Sykes-Picot Agreement with France in May 1916.<sup>48</sup> Under the agreement, the parties agreed to divide the remaining territories of the Ottoman Empire between themselves and Russia. They also agreed to establish an international administration in Palestine and an independent Arab state/confederation, but the precise boundaries were not delineated.<sup>49</sup> Yet, in a subsequent letter to Lord Rothschild – a leading figure in the British Jewish community – the British Foreign Secretary, Arthur James Balfour, confirmed Britain’s support for ‘the establishment in Palestine of a National Home for the Jewish people’.<sup>50</sup> In so doing, Britain hoped to curb Jewish immigration into Britain and gain the support of the Jewish diaspora and the US for its war efforts.<sup>51</sup> The religious beliefs of influential Christians, including the British Prime Minister, David Lloyd George, and the US President, Woodrow Wilson, may have also played a part in the decision.<sup>52</sup>

After the Bolsheviks published the Sykes Picot Agreement, British officials assured Hussein, by now King of the Hejaz, that it would uphold its agreement with him.<sup>53</sup> In his Fourteen Points, Wilson also reiterated that the non-Turkish Ottoman territories should be afforded an ‘absolutely

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<sup>46</sup> ‘Lord McMahon’s Second Note to Sharif Hussein’, dated 24 October 1915, reproduced in G Antonius, *The Arab Awakening: The Story of the Arab National Movement* (Hamish Hamilton 1938) 419–420.

<sup>47</sup> Hourani, *Syria and Lebanon* (n1) 43–45; McHugo (n36) ch1, lcn982–989.

<sup>48</sup> For a post-colonial perspective of the Sykes-Picot Agreement, see Edward Said, *Orientalism* (Penguin 2003) 220–221.

<sup>49</sup> See Hourani, *Syria and Lebanon* (n1) 45–46.

<sup>50</sup> ‘The Balfour Declaration’ (London Foreign Office, 2 November 1917) reprinted in A Gerson, *Israel, the West Bank and International Law* (Frank Cass 1978) 246–252.

<sup>51</sup> M Clement Hall, *The History of Syria 1900:2012* (Kindle edn, Charles Rivers Editors 2013) lcn336–340; McHugo (n36) ch1, lcn963–966.

<sup>52</sup> Sami Moubayed, *Syria and the USA: Washington’s Relations with Damascus from Wilson to Eisenhower* (IB Tauris 2012) 16–18; McHugo (n36) ch1, lcn963–966.

<sup>53</sup> Hourani, *Syria and Lebanon* (n1) 47.

unmolested opportunity of autonomous development.’<sup>54</sup> In November 1918, a joint Anglo-French Declaration stipulated that the core objective of the Allies in the Ottoman Territories was to liberate peoples oppressed by the Turks and create representative national Governments whose authority to rule derived from the indigenous populations.<sup>55</sup>

Nevertheless, after the Ottomans were defeated the Great Powers agreed at the 1919 Paris Peace Conference that Syria, Mesopotamia (Iraq), Palestine and Arabia should be placed under the mandate of ‘advanced nations’ until their inhabitants were ‘able to stand by themselves’.<sup>56</sup> The Arabs were represented at the conference by Hussein’s son, Emir Faisal, the leader of an Arab administration established in Damascus after the fall of the Ottomans.<sup>57</sup> Relying upon Britain’s wartime pledges and the right to self-determination, Faisal unsuccessfully sought recognition of an independent Arab state in the territory of Greater Syria and the Hejaz.<sup>58</sup>

A US-sponsored commission, the King Crane Commission, was subsequently established to investigate whether the people of Greater Syria actually wanted the Arab territories to fall under a mandate system.<sup>59</sup> It visited Greater Syria and received 1,863 petitions, representing ‘a wide range of political, economic, social, and religious classes’.<sup>60</sup> 80.4% of petitioners, including a strong contingent of Christians, supported a united independent state encompassing all of Greater Syria.<sup>61</sup> 73.5% supported ‘absolute independence’ and almost 60% agreed that the new state should take the form of a ‘democratic non-centralised constitutional’ kingdom with Emir Faisal as

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<sup>54</sup> ‘President Woodrow Wilson’s Fourteen Points’ (8 January 1918) para XII <[http://avalon.law.yale.edu/20th\\_century/wilson14.asp](http://avalon.law.yale.edu/20th_century/wilson14.asp)> accessed 21 June 2018.

<sup>55</sup> Hourani, *Syria and Lebanon* (n1) 48.

<sup>56</sup> Moubayed (n52) 14.

<sup>57</sup> Faisal had a considerable degree of cross-sectarian support as evident from a mandate he received to represent the Arabs from the Chief Rabbi of Syria, the Catholic Patriarch and the Greek Orthodox Patriarch of Antioch. Moubayed (n52) 9–10; Daniel Neep, *Occupying Syria under the French Mandate: Insurgency, Space and State Formation* (CUP 2012) 27.

<sup>58</sup> McHugo (n36) ch1, lcn1094–1125; Rogan (n18) 46.

<sup>59</sup> France and Britain withdrew their initial consent to the establishment of the Commission.

<sup>60</sup> ‘First Publication of the King-Crane Report on the Near East’ (2 December 1922) 55 (27) Editor & Publisher iv–v.

<sup>61</sup> *ibid* v–vi.

King.<sup>62</sup> If mandatory rule was obligatory, 60.5% indicated that they would prefer if it were US guided.<sup>63</sup> Only 14.68% chose France as their first choice of mandatory power.<sup>64</sup> 72.3% of petitioners, including 85.3% of Palestinian petitioners, opposed the proposed establishment of a Jewish homeland in Palestine representing ‘a more widespread general opinion among both Moslems and Christians than any other’.<sup>65</sup> In its conclusions, the Commission opposed the establishment of a French mandate in Greater Syria and asserted that the proposed Zionist project in Palestine could not be achieved without instigating unrest and prejudicing the rights of Palestinian Arabs.<sup>66</sup> However, the publication of the Commission’s report was delayed until 1922 by which time it was too late to affect the situation on the ground.

After the Paris Peace Conference, a Syrian National Congress was elected in Damascus. It called for a unified Arab state in Greater Syria, which would be a decentralised, democratic, constitutional monarchy that protected the rights of minorities.<sup>67</sup> In March 1920, it declared the unconditional independence of Syria and pronounced Faisal King of a ‘United Syrian Kingdom’ encompassing Syria, Lebanon and Palestine.<sup>68</sup> These developments alarmed some Lebanese Christians who proceeded to declare the independence of Lebanon.<sup>69</sup> They also prompted France and Britain to finalise the mandates at San Remo.<sup>70</sup> France focussed on securing the mandates for Lebanon and Syria given its historic alliance with Christian Maronites and commercial and educational links to those regions.<sup>71</sup> Britain in

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<sup>62</sup> *ibid* vi.

<sup>63</sup> *ibid*.

<sup>64</sup> *ibid*.

<sup>65</sup> *ibid*.

<sup>66</sup> *ibid* x–xi.

<sup>67</sup> McHugo (n36) ch1, lcn1137–lcn1139.

<sup>68</sup> Ayse Tekdal Fildis, ‘The troubles in Syria: spawned by French divide and rule’ (2011) 18 Middle EPol’y 129, 131. Some prominent Bedouin tribes also reportedly supported the establishment of a single, independent Arab state. Dawn Chatty, ‘Syria’s Bedouin Enter the Fray’ (13 November 2013) Foreign Affairs <<https://www.foreignaffairs.com/articles/middle-east/2013-11-13/syrias-bedouin-enter-fray>> accessed 5 October 2017.

<sup>69</sup> Hall (n51) lcn397–405.

<sup>70</sup> Russia abandoned its claims to former Ottoman territories following the Bolshevik revolution.

<sup>71</sup> Hourani, *Syria and Lebanon* (n1) 41–42 and 150–157; Rosemary Hollis, ‘Europe in the Middle East’ in Fawcett (ed) (n18) 384. According to Van Dam, the Syrian mandate included parts of Mesopotamia. Van Dam, *Destroying a Nation* (n1) Introduction, lcn130–142.



turn focussed on securing the mandate for Palestine and Iraq, which would guarantee it access to the Suez Canal and Iraq's oil fields.<sup>72</sup>

In July 1920, France demanded that Faisal unconditionally recognise the French Mandate prompting him to flee into exile.<sup>73</sup> French forces subsequently occupied Damascus by force. Britain granted Faisal a monarchy in Iraq and his brother Abdullah a monarchy in Transjordan, which was severed from Palestine.<sup>74</sup> Britain subsequently provided weapons and support to the Hashemites to help them consolidate their monarchies in exchange for their implicit agreement to further Britain's interests in the region.<sup>75</sup> The mandates were approved by the League of Nations in 1922 and the US in 1924.<sup>76</sup>

Syria's new and artificial borders dissected local communities, ethnic and religious groups, and families. Some individuals were left with property in different jurisdictions each with its own legal regime.<sup>77</sup> The Syrian-Turkish frontier left many Arabs in Turkey and many Turks in Syria.<sup>78</sup> The imposition of customs barriers destroyed traditional trading routes and caused economic hardship.<sup>79</sup>

### 3.3.i Theoretical Analysis of WWI to Mandate Era

This period supports the realist argument that the effective enforcement of international law is dependent upon the political will of powerful states. Faisal was unable to legally enforce Britain's wartime pledges and secure the

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<sup>72</sup> France, however, was to receive a quarter of Mosul's oil. Hourani, *Syria and Lebanon* (n1) 42 and 157–158; Fildis (n68) 131; Hollis (n71) 383.

<sup>73</sup> Hourani, *Syria and Lebanon* (n1) 54.

<sup>74</sup> This policy was known as the Sharifian solution. Rogan (n18) 50. See also Patrick Seale, *The Struggle for Syria* (Yale UP 1986) 6–8.

<sup>75</sup> Raymond Hinnebusch and Neil Quilliam, 'Contrary Siblings: Syria, Jordan and the Iraq War' (2006) 19 *Cambridge Review of International Affairs* 513, 514; Rogan (n18) 50.

<sup>76</sup> Hourani, *Syria and Lebanon* (n1) 55.

<sup>77</sup> Regarding the arbitrary borders, see McHugo (n36) ch2, lcn1261–1305; Christopher Phillips, *The Battle for Syria: International Rivalry in the New Middle East* (Yale UP 2016) 10.

<sup>78</sup> McHugo (n36) ch2, lcn1261–1278.

<sup>79</sup> Raymond Hinnebusch, 'Foreign Policy in the Middle East' in Raymond Hinnebusch and Anoushiravan Ehteshami, *The Foreign Policies of Middle East States* (2nd edn, Lynne Rienner Publishers 2014) 4–5.

realisation of the right to self-determination of the people of Greater Syria as no Great Power was willing to support his claim. Instead, as realism would expect, the arbitrary partition of Greater Syria was dictated by the strategic interests of European powers and the imperative of maintaining the European balance of power. Despite Wilson's championing of self-determination, the indigenous population of Greater Syria were denied their right to freely determine their political status. Rather, as post-colonial theory would predict, their opinion was considered irrelevant as evident from the lack of consideration afforded to the King-Crane Commission's findings. From an Orientalist perspective, Palestine was viewed as a vacant desert whose uncivilised, nomadic inhabitants were incapable of possessing it.<sup>80</sup> As TWAAIL would anticipate, wartime treaties formed the legal foundation for the imperial division of Syria.

The period challenges essentialist theories, which presuppose the Middle East's incompatibility with representative forms of government, as evident from the establishment of a Syrian National Congress and its support for the establishment of a democratic constitutional monarchy. However, the betrayal of the Arabs by the Allied Powers indirectly contributed to the resilience of future authoritarian Arab regimes. It provided fuel for the anti-imperialist, Arab nationalist ideology and politicised historical memory that authoritarian Arab rulers would utilise to mobilise popular support. As Seale noted, 'Every Syrian schoolchild is brought up to hate the Sykes Picot Agreement of 1916 and the Balfour Declaration of 1917, the two instruments which in Arab eyes carved up and disposed of 'natural Syria''.<sup>81</sup> Indeed, in June 2014 ISIS sought to justify its destruction of the Syrian-Iraq border 'as both the physical and symbolic repudiation of Sykes-Picot'.<sup>82</sup> Furthermore, the period engendered a suspicion of individuals who collaborated with Western powers, which could be readily manipulated by authoritarian rulers to delegitimise opponents.

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<sup>80</sup> Said (n48) 286.

<sup>81</sup> Seale, *Asad* (n1) 14.

<sup>82</sup> Michael Weiss and Hassan Hassan, *ISIS: Inside the Army of Terror* (Regan Arts 2015) 186.

The discussion revealed how the contemporary Levant was born of imperialism aided by international law. The division of the Middle East into a multitude of insecure, artificial states impeded the consolidation of a national identity in Syria.<sup>83</sup> Many Arabs felt that this act contravened the nationalist principle of one nation-one state.<sup>84</sup> The inhabitants of the new Arab states were bound to their neighbours by surviving linguistic, economic, cultural, ethnic, infrastructural and political links. Consequently, they identified more with sub-state communities, including their own tribes and sects, and supra-state communities, most notably the Arab and Islamic communities, than with their new states.<sup>85</sup> The imperial division of the Middle East also laid the foundations for future armed conflicts, including by violating the Palestinians' right to self-determination and denying the Kurdish population their own state.

### **3.4 The Mandate Era**

#### **3.4.i The French Mandate**

The League of Nations classified mandate territories according to their degree of development.<sup>86</sup> The former Ottoman territories were classified as class A mandates whose communities had:

... reached a stage of development where their existence as independent nations can be provisionally recognized subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone.<sup>87</sup>

The legal scope of the mandatories' powers and duties were delineated in the mandate texts. The mandate for Palestine required Britain to establish a

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<sup>83</sup> See Raymond Hinnebusch, 'Europe and the Middle East: From Imperialism to Liberal Peace?' (2012) 4 *Review of European Studies* 18, 18–20; Hinnebusch, 'Foreign Policy in the Middle East' (n79) 9–17.

<sup>84</sup> Raymond Hinnebusch, 'The Politics of Identity in Middle East International Relations' in Fawcett (ed) (n18) 157.

<sup>85</sup> Raymond Hinnebusch, 'The Foreign Policy of Syria' in Hinnebusch and Ehteshami (eds) (n79) 3 and 11–12.

<sup>86</sup> Covenant of the League of Nations (entered into force 10 January 1920) 225 CTS 195 (Covenant of the League of Nations), art 22.

<sup>87</sup> *ibid.*

national home for the Jewish people in Palestine without prejudice to ‘the civil and religious rights of existing non-Jewish communities in Palestine’.<sup>88</sup>

Under the Covenant of the League of Nations, France and Britain, as mandatory powers, were required to report annually on the execution of their mandatory duties to the League Council. A Permanent Mandates Commission (PMC) comprised of experts in colonial administration was established to examine these reports.<sup>89</sup> The PMC also received petitions from the indigenous population. However, this process was largely futile as the petitions were received via the mandatories, which tended to append their own commentary thereto, and the petitioners could not appear directly before the PMC to plead their case.<sup>90</sup> In any event, the PMC’s ability to restrain the mandatories was limited as its own mandate was restricted to providing observations to the Council of the League of Nations.<sup>91</sup>

The mandate for Syria and Lebanon afforded France the right to control Syria and Lebanon’s foreign relations, utilise their infrastructure, maintain troops on their territory and, pending the entry into force of the organic law, organise local militias to maintain order.<sup>92</sup> Article 22 of the League’s Covenant required the mandatories to promote ‘the well-being and development’ of the indigenous populations. According to Anghie, both the mandatories and the PMC interpreted this obligation in primarily economic terms.<sup>93</sup> This enabled the establishment of neo-colonial regimes of unequal exchange between the mandate territories and the mandatories.<sup>94</sup> At the same time, insufficient efforts were made to improve public health services, raise

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<sup>88</sup> League of Nations Council, ‘Mandate for Palestine: Together with a note by the Secretary-General relating to its application to the territory known as Trans-Jordan, Under the Provisions of Article 25’ (London: HM Stationery Office 1922) (Mandate for Palestine) preambular para 2, and see also art 6.

<sup>89</sup> Covenant of the League of Nations, art 22. See also Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP 2004) 123.

<sup>90</sup> Anghie, *Imperialism, Sovereignty* (n89) 176.

<sup>91</sup> Hourani, *Syria and Lebanon* (n1) 166.

<sup>92</sup> ‘The French Mandate for Syria and Lebanon’ (1922) 8 LNOJ 1013–1017 (Annex 391a), arts 2 and 3 (The French Mandate).

<sup>93</sup> Anghie, *Imperialism, Sovereignty* (n89) 156–157.

<sup>94</sup> *ibid* 161, 166–167, 173 and 178.

the standard of living in rural areas and reform the semi-feudal system of land-tenure.<sup>95</sup>

The French mandate stipulated that all of the League's member states were entitled to trade and invest in the mandate territories on an equal basis.<sup>96</sup> This reflected the Open Door policy promoted by the US and effectively legalised the external exploitation of indigenous natural resources.<sup>97</sup> The mandate indicated that France was entitled to 'create monopolies of a purely fiscal character'.<sup>98</sup> However, France also afforded itself commercial privileges and concessions in public utilities and tobacco production contrary to the mandate terms.<sup>99</sup> The mandate required Syria and Lebanon to reimburse France for any expenses incurred in administering them.<sup>100</sup> Consequently, the indigenous population had to pay for the pleasure of being exploited through indirect taxes.<sup>101</sup>

The division of Greater Syria coupled with French monetary and economic policies had a devastating effect on Syria's economy.<sup>102</sup> France discouraged indigenous industrialisation and reinforced Syria's landed elites by rendering the economy over-reliant on agriculture.<sup>103</sup> Profits were reinvested in mechanising agricultural production and increasing the land under cultivation.<sup>104</sup> These developments negatively affected Syria's peasants and sharecroppers who were regularly evicted from their homes,

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<sup>95</sup> AH Hourani, *Syria and Lebanon: A Political Essay* (2nd impression, OUP 1946) 85–92 and 175–176.

<sup>96</sup> The French Mandate, art 11.

<sup>97</sup> Regarding the 'Open Door' policy, see Anghie, *Imperialism, Sovereignty* (n89) 142, 144 and 162–163.

<sup>98</sup> The French Mandate, art 11.

<sup>99</sup> Hourani, *Syria and Lebanon* (n1) 153, 154 and 173; Khoury, 'Continuity and Change' (n13) 1387.

<sup>100</sup> The French Mandate, arts 2 and 15.

<sup>101</sup> Khoury, 'Continuity and Change' (n13) 1387.

<sup>102</sup> See Hourani, *Syria and Lebanon* (n1) 90; Philip S Khoury, 'The Syrian Independence Movement and the Growth of Economic Nationalism in Damascus' (1987) 14 *Bulletin* (British Society for Middle Eastern Studies) 25, 26–27 and 30; Khoury, 'Continuity and Change' (n13) 1387–1388; Moubayed (n52) 36; Lefèvre (n11) 13; McHugo (n36) ch2, lcn1261–1314.

<sup>103</sup> Abboud, *Syria* (n40) ch1, lcn543–550 and lcn551–581. See also Batatu (n11) 129.

<sup>104</sup> Khoury, 'The Syrian Independence Movement' (n102) 34; Batatu (n11) 129.

particularly in the eastern part of the Jazira.<sup>105</sup> They also contributed to the emergence of a new Aleppo-centred commercial bourgeoisie.

The mandate required France to draft an organic law in agreement with local authorities and adopt measures to encourage local autonomy and progressive development toward independence.<sup>106</sup> France was also obligated to ensure the territorial integrity of the mandates; prohibit discrimination on the basis of race, religion and language; and ensure respect for the personal status, religious interests and rights of the mandate's communities.<sup>107</sup> In reality, France implemented a divide and rule strategy. It deliberately promoted separatist inclinations amongst minorities in order to prevent them from rallying behind the ascendant Arab nationalist programme, which was championed predominantly by Sunni Arab urban elites. Accordingly, France extended the existing millet system to Druzes and Alawis and ensured that seats on representative bodies were allocated in accordance with sectarian affiliations.<sup>108</sup> France feared that Arab nationalism was a vehicle for spreading British influence.<sup>109</sup>

France also deliberately recruited rural-dwelling minorities for the local armed forces, the *Troupes Auxiliaires et Supplementives*, later renamed the *Troupes Spéciales du Levant*.<sup>110</sup> Consequently, religious minorities, and especially Alawis, came to be disproportionately represented in the *Troupes*. However, socioeconomic factors also played a part. For impoverished Alawis, the military offered a reliable albeit modest source of income.<sup>111</sup> On the contrary, wealthy, urban Sunnis tended to look down on the armed forces

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<sup>105</sup> Batatu (n11) 129.

<sup>106</sup> The French Mandate, art 1.

<sup>107</sup> The French Mandate, arts 4–6 and 8–9.

<sup>108</sup> Cavanaugh and Castellino (n4) 287 and 307. France also reportedly guaranteed tribal shaykhs seats in Syria's parliament, once established, and paid them to vote in accordance with its instructions. Philip S Khoury, 'The Tribal Shaykh, French Tribal Policy, and the Nationalist Movement in Syria between Two World Wars' (1982) 18 Middle EStud 180, 188.

<sup>109</sup> Hourani, *Syria and Lebanon* (n1) 167 and chX; Hourani, *Minorities* (n2) 61 and ch8; Nikolaos van Dam, *The Struggle for Power in Syria* (4th edn, IB Tauris 2011) 4.

<sup>110</sup> Neep (n57) 34. Although, for an arguably more nuanced view of France's employment of a divide and rule policy in the armed forces, see NE Bou-Nacklie, 'Les Troupes Spéciales: Religious and Ethnic Recruitment, 1916–1946' (1993) 25 Int'l JMidEStud 645.

<sup>111</sup> Seale, *Asad* (n1) 18.

and avoid military service by paying an exemption fee.<sup>112</sup> As Seale observed by ‘scorning the army as a profession, they allowed it to be captured by their class enemies who then went on to capture the state.’<sup>113</sup> France also attempted to reform and standardise personal status laws. However, these efforts were abandoned after they sparked massive protests by Sunnis.<sup>114</sup> France also sought to secularise education in an attempt to undercut religious sources of power. This provoked a counter-reaction led by Muslim clerics and merchants from petty and middle-class families, which became known as the awakening of religious knowledge (*al-nahda al-ilmiyya*).<sup>115</sup>

Most significantly, France divided the mandatory territory into statelets along sectarian lines, namely, Greater Lebanon (Christian majority), Syria (Damascus and Aleppo – Sunni majority), the Alawi State (Latakia – Alawi majority) and the Druze State (Jebel Druze/Hawran plateau – Druze majority). Greater Lebanon encompassed the Ottoman *sanjak* of Mount Lebanon but also incorporated new territories.<sup>116</sup> Whilst the Christians of Mount Lebanon welcomed this change, the predominantly Muslim population of the newly incorporated territories largely opposed it.<sup>117</sup> Greater Lebanon was transformed into the Lebanese Republic in 1926 and subsequently independent Lebanon in 1943. The north-east Jazira region was effectively granted its own administrative regime.<sup>118</sup> France did not create an autonomous Kurdish region partly in order to avoid antagonising Turkey.<sup>119</sup> Also in order to appease Turkey, Alexandretta in northern Syria, which had a considerable Turkish population, was afforded semi-autonomous status in

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<sup>112</sup> Van Dam, *The Struggle for Power* (n109) 27.

<sup>113</sup> Seale, *Asad* (n1) 39.

<sup>114</sup> For a discussion, see Benjamin Thomas White, ‘Addressing the State: The Syrian ‘Ulama’ Protest Personal Status Law Reform, 1939’ (2010) 42 *Int’l JMidEStud* 10; White, *The Emergence of Minorities* (n1) 171–177, 184, 196 and 198. Personal status laws remain controversial to this day.

<sup>115</sup> Thomas Pierret and Kjetil Selvik, ‘Limits of “Authoritarian Upgrading” in Syria: Private Welfare, Islamic Charities, and the Rise of the Zayd Movement’ (2009) 41 *Int’l JMidEStud* 595, 598–599.

<sup>116</sup> Seale, *Asad* (n1) 14.

<sup>117</sup> Hourani, *Minorities* (n2) 69.

<sup>118</sup> The Jazira was home to Kurds, Bedouin tribes and Christian communities. Van Dam, *The Struggle for Power* (109) 4. Bedouin tribes in the Badia region in south-eastern and central Syria were also afforded semi-autonomous status. Chatty (n68).

<sup>119</sup> Abboud, *Syria* (n40) ch5, lcn3011–3015.

1921 and full autonomy in 1937.<sup>120</sup> France eventually allowed Turkey to occupy and annex Alexandretta, which was renamed Hatay, in 1939 in return for Turkey's signature of a Declaration of Mutual Assistance ahead of WWII.<sup>121</sup>

According to White, the term minority<sup>122</sup> only really acquired political and legal significance during the mandate era when formerly autonomous communities were brought into contact with the state.<sup>123</sup> Significantly, in order for the League to recognise Syria as an independent state, Syrian politicians had to agree to include minority protection guarantees in any Franco-Syrian treaty of independence.<sup>124</sup> France viewed 'minority rights' as a vehicle for maintaining its influence. Accordingly, during the treaty negotiations it referred to its historic policy of allying with Christian communities as the 'protection of minorities' and sought the inclusion of a clause affording it a right of intervention on behalf of minorities in a future independent Syrian state.<sup>125</sup> However, when France used the term minorities it was usually referring to Christians and Jews.<sup>126</sup> It was disinclined to recognise ethno-linguistic minorities as recognition would necessitate political representation, which in turn would dilute the influence of Christians.<sup>127</sup> Furthermore, if France recognised Kurds as a minority it would risk alienating Turkey. Significantly, during the treaty negotiations some Isma'ilis, Circassians and Kurds attempted to acquire recognition as

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<sup>120</sup> Hourani, *Syria and Lebanon* (n1) 207.

<sup>121</sup> Hourani, *Syria and Lebanon* (n1) 207–213.

<sup>122</sup> A minority has been defined as a 'group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members – being nationals of the State – possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, religion or language'. Francesco Capotorti, 'Special Rapporteur Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities' (1977) UN Doc E/CN.4/Sub.2/384/Rev.1, para 568. The requirements of numerical inferiority and nationality are problematic. Cavanaugh and Castellino emphasised instead 'the distance between a community and sites of power'. Cavanaugh and Castellino (n4) 52.

<sup>123</sup> See generally Benjamin White, 'The Nation-State Form and the Emergence of 'Minorities' in Syria' (2007) 7 *Studies in Ethnicity and Nationalism* 64.

<sup>124</sup> White, *The Emergence of Minorities* (n1) 133.

<sup>125</sup> *ibid* 132–134; White, 'The Nation-State Form' (n123) 77.

<sup>126</sup> White, 'The Nation-State Form' (n123) 77–78.

<sup>127</sup> *Ibid* 73.



minorities.<sup>128</sup> However, they did not speak for their communities as a whole and were arguably, like France, merely using the notion of minority rights to further their own political objectives.<sup>129</sup>

### 3.4.ii Arab Nationalism

Syrian Arab nationalists opposed the division of the mandatory territory into autonomous regions as it undermined Arab unity and offered a pretext for external interference. Some Arab nationalists were suspicious of minorities due to their historic relations with external powers. A handful of extremists even advocated ethnic purity and deemed non-Sunnis imperfect Arabs.<sup>130</sup> Nevertheless, the movement's leaders undertook to ensure the favourable treatment of religious minorities in any future independent Arab nation.<sup>131</sup> However, like the French, when they referred to minorities they were usually referring to Christians and Jews.<sup>132</sup> They declined to recognise ethnic minorities as this could jeopardise the realisation of a unitary Arab nation. Furthermore, they tended, like the Ottomans, to subsume non-Sunni Islamic sects under the broader category of Muslims.<sup>133</sup> Arab nationalism's explicitly Arab, and implicitly Sunni, character was troubling for many members of minority communities. Consequently, there was strong support amongst minorities for Syrian nationalism, a competing ideology that advocated the reunification of Greater Syria as a single secular nation.<sup>134</sup> Nevertheless, minorities were not uniformly opposed to Arab nationalism and the movement included Christians amongst its leaders and Druzes, Alawis, Kurds and Bedouins amongst its supporters.<sup>135</sup>

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<sup>128</sup> Notably, neither the Druzes nor Alawis tended to self-identify as minorities. White, *The Emergence of Minorities* (n1) 144.

<sup>129</sup> *ibid* 146–147 and 153.

<sup>130</sup> Hourani, *Syria and Lebanon* (n1) 128.

<sup>131</sup> Hourani, *Minorities* (n2) 31. However, see White, 'The Nation-State Form' (n123) 80–81.

<sup>132</sup> White, *The Emergence of Minorities* (n1) 57.

<sup>133</sup> *ibid* 57.

<sup>134</sup> Hourani, *Syria and Lebanon* (n1) 197; Seale, *The Struggle for Syria* (n74) 64–71.

<sup>135</sup> For a discussion, see Hourani, *Syria and Lebanon* (n1) 144–145 and 189; Hourani, *Minorities* (n2) 78–79, 81 and 85–86.

The Arab nationalist movement lacked strong leadership and a coherent economic and social policy. Its leaders were mainly Sunni Muslim landowning elites who focused on liberal individual rights rather than social justice.<sup>136</sup> They employed negotiation and periodic protest to achieve their goals rather than armed struggle as armed struggle could have had a transformative effect on society and undermined their privileged position in the post-independence era.<sup>137</sup> The one major national uprising that did occur, the Great Revolt of 1925–1927, was instigated by Druze peasants.<sup>138</sup> It attracted the support of many Sunni Muslims, Orthodox Christians<sup>139</sup> and some Bedouin shaykhs.<sup>140</sup> Significantly, Druze rebels attempted to assuage the concerns of Christian and Jews by using slogans such as ‘Religion is for God – the Fatherland is for All’.<sup>141</sup> Most Alawi notables failed to participate perhaps because of their geographical isolation or perhaps because they perceived their situation to have improved under the French.<sup>142</sup> The French authorities employed collective punishments to crush the revolt.<sup>143</sup> Some commentators suggested that many leading Arab nationalists were secretly relieved when it was defeated.<sup>144</sup> Afterwards, their policy of ‘honourable cooperation’ attracted popular support due to the perceived futility of armed struggle.<sup>145</sup>

The Great Revolt convinced the French to allow the formation of a Syrian Assembly. Arab nationalist leaders were able to dominate the Assembly as part of the National Bloc, an elite political coalition.<sup>146</sup> Their efforts to secure a Franco-Syrian Treaty were boosted by the conclusion of an Anglo-Iraqi treaty in 1930 and the termination of the Iraqi mandate in 1932.

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<sup>136</sup> Khoury, ‘Continuity and Change’ (n13) 1386 and 1390.

<sup>137</sup> *ibid* 132–134; Khoury, *Syria and the French Mandate* (n28) 6,

<sup>138</sup> Khoury, ‘Continuity and Change’ (n13) 1391; Batatu (n11) 115–117.

<sup>139</sup> However, the Christian Maronites of Mount Lebanon and many Uniates supported France. McHugo (n36) ch2, lcn1551–1555.

<sup>140</sup> Khoury, ‘The Tribal Shaykh’ (n108) 185.

<sup>141</sup> Hall (n51) lcn569–570. Similar slogans were used during the 2011 Arab Spring protests.

<sup>142</sup> Seale, *Asad* (n1) 18; McHugo (n36) ch2, lcn1557–1559.

<sup>143</sup> McHugo (n36) ch2, lcn1506–1508, lcn1538–1549 and lcn1605–1606.

<sup>144</sup> Khoury, ‘Continuity and Change’ (n13) 1391–1392; McHugo (n36) ch2, lcn1560–1568.

<sup>145</sup> Khoury, ‘The Tribal Shaykh’ (n108) 180, 185; Khoury, *Syria and the French Mandate* (n28) 20.

<sup>146</sup> McHugo (n36) ch2, lcn1630–1636.

Eventually in 1936, following a General Strike in Syria and the ascension of a left-wing government to power in France, a Franco-Syrian treaty was agreed.<sup>147</sup> It included guarantees for minorities and implicitly recognised the existence of an independent Lebanese Republic.<sup>148</sup> However, France never implemented the treaty due to another change in government and a reluctance to weaken France's international position in advance of WWII.<sup>149</sup> The National Bloc's popularity subsequently declined as a result of the treaty debacle, weaknesses in its internal administration, the loss of Alexandretta and the perceived inadequacy of its support for the Palestinian cause.<sup>150</sup> It began facing competition for popular support from Islamic organisations and ideological parties, which challenged the politics of notables.<sup>151</sup>

### 3.4.iii Battle for Syria and WWII

During the late 1930s, Arab nationalists began seeking external support and Syria became embroiled in a regional struggle for power that would re-emerge in the post-independence era. Arab nationalists from Aleppo, whose business interests were negatively affected by the Syrian-Iraqi border, supported the unification of Greater Syria in an Arab League with Iraq.<sup>152</sup> Abdul Shahbandar, an Arab nationalist outside the National Bloc, supported the reunification of Greater Syria in a confederation with Jordan.<sup>153</sup> However, Shukri-al Quwatli, a prominent Bloc member, sought support from the Hashemites' rival, Saudi Arabia.<sup>154</sup> Egypt also sought to thwart the Hashemites' respective plans by creating a League of sovereign Arab states in 1945 under Egyptian leadership.<sup>155</sup>

During WWII, Syria also found itself at the centre of an international power struggle between the Allied forces and the Axis powers. The Third

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<sup>147</sup> Hourani, *Syria and Lebanon* (n1) 199; Khoury, *Syria and the French Mandate* (n28) 21.

<sup>148</sup> Hourani, *Syria and Lebanon* (n1) 199–202.

<sup>149</sup> *ibid* 217–220; Khoury, *Syria and the French Mandate* (n28) 21.

<sup>150</sup> Khoury, 'The Syrian Independence Movement' (n102) 32.

<sup>151</sup> Khoury, *Syria and the French Mandate* (n28) 23.

<sup>152</sup> Seale, *The Struggle for Syria* (n74) 11–12.

<sup>153</sup> McHugo (n36) ch2, lcn1763–1764.

<sup>154</sup> Seale, *The Struggle for Syria* (n74) 26. The Hashemite and al Saud monarchies had been bitter enemies since the latter captured the Kingdom of Hejaz in 1925.

<sup>155</sup> *ibid* 11 and 17–23.

Reich promised Syrians independence in return for their support and consequently gained a following in Syria at the popular and elite levels.<sup>156</sup> After the Vichy regime occupied Syria in 1940 and France withdrew from the League of Nations, Arab nationalists argued that the mandate no longer had a legal foundation.<sup>157</sup> The Free French, Britain and America began a propaganda campaign aimed at reversing Nazi infiltration in the Middle East.<sup>158</sup> Accordingly, President Roosevelt delivered his Four Freedoms speech in January 1941 and the Free French pledged to terminate the mandate and grant Syria its independence.<sup>159</sup> Britain effectively confirmed the pledge made by the Free French.<sup>160</sup> These pledges helped the Allied and Free French troops to occupy Syria and Lebanon in 1941.

The Free French subsequently proclaimed Syrian and Lebanese independence. However, they refused to cede full sovereign powers until Syria and Lebanon guaranteed France extensive economic, military and political privileges in bilateral treaties.<sup>161</sup> The Syrian and Lebanese governments refused. Significantly, Lebanon's Christian and Muslim communities united behind their government.<sup>162</sup> Britain supported Syrian and Lebanese independence, but officially deferred to France's 'special position' in Syria.<sup>163</sup> However, Russia and the US recognised Syria and Lebanon's unconditional independence in 1944.<sup>164</sup> In a symbolic demonstration of statehood, Syria declared war on the Axis powers in February 1945 and signed the Arab League Pact in March. Syria was also invited to the UN's inaugural conference. In a final effort to achieve its objectives by force, France subjected Damascus to aerial bombardment in May. However, French

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<sup>156</sup> Moubayed (n52) 42–46.

<sup>157</sup> Hourani, *Syria and Lebanon* (n1) 235.

<sup>158</sup> Moubayed (n52) 44–46.

<sup>159</sup> *ibid* 46; Hourani, *Syria and Lebanon* (n1) 241–242.

<sup>160</sup> Hourani, *Syria and Lebanon* (n1) 242.

<sup>161</sup> The privileges were even more onerous than those contained in the 1930 Anglo-Iraqi Treaty. See *ibid* 279–282 and 293–295.

<sup>162</sup> *ibid* 287 and 297–298.

<sup>163</sup> *ibid* 298–302

<sup>164</sup> *ibid* 302.

troops were forced to evacuate after Britain intervened, with American acquiescence, to protect Anglo-American interests in the region.<sup>165</sup>

#### 3.4.iv Theoretical Analysis of the Mandate Era

The French mandate, which was supposed to be temporary, lasted 26 years. Unlike the Ottomans, the French were never perceived as legitimate rulers due to their historic duplicity, debilitating economic policies and oppressive and sectarian form of rule.<sup>166</sup> In administering the mandate, France was primarily concerned with protecting its own interests.<sup>167</sup> Despite establishing basic state institutions, it actively worked to prevent the consolidation of a nation-state.<sup>168</sup> Its divide and rule policy contributed to political factionalism and reinforced the politics of notables.<sup>169</sup> Syrian administrators and officials were denied adequate training in governance, state building and diplomacy. Consequently, post-independence leaders were ill-prepared to govern a modern state.<sup>170</sup>

The mandate era supports TWAIL's depiction of international law as an enabler of hegemony. Colonialism was no longer a credible foreign policy after WWI as it contravened the liberal principles that the allies had relied upon to galvanise support for their war effort.<sup>171</sup> Accordingly, a new approach was required to legitimise the continuing structural domination of non-Western states under international law. The mandate system offered a solution. Angie described it as 'a system of a progressive, enlightened colonialism'.<sup>172</sup> The mandates and the manner in which the PMC interpreted them effectively legitimised neo-colonialism by justifying the differential

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<sup>165</sup> Moubayed (n52) 64 and 66.

<sup>166</sup> Hourani, *Syria and Lebanon* (n1) 85–92 and 175–176; Khoury, 'Continuity and Change' (13) 1387.

<sup>167</sup> Hourani, *Syria and Lebanon* (n1) 167 and chs VIII and IX generally.

<sup>168</sup> Fred Halliday, *The Middle East in International Relations: Power, Politics and Ideology* (CUP 2005) 83; White, *The Emergence of Minorities* (n1) 12.

<sup>169</sup> Abboud, *Syria* (n40) ch1, lcn543–581.

<sup>170</sup> Hourani, *Syria and Lebanon* (n1) 176; Seale, *The Struggle for Syria* (n74) 45 Rogan (n18) 57.

<sup>171</sup> Anghe, *Imperialism, Sovereignty* (n89) 119–120.

<sup>172</sup> *ibid* 157. See also Gerry Simpson, 'International Law in Diplomatic History' in James Crawford and Martti Koskenniemi (eds), *The Cambridge Companion to International Law* (CUP 2012) 34.

treatment of the ‘advanced’ West and the ‘economically backward’ mandate territories under international law.<sup>173</sup> The League’s Covenant inferred that the mandates were in the best interests of the indigenous populations in blatant contradiction of the findings of the King-Crane Commission.<sup>174</sup> The Covenant’s stipulation that ‘the wishes of these communities must be a principal consideration in the selection of the Mandatory’<sup>175</sup> was blatantly contravened.

The mandate era showed how Syria’s geopolitical location and symbolic importance as the birthplace of Arab nationalism renders it central to regional and international struggles for power. It also lent support to realist arguments that states merely utilise international law to justify actions undertaken for self-interested reasons.<sup>176</sup> France relied upon its mandatory obligation to protect religious communities to justify its divide and rule policies.<sup>177</sup> It also attempted to rely upon the emergent concept of minority rights to secure a right of intervention in post-independence Syria. This incident offers an early example of the risks of abuse inherent in the liberal humanitarian intervention and responsibility to protect concepts.

The mandate experience also reinforced the realist assertion that a powerful state can violate the rights of a weak state with impunity unless another powerful state determines that it is in its interest to help the weak state to defend itself.<sup>178</sup> France suffered no rebuke for contravening its mandatory obligations, including by allowing Turkey to annex Alexandretta. Britain only intervened to halt the French bombardment of Damascus in 1945 to protect its strategic interests. Britain contravened its mandatory obligation not to

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<sup>173</sup> Anghie, *Imperialism, Sovereignty* (n89) 189.

<sup>174</sup> Covenant of the League of Nations, art 22.

<sup>175</sup> *ibid.*

<sup>176</sup> Edward H Carr, *The Twenty Years’ Crisis 1919–1939: An Introduction to the Study of International Relations* (2nd edn, Macmillan and Co Ltd 1946) 78–80; Hans Morgenthau, *Politics among Nations: The Struggle for Power and Peace* (Alfred A Knopf Inc 1948) 49 and 61.

<sup>177</sup> White, *The Emergence of Minorities* (n1) 133; Cavanaugh and Castellino (n4) 286–287. Regarding France’s mandatory obligation to protect minorities, see The French Mandate, arts 1, 6 and 8; Covenant of the League of Nations, art 22 (4).

<sup>178</sup> Carr (n176) 76; Hans Morgenthau, ‘The Main Problems of International Law’ in *Politics among Nations: The Struggle for Power and Peace* (6th edn, McGraw Hill 1985) 312.

prejudice ‘the civil and religious rights of existing non-Jewish communities in Palestine’.<sup>179</sup> Its sponsorship of a Zionist immigration programme laid the foundations for subsequent Arab-Israeli armed conflicts and provided fuel for an intensely anti-imperialist/anti-Zionist strain of Arab nationalism.<sup>180</sup> Notably, the Protocol that established the Arab League in 1944 made Palestine the responsibility of all Arab states.<sup>181</sup>

French mandatory rule indirectly strengthened the appeal of political Islam and cemented the marriage between Islam and the marketplace (*souk*).<sup>182</sup> France’s economic policies disenfranchised Syria’s predominantly Sunni petty traders and artisans, whereas its secularisation of education threatened Sunni religious elites (*ulama*). France’s divide and rule strategy reinforced sectarian identities and laid the foundations for future sectarian conflict in Lebanon and Syria. Its deliberate recruitment of minorities for the *Troupes spéciales* also contributed to a military tradition amongst Alawis.

Finally, the mandate experience reinforces the constructivist argument that identities are socially constructed. According to White, indigenous communities only gradually began to self-identify as minorities during the mandate era due in part to France’s utilisation of the emergent concept of minority rights to ensure its continuing influence in post-mandate Syria and Lebanon. The chapter also supports Barnett’s constructivist suggestion that states may have multiple, conflicting identities.<sup>183</sup> Syria’s emergent national identity developed uneasily alongside its existing Arab nationalist identity during the mandate era. The former was reflected in Syria’s signature of the Arab League Pact, declaration of war on the Axis powers and accession to the UN.

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<sup>179</sup> Mandate for Palestine, preambular para 2. See also arts 2 and 6.

<sup>180</sup> Hourani, *Syria and Lebanon* (n1) 106.

<sup>181</sup> *ibid* 304–306; Seale, *The Struggle for Syria* (n74) 21–22.

<sup>182</sup> Pierret and Selvik (n115) 599; Lefèvre (n11) 13–16.

<sup>183</sup> Michael Barnett, ‘Institutions, Roles, and Disorder: The Case of the Arab States System’ (1993) 37 *Int’l Stud Q* 271, 272 and 291.

### **3.5 Post-independence Era (1946 to 1958)**

The post-independence era was an extremely turbulent period in Syria's history as Syria's divided society competed to control its political destiny and Syria once again found itself central to regional and international struggles for power. Democratic rule was undermined by successive military coups and collapsed governments. The domestic political scene was riddled with factionalism, which in turn reflected underlying societal divisions between landowners and peasants, landowners and capitalists, urban and country dwellers, anti-imperialist radicals and Western-leaning conservatives, Arab nationalists and Syrian nationalists, secularists and conservative Muslims, ethnic minorities and Arabs, and religious minorities and Sunnis. The most significant internal contributor to factionalism was arguably the extreme inequality and politics of notables that Syria inherited from the Ottoman and mandate eras. The creation of Israel and pervasive external interference in Syria's internal affairs also played a major role.

On 29 November 1947, the UNGA resolved to partition Palestine into Arab and Jewish states.<sup>184</sup> The Arab states and Turkey opposed the resolution. Of the P5, France, the USA and the USSR voted in favour, whereas the UK and China abstained. Nevertheless, the Soviet narrative subsequently depicted Israel as a Western surrogate hence the Arab-Israeli armed conflict became entangled in the Cold War.<sup>185</sup> President Truman's recognition of Israel in May 1948 provoked anti-American protests throughout Syria.<sup>186</sup> Arab armies and volunteers went to war with Israel; however, as a result of ill-preparation and disunity, they were decisively defeated.<sup>187</sup> Whilst the war was ongoing, the UNGA adopted Resolution 194 (III). It implicitly recognised the right of Palestinian refugees to return and/or to receive

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<sup>184</sup> UNGA Res 181 (II) 'Future government of Palestine' (29 November 1947) UN Doc A/RES/181 (II). See also Moubayed (52) 75–76.

<sup>185</sup> Rolf Tanner, 'Narrative and Conflict in the Middle East' (2014) 56 *Survival* 89, 94.

<sup>186</sup> Moubayed (52) 76. Miller suggested that fundamentalist and evangelical Christians exerted pressure on the US government to recognise Israel. Paul D Miller, 'Evangelicals, Israel and US Foreign Policy' (2014) 56 *Survival* 7, 9. Marshall suggested that Truman was attempting to secure Jewish support for his re-election campaign. Rachelle Marshall, 'With Israel in Mind, U.S. Targets Syria as a Proxy for Iran' (October/November 2013) 32 *Washington Report on Middle East Affairs* 8, 8–9.

<sup>187</sup> Rogan (n18) 57–58. See also Charles Smith in Fawcett (ed) (n18) 264–265.



compensation for lost or damaged property.<sup>188</sup> The UNGA resolved to admit Israel to the UN in May 1949.<sup>189</sup>

The loss of Palestine contributed to the polarisation of Syria's political scene and a rise in support for ideological parties and Arab nationalism.<sup>190</sup> Arab nationalism enabled the conflict between the Palestinians and the Israelis to be conceptualised in regional terms.<sup>191</sup> When Israel later occupied parts of Syria, Egypt and Lebanon, this ideological conception of an Arab-Israeli conflict was reinforced by material facts. However, there were competing strains of Arab nationalism. Its ambitions ranged from the unification of Arabs in a single Arab nation-state (Ba'athism) to the establishment of a constitutional confederation of Arab states (Jordan's Greater Syria plan) to simply the pursuance of policies directed toward the achievement of shared Arab interests (Egypt's preferred strain as encapsulated in the Arab League Charter).

### 3.5.i Party Politics

After independence, the National Bloc split into the National Party, which was comprised mainly of traditional landowning elites from Damascus, and the People's Party, which was dominated by business elites from Aleppo.<sup>192</sup> These conservative parties competed with each other, independents, the Syrian Muslim Brotherhood<sup>193</sup> and ideological parties for control of Syria's political life.

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<sup>188</sup> UNGA Res 194 (III) 'Palestine - Progress Report of the United Nations Mediator' (11 December 1948) UN Doc A/RES/194 (III), para 11.

<sup>189</sup> UNGA Res 273 (III) 'Admission of Israel to membership of the United Nations' (11 May 1949) UN Doc A/RES/273 (III).

<sup>190</sup> Carsten Wieland, *Syria—A Decade of Lost Chances: Repression and Revolution from Damascus Spring to Arab Spring* (Kindle edn, Cune Press 2012) ch11, lcn6110–6114; Tanner (n185) 92–93.

<sup>191</sup> Hinnebusch, 'The Politics of Identity' (n84) 165.

<sup>192</sup> Seale, *The Struggle for Syria* (n74) 29; Khoury, 'The Syrian Independence Movement' (n102) 34–35.

<sup>193</sup> The Syrian Muslim Brotherhood was initially an elite party comprised mainly of Sunni *ulama* and merchants who were committed to protecting Islamic values against secularism. Thomas Pierret, 'Syria: Old-timers and Newcomers' in Robin Wright (ed), *The Islamists Are Coming: Who They Really Are* (Woodrow Wilson Center Press 2012) 72; Lefèvre (n11) 28–33.

The main ideological parties were the Syrian Social Nationalist Party (PPS)<sup>194</sup> the Syrian Communist Party (SCP)<sup>195</sup> and the Ba'ath Party. The Ba'ath Party, otherwise known as the Party of the Arab Resurrection (*Hizb al-Ba'ath al-Arabi*), originated out of a youth group established around 1940 by two middle-class teachers, Michel Aflaq – a Greek Orthodox Christian – and Salah al-Din Bitar – a Sunni Muslim.<sup>196</sup> Its slogan was 'Unity, Freedom, Socialism' meaning Arab unity, individual freedom and freedom from imperial oppression, and the liberation of peasants from the politics of notables. Ba'athist ideology advocated the creation of a united, secular, socialist Arab society through a revolutionary Arab awakening.<sup>197</sup> Ba'athists asserted that secular Arab nationalism was compatible with Islam as Islam was 'not so much an Arab national religion as an important Arab national cultural heritage'.<sup>198</sup> Unity encompassed not only political unity but also the emancipation of Arabs from the religious, tribal and local loyalties that divided society and impeded the class struggle.<sup>199</sup> Ba'ath party branches were established in Iraq, Jordan, Lebanon, Libya, Kuwait and Yemen. The National Command was the party's highest policy-making body at the national (inter-state) level and the Regional Command was the highest policy-making body at the regional (intra-state) level.<sup>200</sup>

In the early 1950s, the Ba'ath Party joined with Akram al-Hawrani's Arab Socialist Party.<sup>201</sup> The merger considerably expanded the party's rural

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<sup>194</sup> The PPS supported Syrian nationalism and the reunification of Greater Syria as a single secular nation. See Hourani, *Syria and Lebanon* (n1) 197; Seale, *The Struggle for Syria* (n74) 64–71 and 239–243; Seale, *Asad* (n1) 50; Batatu (n11) 120–121; van Dam, *The Struggle for Power* (n109) 18.

<sup>195</sup> The SCP's secularism and strong Kurdish following alienated it from most Arabs and conservative Muslims. Van Dam, *The Struggle for Power* (n109) 18.

<sup>196</sup> Seale, *Asad* (n1) 29–30. The group was reconstituted as the Ba'ath party after it acquired the followers of Zaki al-Arsuzi, an Alawi teacher. Eric Rouleau, 'The Syrian Enigma: What is the Baath?' (1967) 45 *New Left Review* 53, 55–56.

<sup>197</sup> Seale, *The Struggle for Syria* (n74) 155; van Dam, *The Struggle for Power* (n109) 17.

<sup>198</sup> Van Dam, *The Struggle for Power* (n109) 17.

<sup>199</sup> *ibid* 12. See also Seale, *The Struggle for Syria* (n74) 154.

<sup>200</sup> Itamar Rabinovich, *Syria Under the Ba'ath, 1963–66: The Army Party Symbiosis* (Transaction Publishers 1972) 230–1. The inter-state command was referred to as 'National' because Ba'athism viewed the imperially created Arab states as regions within one Arab nation. Each Arab state (region) had a Regional Command. During the intra-Ba'ath struggle for power in Syria in the late 1960s, this power structure was reversed with the Syrian Regional Command superseding the National Command.

<sup>201</sup> Seale, *The Struggle for Syria* (n74) 88; Batatu (n11) 126–130.

and peasant constituency as Hawrani was a popular advocate of land reform.<sup>202</sup> He also persuaded many peasants, particularly Alawis, to enrol in Homs military academy.<sup>203</sup> The Ba'ath party's commitment to socialism and secularism rendered it popular amongst peasants and minority sects. However, this in turn deterred many urban and conservative Sunnis from joining.<sup>204</sup> Despite drawing inspiration from Marxist socialism, the Ba'ath party criticised communism as a Western ideology that was incompatible with Arab unity.<sup>205</sup> However, it differentiated between communism, which it opposed, and the USSR, with whom it sought friendly relations.<sup>206</sup>

During the 1947 parliamentary elections, the Ba'ath Party formed a reformist-business alliance with the People's Party. The alliance advocated land reform and the improvement of rural living conditions.<sup>207</sup> In order to increase consumption and grow the economy, Syrian capitalists in the People's Party supported the controlled political mobilisation of impoverished peasants and workers through agrarian and labour reform, statist welfare programmes and the incorporation of workers into state-controlled corporatist bodies.<sup>208</sup> Ultimately, however, they proved unable to 'control' this mobilisation process.<sup>209</sup> After the Syrian Assembly approved its first Leninist-inspired economic development plan in 1955, capitalists began to view Syria's industrialisation and social reform programme as contrary to their interests.<sup>210</sup> Consequently, the reformist-business alliance collapsed and most capitalists realigned with the landowning elites in opposition to further social reform.<sup>211</sup>

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<sup>202</sup> Seale, (n1) 39–40 and 47–48.

<sup>203</sup> Batatu (n11) 324; van Dam, *The Struggle for Power* (n109) 27–28.

<sup>204</sup> Van Dam, *The Struggle for Power* (n109) 15–19 and 142.

<sup>205</sup> Seale, *The Struggle for Syria* (n74) 153; Rouleau (n196) 58–59.

<sup>206</sup> Seale, *The Struggle for Syria* (n74) 178.

<sup>207</sup> *ibid* 30; Steven Heydemann, *Authoritarianism in Syria: Institutions and Social Conflict, 1946–1970* (Cornell UP 1999) 48–49.

<sup>208</sup> Heydemann, *Authoritarianism in Syria* (n207) 32 and 46–51.

<sup>209</sup> *ibid* 65–67.

<sup>210</sup> *ibid* 71 and 74.

<sup>211</sup> *ibid* 14 and 52–54.

### 3.5.ii The Post-independence ‘Struggle for Syria’

An ideological Cold War erupted during the 1950s between the conservative, Western-aligned Arab monarchies led by Saudi Arabia and the radical, anti-imperialist Arab republics led by Egypt under Gamal Abdul Nasser. It was facilitated by the bipolarity of the Cold War era. The Arab monarchies, especially Jordan, grew dependent upon Western patrons for financial and military support during this period.<sup>212</sup> The republics received support from the USSR and derived inspiration from Marxist-Leninist ideology. Syria became a key prize in the Middle Eastern front of the Cold War and the regional struggle for power. Iraq, supported by the People’s Party, and Jordan both sought to include Syria in some form of pan-Arab federation, whereas Saudi Arabia and Egypt, supported by the National Party, endeavoured to torpedo their plans.<sup>213</sup>

In March 1949, Colonel Husni al-Za’im executed the first of several actual and attempted military coup d’états in Syria. As Batatu observed, ‘From that point onward, mastery over the armed forces became increasingly the principal—and after 1961 the only—means by which mastery over the state could be secured.’<sup>214</sup> Some sources suggested that the US helped Za’im to execute his coup.<sup>215</sup> Another source suggested that the US and Britain had advance knowledge of Za’im’s proposed coup but did not actively promote it, although France may have.<sup>216</sup> Once in power, Za’im implemented an authoritarian form of rule and developed close links with Saudi Arabia and Egypt. Consequently, the Hashemite monarchies opposed him, and France

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<sup>212</sup> Hinnebusch and Quilliam (n75) 514–515.

<sup>213</sup> Jordan’s Greater Syria plan was opposed by Egypt, Saudi Arabia, Lebanon, Britain and Iraq. Apart from the Druze community, it had little support inside Syria. Seale, *The Struggle for Syria* (n74) 14 and 46–47.

<sup>214</sup> Batatu (n11) 198.

<sup>215</sup> See Halliday (n168) 70; Moubayed (n52) 77–82.

<sup>216</sup> Seale, *The Struggle for Syria* (n74) 36. Notably, once in power Za’im signed an armistice agreement with Israel and ratified two agreements that were unlikely to have secured parliamentary approval: a Franco-Syrian agreement resolving outstanding financial issues and an agreement authorising a US company, Bechtel, to construct the Trans-Arabian Pipeline Company (Tapline) via the Golan Heights. Moubayed (n52) 74–77; Hinnebusch, ‘The Foreign Policy of Syria’ (n85) 211.

supported him as France viewed Hashemite plans for Arab union as British expansionism in disguise.<sup>217</sup>

Colonel al-Hinnawi launched a second military coup, possibly with Iraqi and British support, in August 1949 to overthrow Za'im.<sup>218</sup> Hinnawi reinstated civilian rule and a provisional government dominated by the People's Party was established, which pursued a Syrian-Iraqi union. However, Colonel al-Shishakli launched another military coup in December 1949 to prevent the union, which was opposed by the Syrian armed forces, Ba'athists and the Islamic opposition as well as Egypt, Saudi Arabia, France, the US and Israel.<sup>219</sup> Shishakli established a military dictatorship.<sup>220</sup> However, his domestic support base declined dramatically after he hosted high-ranking US officials in Damascus in 1953.<sup>221</sup> He was forced into exile in February 1954 by a Ba'athist supported coup. By this point, France, Saudi Arabia and Egypt still supported his regime; however, Iraq and Lebanon opposed it.<sup>222</sup> The US was agnostic as Shishakli had also made overtures to the Soviets.<sup>223</sup>

After the coup, elections were convened, and Syria became the first Middle Eastern country to vote a communist into parliament much to America's unease. The new parliament became polarised between the Democratic Bloc – an unstable, reformist coalition of ideological, anti-imperialist parties and independents – and the Liberal Bloc – an equally unstable, conservative coalition of landowners and capitalists.<sup>224</sup> The new

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<sup>217</sup> Seale, *The Struggle for Syria* (n74) 47–54, 59–63 and 81–82.

<sup>218</sup> *ibid* 58–59, 62–63 and 73–75; Moubayed (n52) 82–84.

<sup>219</sup> Seale, *The Struggle for Syria* (n74) 76–81. Shishakli reportedly had not forgiven the Hashemites for abandoning Syria at Maysoloun in 1920. See Moubayed (n52) 88.

<sup>220</sup> Seale, *The Struggle for Syria* (n74) 120–126.

<sup>221</sup> Moubayed (n52) 100–102; David Lesch, *Syria and the United States: Eisenhower's Cold War in the Middle East* (Westview Press 1992) 40–42. See also Seale, *The Struggle for Syria* (n74) 118, 127, 132–135 and 141.

<sup>222</sup> Seale, *The Struggle for Syria* (n74) 137–140.

<sup>223</sup> Moubayed (n52) 106–107.

<sup>224</sup> Rabinovich (n200) 13; Seale, *The Struggle for Syria* (n74) 215; Heydemann, *Authoritarianism in Syria* (n207) 53.

cabinet promptly became embroiled in a divisive discussion regarding whether or not Syria should join the Baghdad Pact.<sup>225</sup>

During 1953 and 1954, as part of its containment strategy, the US had begun developing a Northern Tier Alliance with states located along the USSR's southern frontier, including Iran, Pakistan, Turkey and potentially Iraq.<sup>226</sup> These states would receive US military aid in return for their participation in a collective defence system.<sup>227</sup> Britain opposed the Alliance as it could jeopardise its renewal of the Anglo-Iraqi Treaty and negotiations with Egypt over the Suez canal.<sup>228</sup> Consequently, it devised the Baghdad Pact with Iraq as an alternative. The Pact envisaged Turkey, Iraq, Pakistan, Iran and the Arab states participating in a Middle Eastern version of NATO.<sup>229</sup> In return for pledging mutual cooperation, protection and non-intervention, its members would be eligible for Western aid.<sup>230</sup>

Iraq supported the Baghdad Pact because it posed an opportunity to weaken Egypt, combat communist infiltration and cooperate with Turkey and Iran over the Kurdish question.<sup>231</sup> Iran, Turkey and Pakistan also supported it. Saudi Arabia opposed it because it would bolster Iraq and because it was sponsored by Britain with whom Saudi Arabia was involved in a dispute over the Buraimi Oasis.<sup>232</sup> Egypt opposed it because it contravened Egypt's anti-imperialist foreign policy, threatened to enhance Iraq's regional influence, and because Nasser didn't view the USSR as a significant threat.<sup>233</sup> As an alternative, Nasser championed positive neutralism. Given its strategic geopolitical position, Syria could make or break the Pact. If Syria joined, Lebanon and Jordan – who were already inclined to join – would follow.<sup>234</sup>

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<sup>225</sup> Seale, *The Struggle for Syria* (n74) 174–176 and 215; Hinnebusch, 'The Foreign Policy of Syria' (n85) 211–212.

<sup>226</sup> Seale, *The Struggle for Syria* (n74) 186–191.

<sup>227</sup> *ibid* 189.

<sup>228</sup> *ibid* 189–190.

<sup>229</sup> Henry Kissinger, *Diplomacy* (Simon and Schuster 1994) 527.

<sup>230</sup> Moubayed (n52) 106 and 115–117.

<sup>231</sup> Seale, *The Struggle for Syria* (n74) 200.

<sup>232</sup> Moubayed (n52) 106 and 115–117. See also Stephen M Walt, *The Origins of Alliances* (Kindle edn, Cornell UP 1990) ch3, lcn1574–1577.

<sup>233</sup> Seale, *The Struggle for Syria* (n74) 195–199; Walt (n232) ch3, lcn1552–1560.

<sup>234</sup> Seale, *The Struggle for Syria* (n74) 212–214.

The Syrian government collapsed after it refused to condemn the Pact in January 1955.<sup>235</sup> The fact that France was arming Israel at the same time as Western states were refusing to arm the Arabs enhanced the prevailing climate of anti-Westernism.<sup>236</sup> A raid by the Israel Defense Forces (IDF) on Gaza in February highlighted Syria and Egypt's vulnerability.<sup>237</sup> It impelled Nasser to strengthen Egypt's defences resulting in the 'Czech Arms Deal' in contravention of a Western-sponsored arms embargo.<sup>238</sup> The raid prompted Syria to negotiate a mutual defence agreement with Egypt, which officially rejected the Baghdad Pact.<sup>239</sup> Yet another new Syrian government was formed in September 1955, which signed a bilateral defence treaty with Egypt.<sup>240</sup> Israeli attempts to bully Syria into rescinding the treaty merely drove Syria closer to the USSR as Syria felt that it needed a superpower ally to support it diplomatically and protect it against imperialism.<sup>241</sup> Syria still maintained an anti-communist stance at the domestic level. Nonetheless, the US feared that Syria was becoming a Soviet satellite.<sup>242</sup> Significantly, the Syrian government collapsed in June 1956 after it authorised the sale of wheat to western Europe reflecting the extent of anti-Western sentiment in Syria.<sup>243</sup> The Soviet Foreign Minister visited Damascus in June and Syria recognised Communist China in July.

Such was the regional environment prior to the Suez crisis. The US sought to punish Egypt for the Czech arms deal and for recognising Communist China by renegeing on its pledge to finance the Aswan High Dam. Refusing to be intimidated, Nasser nationalised the Suez Canal Company in

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<sup>235</sup> *ibid* 215–217.

<sup>236</sup> *ibid* 236. The US, Britain and France had agreed to restrict the supply of arms to Middle Eastern states under the Tripartite Declaration of 1950.

<sup>237</sup> Walt (n232) ch3, fn32, lcn2379–2387.

<sup>238</sup> Seale, *The Struggle for Syria* (n74) 232 and 236–237; Raymond Hinnebusch, 'The Middle East Regional System' in Hinnebusch and Ehteshami (eds) (n85) 38; Raymond Hinnebusch and Nael Shama, 'The Foreign Policy of Egypt' in Hinnebusch and Ehteshami (eds) (n85) 85.

<sup>239</sup> Seale, *The Struggle for Syria* (n74) 223–224. See also James P Jankowski, *Nasser's Egypt, Arab Nationalism, and the United Arab Republic* (Lynne Rienner Publishers 2002) 75–77.

<sup>240</sup> Seale, *The Struggle for Syria* (n74) 252–254; Seale, *Asad* (n1) 50–51; Moubayed (n52) 126–128.

<sup>241</sup> Seale, *The Struggle for Syria* (n74) 219 and 254–255.

<sup>242</sup> The election of Baqdash had already created a major news story in the US. See *ibid* 185.

<sup>243</sup> Moubayed (n52) 139.

July 1956. In response, France, Israel and Britain devised a plan to occupy the canal.<sup>244</sup> However, the US, which had not been privy to the tripartite scheming, took the matter to the UNSC. The US could not condone the occupation without appearing hypocritical having previously criticised the USSR's intervention in Hungary.<sup>245</sup> It may also have feared Soviet retaliation.<sup>246</sup> The deadlocked UNSC employed the 'Uniting for Peace' mechanism, which enabled the matter to be addressed by the UNGA.<sup>247</sup> The UNGA established the UN Emergency Force (UNEF) to secure and supervise a cessation of hostilities in Suez.<sup>248</sup> The Suez debacle presaged the decline of French and British influence in the Middle East. Nasser in contrast benefited from a wave of pan-Arab nationalism that engulfed the region and fuelled a decolonisation movement in the Maghreb.<sup>249</sup> Israel in turn secured a US undertaking to ensure its ships free passage through the Straits of Tiran.<sup>250</sup> Ominously, Israel asserted that it would consider any future blockade of the Straits a *casus belli*.<sup>251</sup>

The Suez crisis brought Syria, Egypt and the USSR even closer together.<sup>252</sup> The Syrian government and people rallied behind Nasser and Syria's President travelled to Moscow in the midst of the crisis, suggesting to the US that the USSR was Syria's chief protector.<sup>253</sup> The crisis coincided with a foiled conspiracy to bring down the Syrian government, codenamed 'Operation Struggle', which implicated Iraq, the US and Britain.<sup>254</sup> Afterwards, suspected conspirators were expelled from the Syrian cabinet and

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<sup>244</sup> For a discussion of the Suez crisis, see Seale, *The Struggle for Syria* (n74) 247–250 and 260–265; Kissinger (n229) 539; Halliday (n168) 113–114; Smith (n187) 265–266; Hollis (n71) 385–386. For a post-colonial perspective, see Siba N Grovogui, 'Postcolonialism' in Tim Dunne, Mikja Kurki and Steve Smith (eds), *International Relations Theories: Discipline and Diversity* (3rd edn, OUP 2013) 260–262.

<sup>245</sup> Grovogui (n244) 261.

<sup>246</sup> Walt (n232) ch3, fn46, lcn2446–2454.

<sup>247</sup> UNSC Res 119 (31 October 1956) UN Doc S/RES/119; UNGA Res 377 (V) 'Uniting for Peace' (3 November 1950) UN Doc A/RES/377 (V).

<sup>248</sup> UNGA Res 998 ES-1 (4 November 1956) UN Doc A/RES/998 ES-1.

<sup>249</sup> Rouleau (n196) 61.

<sup>250</sup> Walt (n232) ch3, lcn1640–1641.

<sup>251</sup> Smith (n187) 266.

<sup>252</sup> Seale, *The Struggle for Syria* (n74) 277–278; Walt (n232) ch3, lcn1646–1652.

<sup>253</sup> Seale, *The Struggle for Syria* (n74) 260–26; Seale, *Asad* (n1) 52.

<sup>254</sup> Seale, *The Struggle for Syria* (n74) 268–280; Moubayed (n52) 144–153.



Parliament and, under pressure from the Ba'athists, Syria undertook to commence negotiations with Egypt over a Syrian-Egyptian union.<sup>255</sup>

The US announced the Eisenhower Doctrine in January 1957. It was designed to prevent the Soviets from capitalising upon Britain and France's loss of regional influence. It provided that any state that was threatened by communist aggression could request US economic and military aid. It served to polarise the Arab world once again between the radical republics, who opposed the Doctrine as a neo-imperialist tool, and the conservative monarchies, whose leaders viewed it as an opportunity to undermine Nasser. The monarchies viewed Nasser's anti-imperialist ideology and foreign policy as a threat to their domestic legitimacy.<sup>256</sup> The perceived threat was so strong that it even prompted the erstwhile enemies, Iraq and Saudi Arabia, to reconcile and establish a Kings Alliance together with Jordan.<sup>257</sup>

In August 1957, the Eisenhower Doctrine was put into practice following a diplomatic crisis between the US and Syria, the so-called 'Stone Affair'.<sup>258</sup> The crisis emerged after Syria announced that it had uncovered a US-backed conspiracy to overthrow the government. For a time, a US and Turkish military intervention in Syria to prevent communist infiltration looked likely.<sup>259</sup> The Syrian government tried to de-escalate the situation by reasserting its policy of positive neutrality.<sup>260</sup> Even the Arab states that had supported the Eisenhower Doctrine publicly rejected any act of aggression against Syria in order to avoid being perceived as traitors to the Arab cause.<sup>261</sup> In an effort to distract attention from his Western connections and undermine Nasser, King Saud even defended Syria's sovereignty and right to non-interference before the UN.<sup>262</sup> However, ultimately it was Nasser who stole the hearts and minds of the Syrian people.<sup>263</sup> He arrived in Syria in October

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<sup>255</sup> Seale, *The Struggle for Syria* (n74) 282; Moubayed (n52) 150–151.

<sup>256</sup> Seale, *The Struggle for Syria* (n74) 289–292.

<sup>257</sup> *ibid* 289; Walt (n232) ch3, lcn1697–1728; Moubayed (n52) 155–156.

<sup>258</sup> Seale, *The Struggle for Syria* (n74) 293–306; Moubayed (n52) ch12.

<sup>259</sup> Seale, *The Struggle for Syria* (n74) 297–301; Moubayed (n52) 160.

<sup>260</sup> Seale, *The Struggle for Syria* (n74) 295 and 297; Moubayed (n52) 160.

<sup>261</sup> Seale, *The Struggle for Syria* (n74) 302–303.

<sup>262</sup> *ibid* 301–305.

<sup>263</sup> Moubayed (n52) 167.

1957 with 2,000 troops seemingly to save the day.<sup>264</sup> However, in reality the risk of intervention had passed by this point; the US had already indicated that military action wasn't necessary as it wasn't certain that Syria was a communist satellite.<sup>265</sup>

The Stone Affair pushed Syria even closer to the USSR and Egypt and rendered it politically risky for Syrian politicians to demonstrate any pro-Western inclinations.<sup>266</sup> America's main error was viewing the Middle East through the Cold War lens and consequently misinterpreting domestic and regional struggles for power as evidence of communist infiltration.<sup>267</sup> The regional and international struggle for Syria placed an inordinate strain on Syria's political community and armed forces. It highlighted Syria's vulnerability and enhanced the sense of urgency surrounding the proposed union with Egypt championed by the Ba'athists.<sup>268</sup> From an ideological perspective, the union served the Arab nationalist, anti-imperialist and socialist goals of Ba'athism.<sup>269</sup> From a pragmatic perspective, the Ba'athists hoped that it would undermine their main political opponent, the SCP, as Nasser had brutally suppressed communists in Egypt.<sup>270</sup> The Ba'athists also genuinely feared that the SCP's activities could trigger a crackdown against leftist politicians or a Western intervention in Syria.<sup>271</sup>

In January 1958, an unsanctioned delegation of Ba'athist-connected army officers travelled to Cairo to negotiate the union.<sup>272</sup> Syria's Foreign Minister, the Ba'athist Salah al-Bitar, was dispatched to lead the negotiations.<sup>273</sup> Nasser was inclined to reject the request for union as he

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<sup>264</sup> Seale, *The Struggle for Syria* (n74) 305; Moubayed (n52) 179.

<sup>265</sup> Moubayed (n52) 166.

<sup>266</sup> Seale, *The Struggle for Syria* (n74) 301 and 306.

<sup>267</sup> *ibid* 294, 296, 297, 301 and 303.

<sup>268</sup> Radwan Ziadeh, *Power and Policy in Syria* (revised edn, IB Tauris 2013) 4. See also Seale, *The Struggle for Syria* (n74) 54–55.

<sup>269</sup> Heydemann, *Authoritarianism in Syria* (n207) 82.

<sup>270</sup> Seale, *The Struggle for Syria* (n74) 315–317; Heydemann, *Authoritarianism in Syria* (n207).

<sup>271</sup> Seale, *The Struggle for Syria* (n74) 317; Heydemann, *Authoritarianism in Syria* (n207) 80–81.

<sup>272</sup> Moubayed (n52) 172–173.

<sup>273</sup> Seale, *The Struggle for Syria* (n74) 321.

perceived Arab unity as the coordination of foreign policy positions under Egyptian leadership not the unification of Arab states in one nation.<sup>274</sup> Ultimately, however, he felt compelled to accept it in order to maintain his pan-Arab legitimacy. However, he rendered his acceptance subject to provisos, which effectively guaranteed him control of the new state.<sup>275</sup>

### **3.5.iii Theoretical Analysis of the Post-independence Era**

After attaining independence, Syria engaged in political pluralism contrary to essentialist assumptions, which depict the Middle East and Islam as inherently incompatible with democracy. A democratic society could potentially have been consolidated had Syria not become central to regional and international struggles for power. The post-independence struggle for Syria exacerbated factionalism in Syria's institutions, reinforced the military's role in politics, enhanced the fear of external intervention and ultimately compelled Syria to sacrifice its own sovereignty for a Syrian-Egyptian union.

The inter-Arab struggle for power that took place in the post-independence era supports Walt's balance of threat theory, which suggests that political actors balance against threats rather than solely against material power and that geographic proximity and negative intentions influence threat perceptions.<sup>276</sup> For example, by supporting the Eisenhower Doctrine, the conservative Arab monarchies were balancing against the threat posed by Egypt under Nasser's charismatic leadership.<sup>277</sup> However, the period also supports the constructivist argument that, once constructed, identities and ideologies can restrain the behavioural choices of elites. At times, the perceived need to conform to pan-Arab identity compelled Arab leaders to take actions they would not otherwise have taken, for example, when Nasser agreed to join Egypt in a union with Syria. Furthermore, when Syria was threatened with a Western-backed military intervention the Arab monarchies

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<sup>274</sup> *ibid* 224–226, 312–313, 325; Hinnebusch and Shama (n238) 85.

<sup>275</sup> Seale, *The Struggle for Syria* (n74) 322–323; Heydemann, *Authoritarianism in Syria* (n207) 82–83.

<sup>276</sup> Walt (n232) ch1, 1cn209–210.

<sup>277</sup> Hinnebusch, 'Foreign Policy in the Middle East' (n79) 23.

realigned with the radical Arab republics in order to avoid being perceived as traitors to the Arab cause and losing domestic legitimacy. The Arab states' conflicting national and pan-Arab identities again contributed to regional instability during the post-independence era, particularly up until 1967 when the most popular interpretation of Arab nationalism required Arab states to work towards political union.<sup>278</sup>

External interference in Syria and the wider region in the post-independence era contributed to the consolidation of an anti-imperialist, Arab nationalist Syrian identity. The UNGA's approval of the Palestinian partition plan left Syria with a hostile neighbour and increased support for ideological parties. As poststructuralism would anticipate, pan-Arab and Zionist identities were mutually constituted in opposing terms. Israel was viewed by most Arabs as an imperial construct. Hence, Arab nationalism and resistance to Israel and imperialism became inextricably linked.<sup>279</sup> In contrast, the Zionist narrative presented Israel as 'the legitimate return of a persecuted people, based on a religious-historical claim'.<sup>280</sup> As Hinnebusch observed, 'Once identity is constructed around enmity, it assumes an autonomous power that gives conflict extra durability'.<sup>281</sup>

As realists and TWAIL theorists would expect, during the post-independence period powerful external actors sought to utilise international agreements, such as the Baghdad Pact and Eisenhower Doctrine, to further their own interests in the region. However, the Arab republics viewed these instruments as neo-imperial tools.<sup>282</sup> The West's refusal to arm the Arab states unless they participated in international treaties of alliance prompted the republics to look Eastward for support. This in turn contributed to the polarisation of the Arab world and Syrian society along Cold War lines. The perception of Western bias toward Israel and the threatened intervention in

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<sup>278</sup> Barnett, 'Institutions' (n183) 282; Michael N Barnett, 'Sovereignty, Nationalism, and Regional Order in the Arab States' (1995) 49 *Int'l Org* 479, 485.

<sup>279</sup> Tanner (n185) 94–95.

<sup>280</sup> *ibid* 93.

<sup>281</sup> Hinnebusch, 'The Politics of Identity' (n84) 165.

<sup>282</sup> Seale, *The Struggle for Syria* (n74) 231.

1957 to prevent supposed Communist infiltration increased anti-Western sentiment. The chain of events triggered by the threatened intervention highlights the risks of differentiating between liberal and non-liberal states under international law as democratic peace theorists have advocated.

Finally, the period highlighted the reductionism of neorealism by demonstrating the impact of domestic level factors on the behaviour of states at the international level. For example, the Ba'athists' determination to undermine their domestic political opponents, the SCP, contributed to their championing of the union with Egypt.

### **3.6 United Arab Republic (UAR) and Secessionist Era**

Syria and Egypt united as the UAR from February 1958 to September 1961. The Arab monarchies viewed the UAR as a threat and sought to balance against it. Accordingly, King Saud unsuccessfully attempted to have Nasser assassinated and the Hashemite monarchies formed a federal union.<sup>283</sup> However, the Hashemite union collapsed when the Iraqi monarchy was overthrown in a military coup. The collapse of the union rendered Jordan even more reliant upon British and American assistance.<sup>284</sup>

Nasser implemented a Soviet-inspired form of populist authoritarian rule.<sup>285</sup> A State of Emergency Act was promulgated in 1958, which enabled the implementation of draconian measures. All political parties were required to disband apart from Nasser's National Union Party and all legislative, executive and judicial powers were concentrated in Nasser's hands.<sup>286</sup> Laws were enacted by decree and irregular military tribunals were established.<sup>287</sup> No dissent was tolerated. Economic planning was centralised, and Syria was incorporated into a common market with Egypt. Consequently, Syrian industries were undermined by an influx of Egyptian goods.<sup>288</sup> Nasser's

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<sup>283</sup> Walt (n232) lcn1759–1760 and lcn1772–1773.

<sup>284</sup> *ibid* ch3, lcn1779–1781.

<sup>285</sup> Seale, *The Struggle for Syria* (n74) 58–59.

<sup>286</sup> *ibid* 59.

<sup>287</sup> Heydemann, *Authoritarianism in Syria* (n207) 99.

<sup>288</sup> *ibid* 95–97.

economic policies contributed to inflation, capital flight, commodity deficits, smuggling and an underground economy.<sup>289</sup> Like Syria's capitalists, Nasser believed that land reform was a necessary precursor to industrialisation.<sup>290</sup> Accordingly, he introduced legislation to limit the maximum size of individual landholdings with excess land to be sold or rented to peasants.<sup>291</sup> Peasants who benefited were required to join state-sponsored cooperatives.<sup>292</sup> Nasser's land reform programme ultimately proved to be of limited practical effect. By 1961, only 50% of excess landholdings had been expropriated and only 8% of expropriated land had been redistributed.<sup>293</sup>

As a means of controlling civil society, Nasser introduced a Law on Associations and Private Societies in 1958, which permitted the security services to refuse to register associations on arbitrary grounds.<sup>294</sup> Existing independent associations were brought under the authority of state agencies and representative functions were centralised.<sup>295</sup> Nasser sought to eliminate the remaining influence of landowners as they could impede his land reform programme.<sup>296</sup> He also employed a heavy-handed approach to labour and introduced a Uniform Labour Code in 1959, which organised Syria's trade unions into a state-controlled hierarchy.<sup>297</sup> He sought to demobilise and reorganise peasants and workers in a centralised, corporatist manner.<sup>298</sup> He initially allowed business associations to retain a considerable degree of autonomy as he needed private sector capital for his industrialisation programme.<sup>299</sup> However, when capitalists continued to protect their capital, he promulgated the Socialist Decrees of 1961, which effectively nationalised

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<sup>289</sup> *ibid* 99–100 and 127.

<sup>290</sup> *ibid* 109–117.

<sup>291</sup> Agrarian Reform Law No 161 of 27 September 1958.

<sup>292</sup> Heydemann, *Authoritarianism in Syria* (n207) 112–113.

<sup>293</sup> *ibid* 116.

<sup>294</sup> HRW, *A Wasted Decade: Human Rights in Syria during Bashar al-Asad's First Ten Years in Power* (HRW 2010) 8.

<sup>295</sup> Heydemann, *Authoritarianism in Syria* (n207) 117–126.

<sup>296</sup> *ibid* 119 and 125.

<sup>297</sup> Heydemann, *Authoritarianism in Syria* (n207) 120–126.

<sup>298</sup> *ibid* 117–126.

<sup>299</sup> *ibid* 92–93, 119–120 and 126–127.

Syria's major industries and provided the final impetus for Syria's secession.<sup>300</sup>

In September 1961, a group of conservative Syrian officers, supported by Syrian capitalists along with Jordan and Saudi Arabia, declared Syria's secession from the UAR. Turkey, Jordan and Saudi Arabia promptly recognised the provisional secessionist regime followed by the superpowers.<sup>301</sup> However, Syria's political elites, armed forces and even the Ba'ath party itself were divided over the secession.<sup>302</sup> Egypt blamed the coup on reactionary forces and provided arms to Nasser's supporters in Syria (Nasserists) further destabilising the domestic situation.<sup>303</sup> Capitalists dominated the new government and used their influence to introduce a form of controlled economic liberalism.<sup>304</sup> When peasants and workers mobilised to oppose these developments, the supposedly democratic government utilised the UAR's repressive apparatus to suppress them.<sup>305</sup> In March 1962, the secessionist government collapsed prompting a succession of military coups, which further divided Syria's armed forces and culminated in the Ba'athist military coup in March 1963.<sup>306</sup>

Significantly, in October 1962 an exceptional census was conducted in al Hasakah governate in north-eastern Syria as part of the government's 'Arabisation' policy.<sup>307</sup> The census arbitrarily stripped between 120,000 and 150,000 Kurds of their Syrian citizenship and rendered them effectively stateless based on a tenuous allegation that they had entered Syria illegally from Turkey and Iraq after 1945.<sup>308</sup> Kurdish identity was seen as incompatible

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<sup>300</sup> *ibid* 92–93 and 127–131.

<sup>301</sup> Walt (n232) ch3, lcn1879–1882.

<sup>302</sup> Rabinovich (n200) 22; Abboud, *Syria* (n40) ch1, lcn674–690. See also Heydemann, *Authoritarianism in Syria* (n207) 138.

<sup>303</sup> Walt (n232) ch3, lcn1882–1884; Seale, *Asad* (n1) 73.

<sup>304</sup> Heydemann, *Authoritarianism in Syria* (n207) 139–144.

<sup>305</sup> *ibid* 151.

<sup>306</sup> Seale, *Asad* (n1) 73.

<sup>307</sup> UNHRC, 'Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover' (2011) UN Doc A/HRC/17/25/Add.3 (A/HRC/17/25/Add.3), para 60. For a detailed overview, see HRW, *Group Denial: Repression of Kurdish Political and Cultural Rights in Syria* (HRW 2009) 10–11.

<sup>308</sup> A/HRC/17/25/Add.3, para 60; UNHRC, 'Report of the Special Representative on the right

with Syria's prevalent Arab nationalist identity. Stateless Kurds were divided into Kurds registered as foreigners (*ajaneb*) and unregistered Kurds (*maktumeen*).<sup>309</sup> The census resulted in the appropriation of land from stateless Kurds, which was redistributed to Arabs under the Arab Belt project (1973–1976).<sup>310</sup>

### 3.6.i Theoretical Analysis of the UAR and Secessionist Era

The balancing that Arab states engaged in in response to the formation of the UAR accorded with realist expectations. The period demonstrated that authoritarian regimes learn from each other. Nasser's authoritarian UAR regime derived inspiration from the Soviet model. The secessionist regime in turn appropriated the UAR's repressive techniques. Ba'athist ideology was more definitively shaped as populist, anti-Western and socialist during this period, which laid the foundations for the class conflict that took place under the radical Ba'ath regime.<sup>311</sup> The radical Ba'ath and Assad regimes would manipulate Ba'athist ideology to boost their popular appeal. The period also enhanced the militarisation of Syrian society. The proscription of political parties during the UAR contributed to the ascendance of the Ba'athist Military Committee and the decline of the founding civilian Ba'athists. Crucially, the secessionists allowed the military to retain a role in politics. Finally, the al Hasakah census revealed the exclusionary character of Arab nationalism. It contravened the rights of the Syrian Kurds who were rendered stateless and enhanced the overall sense of irredentism amongst Kurds. It reinforced the poststructuralist argument that the construction of national identities involves conditioning practices that generate a sense of solidarity amongst nationals, including through the exclusion of internal others – in this case non-Arabs.<sup>312</sup>

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to food, Olivier De Schutter: Mission to the Syrian Arab Republic (27 January 2011) UN Doc A/HRC/16/49/Add.2 (/HRC/16/49/Add.2), para 48; HRW, *A Wasted Decade* (294) 23–24.

<sup>309</sup> A/HRC/16/49/Add.2, para 47.

<sup>310</sup> A/HRC/16/49/Add.2, para 50; HRW, *Group Denial* (n307) 10–11.

<sup>311</sup> A non-negotiable package of populist gains was delineated during the secessionist era, the so-called 'Damascus Consensus. Heydemann, *Authoritarianism in Syria* (n207) 156–160.

<sup>312</sup> Richard Devetak, 'Postmodernism' in Scott Burchill and others (eds), *Theories of International Relations* (3rd edn, Palgrave MacMillan 2005) 177–178.



### 3.7 Radical Ba'ath Rule

On 8 March 1963, the Ba'athist Military Committee, supported by some independent and Nasserist army officers, performed a coup. The Military Committee had been established clandestinely by five Ba'athist officers, including Hafez al-Assad, during the UAR era.<sup>313</sup> After the coup, the Ba'ath party split into a radical military wing led by the Military Committee and a conservative civilian wing led by the party's founders. The military wing prioritised the transformation of Syria's socioeconomic and political order over the achievement of pan-Arab unity.<sup>314</sup> Its radically socialist orientation reflected the backgrounds of its leaders who derived primarily from minority Islamic sects and rural areas.<sup>315</sup> In contrast, the party's civilian founders were predominantly urban-dwelling, middle class Sunnis. The military wing was able to exploit its control of the armed forces to oust the civilian wing in February 1966.<sup>316</sup> Hafez al-Assad was appointed Minister for Defence in the new regime, which became known as the 'neo-Ba'ath' because of its radically left-wing socioeconomic policies.<sup>317</sup>

#### 3.7.i The Six-Day War, Duality of Power and Black September

The Six-Day War took place in 1967 between Israel on one side and Egypt, Syria and Jordan on the other. It emerged out of a long-running border dispute between Syria and Israel over three demilitarised zones (DMZs).<sup>318</sup> One of the DMZs was located near the intake of Israel's National Water Carrier, which diverted water from the River Jordan as part of an irrigation programme aimed at enabling Israel to accommodate future Jewish immigrants.<sup>319</sup> In response, the neo-Ba'ath regime unsuccessfully endeavoured to obtain a UNSC resolution condemning Israel's actions and allowed Palestinian insurgents (*fedayeen*) to launch raids on Israeli positions from Syrian territory.<sup>320</sup> The latter policy was misguided as it afforded

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<sup>313</sup> Regarding the Military Committee, see Seale, *Asad* (n1) 60–64; Batatu (n11) 144.

<sup>314</sup> See eg Abboud, *Syria* (n40) ch1, lcn693–722.

<sup>315</sup> Batatu (n11) 145.

<sup>316</sup> Seale, *Asad* (n1) 97–101.

<sup>317</sup> *ibid* 104; Lefèvre (n11) 45–46.

<sup>318</sup> Seale, *The Struggle for Syria* (n74) 105–108; Seale, *Asad* (n1) 118–119.

<sup>319</sup> Seale, *Asad* (n1) 119.

<sup>320</sup> *ibid* 120.

Israel's militarily superior armed forces a legal justification to retaliate.<sup>321</sup> Nasser, who was more in tune with the regional balance of power, was reluctant to confront Israel militarily.<sup>322</sup> However, in order to protect his pan-Arab credentials, he signed an Egyptian-Syrian defence pact in 1966.

In May 1967, in response to incorrect Soviet intelligence, the neo-Ba'ath regime sought an Egyptian intervention to deter a seemingly imminent Israeli attack.<sup>323</sup> Egyptian troops subsequently entered the Sinai region, ordered the evacuation of UNEF troops, and declared a blockade of Eilat port effectively closing the Straits of Tiran to Israeli ships.<sup>324</sup> Raymond Hinnebusch and Nael Shama asserted that Nasser's intention was merely to pressurise Israel into moderating its behaviour, a message that he apparently conveyed to the superpowers and the UN.<sup>325</sup> According to Charles Smith, the US advised Israel that Egypt desired a diplomatic solution.<sup>326</sup> However, in Israel's mind Nasser had provided a *casus belli* under international law. Israel launched a devastating surprise attack on Egypt's air force on 5 June, which effectively ended the Six-Day War before it began.

In conventional terms, the combined Egyptian, Syrian and Jordanian armies were no match for Israel.<sup>327</sup> However, Arab disunity also played a part in Israel's victory. Arab states were compelled to support Nasser during the crisis in order to maintain their pan-Arab legitimacy.<sup>328</sup> However, immediately prior to the conflict the Arab world was as hopelessly divided as ever: Jordan had allegedly been plotting to overthrow the neo-Ba'ath regime,<sup>329</sup> Syria and Egypt still distrusted each other after the UAR debacle, and Egypt was also at loggerheads with Jordan and Saudi Arabia over Yemen. Despite signing defence pacts, Egypt, Syria and Jordan had no joint operational plans and pre-existing animosities undermined the cohesiveness

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<sup>321</sup> *ibid* 125; Batatu (n11) 172.

<sup>322</sup> Hinnebusch and Shama (n238) 85.

<sup>323</sup> Walt (n232) ch3, fn172, lcn2884 and lcn2891; Cavanaugh and Castellino (n4) 22–23.

<sup>324</sup> Cavanaugh and Castellino (n4) 22.

<sup>325</sup> Hinnebusch and Shama (n238) 85.

<sup>326</sup> Smith (n187) 267.

<sup>327</sup> Seale, *Asad* (n1) 136–137; Batatu (n11) 198.

<sup>328</sup> Walt (n232) ch3, lcn2214–2228.

<sup>329</sup> Seale, *Asad* (n1) 139.

of their combined Arab forces.<sup>330</sup>

The Six-Day War had major repercussions for the Middle East. By the end of the war, the Arabs had lost control of Gaza, the West Bank, the Golan Heights, the Sinai Peninsula and East Jerusalem. The war marked the beginning of Egypt's decline and forced Nasser to reconcile with the Arab monarchies as he needed their financial assistance to wage a war of attrition against Israel in the Sinai.<sup>331</sup> The war rendered Jordan even more dependent on American protection. As Hinnebusch and Neil Quilliam observed, after the 'West Bank' was incorporated into Jordan, Hussein's monarchy 'became the Arab regime most threatened by Arab and Palestinian nationalism'.<sup>332</sup> The defeat sparked the transformation of the Palestine Liberation Organization (PLO) into an autonomous political actor.<sup>333</sup> Finally, as Hinnebusch surmised, 'The occupation of the Golan made Syria a permanently dissatisfied and insecure state and further locked it into the struggle with Israel'.<sup>334</sup>

The UNSC resolutions adopted after the war would form the basis of future Arab-Israeli peace negotiations. UNSC Resolution 237 recognised Israel's obligation to facilitate the return of inhabitants who had been forced to flee the hostilities.<sup>335</sup> Under UNSC Resolution 242, Israel undertook to withdraw from 'territories occupied in the war' in return for peace.<sup>336</sup> However, the precise extent of those territories was deliberately left undefined. The resolution's acknowledgement of the right of every state in the Middle East 'to live in peace within secure and recognized boundaries'<sup>337</sup>

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<sup>330</sup> *ibid* 137.

<sup>331</sup> Hinnebusch and Shama (n238) 87.

<sup>332</sup> Hinnebusch and Quilliam (n75) 515.

<sup>333</sup> Halliday (n168) 120–121.

<sup>334</sup> Raymond Hinnebusch, 'Globalization and Generational Change: Syrian Foreign Policy between Regional Conflict and European Partnership' (2003) 3 *RevInt'l Aff* 190, 193.

<sup>335</sup> UNSC Res 237 (14 June 1967) UN Doc S/RES/237, para 1. The following UNGA resolutions recognised the right of return of refugees: UNGA Res 2252 (ES-V) (4 July 1967) UN Doc A/RES/2252 (ES-V); UNGA Res 2341 B (XXII) (19 December 1967) UN Doc A/RES/2341 B (XXII); UNGA Res 2443 (19 December 1968) UN Doc A/RES/2443 (XXIII).

<sup>336</sup> UNSC Res 242 (22 November 1967) UN Doc S/RES/242 (S/RES/242), para 1 (i).

<sup>337</sup> *Ibid* para 1 (ii).

effectively reflected Israel's refusal to return to its pre-1967 boundaries.<sup>338</sup> Egypt and Jordan accepted the resolution. The Palestinians rejected it as it failed to acknowledge their right to self-determination and referred to them as the 'refugee problem'.<sup>339</sup> They also refused to negotiate with Israel as negotiation implied recognition of Israeli statehood. Syria also rejected the land for peace deal.<sup>340</sup>

In various ways, the superpowers contributed to the outbreak of the Six-Day War. Both superpowers had increased their material commitments to their respective allies prior to the war.<sup>341</sup> Nasser's blockade of port Eilat was motivated by incorrect Soviet intelligence and a false expectation of Soviet military support.<sup>342</sup> Seale inferred that Israel obtained advance US sanction for its war plans.<sup>343</sup> Halliday opined that the US did not explicitly endorse the attack; however, it offered a permissive context.<sup>344</sup> By demonstrating Israel's military prowess, the war solidified Israel's alliance with America, which now viewed Israel as its core regional ally in the Cold War.<sup>345</sup> It also rendered the radical Arab republics even more dependent on Soviet aid.

For Hafez al-Assad, the war demonstrated the perils of ignoring the regional balance of power and proved that the Arabs could never pose a credible threat to Israel if they remained divided both internally and externally. Consequently, after the war he advocated compromise both on the domestic front, by appeasing the urban bourgeoisie, and on the regional front, by making peace with the Arab monarchies.<sup>346</sup> A so-called 'duality of power' emerged in the Ba'ath party with Hafez in charge of the party's pragmatic military faction and Salah Jadid, also a member of the Military Committee,

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<sup>338</sup> Smith (n187) 268.

<sup>339</sup> S/RES/242, para 2 (b).

<sup>340</sup> Seale, *Asad* (n1) 144–145.

<sup>341</sup> Walt (n232) ch3, lcn2096–2184 and lcn2229–2235.

<sup>342</sup> *ibid* ch3, fn172, lcn2883–2892 and fn175, lcn2897–2902.

<sup>343</sup> Seale, *Asad* (n1) 132–136.

<sup>344</sup> Halliday (n168) 178–179.

<sup>345</sup> *ibid* 116–117.

<sup>346</sup> Raymond Hinnebusch, *Revolution from Above* (Routledge 2001) 65.

in charge of its radicalised civilian wing.<sup>347</sup>

In September 1970, a civil war erupted in Jordan between Palestinian rebels<sup>348</sup> and the Jordanian armed forces. Jadid reportedly ordered Hafez to dispatch the Syrian air force in support of the Palestinian rebels; however, Hafez refused.<sup>349</sup> Syrian ground troops intervened on 18 September, but withdrew shortly thereafter having been overwhelmed by Jordanian troops. The Soviets, perhaps anxious to avoid a confrontation with the US, apparently supported the withdrawal.<sup>350</sup> The Palestinian rebels were subsequently defeated.<sup>351</sup> Jordan's civil war severely undermined Arab solidarity. Hafez claimed that his goal was to prevent a massacre of the *fedayeen* not to help them to oust King Hussein.<sup>352</sup> However, both the Palestinian rebels and Hussein felt betrayed by Syria. During the war, Hussein requested US support and, according to Seale, may even have acquiesced to an Israeli intervention against the Syrians.<sup>353</sup> After the war, Hafez ousted Jadid in a bloodless coup.

### 3.7.ii Manipulation of Regionalism, Tribalism and Sectarianism

During the intra-Ba'ath power struggles of the 1960s, Ba'athist leaders built personal power bases by manipulating sectarian, regional and tribal affiliations in contravention of Ba'athist ideology.<sup>354</sup> Factions of Ba'athists built upon kinship (*assabiya*) and communal ties emerged in the armed forces, the party and the security agencies. As van Dam surmised:

The problem became a vicious circle: on the one hand, power was essential if the necessary drastic social changes entailing the suppression of sectarian, regional and tribal loyalties, were to be effected; on the other hand, maintenance of that power

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<sup>347</sup> Batatu (n11) 172–175. Jadid was also a member of the Military Committee.

<sup>348</sup> The Popular Front for the Liberation of Palestine and the Popular Movement for the Liberation of Palestine.

<sup>349</sup> Seale, *Asad* (n1) 158.

<sup>350</sup> Batatu (n11) 290.

<sup>351</sup> The PLO were forced to relocate to Lebanon. This in turn provoked the creation of Maronite militias who opposed their presence. Smith (n187) 269.

<sup>352</sup> Seale, *Asad* (n1) 158–159. For a further discussion of the war, see Batatu (n11) 290.

<sup>353</sup> Seale, *Asad* (n1) 159–160.

<sup>354</sup> See generally van Dam, *The Struggle for Power* (n109) 15–74.

entailed dependence on those same loyalties thus hindering their suppression.<sup>355</sup>

After the UAR, the Syrian branch of the Ba'ath party was decimated. In order to increase its civilian membership, the party's Organisational Bureau adopted the Advance Regulation (*Qanun al-Zahf*), which effectively promoted all party supporters (*ansar*) to voting active members (*'udw 'amil*).<sup>356</sup> As a result, the number of active members increased from approximately 400 in 1963 to approximately 5,000 in 1967.<sup>357</sup> Prominent party members manipulated the regulation to increase their powerbases.<sup>358</sup> Consequently, competing party blocs emerged whose members were linked by a shared sectarian, regional or tribal heritage rather than a commitment to Ba'athism.<sup>359</sup>

The rural minorities and ultimately the Alawis came to dominate the party's civilian apparatus<sup>360</sup> by first consolidating their control over the armed forces. By this point, minorities, especially Alawis, formed the backbone of the regular army. Sunni officers dominated the officer corps, but they were 'hopelessly divided in political, regional, and class terms'.<sup>361</sup> In contrast, officers from the minority sects, and particularly the Alawis, often originated from the same region and consequently were able to form officer blocs on a regional basis.<sup>362</sup> After the 1963 coup, the Military Committee appointed themselves to the most influential positions in the armed forces and accordingly were able to control admissions to Homs military academy and officer transfers. This enabled them to ensure that politically strategic units were filled with officers of unquestionable loyalty – usually officers who shared their rural and minoritarian background.<sup>363</sup> Sunni officers were generally only placed in command of armed units comprised almost entirely

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<sup>355</sup> *ibid* 74. See also van Dam, *Destroying a Nation* (n1) ch1, lcn924–952.

<sup>356</sup> Van Dam, *The Struggle for Power* (n109) 23.

<sup>357</sup> Batatu (n11) 161.

<sup>358</sup> Van Dam, *The Struggle for Power* (n109) 23.

<sup>359</sup> *ibid* 23.

<sup>360</sup> For figures see Batatu (n11) 161 and 164–169.

<sup>361</sup> *ibid* 158.

<sup>362</sup> Van Dam, *The Struggle for Power* (n109) 79.

<sup>363</sup> *ibid* 36.

of minority sects, often Alawis. Therefore, Alawi officers in command of other units could simply order their co-religionists not to execute the orders of their Sunni commander.<sup>364</sup> From 1963 to 1966, the Military Committee purged potential opponents from the officers corps, including secessionists, Nasserists and independents who all tended to be middle to upper class, urban-dwelling Sunnis.<sup>365</sup> The gaps were filled by reservists whom the Military Committee knew through tribal, sectarian or regional links.<sup>366</sup> The majority of the newly commissioned officers were Alawis of peasant extraction.<sup>367</sup>

By the mid-1960s, the Syrian military was not completely divided along sectarian lines. However, around this time the Military Committee began to battle each other for leadership. After each successive struggle, supporters of the losing faction were purged ostensibly for participating in sectarian, regional and/or tribal bloc formation contrary to Ba'athist ideology. Their positions were filled by officers whom the victor could trust who tended to be members of his own tribe, region or sect. As a result of these successive purges, Alawis of rural extraction came to dominate the officer corps.<sup>368</sup>

### 3.7.iii Institutionalising Power

After seizing power in 1963, the radical Ba'ath regime declared a state of emergency and implemented an emergency law.<sup>369</sup> The radical Ba'athists appropriated the UAR's model of populist authoritarian rule. Accordingly, they established a hierarchical network of Ba'ath party units and introduced new employment policies, which enabled the saturation of the civil service, armed forces, police, schools and judiciary with Ba'athists.<sup>370</sup> The public

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<sup>364</sup> *ibid* 36.

<sup>365</sup> Bassam Haddad, *Business Networks in Syria: The Political Economy of Authoritarian Resilience* (Kindle edn, Stanford UP 2012) ch2, lcn1262–1264. See also Seale, *Asad* (n1) 82–83; van Dam, *The Struggle for Power* (n109) 31–33.

<sup>366</sup> Van Dam, *The Struggle for Power* (n109) 31.

<sup>367</sup> *ibid*.

<sup>368</sup> See discussion and statistics, *ibid* 15–88; van Dam, *Destroying a Nation* (n1) ch1, lcn450–716.

<sup>369</sup> Legislative Decree 51 of 22 December 1962, art 6. See HRW, *No Room to Breathe: State Repression of Human Rights Activism in Syria* (HRW 2007) 15.

<sup>370</sup> Heydemann, *Authoritarianism in Syria* (n207) 174.

sector was dramatically expanded to accommodate the state's increasingly interventionist role in the economy<sup>371</sup> and public sector employment became a core source of patronage.

The radical Ba'athists expanded Nasser's statist corporatist organisations, which were used to represent, indoctrinate and control societal groups.<sup>372</sup> This corporatist restructuring impeded independent civil society activism.<sup>373</sup> Private civil society groups and charities were replaced by 'popular organisations', which were incorporated together with peasant associations, trade unions, youth groups and professional associations into a Ba'athist-controlled apparatus. However, the radical Ba'athists refrained from establishing state-controlled religious institutions and instead sought to restrict and control existing ones.<sup>374</sup> They also appointed a moderate Sunni as Grand Mufti as a counterweight to the Islamic opposition.

The radical Ba'athists appropriated and developed the UAR's legal and institutional instruments of repression. Accordingly, they established the General Intelligence Division in January 1969 and afforded its employees immunity from prosecution for crimes committed in the course of their duties unless the Director ordered otherwise.<sup>375</sup> They also established a small paramilitary unit specifically tasked with regime protection, which would evolve into the Defence Companies after 1970.<sup>376</sup> They retained the UAR's irregular military tribunals and also established ad hoc military field courts and a Supreme State Security Court. These tribunals operated outside of the normal criminal justice system and failed to adhere to internationally

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<sup>371</sup> *ibid* 175 and 177.

<sup>372</sup> *ibid* 196–202.

<sup>373</sup> Laura Ruiz de Elvira and Tina Zintl, 'The End of the Ba'thist Social Contract in Bashar al-Asad's Syria: Reading Sociopolitical Transformations through Charities and Broader Benevolent Activism' (2014) 46 *Int'l JMidEStud* 329, 332–333.

<sup>374</sup> Thomas Pierret, 'The State Management of Religion in Syria: The End of "Indirect Rule"?' in Steven Heydemann and Reinoud Leenders (eds), *Middle East Authoritarianisms: Governance, Contestation, and Regime Resilience in Syria and Iran* (Stanford UP 2013) 86–89; Thomas Pierret, 'The Syrian Baath Party and Sunni Islam: Conflicts and Connivance' (2014) 77 *Middle East Brief* 1, 3 <<https://www.brandeis.edu/crown/publications/meb/MEB77.pdf>> accessed 22 June 2018.

<sup>375</sup> HRW, *A Wasted Decade* (n294) 20.

<sup>376</sup> Seale, *Asad* (n1) 96.



recognised standards.<sup>377</sup> Furthermore, a 1966 legislative decree deprived judges of immunity from suit.<sup>378</sup> Reinoud Leenders suggested that the judicial process was aimed at demonstrating Syria's juridical statehood to the international community rather than achieving justice.<sup>379</sup> The regime's accession to international treaties, including the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD),<sup>380</sup> arguably performed a similar function.

### 3.7.iv Revolution from Above

The radical Ba'ath regime waged a class war against the traditional bourgeoisie, the so-called revolution from above. In order to implement its transformative agenda, it needed to break the urban elites' control of the means of production in the countryside.<sup>381</sup> Accordingly, it appropriated and expanded the UAR's land and agrarian reform programme.<sup>382</sup> This gave rise to 'a mixed small peasant and medium capitalist agrarian structure'.<sup>383</sup> Nevertheless, by permitting the retention of medium sized estates, the regime failed to eradicate landlessness and inequality.<sup>384</sup> Like Nasser, it made membership of agricultural cooperatives an eligibility criterion for the receipt of expropriated land.<sup>385</sup> However, as peasants proved unwilling to relinquish

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<sup>377</sup> CAT, 'Consideration of reports submitted by States parties under article 19 of the Convention, Concluding observations: Syrian Arab Republic' (25 May 2010) UN Doc CAT/C/SYR/CO/1 (CAT/C/SYR/CO/1) paras 11–12; Reinoud Leenders, 'Prosecuting Political Dissent Courts and the Resilience of Authoritarianism in Syria' in Heydemann and Leenders (eds) (n374) 172–174.

<sup>378</sup> CAT/C/SYR/CO/1, para 12.

<sup>379</sup> Leenders (n377) 182–184.

<sup>380</sup> When acceding, the neo-Ba'ath declined to accept the ICJ's jurisdiction to settle any intra-state dispute regarding the interpretation or application of the convention. See 'Syria's reservation to the International Treaty on the Elimination of Racial Discrimination' (21 April 1969) <[https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-2&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-2&chapter=4&lang=en)> accessed 3 June 2017.

<sup>381</sup> Raymond Hinnebusch, 'Change held in abeyance: durability and vulnerability in Asad's Syria' (1997–1998) 2 UCLA Journal of International and Foreign Affairs 171, 173.

<sup>382</sup> For a discussion, see Batatu (n11) 32, 35 and 162–163. See also *ibid* 174; Hinnebusch, *Revolution from Above* (n346) 115–122; Lefèvre (n11) 49–51.

<sup>383</sup> Hinnebusch, *Revolution from Above* (n346) 119–122.

<sup>384</sup> By 1971, landowners of less than 10 hectares amounted to approximately 75.4% of all landowners; yet they owned only 23.5% of all private agricultural land. Batatu (n11) 35.

<sup>385</sup> Heydemann, *Authoritarianism in Syria* (n207) 195.

individual management of their holdings, the goals of collective production were never fully realised.<sup>386</sup> The radical Ba'athists established a system of official procurement prices, which guaranteed cultivators a steady albeit not lucrative income.<sup>387</sup> However, landowners with smallholdings remained economically insecure due to their susceptibility to drought.<sup>388</sup> Ultimately, many of the potential benefits of agrarian reform were negated by waste, inefficiency and corruption.<sup>389</sup>

The radical Ba'ath regime dramatically increased the state's role in economic development through import substitution industrialisation and nationalisations.<sup>390</sup> As a result of its economic policies, many private industrialists were forced out of business and/or emigrated.<sup>391</sup> Production levels declined following nationalisations as most skilled personnel left.<sup>392</sup> Soviet-funded projects ceded some concrete benefits, including the delivery of electricity to rural areas.<sup>393</sup> Nevertheless, despite accepting Soviet credit the radical Ba'athists remained distrustful of communists and declined to establish a fully-fledged command economy.<sup>394</sup> Their macroeconomic policies aimed at achieving a more equitable distribution of wealth through increased public sector employment, subsidies, land reform and social welfare programmes.<sup>395</sup> The fact that Syria's economy was not well integrated into the global economy or severely indebted to foreign creditors helped them to implement their populist strategies.<sup>396</sup> They were also assisted

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<sup>386</sup> Hinnebusch, *Revolution from Above* (n346) 122.

<sup>387</sup> *ibid* 123.

<sup>388</sup> Batatu (n11) 36, 42, 75, 79 and 81–82.

<sup>389</sup> Hinnebusch, *Revolution from Above* (n346) 118–119. See also Volker Perthes, 'The Syrian Private Industrial and Commercial Sectors and the State' (1992) 24 *Int'l JMidEStud* 207, 208–209; Seale, *Asad* (n1) 97; Heydemann, *Authoritarianism in Syria* (n207) 171 and 177–183.

<sup>390</sup> Linda Matar, 'Twilight of 'state capitalism' in formerly 'socialist' Arab states' (2013) 18 *The Journal of North African Studies* 416, 422–425.

<sup>391</sup> Raymond Hinnebusch, 'The Political Economy of Economic Liberalization in Syria' (1995) 27 *Int'l JMidEStud* 305, 306. See also Perthes, 'The Syrian Private Industrial and Commercial Sectors' (n389) 209 and 211.

<sup>392</sup> Perthes, 'The Syrian Private Industrial and Commercial Sectors' (n389) 209.

<sup>393</sup> Seale, *Asad* (n1) 108; Batatu (n11) 63; Hinnebusch, *Revolution from Above* (n346) 123–124.

<sup>394</sup> Heydemann, *Authoritarianism in Syria* (n207) 192.

<sup>395</sup> Matar (n390) 423.

<sup>396</sup> Heydemann, *Authoritarianism in Syria* (n207) 28, 204 and 315.

by the institutions and populist discourses that they inherited from the UAR and secessionist era.

### 3.7.v Opposition to Radical Ba'ath Rule

An Islamic-business coalition galvanised in opposition to the radical Ba'ath regime. The *ulama-souk* axis that had emerged in the mandate era became a central cog in this movement.<sup>397</sup> By calling up Ba'athist reservists in 1963, the Ba'ath regime lost many of its schoolteachers and consequently a source of influence over Syria's youth. Instead, mosque study circles became centres of recruitment for Islamist militants.<sup>398</sup> Many conservative Sunnis viewed the regime as heretical because of its secularism and the minoritarian background of its leaders. Furthermore, urban-dwelling, middle class Sunnis resented the urban migration of rural minorities who were the primary beneficiaries of new public sector jobs.<sup>399</sup> Sunni politicians resented the repression of political pluralism. Sunni industrialists and traders opposed the regime's statist economic policies, whereas Sunni landlords opposed its land reform programme.

The Islamic-business opposition centred around Hama and Aleppo. Hama was a stronghold of religious and landed conservatism, whereas its surrounding villages were populated by peasants from minority sects. Hence, urban-rural, class and sectarian divides overlapped in Hama.<sup>400</sup> In 1964, mullahs instructed their congregations to revolt triggering nationwide protests and strikes.<sup>401</sup> Egypt and Iraq were accused of financing the revolt.<sup>402</sup> Events culminated in Hama where the regime shelled a mosque in which Islamist militants led by Marwan Hadid were hiding along with their weapons.<sup>403</sup> The mosque bombing outraged conservative Sunnis and provoked protests and shop closures.<sup>404</sup> Significantly, the protesters included working class Sunnis

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<sup>397</sup> Pierret and Selvik (n115) 599. See also Lefèvre (n11) 51–52.

<sup>398</sup> Seale, *Asad* (n1) 323.

<sup>399</sup> Batatu (n11) 160.

<sup>400</sup> Van Dam, *The Struggle for Power* (n109) 19–20.

<sup>401</sup> Seale, *Asad* (n1) 93–95; Heydemann, *Authoritarianism in Syria* (n207) 183–184.

<sup>402</sup> Seale, *Asad* (n1) 92.

<sup>403</sup> Lefèvre (n11) 44–46.

<sup>404</sup> Seale, *Asad* (n1) 93–94; Lefèvre (n11) 44–46.

– the intended beneficiaries of the regime’s socioeconomic policies.<sup>405</sup> The regime deployed the army to force shop-owners to reopen.<sup>406</sup> Hadid became a role model for Syrian jihadists and subsequently founded the Fighting Vanguard of the Mujahidin, an extreme offshoot of the Syrian Muslim Brotherhood.<sup>407</sup> Further anti-regime protests and strikes occurred in 1965 and 1967.<sup>408</sup>

### **3.7.vi Theoretical Analysis of Radical Ba’ath Rule**

The internal power struggles that took place during the radical Ba’ath era suggest that states are not unitary actors as rationalist theories assume. The military wing’s defeat of the Ba’ath party’s civilian leadership marked the end of democratic politics in Syria. The radical Ba’athists’ use of sectarian strategies to consolidate their rule, contrary to Ba’athist ideology, afforded their regime a sectarian veneer that would be inherited by the Assad regime. It also reinforced the realist argument that ruling elites merely manipulate ideational factors for political ends.

The radical Ba’ath era revealed the shallowness of Arab nationalism. Ultimately, Arab leaders proved unwilling to sacrifice the sovereignty of the states they presided over and their own associated power in order to achieve Arab unity.<sup>409</sup> Arab disunity contributed to the devastating loss of the Six-Day War. Nonetheless, the period again showed that ideological roles can restrain the behavioural choices of political elites. Nasser felt compelled to blockade the Straits of Tiran in 1967 in order to save his Arab legitimacy. This example also supports omnibalancing theory’s contention that authoritarian regimes prioritise regime security over the national interest.

The era suggested that authoritarian regimes consolidate their rule by learning from each other. The radical Ba’athists appropriated and expanded the institutional, legislative and juridical tools they inherited from the UAR

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<sup>405</sup> Seale, *Asad* (n1) 94.

<sup>406</sup> *ibid* 96.

<sup>407</sup> Lefèvre (n11) 88–103 and Appendix II.

<sup>408</sup> *ibid* 46–47; Seale, *Asad* (n1) 97 and 115.

<sup>409</sup> Van Dam, *Destroying a Nation* (n1) Introduction, lcn255–272.

era, including its corporatist bodies, emergency legislation, statist economic development strategy, populist policies, land reform programme and repressive apparatus.<sup>410</sup> The UAR era revealed the resilience of capitalists.<sup>411</sup> Consequently, instead of seeking to accommodate them like Nasser, the radical Ba'ath regime sought to subordinate them. Ultimately, the radical Ba'ath regime's policies disenfranchised many societal groups, including Sunni traders, *ulama*, capitalists and landowners. The loss of the 1967 war inspired Hafez to make peace with his class enemies. However, surviving sectarian, class and geographic cleavages meant that he had 'to find ways to make business relevant without allowing it to convert its material wealth into political power'.<sup>412</sup>

### 3.8 Conclusion

This chapter demonstrated that the contemporary Syrian state was born of imperialism. It illustrated how sub- and supra-state identities and ideologies acquired such salience in Syria and the Middle East. Sub-state identities based upon sectarianism, tribalism and localism were nurtured during the Ottoman era as a result of the Ottomans' decentralised form of rule, the millet system and the exploitation of religious identity by European powers for political ends. Western infiltration of the Empire triggered a counter-interest in the supra-national ideologies of pan-Arabism and pan-Islam. The imperial division of *bilad al-Sham*, the loss of Palestine and the divide and rule policies employed by the mandatory powers increased the appeal of supra-national ideologies, particularly Arab nationalism, and ensured the survival of sub-state identities. The radical Ba'athists' use of tribal, sectarian and regional links to consolidate their personal powerbases further reinforced sub-state identities. Due to their minoritarian background, the class conflict they waged became overlaid with sectarian undertones.

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<sup>410</sup> Heydemann, *Authoritarianism in Syria* (n207) 124–125, 132–133, 168–169 and 204.

<sup>411</sup> Heydemann suggested that the initial moderation that Nasser demonstrated toward the business sector contributed to the UAR's downfall. See *ibid* 85, 92–93 and 126–133.

<sup>412</sup> Haddad, *Business Networks in Syria* (n365) Introduction, lcn229.

The political pluralism that existed in post-independence Syria challenges essentialist theories. Furthermore, the lack of consideration afforded to the King-Crane Commission's findings suggested that the opinion of indigenous populations was considered irrelevant by European powers as Orientalism would predict. As post-structuralists would expect, pan-Arab and Zionist identities were constructed in opposing terms in the post-independence era. Furthermore, the rendering stateless of Syrian Kurds as part of the secessionist regime's Arabisation policy supported the post-structuralist argument that identities are constructed through violence and exclusion.

The chapter lent support to many realist arguments. European powers exploited identity-based politics to legitimise their interference in the Ottoman Empire's internal affairs. Leaders of sovereign Arab states relied upon Arab nationalism to secure domestic legitimacy. However, they ultimately proved unwilling to sacrifice their own power in the name of Arab unity. At the same time, the chapter demonstrated that Arab identity was not solely a political tool. At times, it compelled Arab leaders to take actions they would have otherwise avoided.

European interference in the Ottoman Empire and the division of the former Ottoman territories was largely driven by the imperative of maintaining the European balance of power. The post-independence struggle for Syria at the regional and international levels also accorded with balance of power logic. Faisal's inability to legally enforce Britain's wartime pledges after WWI and the lack of accountability for the mandatories' breaches of their mandatory obligations supports the realist argument that powerful states can violate the rights of weak states and peoples with impunity unless another powerful state determines that it is in its interest to defend them.

The chapter also reinforced the realist contention that states merely utilise international law to justify actions undertaken for self-interested reasons. France utilised its mandatory obligation to protect religious communities to justify its divide and rule policies. It also attempted to rely

upon the emergent concept of minority rights to secure a right of intervention in post-independence Syria. The chapter highlighted the dangers of differentiating between liberal and non-liberal states under international law as some democratic peace theorists have advocated. The threatened intervention in Syria to prevent supposed communist infiltration triggered a sequence of events that ultimately resulted in Syria sacrificing its own sovereignty.

The post-independence Arab Cold War reinforced Walt's theory that political actors balance against threats rather than solely against material power and that threat perceptions are influenced by geographic proximity and hostile intentions. By aligning themselves with external powers, the conservative Arab monarchies balanced against threats to their regimes emanating from within the region itself, most notably from Egypt under Nasser's charismatic leadership.

From a TWAIL perspective, the chapter revealed international law's complicity in the imperial project. Powerful states repeatedly utilised international law in the form of capitulation treaties, wartime agreements, the mandate system and collective security pacts to further their interests and exert control over the region. However, the chapter also demonstrated that in certain circumstances international law can empower the marginalised. In the late mandate era, Syrian Arab nationalists availed of international law to demonstrate and consolidate Syria's juridical statehood and in so doing undermined France's claim to special privileges.

Finally, the chapter demonstrated that authoritarian regimes learn from each other and revealed how the foundations of the authoritarian Assad regime were constructed. Significantly, the elimination of the 1958 Associations' Law, the 1963 emergency law and Syria's repressive security agencies were key demands of the Arab Spring protesters.

## Chapter Four: Hafez al-Assad Era

### 4.1 Introduction

Chapter four investigates significant developments within Syria and the surrounding region during the period from Hafez al-Assad's Corrective Movement in 1970 until his son Bashar's ascension to power in 2000. Prominent themes include the role played by international law in domestic politics and the struggle for power in the Middle East during the Hafez era.

### 4.2 Domestic Developments

This section examines significant domestic developments during the Hafez era, including Syria's human rights record, authoritarian regime consolidation, the evolution of Syria's political economy and the 1970s/1980s insurgency.

#### 4.2.i Syria's Human Rights Record

Syria has human rights obligations under the 1973 Constitution,<sup>1</sup> customary international law and international treaties to which it is a party. Syria is a monist state. Consequently, any international treaties it ratifies are directly applicable at the national level and supersede any conflicting provisions under domestic law.<sup>2</sup> By 1970, Syria was already a party to ICESCR, ICCPR and ICERD. Under Hafez's leadership, Syria also ratified the International Convention on the Rights of the Child (CRC) in 1993.<sup>3</sup> The Assad regime

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<sup>1</sup> 1973 Syrian Constitution, reprinted at <<http://carnegie-mec.org/diwan/50255?lang=en>> accessed 6 June 2018 (1973 Syrian Constitution). For a discussion, see Kathleen Cavanaugh and Joshua Castellino, *Minority Rights in the Middle East: A Comparative Legal Analysis* (OUP 2013) 313–314.

<sup>2</sup> CCPR, 'Syria's Third Period Report to the Human Rights Committee' (19 October 2004) UN Doc CCPR/C/SYR/2004/3, para 39.

<sup>3</sup> When ratifying, Syria submitted a reservation to provisions 'which are not in conformity with the Syrian Arab legislations and with the Islamic Shariah's principles'. The reservation attracted objections from several states and the Committee on the Rights of the Child which indicated that it was incompatible with the object and purpose of the treaty. On 13 June 2012, the Syrian Government partially withdrew its reservations to arts 20 and 21. See reservation and objections thereto at <[https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-11&chapter=4&lang=en#11](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&lang=en#11)> accessed 24 June 2018. See also CRC, 'Summary Record of the 360th meeting of the Committee on the Rights of the Child' (22 January 1997) UN Doc CRC/C/SR.360 (CRC/C/SR.360), paras 45–46 and 62–63; CRC, 'Concluding Observations of the Committee on the Rights of the Child on the Initial Report of the Syrian Arab Republic'



declined to accede to optional individual communications procedures under international human rights treaties or advance a standing invitation to the UN special procedures.<sup>4</sup> It sought to use international law to further its political objectives. For example, it utilised the state reporting procedure under international human rights treaties to focus international attention on Israel's unlawful occupation of the Golan Heights.<sup>5</sup> It also attempted to defend its state of emergency as necessary to protect Syria from Israeli aggression.<sup>6</sup>

Many of the rights protected under ICESCR, ICCPR and CRC are implicitly and explicitly limited.<sup>7</sup> In order to be legitimate, any restrictions on explicitly and implicitly limited rights must be provided for by law, reasonable and strictly necessary to protect a legitimate aim, for example, national security. Article 4 of ICCPR allows States parties to derogate from some of their obligations under the Covenant in times of emergency subject to certain conditions being satisfied.<sup>8</sup> ICESCR, CRC and ICERD do not contain derogation regimes. Accordingly, Syria cannot derogate from its

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(24 January 1997) UN Doc CRC/C/15/Add.70 (CRC/C/15/Add.70), para 8; CRC, 'Summary Record of the 361st meeting of the Committee on the Rights of the Child' (21 March 1997) UN Doc CRC/C/SR.361(CRC/C/SR.361), paras 6, 10 and 18–20.

<sup>4</sup> The special procedures are independent experts appointed by the UN Human Rights Council (and, prior to 2006, by the UN Commission on Human Rights) to monitor and report on thematic and country-specific human rights issues. For more information on the UN special procedures and treaty monitoring bodies, see OHCHR, *Working with the United Nations Human Rights Programme: a Handbook for Civil Society* (OHCHR 2008) 31–73 and 107–136.

<sup>5</sup> CERD, 'Report of the Committee on the Elimination of Racial Discrimination' (UNGA Official Records, 26th Session, Supplement 18, 1971) UN Doc A/8418, paras 37, 76–77 and 82–83; CERD, 'Report of the Committee on the Elimination of Racial Discrimination' (UNGA Official Records, 43rd Session, Supplement 18, 1988) UN Doc A/43/18 (A/43/18), para 63.

<sup>6</sup> CESCR, 'Report on the Sixth Session of the Committee on Economic, Social and Cultural Rights' (UNGA Official Records, Supplement 3, 1992) UN Doc E/1992/23/E/C.12/1991/4 (E/1992/23/E/C.12/1991/4), para 164; CRC/C/SR.360, para 22; CRC, 'Summary Record of the 362nd Meeting of the Committee on the Rights of the Child' (24 January 1997) UN Doc CRC/C/SR.362 (CRC/C/SR.362), para 14. See also HRW World Reports 1993 and 1995.

<sup>7</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) arts 6, 9 (1), 12 (1), 12 (2), 12 (4), 14 (1), 17, 18, 19, 21 and 22; International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) art 8 (1) (a), (c) and (d); International Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC) arts 10 (2) and 13–16.

<sup>8</sup> CCPR, 'General Comment No 29: Article 4, Derogations during a State of Emergency' (31 August 2001) UN Doc CCPR/C/21/Rev.1/Add.11.

obligations thereunder regardless of any proclamation of a state of emergency.

During the Hafez era, the Assad regime was accused of perpetrating gross violations of human rights in Syria and Syrian-controlled parts of Lebanon.<sup>9</sup> The regime maintained the state of emergency, originally proclaimed in 1963, and the emergency measures enacted pursuant thereto. It also implemented additional emergency measures pursuant to Articles 101 and 113 of the Constitution.<sup>10</sup> These measures suspended most of the human rights guarantees contained in the Constitution and international treaties to which Syria was a party. They generally failed to satisfy the conditions for legitimate derogating measures or legitimate restrictions on implicitly or explicitly limited human rights. For example, measures which afforded security and intelligence officials immunity from prosecution contravened the prohibition against torture, a non-derogable peremptory norm.<sup>11</sup>

Citizens were denied their right to freedom of association and assembly<sup>12</sup> and their right to participate in political life.<sup>13</sup> Non-private gatherings were prohibited, and all political organisations were proscribed apart from members of the National Progressive Front (NPF), a constellation of regime-aligned political parties.<sup>14</sup> Presidential elections were mere formalities. After 1970, the government refused to register most new civil society organisations and existing ones were subjected to surveillance and

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<sup>9</sup> Regarding Lebanon, see AI World Reports 1976–7, 290 and 312; 1977–8, 271; 1978–9, 169; 1988, 253–254; 1990, 227; 1991, 220–221. See also HRW World Reports 1989, 1990, 1992 and 1993.

<sup>10</sup> Art 113 authorises the president to take special measures ‘in case of a grave danger or situation threatening national unity or the safety and independence of the homeland’. 1973 Syrian Constitution, art 113.

<sup>11</sup> HRW, *A Wasted Decade: Human Rights in Syria during Bashar al-Asad’s First Ten Years in Power* (HRW 2010) 20.

<sup>12</sup> These rights are guaranteed under ICCPR, arts 21 and 22, and CRC, art 15.

<sup>13</sup> This right is guaranteed under ICCPR, art 25.

<sup>14</sup> CCPR, ‘Addendum to Initial Report of Syria submitted under Article 40 of the Covenant’ (12 July 1978) UN Doc CCPR/C/1 Add.31.

repression.<sup>15</sup> The media, school curricula and all forms of cultural expression were subjected to pervasive state censorship.<sup>16</sup>

Thousands of political prisoners were detained for actual or suspected engagement in unauthorised political activities.<sup>17</sup> Some were held incommunicado for decades without charge.<sup>18</sup> Those who were tried were often prosecuted for vaguely defined security-related offences by irregular military tribunals and security courts that failed to adhere to internationally recognised procedural safeguards.<sup>19</sup> International NGOs documented allegations of severe ill-treatment and torture of detainees.<sup>20</sup> The regime was also accused of perpetrating mass extrajudicial executions mainly of alleged members and supporters of the Syrian Muslim Brotherhood.<sup>21</sup>

The regime enabled discrimination against women,<sup>22</sup> Jews,<sup>23</sup> Palestinian refugees,<sup>24</sup> non-Muslims and Kurds. The Constitution discriminated against non-Muslims by stipulating that the president had to be a Muslim and identified Islamic jurisprudence as the main source of legislation.<sup>25</sup> Nevertheless, Pierret asserted that Syria's legal system was

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<sup>15</sup> Laura Ruiz de Elvira and Tina Zintl, 'The End of the Ba'thist Social Contract in Bashar al-Assad's Syria: Reading Sociopolitical Transformations through Charities and Broader Benevolent Activism' (2014) 46 *Int'l JMidEstud* 329, 332–333.

<sup>16</sup> HRW World Report 1989. The right to freedom of expression is guaranteed under ICCPR, art 19, and CRC, art 13.

<sup>17</sup> See generally AI World Reports from 1970 to 2000.

<sup>18</sup> *ibid.* Regarding their rights, see ICCPR, arts 9, 10, 14 and 16.

<sup>19</sup> AI World Report 1980–81, 378. The right of accused persons to procedural guarantees is recognised under ICCPR, art 9, and CRC, art 40.

<sup>20</sup> AI World Reports 1976–7, 314–315; 1980–1981, 377–378; 1981–1982, 347; 1982–1983, 330; 1984, 364; 1985, 359; 1987, 371; 1988, 254; 1989, 276; 1990, 228; 1991, 219; 1992, 246; 1993, 274; 1994, 279 and 281; 1995, 276, 278 and 279; 1998, 323; 1999, 321 and 323; 2000, 227 and 229. See also HRW World Reports 1989–2000. The right to freedom from torture is a peremptory norm and is guaranteed under ICCPR, art 7, and CRC, art 37.

<sup>21</sup> AI World Reports 1980–81, 378; 1981–82, 347; 1982–3, 330. Extrajudicial execution contravenes the non-derogable right to life under ICCPR, art 6, and CRC, art 6.

<sup>22</sup> See eg E/1992/23/E/C.12/1991/4, paras 178–179 and 187; CRC/C/15/Add.70, paras 13 and 16; CRC/C/SR.361, para 26

<sup>23</sup> See eg AI World Reports 1967–8, 10–15; 1971–1972, 51–52; 1972–1973, 74–75, 1973–4, 74; 1978–9, 66; 1989, 276–277; 1990, 228–229; 1991, 220; 1992, 246–247, 1993, 246. See also HRW World Reports 1989–1995.

<sup>24</sup> Palestinian refugees in Syria and their Syrian-born children were denied citizenship and passports.

<sup>25</sup> 1973 Syrian Constitution, art 3. This contravened Syria's obligation to ensure equality before the law and prohibit discrimination on any ground, including religion. See eg ICCPR, art 26.

predominantly secular, whereas Shariah law was generally restricted to the civil domain.<sup>26</sup> The Constitution also discriminated against ethnic minorities by emphasising Syria's Arab identity.<sup>27</sup> The regime's failure to ensure the human rights of Kurds<sup>28</sup> was repeatedly highlighted by international NGOs<sup>29</sup> and treaty monitoring bodies.<sup>30</sup> Kurds were frequently subjected to arrest and prolonged detention for attempting to exercise their civil, political and cultural rights.<sup>31</sup> Stateless Kurds, especially the *maktumeen*, and their descendants experienced additional discrimination. They were denied a passport and the right to vote and own property.<sup>32</sup> They also encountered obstacles when attempting to register marriages and access public services and public sector employment.<sup>33</sup>

The regime failed to take steps to the maximum of its available resources to progressively realise the rights guaranteed under ICESCR<sup>34</sup> due to endemic corruption and the regime's disproportionately high military

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<sup>26</sup> Thomas Pierret, 'Implementing 'Sharia' in Syria's Liberated Provinces' (*Foundation for Law, Justice and Society*, 7 August 2013) <<http://www.fljs.org/implementing-sharia-in-syria>> accessed 2 December 2014.

<sup>27</sup> 1973 Syrian Constitution, Preamble and arts 1, 2, 4, 6, 7, 8, 13, 21, 23, 24, 43, 45, 49, 83, 84, 134 and 154.

<sup>28</sup> In particular, their right to a nationality, cultural expression and freedom from discrimination on the basis of ethnicity. The right to a nationality is guaranteed under the International Convention on the Elimination of All Forms of Racial Discrimination (adopted 7 March 1966, entered into force 4 January 1969) 660 UNTS 195 (ICERD) art 5 (3); ICCPR, art 24; and CRC, arts 7 and 8. The right to cultural expression is guaranteed under ICERD, art 5 (e); ICCPR, arts 1 (1) and 27; ICESCR, arts 3 and 15; and CRC, arts 29–31. The right to freedom from discrimination on the basis of ethnicity is guaranteed under ICERD, arts 1 (1) and 5; ICCPR, arts 26–27; ICESCR, art 2 (2); and CRC, art 2.

<sup>29</sup> See AI World Reports 1971–1972, 51–52; 1975–1976, 185; 1978–1979, 169; 1980–1981, 376; 1981–1982, 344; 1993, 274; 1994, 279; 1995, 277; 1996, 289–290; 1997, 300; 1998, 322–323; 1999, 322. See also HRW World Reports 1990, 1992, 1994, 1997 and 1999; HRW, *Group Denial: Repression of Kurdish Political and Cultural Rights in Syria* (HRW 2009).

<sup>30</sup> See eg A/43/18 paras 66–67; E/1992/23/E/C.12/1991/4, paras 164 and 189; CRC/C/15/Add.70, paras 15 and 27; CRC/C/SR.362, paras 12–14, 16–17, 33–35, 40, 43 and 45; CERD, 'Concluding Observations of the Committee on the Elimination of Racial Discrimination on the combined twelfth, thirteenth, fourteenth and fifteenth periodic reports of the Syrian Arab Republic' (7 April 1999) UN Doc CERD/C/304/Add.70, paras 9, 10 and 14.

<sup>31</sup> AI World Reports 1971–1972, 51–52; 1975–1976, 185; 1978–1979, 169; 1993, 274; 1996, 290; 1997, 300; 1998, 322. See also HRW World Reports 1993, 1994 and 1997.

<sup>32</sup> HRW World Report 1997.

<sup>33</sup> A/43/18, para 67; E/1992/23/E/C.12/1991/4, para 164; CRC/C/SR.362, paras 11–13 and 34–35; CERD, 'Addendum to the Combined Twelfth, Thirteenth, Fourteenth and Fifteenth Periodic Report of the Syrian Arab Republic to the Committee on the Elimination of Racial Discrimination' (26 October 1998) UN Doc CERD/C/338/Add.1/Rev.1 (CERD/C/338/Add.1/Rev.1), para 10. See also HRW World Report 1989.

<sup>34</sup> ICESCR, art 2 (1).

expenditure.<sup>35</sup> It deliberately denied individuals their labour rights.<sup>36</sup> It also failed to guarantee individuals their rights under ICESCR without discrimination as to political status by rendering Ba'ath party membership an eligibility requirement for many public sector jobs.<sup>37</sup>

Given their trade and economic links with Syria, European states were arguably better placed to exert pressure on the regime to improve its human rights record than the US.<sup>38</sup> Indeed, the European Parliament blocked aid packages to Syria in 1992 and 1993 due to concerns over human rights violations.<sup>39</sup> It also adopted a resolution condemning human rights violations in Syria in 1995.<sup>40</sup> However, EU member states generally proved reluctant to publicly criticise the regime's human rights record.<sup>41</sup> Similarly, successive US administrations inferred that private pressure was more effective than public naming and shaming.<sup>42</sup> Western states may have been wary of undermining regional stability and jeopardising the Arab-Israeli peace process and their own interests.<sup>43</sup> Crucially, Syria was considered vital to a sustainable settlement.<sup>44</sup> The US may also have wished to avoid antagonising the USSR during the Cold War<sup>45</sup> and, after the war ended, to avoid jeopardising a mutually beneficial rapprochement with Syria.<sup>46</sup>

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<sup>35</sup> CRC/C/15/Add.70, para 7; CRC/C/SR.362, para 36.

<sup>36</sup> CESCR, art 8. For criticism of state control of trade unions and the education system, see E/1992/23/E/C.12/1991/4, paras 174–175 and 178–179.

<sup>36</sup> ICESCR, art 2 (2).

<sup>37</sup> ICESCR, art 2 (2) and see also art 1 (1).

<sup>38</sup> Since the collapse of the USSR, the EU has been Syria's primary trading partner.

<sup>39</sup> HRW World Report 1994.

<sup>40</sup> EU Parliament, 'Resolution on Human Rights Violations in Syria of 15 June 1995' (Official Journal C 166, 3 July 1995) 130–131.

<sup>41</sup> HRW World Reports 1996, 1997 and 2000.

<sup>42</sup> Public criticism was generally limited to the State Department's annual Country Report on Human Rights Practices in Syria. See HRW World Reports 1989, 1990, 1994, 1995, 1996, 1997, 2000 and 2001.

<sup>43</sup> Augustus Richard Norton, 'The puzzle of political reform' in Louise Fawcett (ed), *International Relations of the Middle East* (4th edn, OUP 2016) 136–138.

<sup>44</sup> Flynt Leverett, *Inheriting Syria: Bashar's Trial by Fire* (The Brookings Institution 2005) 8.

<sup>45</sup> Christopher Phillips, *The Battle for Syria: International Rivalry in the New Middle East* (Yale UP 2016) 12.

<sup>46</sup> The rapprochement helped the US to attain the Assad regime's support for Operation Desert Storm, assistance in securing the release of American hostages in Lebanon, participation in the Madrid Peace Process, and relaxation of emigration restrictions on Syrian Jews. See HRW World Reports 1990, 1992 and 1993.

#### 4.2.i.a Theoretical Analysis of Syria's Human Rights Record

Syria's human rights record challenges the assumption implicit in liberal internationalism that international law can restrain the arbitrary exercise of power. Instead, the Assad regime's perpetration of gross human rights violations with virtual impunity during the Hafez era reinforces the realist argument that international law is reliant upon the connivance of powerful states for its enforcement. America's reluctance to promote democratisation in the Middle East during the Hafez era supports Thomas Carothers' assertion that 'Where democracy appears to fit in well with U.S. security and economic interests, the United States promotes democracy. Where democracy clashes with other significant interests, it is downplayed or even ignored'.<sup>47</sup>

Heydemann suggested that Western policymakers followed a 'markets first' policy in the Middle East.<sup>48</sup> Accordingly, they promoted economic liberalisation in the expectation that it would create an enabling environment for subsequent political reforms.<sup>49</sup> However, authoritarian Middle Eastern regimes proved adept at exploiting limited economic liberalisation to defer external demands for political reform.<sup>50</sup> As a result of the 'markets first' policy, they were able to repress internal calls for democratisation without fear of external rebuke.<sup>51</sup> Indeed, Halliday suggested that external actors afforded legitimacy to their respective regional allies by applauding their efforts at 'cosmetic democracy'.<sup>52</sup>

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<sup>47</sup> Thomas Carothers, 'The Clinton Record on Democracy Promotion' (2000) Carnegie Endowment for International Peace Democracy and Rule of Law Project Working Paper 16, September 2000, 3 <<http://carnegiendowment.org/files/16carothers.pdf>> accessed 25 January 2018.

<sup>48</sup> HRW World Report 1994.

<sup>49</sup> Steven Heydemann, 'Upgrading Authoritarianism in the Arab World' (2007) Saban Center for Middle East Policy at the Brookings Institution Analysis Paper 13, October 2007, 18 <<http://www.brookings.edu/wp-content/uploads/2016/06/10arabworld.pdf>> accessed 3 December 2014. This policy coincided with the Chinese authoritarian capitalist model that Bashar later advocated in the 2000s. See Volker Perthes, 'Europe and the Arab Spring' (2011) 53 *Survival* 73, 82–83.

<sup>50</sup> See generally Heydemann, 'Upgrading Authoritarianism' (n49) 14.

<sup>51</sup> Norton (n43) 136.

<sup>52</sup> Fred Halliday, *The Middle East in International Relations: Power, Politics and Ideology* (CUP 2005) 160.

Neoliberal institutionalism infers that compliance with regimes occurs where the costs of non-compliance outweigh the benefits. For the Assad regime, the costs of compliance with the international human rights regime were extremely high given that the regime was reliant upon repression to stay in power. At the same time, the costs of non-compliance were relatively low given the treaties' weak enforcement mechanisms and the reluctance of external actors to exert pressure on the regime to comply. Accordingly, the Syrian experience supports Hathaway's argument that authoritarian regimes sometimes ratify human rights treaties in order to obtain the rewards that accrue from ratification without actually intending to comply with their obligations thereunder.<sup>53</sup> The Assad regime's refusal to sign up to individual communications procedures also supports Hathaway's argument that authoritarian regimes are more likely to ratify human rights instruments with weak enforcement mechanisms.<sup>54</sup>

Constructivists and English School scholars suggested that the requirement to justify international behaviour as in accordance with international law can, in certain circumstances, socialise states to comply therewith.<sup>55</sup> However, the requirement to justify its human rights record before treaty monitoring bodies did not socialise the Assad regime to comply with its human rights obligations. This suggests, as Simpson has inferred, that whilst international law may impact official discourse, it does not necessarily follow that it will impact state behaviour.<sup>56</sup>

#### **4.2.ii Authoritarian Regime Consolidation**

Hafez consolidated his regime through a combination of patronage, co-optation, institutionalisation, manipulation of ideational factors and external alliance-building.

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<sup>53</sup> Oona A Hathaway, 'Do Human Rights Treaties Make a Difference?' (2002) 111 Yale LJ 1935, 2009.

<sup>54</sup> *ibid* 1982, 1999–2000, 2011–2016 and 2020.

<sup>55</sup> Hedley Bull, *The Anarchical Society* (3rd edn, Palgrave 2002) 43; Christian Reus-Smit, 'The Politics of International Law' in Christian Reus-Smit (ed), *The Politics of International Law* (CUP 2004) 22–23.

<sup>56</sup> Gerry Simpson, 'International Law in Diplomatic History' in James Crawford and Martti Koskeniemi (eds), *The Cambridge Companion to International Law* (CUP 2012) 44.

#### 4.2.ii.a Patronage, Co-optation and Institutionalisation

Ezrow and Frantz classified the Assad regime as a triple threat regime, namely a regime that has elements of military, personalist and single-party regime.<sup>57</sup> The Assad regime has been frequently described as personalist<sup>58</sup> and neopatrimonial.<sup>59</sup> As President of Syria, Secretary General of the Ba'ath party and Supreme Commander of the Syrian army, Hafez exercised centralised control over the party, the armed forces, the intelligence community and the government.<sup>60</sup> He constructed an inner circle (*jama'a*), which included the commanders of elite armed units, the heads of intelligence and security agencies, and senior Ba'ath party and government officials. His inner circle only included individuals of unquestionable loyalty who were usually Alawis from his own family, tribe and region.<sup>61</sup> He distributed power equally amongst them in order to prevent any one individual becoming powerful enough to threaten his leadership.<sup>62</sup> Through a mixture of co-optation and repression, he also attained the acquiescence, if not support, of a considerable segment of the general population.

Hafez dramatically expanded Syria's armed forces and also brought them under his control.<sup>63</sup> Elite armed units specifically tasked with regime protection were established and filled with Alawis in order to avoid any

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<sup>57</sup> Natasha M Ezrow and Erica Frantz, *Dictators and Dictatorships: Understanding Authoritarian Regimes and Their Leaders* (Bloomsbury 2011) 252–263. Ehteshami and others described it as a single party-military regime. Anoushiravan Ehteshami and others, 'Authoritarian Resilience and International Linkages in Iran and Syria' in Steven Heydemann and Reinoud Leenders (eds), *Middle East Authoritarianisms: Governance, Contestation and Regime Resilience in Syria and Iran* (Stanford UP 2013) 225.

<sup>58</sup> See eg Patrick Seale, *Asad: the Struggle for the Middle East* (University of California Press 1995) 174; Hanna Batatu, *Syria's Peasantry, the Descendants of its Lesser Rural Notables, and Their Politics* (Princeton UP 1999) 328; Raymond Hinnebusch, *Revolution from Above* (Routledge 2001) 67; Leverett (n44) 23–27; Radwan Ziadeh, *Power and Policy in Syria* (revised edn, IB Tauris 2013) 16. For a contrary view, see Joshua Stacher, 'Reinterpreting Authoritarian Power' (2011) 65 *Middle EJ* 197.

<sup>59</sup> A neopatrimonial regime relies upon a combination of patronage, nepotism and repression to stay in power. Jason Brownlee, '...And Yet They Persist: Explaining Survival and Transition in Neopatrimonial Regimes' (2002) 37 *StudCompInt'l Dev* 35, 42.

<sup>60</sup> Batatu (n58) 206–207; Ziadeh (n58) 13–35.

<sup>61</sup> Batatu (n58) 217–227; Nikolaos van Dam, *The Struggle for Power in Syria* (4th edn, IB Tauris 2011) 68–71, 118 and 123.

<sup>62</sup> Batatu (n58) 206 and 237–238; Hinnebusch, *Revolution from Above* (n58) 70–76; Leverett (n44) 27.

<sup>63</sup> Seale, *Asad* (n58) 181; Hinnebusch, *Revolution from Above* (n58) 86.



potential division of the armed forces along sectarian lines.<sup>64</sup> Hafez also created multiple overlapping intelligence and security agencies (the *Mukhabarat*) to oversee internal and external security.<sup>65</sup> He directly appointed government ministers upon the recommendation of the Ba'ath party Regional Command, which he also led.<sup>66</sup> A People's Assembly was elected in 1973 and the National Progressive Front (NPF), a coalition of political parties that had ratified the National Progressive Charter, was established.<sup>67</sup> As the Charter and the Constitution guaranteed the Ba'ath party control of policy formation, parties who participated in the NPF lacked credibility.<sup>68</sup> The Constitution empowered the Ba'ath party's Regional Command to nominate the presidential candidate and allowed presidents to serve an unlimited number of terms.<sup>69</sup> It also authorised the president to legislate by decree and veto any laws passed by the Assembly.<sup>70</sup> Furthermore, it afforded the president effective control over the judiciary, which functioned as an instrument of regime repression.<sup>71</sup>

Hafez used the Ba'ath party to enlarge his support base, including by expanding the existing Ba'athist corporatist organisations to cover all societal sectors.<sup>72</sup> He purged the party of any potential opponents.<sup>73</sup> Consequently, the ideologues of the radical Ba'ath era were largely replaced with opportunistic careerists.<sup>74</sup> After 1985, he stalled the convening of party congresses and periodic elections altogether.<sup>75</sup> Instead, a Central Committee,

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<sup>64</sup> Seale, *Asad* (n58) 286; Batatu (n58) 217, 225 and 327.

<sup>65</sup> UNHRC, 'Report of the independent international commission of inquiry on the Syrian Arab Republic' (23 November 2011) UN Doc A/HRC/S-17/2/Add.1, para 19; Batatu (n58) 238–243; Ziadeh (n58) 23–25; Phillips, *The Battle for Syria* (n45) 52.

<sup>66</sup> Hinnebusch, *Revolution from Above* (n58) 78–79.

<sup>67</sup> Seale, *Asad* (n58) 156–176.

<sup>68</sup> Ziadeh (n58) 27–28. See also *ibid* 175–176.

<sup>69</sup> The 1973 Syrian Constitution, arts 84 and 85,

<sup>70</sup> *ibid* arts 88, 94, 95, 98, 99, 107, 109, 111, 132, 139 and 149.

<sup>71</sup> See generally Reinoud Leenders, 'Prosecuting Political Dissent: Courts and the Resilience of Authoritarianism in Syria' in Heydemann and Leenders (eds) (n57).

<sup>72</sup> Batatu (n58) 251 and 253; Ziadeh (n58) 30–32.

<sup>73</sup> Party membership increased from 65,398 in 1971 to 1,008,243 in 1992. Batatu (n58) 177 and 179.

<sup>74</sup> Seale, *Asad* (n58) 171 and 175; Hinnebusch, *Revolution from Above* (n58) 82; Bassam Haddad, *Business Networks in Syria: The Political Economy of Authoritarian Resilience* (Kindle edn, Stanford UP 2012) ch2, lcn1200–1204).

<sup>75</sup> Hinnebusch, *Revolution from Above* (n58) 82.

dominated by his inner circle, elected members of the Regional Command and controlled policy-formation.<sup>76</sup>

Hafez undertook considerable efforts to co-opt Sunnis. Sunnis were appointed to high-ranking civilian positions and placed in command of some armed units, albeit with Alawi deputies.<sup>77</sup> Through rural development,<sup>78</sup> public sector employment,<sup>79</sup> increased representation on public bodies,<sup>80</sup> and populist subsidies, the regime built a support base amongst low to middle income workers and peasants.<sup>81</sup> It also co-opted elements of the traditional Sunni-dominated commercial bourgeoisie, particularly in Damascus, by enacting limited economic liberalisation measures.<sup>82</sup> However, its support base remained markedly stronger in rural areas where minority sects and peasants formed the majority.<sup>83</sup>

Hafez did not attempt to directly incorporate the conservative Islamic community into the state apparatus.<sup>84</sup> Instead he sought to neutralise Islam as a political force through a mixture of appeasement and repression. The laws governing religious activities were deliberately vague and selectively applied as a means of rewarding allies and punishing opponents.<sup>85</sup> Hafez presented himself as a dedicated Muslim, increased mosque construction, publicly

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<sup>76</sup> Seale, *Asad* (n58) 174–175; Batatu (n58) 244; van Dam, *The Struggle for Power* (n61) 123–124.

<sup>77</sup> Seale, *Asad* (n58) 179–183; Batatu (n58) 226–227 and 271–272; Hinnebusch, *Revolution from Above* (n58) 86; Salwa Ismail, ‘Changing Social Structure, Shifting Alliances and Authoritarianism in Syria’ in Fred H Lawson (ed), *Demystifying Syria* (Kindle edn, Saqi 2012) ch1, lcn162–168.

<sup>78</sup> Seale, *Asad* (n58) 444–447; Batatu (n58) 63–74.

<sup>79</sup> The public sector reportedly employed 20% of Syrians by 1980. See Hinnebusch, *Revolution from Above* (n58) 84.

<sup>80</sup> At least 50% of National Assembly seats and 51% of local council seats were reserved for workers and peasants. See 1973 Syrian Constitution, art 53; Seale, *Asad* (n58) 176.

<sup>81</sup> By the 1980s, over 60% of the Ba’ath party’s members were low-middle income workers and peasants, whereas only 2% of its members belonged to the upper middle class. See Hinnebusch, *Revolution from Above* (n58) 81.

<sup>82</sup> Hinnebusch, *Revolution from Above* (n58) 96; Volker Perthes, ‘The Syrian Private Industrial and Commercial Sectors and the State’ (1992) 24 *Int’l JMidEstud* 207, 209, 215 and 225.

<sup>83</sup> Batatu (n58) 180–190.

<sup>84</sup> Thomas Pierret, ‘Sunnī Clergy Politics in the Cities of Ba’thi Syria’ in Lawson (ed) (n77) ch4, lcn1527–1553.

<sup>85</sup> Teije Hidde Donker, ‘Islamic Social Movements and the Syrian Authoritarian Regime: Shifting Patterns of Control and Accommodation’ in Heydemann and Leenders (eds) (n57) 116–117.

reiterated Syria's Islamic identity and appropriated the radical Ba'ath regime's strategy of co-opting moderate *ulama* and appointing them to high-ranking religious positions.<sup>86</sup> Co-opted religious elites publicly supported the regime's policies and acted as intermediaries between the regime and the Sunni-dominated traditional business community.<sup>87</sup> In return, they were allowed to conduct their religious affairs relatively free of regime interference and Hafez encouraged Damascene businessmen to support them financially.<sup>88</sup>

#### 4.2.ii.b Manipulation of Ideational Factors

After the instability of the post-independence period, the regime sought to market itself as 'the guarantor of social cohesion'.<sup>89</sup> The Ministry of Information used rituals and symbols to develop a leadership cult around Hafez.<sup>90</sup> The regime retained the Ba'ath party's rhetorical commitment to socialism as the radical Ba'athists had created redistributive expectations that could not be easily rescinded without threatening regime survival. Nevertheless, under Hafez's leadership the regime evolved from an ideological movement dedicated to social revolution into a privileged elite committed to maintaining the status quo.<sup>91</sup> Consequently, many Syrians developed a cynical attitude toward Ba'athist socialism in the face of systemic corruption and repression. The regime retained the party's ostensible commitment to secularism as it helped the regime to maintain the support of religious minorities.<sup>92</sup> Nonetheless, over time many Syrians came to associate secularism with authoritarianism.<sup>93</sup>

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<sup>86</sup> Hinnebusch, *Revolution from Above* (n58) 47 and 96; Ziadeh (n58) 139–140; Raphaël Lefèvre, *Ashes of Hama: the Muslim Brotherhood in Syria* (OUP 2013) 47–48.

<sup>87</sup> Pierret, 'Sunni Clergy Politics' (n84) ch4, lcn1536–1553; Donker (n85) 118–120; Ziadeh (n58) 141–142; Lefèvre (n86) 154–156

<sup>88</sup> Ziadeh (n58) 141; Lefèvre (n86) 155.

<sup>89</sup> Aurora Sottimano, 'Nationalism and Reform under Bashar al-Asad: Reading the Legitimacy of the Syrian Regime' in Raymond Hinnebusch and Tina Zintl (eds), *Syria from Reform to Revolt: Volume I* (Kindle edn, Syracuse UP 2015) ch4, lcn793.

<sup>90</sup> Seale, *Asad* (n58) 339; Omar S Dahi and Yasser Munif, 'Revolts in Syria: Tracking the Convergence Between Authoritarianism and Neoliberalism' (2012) 47 JAAS 323, 325; Lisa Wedeen, *Ambiguities of Domination: Politics, Rhetoric and Symbols in Contemporary Syria* (revised edn, The University of Chicago Press 2015) 33. See also Batatu (n58) 206–207.

<sup>91</sup> Hinnebusch, *Revolution from Above* (n58) 8–9, 70 and 91–92.

<sup>92</sup> The Constitution reiterated Syria's secularist character. See 1973 Syrian Constitution, art 3.

<sup>93</sup> Carsten Wieland, *Syria—A Decade of Lost Chances: Repression and Revolution from Damascus Spring to Arab Spring* (Kindle edn, Cune Press 2012) ch10, lcn5764–5798.

The Assad regime reinterpreted the Ba'ath party's commitment to Arab nationalism in order to reconcile it with Syrian sovereignty. Accordingly, it no longer required the physical unification of Arab states but rather their cooperation against external threats.<sup>94</sup> Under this interpretation, the oil-rich Arab monarchies were expected to demonstrate Arab solidarity by providing aid to frontline Arab states, including Syria. Syria's Arab nationalist identity required the suppression of competing identities, most notably, Kurdish identity.<sup>95</sup> Arab nationalism was boosted by the October 1973 war with Israel. However, in reality Arab disunity undermined the Arabs' war effort.<sup>96</sup> The war earned the Assad regime much support at the domestic and regional levels as the Arabs deemed it a psychological victory.<sup>97</sup> Yet, the state-building that took place after the war further developed Syria's national identity. The loss of a superpower patron prompted the Assad regime to moderate Syria's Arab nationalist foreign policy after the Cold War ended in order to secure access to Foreign Direct Investment (FDI).<sup>98</sup> After the PLO negotiated the Oslo Accord in 1993, the Arab states were free to negotiate bilateral peace deals with Israel.<sup>99</sup> Nevertheless, the Assad regime did not completely renounce Arab nationalism. It maintained close relations with Hezbollah and Palestinian rejectionist organisations, which in turn helped it to maintain a semblance of domestic legitimacy.<sup>100</sup>

Arab unity was severely diluted during the Hafez era as a result of Syria's 1976 intervention in Lebanon on the side of Christian militias,<sup>101</sup> Egypt's 1979 bilateral peace deal with Israel, Syria's alignment with Persian Iran against Arab Iraq during the Iran-Iraq war and the Arab world's support

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<sup>94</sup> Raymond Hinnebusch, 'Globalization and Generational Change: Syrian Foreign Policy between Regional Conflict and European Partnership' (2003) 3 *RevInt'l Aff* 190, 193.

<sup>95</sup> The regime disingenuously alleged that Syria's stateless Kurds were illegal immigrants. See: A/43/18, para 67; E/1992/23/E/C.12/1991/4, para 164; CRC/C/SR.362, paras 11–13 and 34–35; CERD/C/338/Add.1/Rev.1, para 10.

<sup>96</sup> Seale, *Asad* (n58) 196, 200, 201, 208 and chs13 and 14 generally.

<sup>97</sup> Batatu (n58) 202.

<sup>98</sup> Ehteshami and others (n57) 226–227.

<sup>99</sup> Raymond Hinnebusch, 'The Foreign Policy of Syria' in Raymond Hinnebusch and Anoushiravan Ehteshami (eds), *The Foreign Policies of Middle East States* (2nd edn, Lynne Rienner Publishers 2014) 225.

<sup>100</sup> Ziadeh (n58) 82.

<sup>101</sup> See eg Seale, *Asad* (n58) ch17; Batatu (n58) 292–300; Ziadeh (n58) 98–102.

for the US-led military intervention against ‘Arab’ Iraq in 1991.<sup>102</sup> The gradual discrediting of Arab nationalism left a void that political Islam<sup>103</sup> was well placed to fill.<sup>104</sup> The Islamic revolution in Iran boosted support for political Islam and aroused concern in Sunni-dominated states with restive Shia populations. In an effort to balance against the ideological threat posed by revolutionary Islam, these states increased their support for Salafist movements in the region.<sup>105</sup> Islamist extremism was further fuelled by the Soviet intervention in Afghanistan and the permanent basing of US troops in Saudi Arabia following Iraq’s invasion of Kuwait.<sup>106</sup> Many Islamist resistance movements situated their opposition to Israel in a larger struggle against neo-imperialism, which at times pitted them against the West’s regional allies, including Saudi Arabia.<sup>107</sup>

#### **4.2.ii.c External Alliance-building**

Hafez realised that in order to guarantee his regime’s survival, he would need to strengthen Syria’s external alliances.<sup>108</sup> Accordingly, he upgraded Syria’s alliance with the USSR, established an alliance with the Islamic Republic of Iran, developed links with a variety of rejectionist non-state armed groups, and pursued a rapprochement with Turkey.

##### *Syrian-Soviet alliance*

Syria’s socialist orientation rendered it a natural ideological ally of the USSR. Nevertheless, the Syrian-Soviet alliance was based upon ‘strategic

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<sup>102</sup> Jubin M Goodarzi, *Syria and Iran: Diplomatic Alliance and Power Politics in the Middle East*, (2nd edn, IB Tauris 2009) 289; Raymond Hinnebusch, ‘The Middle East Regional System’ in Hinnebusch and Ehteshami (eds) (n99) 55–59; Anoushiravan Ehteshami, ‘Making Foreign Policy in the Midst of Turbulence’ in Hinnebusch and Ehteshami (eds) (n99) 340–341.

<sup>103</sup> Within this broad term, it is important to differentiate between the moderate and pragmatic Islam presently endorsed by the Syrian Muslim Brotherhood, the ultra-conservative Salafism and Wahhabism sponsored by the al Saud monarchy, the revolutionary Islam advocated by the Islamic Republic of Iran, and the radical jihadism endorsed by Islamist extremist groups. See Rolf Tanner, ‘Narrative and Conflict in the Middle East’ (2014) 56 *Survival* 89, 100.

<sup>104</sup> *ibid* 97–98; Hinnebusch, ‘Foreign Policy in the Middle East’ in Hinnebusch and Ehteshami (eds) (n99) 15–16.

<sup>105</sup> Tanner (n103) 99.

<sup>106</sup> Halliday (n52) 150; Matteo Legrenzi and F Gregory Gause III, ‘The International Politics of the Gulf’ in Fawcett (ed) (n43) 313.

<sup>107</sup> Tanner (n103) 98.

<sup>108</sup> Raymond Hinnebusch, ‘Syrian Foreign Policy under Bashar al-Asad’ (2009) 1 *Ortadoğu Etütleri* 7, 9.

interdependence'<sup>109</sup> rather than ideological affinity as evident from the Assad regime's repression of domestic communists and the Soviets' tolerance of same. The Assad regime derived inspiration from the Soviets' political system and statist economic management model. However, it declined to surrender any decisional autonomy to the USSR over Syria's domestic or foreign policy. After Egypt's bilateral peace treaty with Israel, Syria became the USSR's most important regional ally. Syria in turn became more dependent on Soviet aid for military deterrence as evident from its signature of a Friendship and Cooperation Treaty in 1980.<sup>110</sup> The support that the USSR provided Syria never matched that which the US provided Israel perhaps because the Soviets were afraid of jeopardising the superpower détente.<sup>111</sup> Nevertheless, it enabled Syria to develop a military deterrent capacity that rendered Israel reluctant to take Syria on militarily.

*Syrian-Iranian alliance and the origins of the Saudi-Iranian rivalry*

After the overthrow of the Pahlavi dynasty, the Assad regime forged an alliance with the Islamic Republic of Iran. The alliance was costly for the Assad regime. By supporting Persian Iran against Arab Iraq, the regime jeopardised its Arab nationalist credentials, domestic legitimacy and relationship with fellow Arab states.<sup>112</sup> The alliance also weakened the Syrian economy as Gulf states reduced their economic aid and Syria lost transit fees due to its closure of the Iraqi Petroleum Company (IPC) pipeline.<sup>113</sup> Iran attempted to compensate, including by providing Syria with free and subsidised oil.<sup>114</sup> However, it couldn't entirely offset the economic losses Syria endured as a result of the alliance.<sup>115</sup>

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<sup>109</sup> Roy Allison, 'Russia and Syria: explaining alignment with a regime in crisis' (2013) 89 *International Affairs* 795, 801.

<sup>110</sup> The USSR's rift with Iran in the early 1980s also enhanced the importance of the Syrian-Soviet relationship. Regarding the Syrian-Soviet alliance during the 1980s, see Seale, *Asad* (n58) 399–400; Goodarzi, *Syria and Iran* (n102) 80, 124–125 and 209–210.

<sup>111</sup> Peter Sluglett, 'The Cold War in the Middle East' in Fawcett (ed) (n43) 71 and 73.

<sup>112</sup> Libya, Algeria the PLO and South Yemen also veered toward Iran. See Goodarzi, *Syria and Iran* (n102) 18 and 34–38.

<sup>113</sup> Volker Perthes, 'The Syrian Economy in the 1980s' (1992) 46 *Middle East Journal* 37, 57.

<sup>114</sup> Goodarzi, *Syria and Iran* (n102) 6, 54–55, 72, 111–112, 114.

<sup>115</sup> Perthes, 'The Syrian Economy' (n113) 57.

Hafez was accused of aligning with the Islamic Republic for sectarian reasons because his Alawi sect has been linked with Shi'ism.<sup>116</sup> Indeed, the alliance provoked fears of Shia proselytising amongst some Syrian Sunnis.<sup>117</sup> Nevertheless, in reality the alliance was strategic rather than sectarian *or* ideological in character even though Hafez sought to defend it in ideological terms.<sup>118</sup> Iraq was the natural ideological ally for Syria as both were supposedly secular, Arab nationalist, Ba'athist regimes. However, Hafez argued that, following the effective loss of Egypt from the anti-Israel bloc in 1979, the Islamic revolution had readjusted the regional balance of power in the Arabs' favour by replacing the Western-aligned Shah with Ruhollah Khomeini's rejectionist regime.<sup>119</sup> Iran, through its ally Hezbollah, could help the Assad regime to wage an unconventional war against Israel in Lebanon.<sup>120</sup> Indeed, Edward Wastnidge viewed the alliance as an example of realist balancing against Israel.<sup>121</sup> From a neorealist perspective, Iraq posed a greater conventional threat to Syria, at least until 1982. From a 'balance of threat' perspective, Iraq also posed the greater threat bearing in mind its geographic proximity and the historic animosity between the Ba'athist regimes.

Iran's decision to align with Syria was also driven by strategic considerations. Iran jeopardised its Islamic credentials by supporting the secular Assad regime instead of the Islamist-led opposition during Syria's internal uprising.<sup>122</sup> However, the benefits outweighed the costs. Syria provided Iran with military, diplomatic and economic assistance, disseminated anti-Iraqi propaganda, supported Iraqi Kurdish insurgents and undermined the Iraqi economy by closing the Syrian-Iraqi border and the IPC

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<sup>116</sup> See Seale, *Asad* (n58) 351.

<sup>117</sup> Myriam Ababsa, 'The Shi'i Mausoleums of Raqqa: Iranian proselytism and local significations' in Lawson (ed) (n77) ch5, lcn1773; Thomas Pierret, 'Karbala in the Umayyad Mosque: Sunni Panic at the 'Shiitization' of Syria in the 2000s' in B Maréchal and S Zemni (eds), *The Dynamics of Sunni-Shia Relationships: Doctrine, Transnationalism, Intellectuals and the Media* (Hurst 2013) 99–116.

<sup>118</sup> Seale supports this argument. Seale, *Asad* (n58) 357.

<sup>119</sup> *ibid* 353–354.

<sup>120</sup> Goodarzi, *Syria and Iran* (n102) 183.

<sup>121</sup> Edward Wastnidge, 'Iran and Syria: An Enduring Axis' (2017) XXIV Middle EPol'y 148, 149.

<sup>122</sup> Pierret, 'Karbala in the Umayyad Mosque' (n117) 99–116.

pipeline.<sup>123</sup> Crucially, Syria also prevented the consolidation of a united anti-Iranian Arab bloc and provided Iran with an entry point into southern Lebanon.<sup>124</sup> Khomeini had sought to market revolutionary Islam as promoting resistance not sectarianism.<sup>125</sup> Significantly, by supporting Lebanese Hezbollah, Iran was able to demonstrate its solidarity with the Arab World and export its revolution.<sup>126</sup>

Revolutionary Islam posed a threat to Sunni-dominated Arab states with restive Shia populations, especially Iraq and Saudi Arabia.<sup>127</sup> Indeed, Saddam Hussein invaded Iran in 1980 primarily to eradicate this threat.<sup>128</sup> The Saudi monarchy's survival strategy is based on three pillars: its oil wealth, Islamic credentials and alliance with the US.<sup>129</sup> However, Iran challenged Saudi Arabia's self-professed leadership of the Islamic world and asserted that its monarchic form of rule and alliance with the US were incompatible with Islam.<sup>130</sup> Furthermore, revolutionary Islam appealed to Saudi's alienated Shia minority, particularly given that Saudi's official ideology, Wahhabism, condones discrimination against Shias.<sup>131</sup> Consequently, from a balance of threat perspective the ideological threat that revolutionary Islam posed to the Saudi monarchy outweighed the material

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<sup>123</sup> Seale, *Asad* (n58) 358–359.

<sup>124</sup> Southern Lebanon had a special historic importance as during the early 14th century, Persian kings had transported clerics from southern Lebanon to Iran to preach Shia Islam to the predominantly Sunni population. Mohsen Milani, 'Why Tehran Won't Abandon Assad(ism)' (2013) 36 TWQ 79, 80.

<sup>125</sup> Daniel Byman, 'Sectarianism Afflicts the New Middle East' (2014) 56 *Survival* 79, 89.

<sup>126</sup> Jubin Goodarzi, 'Iran and Syria at the Crossroads: The Fall of the Tehran-Damascus Axis?' (2013) Wilson Center Middle East Program, Viewpoints No 35, August 2013, 5 <[https://www.wilsoncenter.org/sites/default/files/iran\\_syria\\_crossroads\\_fall\\_tehran\\_damascus\\_axis.pdf](https://www.wilsoncenter.org/sites/default/files/iran_syria_crossroads_fall_tehran_damascus_axis.pdf)> accessed 22 June 2018.

<sup>127</sup> Goodarzi, *Syria and Iran* (n102) 18, 22 and 24.

<sup>128</sup> Other potential incentives included Hussein's desire to secure leadership of the Arab world and the abrogation of the 1975 Algiers Agreement under which Iraq conceded partial control of the Shatt al-Arab waterway to Iran in return for Iran's undertaking to stop supporting Iraqi Kurdish insurgents. See Seale, *Asad* (n58) 356 and 363–365; Halliday (n52) 103 and 180–181; Legrenzi and Gause III (n106) 307.

<sup>129</sup> See generally F Gregory Gause III, 'The Foreign Policy of Saudi Arabia' in Hinnebusch and Ehteshami (eds) (n99).

<sup>130</sup> F Gregory Gause III, 'Balancing What? Threat Perception and Alliance Choice in the Gulf' (2003) 13 *Security Studies* 273, 288–289; Goodarzi, *Syria and Iran* (n102) 26–27.

<sup>131</sup> Saudi Arabia's Shia minority amounts to approximately 2–3 million people and approximately 5–15% of its overall citizen population. Shias are also discriminated against in Bahrain. See Toby Matthiesen, *Sectarian Gulf: Bahrain, Saudi Arabia, and the Arab Spring that wasn't* (Kindle edn, Stanford UP 2013) ch1, lcn192–197; Gause III, 'The Foreign Policy of Saudi Arabia' (n129) 195; Cavanaugh and Castellino (n2) 176–177.



threat posed by the conventionally more powerful Iraq. Saudi Arabia balanced against this ideological threat by aligning with Iraq, increasing its support for its Wahhabi ideology<sup>132</sup> and seeking to portray Iran as a sectarian, Persian regime.<sup>133</sup> Toby Matthiesen opines that the substance of the Saudi-Iranian rivalry is geopolitical, given their size and oil wealth, whereas religion is merely used as a rhetorical justification and foreign policy tool.<sup>134</sup> Saudi Arabia's alliance with the 'infidel' US and Iran's alliance with secular Syria supports this argument.

#### *Non-state armed groups*

The Assad regime nurtured links with secular and Islamist armed groups as a means of enhancing its military deterrent capacity, reinforcing its Arab nationalist credentials, deterring other Arab states from negotiating bilateral peace agreements with Israel and strengthening Syria's negotiating position in any potential peace talks. Syria supported armed Shiite opposition groups in Lebanon, including Hezbollah and Amal, and offered refuge to radical secular Palestinian resistance groups.<sup>135</sup> It also developed links with Sunni Islamist rejectionist groups, including Hamas and Islamic Jihad, and in 1993 adopted a Palestinian Declaration of Principles as part of a rejectionist alliance.<sup>136</sup> Consequently, the US classified Syria as a state sponsor of terrorism in 1979.<sup>137</sup>

#### *Turkey*

Syria historically had an antagonistic relationship with Turkey. Turkey afforded refuge to exiled leaders of the Syrian Muslim Brotherhood, whereas the Assad regime and Iran in turn provided support to the Turkish separatist

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<sup>132</sup> Goodarzi, *Syria and Iran* (n102) 26–27; Byman, 'Sectarianism' (n125) 91; Gause III, 'The Foreign Policy of Saudi Arabia' (n129) 190–191.

<sup>133</sup> Byman, 'Sectarianism' (n125) 89.

<sup>134</sup> Matthiesen (n131) ch2, lcn419–422. Hokayem asserted that the rivalry has geopolitical and ideational dimensions. Emile Hokayem, 'Iran, the Gulf States and the Syrian Civil War' (2014) 56 *Survival* 59, 60.

<sup>135</sup> Leverett (n44) 10–12.

<sup>136</sup> *ibid* 12.

<sup>137</sup> Although the US conceded that, up until the Arab Spring, the Assad regime had not been directly involved in an act of terrorism since 1986.

group, the Kurdish Workers Party (PKK).<sup>138</sup> Matters came to a head in 1998 when Turkey threatened to invade Syria – ostensibly in the exercise of its right to self-defence – in order to capture the PKK’s leader, Abdullah Öcalan.<sup>139</sup> The threat prompted the Assad regime to expel Öcalan and sign the Adana Accord under which it undertook to stop assisting the PKK.<sup>140</sup>

The rapprochement marked the beginning of a new era of congenial Turkish-Syrian relations that lasted until the Arab Spring. It was primarily strategic in nature. From a Syrian perspective, a military confrontation with Turkey was ill-advised in 1998 given the risk of a combined Turkish-Israeli assault and the extent of Syria’s dependency on Turkish-controlled water supplies.<sup>141</sup> In addition, Hafez was anxious to secure a smooth transition of power to Bashar.<sup>142</sup> From a Turkish perspective, a joint Turkish-Israeli offensive against Syria was undesirable given the extent of popular support for the Palestinian cause in Turkey.<sup>143</sup> Furthermore, Syria could help Turkey improve its relations with the Caucasus states.<sup>144</sup> The rapprochement was also driven by the need to address the shared threat posed by Kurdish autonomy in northern Iraq.<sup>145</sup>

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<sup>138</sup> Bülent Aras and Rabia Karakaya Polat, ‘From Conflict to Cooperation: Desecuritization of Turkey’s Relations with Syria and Iran’ (2008) 39 *Sec Dialogue* 495, 496; Carolyn C James and Ozgur Ozdamar, ‘Modelling Foreign Policy and Ethnic Conflict: Turkey’s Policies Towards Syria’ (2009) 5 *Foreign Policy Analysis* 17, 25–27; Ömer Taspınar, ‘Turkey’s Strategic Vision and Syria’ (2012) 35 *TWQ* 127, 136–137; Hinnebusch, ‘The Foreign Policy of Syria’ (n99) 229.

<sup>139</sup> Aras and Polat (n138) 509; Özlem Demirtas-Bagdonas, ‘Reading Turkey’s Foreign Policy on Syria: The AKP’s Construction of a Great Power Identity and the Politics of Grandeur’ (2014) 15 *Turkish Studies* 139, 141.

<sup>140</sup> Fred H Lawson, ‘The Beginning of a Beautiful Friendship: Syrian–Turkish relations since 1998’ in Lawson (ed) (n77) ch10, lcn4005–4007 and lcn4030–4031.

<sup>141</sup> Turkey had recently formed an alliance with Israel. See *ibid* ch10, lcn4067–4097; Julie Gauthier (Diana V Galbraith translator), ‘Events in al-Qamishli: Has the Kurdish question erupted in Syria?’ in Lawson (ed) (n77) ch6, lcn2223–2225; Jamal Wakim, ‘End of Asad, or of Erdogan?’ (2014) 36 *Arab Studies Quarterly* 186, 188–189.

<sup>142</sup> Ziadeh (n58) 41–42.

<sup>143</sup> Lawson, ‘The Beginning of a Beautiful Friendship’ (n140) ch10, lcn4099–4107.

<sup>144</sup> *ibid* ch10, lcn4122–4131.

<sup>145</sup> Gauthier (n141) ch6, lcn2222–2224.

#### 4.2.ii.d Theoretical Analysis of Regime Consolidation

The Hafez era supports the argument that authoritarian regimes enhance their durability by creating nominal legislative, judicial and political institutions.<sup>146</sup> It also supports the contention that authoritarian regimes learn from each other. The Assad regime appropriated the radical Ba'ath regime's corporatist organisations and co-optative strategies, including expansive public sector employment, populist socio-economic policies and appointment of moderate Islamic actors to influential positions. These strategies helped it to retain a considerable degree of popular support.

The analysis demonstrated how authoritarian regimes utilise ideational tools to consolidate their rule. The Assad used its commitment to socialism and secularism to secure a wide support base that transcended class and sectarian divisions. It instrumentalised its commitment to Arab nationalism to secure popular legitimacy and access to the external rent it needed to finance domestic patronage networks. It also manipulated its control of the army, *Mukhabarat*, media, education system, legislature and judiciary to reinforce the leadership cult around Hafez and fortify Syria's identity as an Arab nationalist, secular and socialist state.

The analysis also demonstrated the importance of testing the ideological claims of authoritarian regimes against their actions. Driven by realist considerations, authoritarian Arab regimes often took actions that contravened their Arab nationalist identity. Furthermore, the strategic nature of the alliances examined supports Walt's argument that states prioritise strategic concerns over ideological affinities when forming alliances. Syria's experience also supports Davis' argument that socially constructed identities are more effective at reinforcing authoritarian rule when they accord somewhat with actual behaviour.<sup>147</sup> The regime's intervention in Libya's civil war on the side of Christian Maronite militias undermined its Arab

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<sup>146</sup> See s2.5.i in ch2.

<sup>147</sup> Eric Davis, *Memories of State: Politics, History and Collective Identity in Modern Iraq* (University of California Press 2005) 272 and Conclusion generally.

nationalist credentials and ultimately contributed to the outbreak of an internal insurgency.

#### 4.2.iii Syria's Political Economy

In an effort to appease the traditional commercial bourgeoisie, the Assad regime implemented a limited economic opening (*infitah*) during the 1970s.<sup>148</sup> It was limited due to the regime's ideological commitment to socialism and fear that extensive liberalisation would enable the traditional, and predominantly Sunni, commercial bourgeoisie to recapture the state as it had done during the UAR.<sup>149</sup>

Syria negotiated a Co-operation Agreement with the European Economic Community in 1977 signifying growing international confidence in the Syrian economy.<sup>150</sup> However, despite impressive economic growth,<sup>151</sup> the regime was not accumulating enough capital through public sector surpluses and taxation to finance its populist subsidies, military expenditure and bloated public sector.<sup>152</sup> In reality, Syria's economy was propped up by rent, namely, 'income that derives from ownership of natural resources or directly unproductive profit-seeking'.<sup>153</sup> Syria's rent income derived from Arab aid, discounted Russian arms and oil, and oil sales.<sup>154</sup> Syria received a

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<sup>148</sup> Hinnebusch, *Revolution from Above* (n58) 96; Perthes, 'The Syrian Private Industrial and Commercial Sectors' (n82) 209–210.

<sup>149</sup> Haddad, *Business Networks in Syria* (n74) Introduction, lcn214–235, and ch4, lcn1852–1880. See also Steven Heydemann, *Authoritarianism in Syria: Institutions and Social Conflict, 1946–1970* (Cornell UP 1999) 85, 90 and 171.

<sup>150</sup> The Agreement granted most Syrian-produced industrial exports duty-free access to EU markets on a non-reciprocal basis. See Cooperation Agreement between the European Economic Community and the Syrian Arab Republic, Official Journal L 269 (27 September 1978) 2–87  
<[http://eeas.europa.eu/delegations/syria/eu\\_syria/political\\_relations/agreements/index\\_en.htm](http://eeas.europa.eu/delegations/syria/eu_syria/political_relations/agreements/index_en.htm)> accessed 24 January 2016.

<sup>151</sup> Syria's real GNP reportedly increased by 8.2% between 1970 and 1975 and by 6.8% between 1977 and 1980. Hinnebusch, *Revolution from Above* (n58) 128.

<sup>152</sup> Perthes, 'The Syrian Economy' (n113) 37–40. Only 24.9% of Syrians participated in the official workforce in 1970 and only 22.7% in 1981. Batatu (n58) 9.

<sup>153</sup> Haddad, *Business Networks in Syria* (n74) ch1, lcn749. Heydemann described rent-seeking as 'nonproductive or directly counterproductive efforts to capture excess profit by creating or exploiting government regulation to avoid competition'. See Steven Heydemann, *Networks of Privilege in the Middle East: the Politics of Economic Reform Revisited* (Palgrave MacMillan 2004) 2.

<sup>154</sup> Some commentators would also include remittances from Syrian expats, although Luciani excludes it. Giacomo Luciani, 'Oil and Political Economy in the International Relations of the Middle East' in Fawcett (ed) (n43) 117. After 1975, Syria's oil income amounted to

massive influx of Arab aid after the October 1973 war, but it was mostly squandered on inefficient public sector projects.<sup>155</sup> As is typical in populist-authoritarian states with rentier economies, this rent boom gave rise to an overdevelopment of the public-sector and an unsustainable increase in redistributive expectations.<sup>156</sup>

Syria's rent income declined dramatically during the 1980s as a result of decreasing international oil prices and a loss of oil transit fees and Arab aid following Syria's alignment with Iran in the Iran-Iraq war.<sup>157</sup> After Syria experienced an acute foreign exchange crisis in 1986,<sup>158</sup> the regime introduced limited economic liberalisation and austerity measures, including a reduction in populist subsidies.<sup>159</sup> However, in order to avoid completely alienating the low-middle income class, essential commodities could still be obtained at discounted rates in the poorest neighbourhoods and there were no mass public sector redundancies.<sup>160</sup> Even after the second *infitah*, most private investors avoided long-term, capital-intensive investments, given the uncertain political and economic climate, and instead focused on non-productive and non-labour-intensive areas.<sup>161</sup> The vast majority of private enterprises remained small, family-run businesses.<sup>162</sup> Some large private industries manufactured goods for export to the USSR and the Gulf.

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approximately 60% of its foreign exchange income. In the late 1970s, Arab aid amounted to approximately 10% of Syria's GNP. Haddad, *Business Networks in Syria* (n74) ch1, lcn765–770.

<sup>155</sup> Haddad, *Business Networks in Syria* (n74) ch4, lcn1981–2000.

<sup>156</sup> Perthes, 'The Syrian Economy' (n113) 39; Raymond Hinnebusch, 'The Political Economy of Economic Liberalization in Syria' (1995) 27 *Int'l JMidEstStud* 305, 309–310; Hinnebusch, *Revolution from Above* (n58) 11–12, 66, 87, 92–93 and 196.

<sup>157</sup> Volker Perthes, 'The Bourgeoisie and the Baath: a Look at Syria's Upper Class' (1991) 21 *Middle East Report* 31, 31–37.

<sup>158</sup> Hinnebusch, 'The Political Economy' (n156) 312; Raymond A Hinnebusch, 'Syria: The politics of economic liberalisation' (1997) 18 *TWQ* 249, 251; Hinnebusch, *Revolution from Above* (n58) 103.

<sup>159</sup> Perthes, 'The Syrian Economy' (n113) 49–51; Perthes, 'The Syrian Private Industrial and Commercial Sectors' (n82) 210–211 and 220–223.

<sup>160</sup> Hinnebusch, *Revolution from Above* (n58) 112; Raymond Hinnebusch, 'Authoritarian Upgrading and the Arab Uprising: Syria in Comparative Perspective' (BRISMES Conference, London, March 2012) 6  
<<https://brismes2012.files.wordpress.com/2012/02/raymond-hinnebusch-syria-authoritarian-upgrading.pdf>> accessed 2 December 2014.

<sup>161</sup> Hinnebusch, *Revolution from Above* (n58) 130–131.

<sup>162</sup> Trade contributed approximately 25% to Syria's GNP in the 1980s, whereas industry only contributed 15%. Perthes, 'The Syrian Private Industrial and Commercial Sectors' (n82) 211.

However, after the Cold War ended most of these industries collapsed as they were unable to satisfy Western quality standards.<sup>163</sup>

The loss of Soviet rent forced the regime to implement further limited economic liberalisation measures during the 1990s.<sup>164</sup> However, the public sector retained a monopoly in industries producing basic consumer goods as this enabled the regime to maintain its redistributive capacity.<sup>165</sup> The Syrian economy rebounded at the start of the decade due to new oil and gas discoveries and an influx of Arab aid following Syria's alignment with the US-led coalition in the first Gulf War.<sup>166</sup> However, it subsequently declined in accordance with falling rent income.<sup>167</sup> The imperative of regime survival prompted the regime to diversify its trading partners in the latter half of the decade. Accordingly, Syria ratified a Greater Arab Free Trade Agreement, pursued a diplomatic and economic rapprochement with Iraq, and began negotiations on a Syrian-European Association Agreement in 1998.

#### 4.2.iii.a Corruption and Inequality

The weaknesses in the Syrian economy derived in large part from structural problems related to the regime's authoritarian character. Hafez apparently refrained from exploiting his position for self-enrichment. However, he tolerated corruption amongst regime elites in order to afford them a stake in regime survival.<sup>168</sup> Consequently, the line between the public and private sectors became blurred and hierarchical state-business networks emerged comprised of military officers, security officials, businessmen and bureaucrats.<sup>169</sup> These networks were consolidated during the 1980s due to the

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<sup>163</sup> Haddad, *Business Networks in Syria* (n74) ch4, lcn2093–2104.

<sup>164</sup> Hinnebusch, *Revolution from Above* (n58) 103–104; Kjetil Selvik, 'It's the Mentality, Stupid: Syria's Turn to the Private Sector' (2008) 1 *Syria Studies* 33, 35–36 <<https://ojs.st-andrews.ac.uk/index.php/syria/article/view/705/592>> accessed 22 June 2018. The private sector's contribution to gross fixed capital formation almost doubled between 1985 and 1993 to nearly 68%. See Haddad, *Business Networks in Syria* (n74) ch3 lcn1586.

<sup>165</sup> Hinnebusch, *Revolution from Above* (n58) 133.

<sup>166</sup> The average annual growth rate was approximately 7%. See Heydemann, *Authoritarianism in Syria* (n149) 6; Selvik (n164) 36.

<sup>167</sup> Hinnebusch, 'Globalization and Generational Change' (n94) 196; Selvik (n164) 36; Haddad, *Business Networks in Syria* (n74) ch1, lcn769–774; Ehteshami and others (n57) 226–22.

<sup>168</sup> Hinnebusch, *Revolution from Above* (n58) 69.

<sup>169</sup> For a comprehensive analysis, see Haddad, *Business Networks in Syria* (n74).

renaissance of private sector representative organisations, including the Committee for the Guidance of Imports, Exports, and Consumption. These organisations were not truly representative as they only represented the interests of state-business networks. They facilitated rampant tax evasion by granting exemptions to non-productive sectors.<sup>170</sup>

The state-business networks gave rise to a new economic elite (*hadithi al-ni'ma*) comprised of an Alawi-dominated public element and a Sunni-dominated private element.<sup>171</sup> Over time, the children of the former (*awlaad al-mas'ulin*) began to directly invest in commercial enterprises as their father's business partners and compete with the original private element.<sup>172</sup> The new economic elite evolved into the super-rich. They were distinguishable from the moderately wealthy middle class of private industrialists and merchants. They engaged predominantly in unproductive areas, including the Soviet export trade, real estate, black-market trading and mixed (state-private) joint stock companies for tourism, transport and agriculture.<sup>173</sup>

Whilst corruption helped Hafez to consolidate his regime, it also threatened its survival. The regime instigated numerous well-publicised campaigns to address corruption, but they tended to make examples of small-timers who broke the law to survive whilst ignoring the biggest culprits, namely, regime elites.<sup>174</sup> The regime's economic policies increased inequality as evident from a decline in average GDP income per capita between the late 1980s and the late 1990s.<sup>175</sup> Its encouragement of rural-urban migration, in order to increase its urban support base, contributed to a

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<sup>170</sup> See discussion of Investment Law No 10 of 1991 in Hinnebusch, *Revolution from Above* (n58) 134; Haddad, *Business Networks in Syria* (n74) ch5, lcn2688–2792.

<sup>171</sup> For a discussion, see Perthes, 'The Syrian Private Industrial and Commercial Sectors' (n82) 214–215 and 226; Perthes, 'The Syrian Economy' (n113) 39; Bassam Haddad, 'Syria's State Bourgeoisie: An Organic Backbone for the Regime' (2012) 21 *Middle East Critique* 231, 232–233; Haddad, *Business Networks in Syria* (n74) ch3, lcn1420–1447.

<sup>172</sup> Hinnebusch, 'The Political Economy' (n156) 314; Haddad, *Business Networks in Syria* (n74) ch3, lcn1466–1469, and ch4, lcn2080–2082; Ismail (n77) ch1, lcn223–335.

<sup>173</sup> Perthes, 'The Syrian Private Industrial and Commercial Sectors' (n82) 208, 214–217, 220–221.

<sup>174</sup> *ibid* 214; Perthes, 'The Bourgeoisie and the Baath' (n157) 31–37.

<sup>175</sup> Haddad, *Business Networks in Syria* (n74) ch6, lcn3219–3231.

sharp increase in urban living costs. Informal housing developments emerged on the city limits to accommodate rural migrants and informal workers.<sup>176</sup> Rampant inflation rendered real estate an attractive investment option, which in turn fuelled property prices and trapped many Syrians in informal housing.<sup>177</sup>

The regime's import-substitution and export-oriented industrialisation policies fuelled the black market for smuggled goods.<sup>178</sup> Black market profits escaped the taxman unlike public sector wages, which were taxed at source.<sup>179</sup> During the 1990s, the regime implemented regressive fiscal policies with total indirect taxes exceeding total public subsidies.<sup>180</sup> It reduced public expenditure on social subsidies, froze public sector pay and increased taxation on public sector and low-income workers.<sup>181</sup> At the same time, state-business networks enjoyed a tax holiday.

The regime maintained a contradictory economic regulatory framework, which could be selectively utilised to repress businessmen who posed a threat to regime security.<sup>182</sup> This framework also provided an avenue for the payment of bribes (*wasta*) to public sector officials, an important supplement to their declining wages. It undermined the economy by deterring small manufacturers from expanding, dis-incentivising investment in productive sectors and protecting state-business networks from competition.<sup>183</sup>

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<sup>176</sup> Official estimates suggest that between 30% and 50% of Syrians live in informal settlements. Robert Goulden, 'Housing, Inequality, and Economic Change in Syria' (2012) 38 *British Journal of Middle Eastern Studies* 187, 188.

<sup>177</sup> Perthes, 'The Syrian Private Industrial and Commercial Sectors' (n82) 219; Perthes, 'The Syrian Economy' (n113) 43 and 55; Seale, *Asad* (n58) 320 and 453.

<sup>178</sup> Perthes, 'The Syrian Private Industrial and Commercial Sectors' (n82) 218–219; Perthes, 'The Syrian Economy' (n113) 42 and 47–48. By 1987, Syria's black market reportedly amounted to over 30% of its GDP. See Batatu (n58) 212–213.

<sup>179</sup> Haddad, *Business Networks in Syria* (n74) ch6, lcn3426–3427.

<sup>180</sup> *ibid* ch6, lcn3243–3249.

<sup>181</sup> General social subsidies decreased from 8.23% in the early 1980s to 2.44% in the early 1990s. Haddad, *Business Networks in Syria* (n171) 242 fn42. See generally *ibid* ch6; Goulden (n176) 194–195.

<sup>182</sup> Perthes, 'The Syrian Private Industrial and Commercial Sectors' (n82) 224–225; Haddad, *Business Networks in Syria* (n74) ch3, lcn1675–1677 and ch5, lcn2980–2991.

<sup>183</sup> Perthes, 'The Syrian Private Industrial and Commercial Sectors' (n82) 225.



#### 4.2.iii.b Theoretical Analysis of Syria's Political Economy

Halliday argued that perhaps more so than any other region, the Middle East demonstrates the extent to which political and economic considerations are interdependent and interconnected.<sup>184</sup> During the Hafez era, the provision of aid to Middle Eastern states was driven by political considerations.<sup>185</sup> However, economic aid did not give rise to typical patron-client relations as recipients demonstrated an ability to maintain autonomy over policy formation as evident, for example, from Syria's alignment with Iraq in the Iran-Iraq war contrary to the wishes of its Arab and Soviet benefactors. External rent provided an economic lifeline to authoritarian regimes. The Assad regime capitalised upon its Arab nationalist ideology to access rent, which it then used to service its patronage networks and offset demands for economic and political reforms.

The regime's economic policy prioritised regime survival over economic rationality.<sup>186</sup> It proved a source of the regime's strength and its weakness. The regime used public funds to reinforce its repressive apparatus and construct a support base that transcended ethno-sectarian, class and geographical cleavages. It acquired the support of lower-middle income workers and peasants through populist subsidies, public sector employment and public goods. By co-opting a privileged portion of the business community, it sought to prevent the private sector from organising collectively to oppose its rule.<sup>187</sup> However, one important constituency was largely overlooked – the Sunni-dominated *real* private sector. The regime had to rely primarily on its repressive apparatus to control this constituency, which formed the core support base for the 1970s/1980s insurgency.

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<sup>184</sup> Halliday (n52) 261–262.

<sup>185</sup> For example, America provided military aid to the Gulf states as a means of securing control of international oil prices, whereas the Gulf states provided aid to frontline states in the war with Israel as a way of demonstrating Arab solidarity and securing domestic legitimacy.

<sup>186</sup> Hinnebusch, 'The Political Economy' (n156) 31; Hinnebusch, *Revolution from Above* (n58) 10–12. See also generally Haddad, *Business Networks in Syria* (n74); Samer N Abboud, 'Locating the Social in the Social Market Economy' in Hinnebusch and Zintl (eds) (n89).

<sup>187</sup> Haddad, *Business Networks in Syria* (n74) ch5, lcn2893–2894.

The ramifications of the regime's economic policies manifested themselves in successive economic crises. The regime's response to these crises was conditioned by the need to satisfy the redistributive expectations generated by its socialist ideology, appease state-business networks and prevent the empowerment of the traditional Sunni-dominated business bourgeoisie.<sup>188</sup> Its reluctance to completely abandon populist subsidies supports the argument that ideological roles, in this case socialism, can restrain the behavioural options of political elites.<sup>189</sup> At the same time, increasing inequality during the Hafez era again demonstrated the importance of testing the ideological claims of authoritarian regimes against the reality of their actions.

After the Cold War ended, Syria experienced structural pressures to liberalise its economy. However, through circumscribed liberalisation the regime was able to offset demands for far-reaching reforms. The Asian-Tigers suggested that some form of state intervention was necessary to enable developing economies to grow.<sup>190</sup> However, as Haddad observed, the success of statist interventionism depends upon the competency of economic policy makers and effective collaboration, as distinct from collusion, between the state and the private sector.<sup>191</sup> These factors were lacking in Syria.

#### 4.2.iv The Insurgency

An Islamist-tinged insurgency took place in Syria between 1976 and 1982. Once again, support for the opposition was particularly strong in Hama and Aleppo. Sunni landowning elites from Hama resented Ba'athist land reform,

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<sup>188</sup> Hinnebusch, *Revolution from Above* (n58) 133; Haddad, *Business Networks in Syria* (n74) ch5, lcn2887–2897.

<sup>189</sup> Stephen M Walt, *The Origins of Alliances* (Kindle edn, Cornell UP 1990) ch2, lcn890–913, and 930–938; Michael Barnett, 'Institutions, Roles, and Disorder: The Case of the Arab States System' (1993) 37 *Int'l Stud Q* 271, 272 and 278–279; Michael N Barnett, 'Sovereignty, Nationalism, and Regional Order in the Arab States' (1995) 49 *Int'l Org* 479, 485; James H Lebovic, 'Unity in Action: Explaining Alignment Behavior in the Middle East' (2004) 41 *JPR* 167, 169; Raymond Hinnebusch and Anoushirvan Ehteshami, 'Foreign Policy Making in the Middle East: Complex Realism' in Fawcett (ed) (n43) 242.

<sup>190</sup> Alfredo Saad-Filho, 'Growth, Poverty and Inequality: From Washington Consensus to Inclusive Growth' (UN Department of Economic and Social Affairs Working Paper No 100, November 2010) ST/ESA/2010/DWP/100 5.

<sup>191</sup> Haddad, *Business Networks in Syria* (n74) Introduction, lcn312–347 and lcn431–444.

whereas former political elites from Aleppo resented one party rule.<sup>192</sup> Both cities were home to influential Sunni *ulama* and Sunni merchants who were particularly detrimentally affected by the regime's economic policies.<sup>193</sup> Crucially, however, the opposition failed to develop a significant support base in Damascus due primarily to the regime's successful co-optation of Sunni religious and business elites.<sup>194</sup>

The Syrian Muslim Brotherhood played a significant role in the insurgency. During the 1970s, its constituency became divided between a moderate Damascus Wing, which advocated non-violence, the militant Fighting Vanguard and the officially recognised Syrian Muslim Brotherhood.<sup>195</sup> The latter subsequently fractured into a radical Hama branch and a more moderate Aleppo branch. The former dominated the party from the mid-1970s.<sup>196</sup>

The insurgency began with a campaign of assassinations and attacks against regime elites, which were mainly perpetrated by the Fighting Vanguard.<sup>197</sup> The insurgents attempted to polarise Syrian society by utilising sectarian slogans and specifically targeting Alawis, including non-Ba'athists.<sup>198</sup> In June 1979, approximately 32 cadets were killed by Islamist militants at the Aleppo Artillery School.<sup>199</sup> The Fighting Vanguard were allegedly responsible, but the regime blamed the official Muslim Brotherhood forcing its leaders into exile.<sup>200</sup> This prompted the Brotherhood to establish a military wing and a Joint Command together with the Fighting Vanguard and

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<sup>192</sup> Hinnebusch, *Revolution from Above* (n58) 97; Lefèvre (n86) 56–58.

<sup>193</sup> Lefèvre (n86) 56–58.

<sup>194</sup> Although some Damascene merchants were suspected of hedging their bets by also covertly funding the Muslim Brotherhood. See Seale, *Asad* (n58) 325–326; Batatu (n58) 208. See also Hinnebusch, *Revolution from Above* (n58) 67, 71, 91 and 96; Ismail (n77) ch1, lcn206–222; Lefèvre (n86) 60.

<sup>195</sup> Batatu (n58) 262–265.

<sup>196</sup> Lefèvre (n86) 82–83 and 88–96.

<sup>197</sup> Van Dam, *The Struggle for Power* (n61) 89–92; Lefèvre (n86) 73.

<sup>198</sup> Van Dam, *The Struggle for Power* (n61) 89–91 and 108–111; Lefèvre (n86) 73.

<sup>199</sup> See Batatu (n58) 266–267; van Dam, *The Struggle for Power* (n61) 91–92; Nikolaos van Dam, *Destroying a Nation: the Civil War in Syria* (Kindle edn, IB Tauris 2017) ch1, lcn796–804.

<sup>200</sup> Van Dam, *The Struggle for Power* (n61) 92; Lefèvre (n86) 105 and 111–115; van Dam, *Destroying a Nation* (n199) ch1, lcn805–808.

the Damascus wing.<sup>201</sup> The Brotherhood has since defended its recourse to violence as ‘self-defence’ and a ‘last resort’.<sup>202</sup> In 1980, the Joint Command created a coalition of Sunni opposition groups, the Islamic Front in Syria, whose political manifesto indicated that no truce would be made with the regime.<sup>203</sup> Whilst the Front undertook to guarantee the rights of minorities in a future Islamic State, it failed to convince religious minorities as some of its members had already indiscriminately targeted Alawis.<sup>204</sup>

After the Aleppo Artillery School massacre, the regime’s suppression of the insurgency assumed a sectarian character and hundreds of Sunnis were purged from the army.<sup>205</sup> The Seventh Ba’ath Regional Congress resolved to arm the party’s civilian supporters to fight the insurgents.<sup>206</sup> Neutrality was no longer an option. After the Congress, anti-regime strikes spread across northern Syria.<sup>207</sup> The strikes were brutally suppressed in Aleppo.<sup>208</sup> After a failed assassination attempt on Hafez, the regime reportedly summarily executed over 500 imprisoned members of the Muslim Brotherhood and membership of the Brotherhood was made a capital offence.<sup>209</sup>

A decisive confrontation took place in Hama in February 1982. The uprising was pioneered by the Fighting Vanguard; however, once it was underway the Muslim Brotherhood’s exiled leaders reportedly felt they had no option but to support it.<sup>210</sup> The regime perceived the uprising as a zero-sum battle. Hama was placed under blockade and communities were

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<sup>201</sup> The Joint Command disintegrated in late 1981. Lefèvre (n86) 117–120; van Dam, *Destroying a Nation* (n199) ch1, lcn808–812.

<sup>202</sup> Van Dam, *The Struggle for Power* (n61) 112–113; Lefèvre (n86) 110–111.

<sup>203</sup> Van Dam, *The Struggle for Power* (n61) 107.

<sup>204</sup> *ibid* 107–108; Hinnebusch, *Revolution from Above* (n58) 94–95.

<sup>205</sup> Lefèvre (n86) 75–76.

<sup>206</sup> Van Dam, *The Struggle for Power* (n61) 105.

<sup>207</sup> AI World Report 1979–80, 353; Lefèvre (n86) 58–59.

<sup>208</sup> Batatu (n58) 273; Hinnebusch, *Revolution from Above* (n58) 99–100; Ismail (n77) ch1, lcn205–208; Lefèvre (n86) 58–60 and 76.

<sup>209</sup> The regime subsequently claimed that the victims had been sentenced to death by a field tribunal. See Seale, *Asad* (n58) 329; van Dam, *Destroying a Nation* (n199) ch1, lcn817–822.

<sup>210</sup> For a discussion of the circumstances surrounding the initiation of the Hama uprising, see Seale, *Asad* (n58) 332; Batatu (n58) 269–270; van Dam, *The Struggle for Power* (n61) 112; Lefèvre (n86) 126–127.

subjected to indiscriminate bombardment, mass executions and pillage.<sup>211</sup> Estimates of fatalities range from 3,000 to 40,000.<sup>212</sup> Elite Alawi-dominated armed units were used to suppress the opposition and officers from Hama were removed from strategic units in advance.<sup>213</sup> Consequently, overall discipline was maintained within the armed forces.<sup>214</sup> The regime survived the uprising due to the solidarity of the armed forces and the Ba'ath party leadership, the failure of the uprising to spread to other major cities and the loyalty demonstrated by most workers and peasants.<sup>215</sup> Internal divisions within the opposition and its alienation of religious minorities also helped the regime.

Hafez argued that the insurgency was part of a conspiracy supported by the US, Israel, Jordan, Lebanon and Iraq to secure Syria's capitulation in the Arab-Israeli peace process.<sup>216</sup> His argument was not totally unfounded. Many of the Brotherhood's leaders took refuge in Jordan, Iraq, Saudi Arabia and Turkey,<sup>217</sup> and Islamic militants allegedly attended training camps in Egypt,<sup>218</sup> Iraq<sup>219</sup> and Jordan.<sup>220</sup> After the uprising, the regime reportedly located weapons supplied by Israeli-linked Lebanese Christian militias and weapons whose serial numbers indicated that they had transited through Saudi Arabia, Jordan and Iraq.<sup>221</sup> Furthermore, Egyptian, Israeli, Jordanian and Lebanese propaganda deliberately stirred sectarian tensions during the insurgency.<sup>222</sup>

The insurgency dramatically undermined civil society development and political activism in Syria. The regime declined to uncoil its iron fist

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<sup>211</sup> Seale, *Asad* (n58) 333–334; Batatu (n58) 273; Hinnebusch, *Revolution from Above* (n58) 101; Lefèvre (n86) 128.

<sup>212</sup> Seale, *Asad* (n58) 334; van Dam, *The Struggle for Power* (n61) 111; Lefèvre (n86) 128.

<sup>213</sup> Van Dam, *The Struggle for Power* (n61) 114–115.

<sup>214</sup> *ibid* 113–115; Seale, *Asad* (n58) 333.

<sup>215</sup> Raymond Hinnebusch, 'Change held in abeyance: durability and vulnerability in Asad's Syria' (1997–1998) 2 *UCLA Journal of International and Foreign Affairs* 171, 174.

<sup>216</sup> Seale, *Asad* (n58) 334–336; Hinnebusch, *Revolution from Above* (n58) 100; van Dam, *The Struggle for Power* (n61) 116.

<sup>217</sup> Lefèvre (n86) 129–133.

<sup>218</sup> *ibid* 131.

<sup>219</sup> Batatu (n58) 268–269; Lefèvre (n86) 128–129.

<sup>220</sup> Seale, *Asad* (n58) 336.

<sup>221</sup> *ibid* 336; Lefèvre (n86) 129.

<sup>222</sup> Van Dam, *The Struggle for Power* (n61) 93, 94 and 106; Lefèvre (n86) 133.

during the 1980s, whereas survivors of the Hama Uprising were afraid to even discuss political issues.<sup>223</sup> After Hama, the Muslim Brotherhood effectively ceased to exist as an organisation within Syria. Its exiled leaders were accused of abandoning Hama to its fate and for decades afterwards it was associated with extremism.<sup>224</sup> The Aleppo and Hama factions finally reconciled after the latter renounced violence during the 1990s.<sup>225</sup> Some exiled members of the Fighting Vanguard, including Abu Mus'ab al-Suri, joined the 'Arab Afghan' in Afghanistan.<sup>226</sup> Suri wrote 'The Global Islamic Resistance Call', which provided the organisational and doctrinal foundations for al-Qaeda.<sup>227</sup>

#### 4.2.iv.a Alawi Rule?

The Assad regime's policies created a perception of sectarian rule given that the majority of regime elites and the primary beneficiaries of corruption were Alawis. However, the regime did not favour Alawis or punish Sunnis purely on the basis of sectarian affiliation. Alawi applicants to Homs military academy were favoured, but this was more to do with the necessities of regime consolidation than deliberate sectarian favouritism. The regime's form of rule has been described as political 'Alawism (*al-alawiyyah al-siyasiyyah*) which encapsulates 'the idea that authority and rule (*al-sultah wal-hukm*) are 'Alawi, but that the 'Alawis do not rule'.<sup>228</sup> As Batatu observed with regard to Hafez, 'it would be going too far to infer that he is sectarian or tribal in his outlook or line of conduct.'<sup>229</sup> Many rural Alawis remained impoverished under the Assad regime<sup>230</sup> and some Alawis were even imprisoned for opposing it.<sup>231</sup> Nevertheless, during the insurgency the fear of communal retribution caused many Alawis to rally behind the regime.<sup>232</sup>

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<sup>223</sup> Seale, *Asad* (n58) 338; Hinnebusch, *Revolution from Above* (n58) 102–103.

<sup>224</sup> Lefèvre (n86) 109–110.

<sup>225</sup> *ibid* 129–133 and 163–174; Batatu (n58); 275–276.

<sup>226</sup> Lefèvre (n86) 143–144 and 175.

<sup>227</sup> *ibid* 144–145.

<sup>228</sup> Ismail (n77) ch1, lcn166–168.

<sup>229</sup> Batatu (n58) 327.

<sup>230</sup> *ibid* 229; Christa Salamandra, 'Sectarianism in Syria: Anthropological Reflections' (2013) 22 *Middle East Critique* 303, 305.

<sup>231</sup> Wieland (n93) ch10, lcn5874.

<sup>232</sup> Van Dam, *The Struggle for Power* (n61) 97. See also Hinnebusch, *Revolution from Above* (n58) 70 and 72.

#### 4.2.iv.b Theoretical Analysis of the Insurgency

The causes of the insurgency included repression, economic decline, inequality, corruption, political disenfranchisement, the perception of sectarian rule, the regime's intervention in Lebanon and the suppression of Syria's moderate and secular opposition.<sup>233</sup> Most of these factors derived from the regime's authoritarian nature. Hence the insurgency supports the liberal argument that authoritarian regimes are more susceptible to civil war than democracies as they are more likely to engage in divisive clientelism and less capable of reconciling the competing demands of societal groups.<sup>234</sup> The regime's response to the uprising supports liberalism's suggestion that domestic regime type affects compliance with international human rights law.

The regime's brutal suppression of the insurgency, in blatant contravention of its human rights obligations, supports the realist argument that international law exerts little influence over state behaviour when the state's survival is at stake. Although in this case the survival of the state was equated with the survival of the regime. Hence, the episode also reinforces omnibalancing theory's argument that authoritarian regimes prioritise regime security over the national interest. It also supports the contention advanced by rationalists and neoliberal institutionalists that compliance with regimes, in this case international human rights law, will only be achieved if the costs of non-compliance outweigh the benefits. Finally, the extent to which the insurgents were enabled by regional actors once again demonstrated the impact of the regional struggle for power on internal developments in Syria.

#### 4.3 Regional Developments

This section examines significant regional developments during the Hafez era, including the Arab-Israeli peace process, Iraq's invasion of Kuwait and the struggle for Lebanon.

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<sup>233</sup> Seale, *Asad* (n58) 321; Hinnebusch, *Revolution from Above* (n58) 97.

<sup>234</sup> Andrew Moravcsik, 'Taking Preferences Seriously: A Liberal Theory of International Politics' (1997) 51 *Int'l Org* 513, 517–518 and 530–533

### 4.3.i Arab-Israeli Peace Process

Hafez supported a comprehensive settlement to the Arab-Israeli conflict and opposed bilateral peace deals. He opined that the Arabs should only negotiate with Israel as a unit and from a position of strength. He downsized Syria's ambitions to the return of the Golan Heights and the creation of a Palestinian state in Gaza and the West Bank.<sup>235</sup> In pursuit of this goal, he upgraded Syria's relationship with the USSR and ended Syria's isolation within the Arab world.<sup>236</sup>

Syria and Egypt launched a surprise attack against Israel in October 1973. The Arab states demonstrated considerable solidarity during the subsequent war.<sup>237</sup> Saudi Arabia even unleashed the 'oil weapon' in an effort to force the US into pursuing a more balanced approach to the Arab-Israeli peace process.<sup>238</sup> Ultimately, however, the enterprise was doomed from the outset as Egypt and Syria were at cross-purposes. Hafez's war objective was the recovery of lost Arab territory in order to strengthen the Arabs' negotiating position in comprehensive peace talks.<sup>239</sup> However, the Egyptian President, Anwar Sadat's, goal was merely to unblock US-mediated negotiations that he had been secretly conducting with Israel over the Sinai.<sup>240</sup> Sadat's duplicity and US support for Israel were crucial in turning the war tide in Israel's favour.<sup>241</sup>

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<sup>235</sup> Hinnebusch, 'Syrian Foreign Policy' (n108) 9.

<sup>236</sup> Seale, *Asad* (n58) ch13.

<sup>237</sup> Walt (n189) ch4, lcn3195–3261; Hinnebusch, 'The Middle East Regional System' (n102) 44–46.

<sup>238</sup> Accordingly, the Organization of Petroleum Exporting Countries (OPEC) banned oil shipments to the US and Saudi Arabia substantially reduced its production levels prompting an explosion in international oil prices. However, the impact of the oil weapon may have been overstated as the oil embargo was effectively over by Spring 1974. Furthermore, much of the surplus capital generated was recycled in the US. See Halliday (n52) 92 and 98; Sluglett (n111) 67–68; Michael C Hudson, 'The US in the Middle East' in Fawcett (ed) (n43) 360–361; Rosemary Hollis, 'Europe in the Middle East' in Fawcett (ed) (n43) 386.

<sup>239</sup> Seale, *Asad* (n58) 194–200.

<sup>240</sup> Halliday (n52) 58; Louise Fawcett, 'Alliances and Regionalism in the Middle East' in Fawcett (ed) (n43) 208.

<sup>241</sup> Seale, *Asad* (n58) 196–201 and 207–208; Batatu (n58) 201–202; Raymond Hinnebusch and Nael Shama, 'The Foreign Policy of Egypt' in Hinnebusch and Ehteshami (eds) (n99) 87–88.



After the war, the US mediated disengagement of forces agreements between Israel and Egypt and Israel and Syria.<sup>242</sup> Under the latter, Israel undertook to withdraw from part of the occupied Golan and it was agreed to establish a UN buffer zone between the Syrian and Israeli zones.<sup>243</sup> A further agreement was concluded between Israel, Egypt and the US in September 1975 under which the US promised not to negotiate with the PLO as long as the PLO refused to recognise Israel's right to exist and to accept UNSC Resolutions 242 and 338.<sup>244</sup> However, these resolutions were problematic for the PLO as they did not explicitly recognise the Palestinians' right to self-determination. America's refusal to negotiate with the PLO was controversial as by this point the PLO had been recognised by the Arab League as the sole representative of the Palestinian people and had been granted observer status at the UNGA.<sup>245</sup> Furthermore, the UNGA had recognised the Palestinians' rights to self-determination, to return to their homes and to participate in peace negotiations.<sup>246</sup>

In 1977, a right-wing Likud government led by Menachem Begin ascended to power in Israel. Begin had no interest in negotiating any peace agreement with the Palestinians or Syrians that would require a return of part of 'Eretz Israel'.<sup>247</sup> Instead, he pursued a bilateral peace deal with Egypt as it would deprive the Arabs of their strongest military power.<sup>248</sup> Sadat was also eager to negotiate a bilateral deal as it would enable Egypt to access much needed American aid.<sup>249</sup> Egypt, Israel and the US concluded the Camp David

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<sup>242</sup> Hinnebusch, 'The Foreign Policy of Syria' (n99).

<sup>243</sup> UNSC, 'Annex to Report of the Secretary General' (30 May 1974) UN Doc S/11302/Add.1 'Agreement on Disengagement between Israeli and Syrian Forces'. See also UNSC Res 350 (31 May 1974) UN Doc S/RES/350.

<sup>244</sup> Seale, *Asad* (n58) 255–261. UNSC Res 338 called for peace negotiations based upon UNSC Res 242. See UNSC Res 338 (22 October 1973) UN Doc S/RES/338.

<sup>245</sup> UNGA Res 3237 (XXIX) 'Observer status for the Palestine Liberation Organization' (22 November 1974) UN Doc A/RES/3237 (XXIX). In 1998, the UNGA upgraded this status to allow Palestine to participate in the sessions and work of the UNGA and UN conferences. UNGA Res 55/250 'Participation of Palestine in the work of the UN' (13 July 1998) UN Doc A/RES/52/250, para 1.

<sup>246</sup> UNGA Res 3236 (XXIX) 'Question of Palestine' (22 November 1974) UN Doc A/RES/3236 (XXIX).

<sup>247</sup> Seale, *Asad* (n58) 298–302.

<sup>248</sup> Charles Smith, 'The Arab Israeli Conflict' in Fawcett (ed) (n43) 270.

<sup>249</sup> Hinnebusch and Shama (n241) 88–90.

Accords in September 1978.<sup>250</sup> A final Israeli-Egyptian peace agreement was concluded in March 1979 under which Israel undertook to withdraw from the Sinai and in return Egypt undertook to restore full diplomatic and economic relations with Israel and grant Israel unhindered access to the Suez Canal.<sup>251</sup> Afterwards, Egypt's membership of the Arab League and OIC were suspended. By decommissioning Egypt, the peace agreement increased the Arabs' vulnerability to Israel and undermined their position in the peace process. Hafez sought to balance against the increased threat posed by Israel by upgrading Syria's alliance with the USSR and forming a short-lived strategic alliance with Iraq.<sup>252</sup> He also devised the principle of 'strategic parity',<sup>253</sup> which aimed at ensuring that Syria would be able to face Israel alone if necessary and negotiate from a position of strength.<sup>254</sup>

The US and Israel concluded a Memorandum of Understanding on strategic cooperation in November 1981.<sup>255</sup> Israel's strengthened position motivated it to increase settlement construction in the West Bank and officially annex the Golan Heights.<sup>256</sup> The UNSC unanimously denounced the annexation<sup>257</sup> and repeatedly determined that the settlements were contrary to international law and a serious obstruction to a fair and durable peace.<sup>258</sup> The Israeli-US alliance was reinforced under the Reagan administration as Reagan sought to isolate Syria by pursuing bilateral peace deals with Lebanon and Jordan. Reagan advocated Palestinian self-

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<sup>250</sup> For an overview of the Accords, see Smith (n248) 271–272.

<sup>251</sup> Walt (n189) ch4, lcn3432–3451; Halliday (n52) 119; Cavanaugh and Castellino (n2) 23.

<sup>252</sup> Raymond Hinnebusch and Neil Quilliam, 'Contrary Siblings: Syria, Jordan and the Iraq War' (2006) 19 *Cambridge Review of International Affairs* 513, 517. The alliance promptly collapsed due to residual suspicions and disagreements over the distribution of water from the Euphrates. See Seale, *Asad* (n58) 312–313 and 354–357.

<sup>253</sup> Also referred to as 'comprehensive strategic balance'. See Seale, *Asad* (n58) 346–349 and 399; Batatu (n58) 285–286.

<sup>254</sup> Seale, *Asad* (n58) 347–348; Hinnebusch, 'Syrian Foreign Policy' (n108) 9.

<sup>255</sup> The memorandum was suspended as a result of Israel's annexation of the Golan Heights. However, it was resuscitated informally in 1982 and formally in 1983. Seale, *Asad* (n58) 372–373.

<sup>256</sup> *ibid* 372–373.

<sup>257</sup> UNSC Res 497 (17 December 1981) UN Doc S/RES/497.

<sup>258</sup> See eg UNSC Res 446 (22 March 1979) UN Doc S/RES/446; UNSC Res 452 (20 July 1979) UN Doc S/RES/452; UNSC Res 465 (1 March 1980) UN Doc S/RES/465; UNSC Res 476 (30 June 1980) UN Doc S/RES/476; UNSC Res 478 (20 August 1980) UN Doc S/RES/478. The US abstained from resolutions 446, 452, 465 and 476, but resolution 478 was adopted unanimously.

determination within a Jordanian-Palestinian confederation.<sup>259</sup> However, the Assad regime thwarted this ‘Jordanian option’ by launching a propaganda campaign against King Hussein and sponsoring terrorist attacks against Jordanian officials and airlines.<sup>260</sup>

The first *intifada* erupted in the West Bank and Gaza in December 1987 and refocused international attention on the Palestinians’ plight. After the PLO renounced terrorism and accepted the terms of UNSC Resolution 242, the US agreed to liaise with it and King Hussein relinquished Jordan’s claim to the West Bank.<sup>261</sup> In December 1988, the UNGA called for an international peace conference involving all parties to the Arab-Israeli conflict with a view to achieving a comprehensive settlement based upon UNSC Resolutions 242 and 338.<sup>262</sup> The US subsequently agreed to pursue a comprehensive settlement if the Arab states supported its military intervention to expel Iraq from Kuwait. Significantly, Saddam Hussein was threatening to use his control of Kuwaiti oil fields to force the US into adopting a more balanced approach to the peace process.<sup>263</sup>

US-mediated Arab-Israeli peace negotiations commenced in Madrid in October 1991. Little progress was achieved until a moderate Labour government led by Yitzhak Rabin acceded to power in Israel. It engaged in secret, Norwegian-mediated negotiations with the PLO leader, Yasser Arafat, resulting in the 1993 Oslo Accord. The Accord included mutual letters of recognition and a Declaration of Principles on Interim Palestinian Self Government.<sup>264</sup> However, core issues were postponed, including the future borders of the Palestinian state, and crucially Israel retained control of

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<sup>259</sup> Seale, *Asad* (n58) 402; Batatu (n58) 308–309; Leverett (n44) 7.

<sup>260</sup> Seale, *Asad* (n58) 461–466 and 490–491; Goodarzi, *Syria and Iran* (n102) 136, 141–143, 166 and 168.

<sup>261</sup> Smith (n248) 274.

<sup>262</sup> UNGA Res 43/176 ‘The Question of Palestine’ (15 December 1988) UN Doc A/RES/43/176. The UNSC subsequently supported the convening of an international peace conference in 1990. UNSC, ‘Note by the President of the Security Council’ (31 December 1990) UN Doc S/22027.

<sup>263</sup> Raymond Hinnebusch, ‘The US Invasion of Iraq: Explanations and Implications’ (2007) 16 *Critique: Critical Middle Eastern Studies* 209, 217.

<sup>264</sup> Batatu (n58) 316–317.

security.<sup>265</sup> The Oslo process ultimately collapsed in 2000 following failed US-mediated peace negotiations at Camp David and the outbreak of a second *intifada* in the West Bank.<sup>266</sup>

The Oslo Accord relieved Arab states of the ideological obligation to forego bilateral peace agreements pending a satisfactory resolution of the Palestinian question.<sup>267</sup> Consequently, Jordan, having no land to recover, promptly concluded a peace agreement in 1994. The Jordanian monarchy needed to appease the US, having refused to support its intervention against Iraq.

A bilateral peace deal posed risks and opportunities for the Assad regime. On the one hand, it would help the regime to access Western aid and investment, which the regime needed to satisfy domestic patronage networks. On the other hand, it would remove the traditional justification for the regime's extensive repressive apparatus. Furthermore, Western states would most likely render any aid conditional upon the introduction of economic liberalisation measures, which could alienate domestic constituencies. Bilateral negotiations took place between 1994 and 1996. Hafez sought to strengthen Syria's negotiating position by continuing to exert indirect pressure on Israel through Hezbollah.<sup>268</sup> He rejected Oslo-style partial agreements and requested a full Israeli withdrawal from the Golan Heights to the 4 June 1967 armistice lines.<sup>269</sup> Rabin allegedly promised a full withdrawal if Israeli security demands were met and Israeli-Syrian relations were normalised within an established timetable, the so-called 'Rabin deposit'.<sup>270</sup> According to Hinnebusch, Hafez made numerous concessions in response to

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<sup>265</sup> *ibid* 316 and 319–320; Avi Shlaim, 'The Rise and Fall of the Oslo Peace Process' in Fawcett (ed) (n43) 292–294.

<sup>266</sup> For a discussion, see Halliday (n52) 121–122, 135, 151 and 186; Shlaim (n265) 298–299; Smith (n248) 275–277.

<sup>267</sup> Hinnebusch, 'The Foreign Policy of Syria' (n99) 225.

<sup>268</sup> Hinnebusch, 'Change held in abeyance' (n215) 179; Batatu (n58) 317; Leverett (n44) 12; Hinnebusch, 'Syrian Foreign Policy' (n108) 9–10;

<sup>269</sup> Israel would have preferred a withdrawal to the 1923 border. See Shlaim (n265) 295.

<sup>270</sup> *ibid* 295; Leverett (n44) 47.

Rabin's offer, but Israeli negotiators kept adding additional conditions.<sup>271</sup> The negotiations were suspended by Israel<sup>272</sup> but subsequently re-initiated under Ehud Barak's Labour government. However, Barak did not recognise the Rabin deposit and the Syrian track collapsed in March 2000.<sup>273</sup>

#### 4.3.i.a The US and the Arab-Israeli Peace Process

The superpowers enabled Arab-Israeli wars by providing support to both sides. However, they were reluctant to become directly involved for fear of triggering a superpower confrontation.<sup>274</sup> They did not control their respective regional allies as evident from the inability of successive US administrations to convince Israel to halt the construction of illegal settlements and the inability of the USSR to persuade its Arab allies, apart from South Yemen, to convert to communism.<sup>275</sup> Nevertheless, the US demonstrated the capacity to influence regional developments. For example, the promise of US economic aid helped secure bilateral peace deals.<sup>276</sup>

The US worked to exclude the USSR from Arab-Israeli peace negotiations thereby undermining the likelihood of a settlement through international cooperation.<sup>277</sup> It prioritised its own interests – including preserving its alliance with Israel, preventing Communist infiltration and maintaining control of international oil markets – over the achievement of a fair and sustainable settlement. It sought to justify its alliance with Israel by alluding to Israel's liberal political order.<sup>278</sup> However, Israel's violations of the civil and political rights of Arabs living in Israel and the Occupied Territories undermined this argument. Other explanations for the alliance included trade links and the shared interest in limiting Iranian influence and fighting terrorism. However, America's bias toward Israel fuelled the

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<sup>271</sup> Hinnebusch, 'The Foreign Policy of Syria' (n99) 226–227. See also Batatu (n99) 308–309 and 317–318; Wieland (n93) ch12, lcn6813–6822.

<sup>272</sup> Hinnebusch, 'Change held in abeyance' (n215) 180.

<sup>273</sup> Leverett (n44) 47–48; Ziadeh (n58) 42.

<sup>274</sup> Halliday (n52) 125–126 and 177.

<sup>275</sup> *ibid* 126–127 and 176; Walt (n189) ch7.

<sup>276</sup> Hinnebusch and Shama (n241) 78.

<sup>277</sup> Smith (n248) 262.

<sup>278</sup> Paul D Miller, 'Evangelicals, Israel and US Foreign Policy' (2014) 56 *Survival* 7, 19.

terrorism which the alliance was meant to fight.<sup>279</sup> Another, perhaps more convincing, explanation was the influence exerted by the pro-Israeli lobby on US foreign policy.<sup>280</sup>

It has been suggested that the Nixon Administration helped trigger the October 1973 war by stalling bilateral peace negotiations between Egypt and Israel.<sup>281</sup> Furthermore, Seale inferred that the then Secretary of State, Henry Kissinger, deliberately impeded comprehensive peace negotiations after the war, instead seeking to cajole Syria, Egypt and Jordan into negotiating bilateral peace deals contrary to the spirit of UNSC Resolutions 242 and 338.<sup>282</sup> During the Ford Administration, the US reportedly undertook not to initiate any peace initiative without first consulting Israel.<sup>283</sup> The Carter administration attempted to pursue a more balanced approach.<sup>284</sup> However, its efforts were undermined by the Palestinians' refusal to agree to UNSC Resolution 242 and opposition from Israel and the domestic pro-Israeli lobby.<sup>285</sup>

The overthrow of the Shah and the Soviet intervention in Afghanistan enhanced the importance of the US-Israeli alliance for the US.<sup>286</sup> The Reagan administration was determined not to concede any ground to the Soviets' regional allies. It has been suggested that it even gave Israel tacit advance approval for its 1982 intervention in Lebanon in the hope that it would undermine Syria and the PLO.<sup>287</sup> By concentrating on counter-terrorism, the Reagan administration sought to address the symptoms rather than the causes

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<sup>279</sup> Hinnebusch, 'The US Invasion of Iraq' (n263) 218–221.

<sup>280</sup> The pro-Israeli lobby includes Jewish political groups and fundamentalist Christians who support Israel's retention of the West Bank. See Walt (n189) ch7, lcn6356–6513; Miller (n278) 8–10; Smith (n248) 263.

<sup>281</sup> Seale inferred that Kissinger deliberately stalled the talks, whereas Smith and Walt suggested that US officials were distracted by Nixon's re-election campaign. See Seale, *Asad* (n58) 195; Walt (n189) ch4, lcn3175–3186; Smith (n248) 267.

<sup>282</sup> Seale, *Asad* (n58) 264–266 and generally ch15 and 16. See also Walt (n189) ch4, lcn3271–3333 and lcn3380–3515.

<sup>283</sup> Walt (n189) ch4, lcn3300–3305; Seale, *Asad* (n58) 259–260.

<sup>284</sup> Seale, *Asad* (n58) 290–293.

<sup>285</sup> See generally *ibid* ch18.

<sup>286</sup> Goodarzi, *Syria and Iran* (n102) 62.

<sup>287</sup> Seale, *Asad* (n58) 376; Halliday (n52) 117; Goodarzi, *Syria and Iran* (n102) 62; Hudson (n238) 362.

of regional instability.<sup>288</sup> The Iran-Contra affair revealed the hypocrisy of its counter-terrorism policy.<sup>289</sup> The Reagan administration's policies arguably contributed to the first *intifada*.<sup>290</sup> The G.H.W. Bush administration pursued a comprehensive peace agreement perhaps influenced by the risk that regional instability posed to America's ability to control international oil prices.<sup>291</sup> Nevertheless, Avi Shlaim suggested that the failure of both the G.H.W. Bush and Clinton administrations to exert pressure on Israel to comply with its obligations under the Oslo Accord contributed to the collapse of the Israeli-Palestinian peace process.<sup>292</sup>

#### 4.3.i.b Theoretical Analysis of the Peace Process

The above analysis supports the constructivist argument that international law provides a language of diplomacy and conditions states to articulate their interests in terms that are compatible with international law.<sup>293</sup> International law, in the form of UNSC Resolutions 242 and 338, set the parameters for the Arab-Israeli peace process. Regional states and actors, including Syria, Israel and the PLO, used international law to justify their actions and further their political objectives. From 1970 to 2000, Syria issued hundreds of communications to the UN in which it condemned alleged Israeli violations of international law, conveyed its interpretation of crucial UN resolutions and reiterated its opposition to bilateral peace deals.<sup>294</sup>

Nonetheless, the analysis does not support the constructivist suggestion that participation in the international legal regime necessarily

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<sup>288</sup> Seale, *Asad* (n58) 419.

<sup>289</sup> In November 1986, it was revealed that Israel had been covertly supplying Iran with weapons, mainly of US origin, during the Iran-Iraq war with the Reagan Administration's acquiescence. The trade contravened US law as Iran had been classified a state sponsor of terrorism in 1983. See *ibid* 489–491.

<sup>290</sup> Hudson (n238) 362–363.

<sup>291</sup> Halliday (n52) 134.

<sup>292</sup> Shlaim (n265) 300.

<sup>293</sup> Anthony Clark Arend, 'Do Legal Rules Matter' (1999) 38 *VaJInt'l L* 107, 144; Martti Koskeniemi, *The Politics of International Law* (Hart Publishing 2009) 245.

<sup>294</sup> See eg UNGA/UNSC, 'Letter dated 26 March 1979 from the Permanent Representative of the Syrian Arab Republic to the United Nations Addressed to the Secretary-General' (26 March 1979) UN Doc A/34/133. Israel also issued hundreds of communications to the UN during this period. See <<https://library.un.org/content/united-nations-depository-library-programme>> accessed 29 May 2017.

socialises states to comply with international law or the assumption inherent in liberal internationalism that international law can restrain the arbitrary use of power. America's sponsorship of a military coalition to guarantee Kuwaiti sovereignty merely highlighted its failure to redress Israel's illegal occupation of Arab territory. It reinforced realism's argument that the enforcement of international law is dependent upon the connivance of powerful states.<sup>295</sup> Neoliberal institutionalism suggests that compliance with regimes will only be achieved if the costs of non-compliance outweigh the benefits. For Israel, the costs of non-compliance with international law were reduced by its alliance with America.

Hafez clearly lacked confidence in the ability of international law to reach a fair settlement to the Arab-Israeli conflict as evident from his refusal to negotiate from a position of weakness and his balancing tactics.<sup>296</sup> States regularly used power to achieve their objectives and have their preferences reflected in post-conflict legal agreements as realists would anticipate. Israel used its military occupation of the Sinai to undermine Egypt's negotiating position after the October 1973 war, whereas the US used its economic power to secure the final bilateral peace deal. America's prioritisation of its own interests over the imperative of achieving a fair and sustainable settlement accords with realist expectations. Its alliance with Israel demonstrated the impact of domestic factors, in this case domestic lobby groups, on foreign policy formation and international behaviour. In this regard, the analysis again revealed the inherent limitations of neorealism, which fails to take account of the impact of domestic level factors on the behaviour of states at the international level.

The analysis reinforced the constructivist argument that identities and ideological roles can restrain foreign policy options. Arab nationalism

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<sup>295</sup> Edward H Carr, *The Twenty Years' Crisis 1919–1939: An Introduction to the Study of International Relations* (2nd edn, Macmillan and Co Ltd 1946) 176; Hans Morgenthau, *Politics among Nations: The Struggle for Power and Peace* (6th edn, McGraw Hill 1985) 312.

<sup>296</sup> Several commentators concluded that Hafez was an adherent of realism. See Hanna Batatu (n58) 320; Leverett (n44) 38; Hinnebusch, 'The Foreign Policy of Syria' (n99) 216.



effectively prevented the Arab states, apart from Egypt, from negotiating bilateral peace deals with Israel until the Oslo Accord was agreed.<sup>297</sup> Furthermore, Egypt's subsequent estrangement from the Arab world proved that failure to adhere to ideological roles can have costs.

Finally, the analysis suggested that the absence of justice can jeopardise order. The absence of justice for the Palestinians jeopardised regional order as evident in successive Arab-Israeli conflicts. It also jeopardised international order as one can trace the roots of some of the international acts of terrorism committed during the period to the denial of the Palestinians' right to self-determination.

#### **4.3.ii The Arab States and Operation Desert Storm**

After Iraq invaded Kuwait in 1990, the US led a UNSC-authorized military intervention to remove the Iraqi aggressors.<sup>298</sup> In the Arab world, Syria, Egypt and Saudi Arabia supported the intervention, whereas Jordan and the PLO opposed it. By supporting the intervention, the Assad regime risked undermining its Arab nationalist credentials and indirectly benefitting Israel by enhancing America's regional influence.<sup>299</sup> On the other hand, the regime's support for the intervention enabled it to weaken a core rival (Iraq), escape regional isolation after the Iran-Iraq war, secure Arab aid, maintain US acquiescence to Syria's presence in Lebanon<sup>300</sup> and gain concessions in US-mediated Arab-Israeli peace talks.<sup>301</sup> It also enabled a rapprochement between Syria and the US, which was essential in the post-Cold War era.<sup>302</sup> Egypt supported the intervention as by doing so it was able to undermine a rival, access economic aid and restore diplomatic relations with Saudi

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<sup>297</sup> Hinnebusch, 'The Foreign Policy of Syria' (n99) 225.

<sup>298</sup> UNSC Res 678 (29 November 1990) UN Doc S/RES/678 (S/RES/678).

<sup>299</sup> Gause III, 'Balancing What?' (n130) 287.

<sup>300</sup> The US supported the Ta'if Accord and helped secure international recognition of the Syrian sponsored Elias el-Hrawi led government. See HRW World Report 1992.

<sup>301</sup> Leverett (n44) 55–56; Goodarzi, *Syria and Iran* (n102) 289; Ziadeh (n58) 103; Hinnebusch, 'The Foreign Policy of Syria' (n99) 225. See also HRW World Report 1992.

<sup>302</sup> Leverett (n44) 55; Ziadeh (n58) 102–103; Hinnebusch, 'The Foreign Policy of Syria' (n99) 225.

Arabia.<sup>303</sup> As the vast majority of Jordanians were vehemently against the intervention, King Hussein decided not to sacrifice his domestic legitimacy and jeopardise his monarchy's survival by supporting the coalition.<sup>304</sup> Supporting the intervention also posed a risk to the Saudi monarchy's domestic legitimacy. However, the monarchy calculated that this risk was outweighed by the combined conventional and ideological threat posed by Saddam Hussein's regime.<sup>305</sup> Ultimately, the survival of the Iraqi Ba'athist regime enhanced the Gulf states' dependency on the US for military protection.<sup>306</sup>

#### 4.3.iii The Struggle for Lebanon

A non-international armed conflict erupted in Lebanon in 1975 between right-wing Christian Maronite militias and the Kata'ib (Phalanges) Party on the one side and the Palestinian resistance and a left-wing coalition of Arab nationalists and Muslims on the other.<sup>307</sup> Its causes included differences of opinion over Lebanon's national identity, political system and treatment of Palestinian refugees. Most Christian Maronites advocated a Lebanese identity and opposed the Palestinian refugees' presence in Lebanon as the activities of Palestinian insurgents rendered Lebanon vulnerable to Israeli reprisals.<sup>308</sup> However, most Muslims advocated an Arab nationalist identity and were sympathetic to the Palestinians' plight.<sup>309</sup> Furthermore, many Muslims, especially Druze and Shias, felt disenfranchised by Lebanon's confessional political system, a relic of the mandate era that effectively enabled Christian Maronites to dominate Lebanon's governing structure.<sup>310</sup>

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<sup>303</sup> Hinnebusch, 'The Middle East Regional System' (n102) 57; Hinnebusch and Shama (n241) 93–94.

<sup>304</sup> Gause III, 'Balancing What?' (n130) 293. Hussein may also have felt that the intervention would undermine the Arabs' position in the Arab-Israeli peace process. See Curtis R Ryan, 'The Foreign Policy of Jordan' in Hinnebusch and Ehteshami (eds) (n99) 142–143.

<sup>305</sup> Hussein's regime had incited Saudi Islamists and Arab nationalists to rebel against the 'reactionary Saudi regime'. See Gause III, 'The Foreign Policy of Saudi Arabia' (n129) 190; Legrenzi and Gause III (n106) 313.

<sup>306</sup> Hinnebusch, 'The Middle East Regional System' (n102) 59.

<sup>307</sup> Seale, *Asad* (n58) 271.

<sup>308</sup> *ibid* 270–271; Adham Saouli, 'The Foreign Policies of Iraq and Lebanon' in Hinnebusch and Ehteshami (eds) (n99) 109–110.

<sup>309</sup> Seale, *Asad* (n58) 270–271; Saouli (n308) 109–110. The situation was complicated by tensions between Sunnis and Shias, and the impoverished status of Shias as compared with Sunnis and Christians. See Cavanaugh and Castellino (n2) 343–345.

<sup>310</sup> Seale, *Asad* (n58) 271–272; Cavanaugh and Castellino (n2) 335–336.

Syria played a decisive role in Lebanon's armed conflict. When the Palestinians and Arab nationalists gained the upper hand, Syria intervened militarily supposedly at the invitation of the then President, Suleiman Franjeh.<sup>311</sup> Syria's intervention shifted the momentum in the Maronites' favour and enabled them to go on the offensive culminating in the massacre of approximately 3,000 Palestinian and Shia civilians at the Tal-az-Zatar refugee camp.<sup>312</sup> Many theories have been advanced to explain Hafez's decision to intervene, which was massively unpopular in Syria and the Arab world.<sup>313</sup> Hafez himself maintained that he intervened to save the Palestinian resistance.<sup>314</sup> One argument suggests that he intervened to maintain Arab unity by preventing Lebanon and the Maronite Christians from falling within Israel's sphere of influence.<sup>315</sup> Another argument asserts that he intervened to regain control over both Lebanon and the Palestinians.<sup>316</sup> Indeed, with Egypt negotiating a separate peace agreement, securing control of the Levant became a strategic imperative.<sup>317</sup> Yet another argument posits that Hafez was manipulated into intervening by the US who intimated that a Syrian intervention was necessary to prevent an imminent Israeli intervention in favour of the Maronites. This argument maintains that the US and Israel gave advance approval of a Syrian intervention as far as Sidon-Jazzin – the so-called red line agreement.<sup>318</sup> The intervention undermined the Assad regime's Arab nationalist credentials, domestic legitimacy and relations with both the Arab world and the USSR.<sup>319</sup> Nevertheless, it ultimately enabled Syria to enhance its influence in Lebanon. At Saudi-mediated peace negotiations in

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<sup>311</sup> For a discussion, see 'Report of the International Independent Investigation Commission established pursuant to Security Council Resolution 1595 (2005)' (19 October 2005) para 24; Fred H Lawson, 'Syria's intervention in the Lebanese civil war, 1976: a domestic conflict explanation' (1984) 38 *Int'l Org* 451, 451; Seale, *Asad* (n58) 281–288; Batatu (n58) 292–300.

<sup>312</sup> Seale, *Asad* (n58) 284; Batatu (n58) 300.

<sup>313</sup> Hafez would have had the final word on a decision of this magnitude, which divided the Ba'ath Party and Syrian armed forces. Van Dam, *The Struggle for Power* (n61) 72.

<sup>314</sup> Batatu (n58) 295–296.

<sup>315</sup> Seale, *Asad* (n58) 275 and 279; Batatu (n58) 295–296; Ziadeh (n58) 101.

<sup>316</sup> Seale, *Asad* (n58) 278–280; Batatu (n58) 293 and 299–300; Hinnebusch, 'The Foreign Policy of Syria' (n99) 223–224.

<sup>317</sup> Seale, *Asad* (n58) 267–268 and 275–276; Hinnebusch, 'The Foreign Policy of Syria' (n99) 223.

<sup>318</sup> Batatu observed that the limited nature of Hafez's initial incursion supports this argument. Batatu (n58) 297–300. See also Seale, *Asad* (n58) 278–280; Ziadeh (n58) 100–101.

<sup>319</sup> Allison (n109) 801–802.

October 1976, Syria's military presence in Lebanon was legitimised as part of an Arab Deterrent Force.<sup>320</sup>

Under Begin's Likud government, Israeli assaults against Palestinian strongholds in southern Lebanon increased despite Syria and the PLO's undertakings not to conduct raids into Israel under the 1977 Shtaura Agreement.<sup>321</sup> Israel invaded Lebanon in 1978 in response to a Palestinian attack on an Israeli bus.<sup>322</sup> The disproportionate nature of the Israeli response, which resulted in approximately 2,000 fatalities and widespread displacement, exceeded the boundaries of legitimate self-defence<sup>323</sup> and prompted the UNSC to demand a full Israeli withdrawal.<sup>324</sup>

Israel invaded Lebanon again in June 1982 in response to the attempted assassination of the Israeli Ambassador to the UK. According to Seale, the assault was planned in advance by the Israeli Defence Minister, Ariel Sharon, as part of a strategy to destroy the PLO, maintain Israeli control of the West Bank, eradicate Syrian influence in Lebanon and ensure the ascension of Bachir Gemayel, the leader of the Phalanges Party, to the Lebanese presidency.<sup>325</sup> The UNSC unanimously called for an immediate Israeli withdrawal; however, instead Israel proceeded to occupy much of southern Lebanon and advanced toward Beirut.<sup>326</sup> On 23 August, Bachir Gemayel was elected president of Lebanon. However, he was subsequently assassinated, allegedly with Syrian complicity.<sup>327</sup> In response, the Phalanges militia massacred Palestinian civilians at the Sabra and Shatila refugee camps, apparently with Israeli acquiescence. The attacks provoked outrage, including amongst the Israeli public.<sup>328</sup> Consequently, the IDF was forced to exit

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<sup>320</sup> Seale, *Asad* (n58) 287–288; Ziadeh (n58) 102.

<sup>321</sup> Batatu (n58) 300–301.

<sup>322</sup> Seale, *Asad* (n58) 311–312.

<sup>323</sup> *ibid* 312; Smith (n248) 273.

<sup>324</sup> UNSC Res 425 (19 March 1978) UN Doc S/RES/425; Cavanaugh and Castellino (n2) 23.

<sup>325</sup> Seale, *Asad* (n58) 373–374. Likud apparently believed that Gemayel would sign a bilateral peace treaty with Israel. Goodarzi, *Syria and Iran* (n102) 72.

<sup>326</sup> UNSC Res 509 (6 June 1982) UN Doc S/RES/509. See Seale, *Asad* (n58) 386–389; Batatu (n58) 302–303; Goodarzi, *Syria and Iran* (n102) 73.

<sup>327</sup> Seale, *Asad* (n58) 391.

<sup>328</sup> *ibid* 392–393. See also UNSC Res 521 and UNSC Res 520 which unanimously condemned the massacre and 'recent Israeli incursions into Beirut' respectively: UNSC Res

Beirut, although it continued to occupy part of southern Lebanon. The Israeli intervention and occupation contributed to the formation of Hezbollah.<sup>329</sup>

An Israeli-Lebanese Accord was signed in 1983 following US-mediated bilateral peace talks.<sup>330</sup> It provided for the re-establishment of diplomatic relations between Israel and Lebanon pending the withdrawal of Israeli troops and dramatically increased Israel's influence in Lebanon.<sup>331</sup> Hafez devised a 'sword and shield' strategy to defeat the Accord.<sup>332</sup> The defensive element involved the upgrading of Syria's military deterrent capacity through enhanced Soviet support.<sup>333</sup> The offensive element entailed the use of asymmetrical warfare against Israel and its allies in Lebanon through the Shiite militias, Amal and Hezbollah.<sup>334</sup> Syria's strategy paid off. The Lebanese President, Amin Gemayel, rescinded the Accord in 1984 and the IDF was forced to withdraw to a security zone near the Israeli border.<sup>335</sup> After the Israeli withdrawal, local Lebanese actors continued to battle for influence.<sup>336</sup>

The 1989 Ta'if Agreement sought to end Lebanon's civil war; however, it failed to extinguish ethno-sectarian tensions.<sup>337</sup> It maintained a modified version of the post-independence confessional system, which sought to redress the disproportionate power originally afforded to Maronite Christians.<sup>338</sup> It legitimised Syria's continuing military presence in Lebanon as did the subsequent 1991 Syrian-Lebanese Treaty of Brotherhood, Cooperation and Coordination, and the 1991 Defence and Security

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521 (19 September 1982) UN Doc S/RES/521; UNSC Res 520 (17 September 1982) UN Doc S/RES/520, para 2.

<sup>329</sup> Smith (n248) 273.

<sup>330</sup> Seale, *Asad* (n58) 405–409.

<sup>331</sup> *ibid* 409–410.

<sup>332</sup> Goodarzi, *Syria and Iran* (n102) 75–76 and 89–90.

<sup>333</sup> *ibid* 75.

<sup>334</sup> *ibid* 75–77 and 87–107

<sup>335</sup> *ibid* 106 and 144–145.

<sup>336</sup> *ibid* 144–145.

<sup>337</sup> The Document of National Understanding (26 May 1989) as the Ta'if Agreement is officially known is reproduced in J Maila, *Prospects for Lebanon – The Document of National Understanding: A Commentary* (Centre for Lebanese Studies 1992).

<sup>338</sup> HRW World Report 1992; Cavanaugh and Castellino (n2) 350–352.

Agreement.<sup>339</sup> In 1996, in response to a Hezbollah attack, Israel initiated Operation Grapes of Wrath in southern Lebanon.<sup>340</sup> Significantly, a US-mediated ceasefire agreement between Israel and Syria after the intervention acknowledged the right of the Lebanese people to resist the Israeli occupation under international law.<sup>341</sup>

#### **4.3.iii.a Theoretical Analysis of the Struggle for Lebanon**

The causes of Lebanon's civil war, including disagreement over Lebanon's identity, confessional political system and the Palestinian presence, derive in part from the region's history of imperialism. The atrocities committed during the war served to reinforce sectarian identities. The analysis reinforced realism's argument that states instrumentalise ideology and international law to justify actions undertaken for self-interested reasons.<sup>342</sup> The Assad regime's intervention in Lebanon on the side of the Christian Maronites contravened its Arab nationalist ideology. Furthermore, Seale suggested that Israel exploited the attempted assassination of the Israeli Ambassador to the UK as a convenient *casus belli* for its 1982 intervention in Lebanon, which had in fact been planned in advance.<sup>343</sup> Both Israel and Syria sought to use military power to secure control of Lebanon and have their preferences reflected in post-conflict agreements. Syria was ultimately more successful as apparent from the collapse of the 1983 Israeli-Lebanese Accord and America's acquiescence to the 1989 Ta'if Agreement.

#### **4.4 Conclusion**

Syria's abysmal human rights record during the Hafez era supports Hathaway's suggestion that authoritarian regimes ratify human rights treaties in order to obtain the rewards that accrue from ratification without actually

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<sup>339</sup> AI World Report 1992; HRW World Report 1992; Batatu (n58) 313.

<sup>340</sup> Ziadeh (n58) 106–108.

<sup>341</sup> *ibid* 108.

<sup>342</sup> Carr (n295) 78–80; Hans Morgenthau, *Politics among Nations: the Struggle for Power and Peace* (Alfred A Knopf Inc 1948) 49 and 61.

<sup>343</sup> Seale, *Asad* (n58) 376. The assassination was allegedly perpetrated by the Iraqi-backed Palestinian organisation, Abu Nidal. Goodarzi maintained that Iraqi intelligence planned the assassination in anticipation of Israel's response and in an effort to undermine the Syrian-Iranian axis. Goodarzi, *Syria and Iran* (n102) 61–62

intending to comply with their obligations thereunder.<sup>344</sup> The analysis reinforced the neoliberal suggestion that compliance with regimes, including international law, will only be achieved if the costs of non-compliance outweigh the benefits. Furthermore, Syria's internal insurgency supported the liberal contention that authoritarian regimes are more vulnerable to internal unrest than democracies.<sup>345</sup>

The analysis indicated that international law conditions states to articulate their interests in terms that are compatible therewith as constructivists have argued. However, it did not indicate that participation in the international legal regime necessarily socialises states to comply with international law. Instead, it reinforced many of realism's arguments. It revealed the limited extent to which international law restrained the arbitrary use of power in the Middle East during the Hafez era. States regularly used power to achieve their objectives and have their preferences reflected in post-conflict legal agreements. The Assad regime's brutal suppression of Syria's insurgency, in contravention of its human rights obligations, reinforced the realist argument that international law will be ignored when it conflicts with vital interests. It also reinforced omnibalancing theory's contention that authoritarian regimes prioritise regime security over the national interest. America's intervention against Iraq to restore Kuwaiti sovereignty underscored its failure to intervene against Israel to secure the Palestinians right to self-determination. It strengthened realism's argument that a powerful state can violate the rights of a weak state with impunity unless another powerful state determines that it is in its interest to help the weak state to defend itself.<sup>346</sup>

The response of Arab states to major events, including Iraq's interventions in Iran and Kuwait, often accorded with balance of threat theory. The strategic nature of the alliances examined also reinforced Walt's argument that states prioritise strategic concerns over ideological affinities

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<sup>344</sup> Hathaway, 'Do Human Rights Treaties Make a Difference?' (n53) 2009.

<sup>345</sup> Moravcsik (n234) 517–518 and 530–533.

<sup>346</sup> Carr (n295) 176; Morgenthau, *Politics* (6th edn) (n295) 312.

when forming alliances. The Arab states' numerous contraventions of their ostensible commitment to Arab nationalism support the realist contention that states merely instrumentalise ideology for strategic purposes. However, many examples also arose which indicated that, once constructed, ideological roles can exert an independent influence on foreign policy. Most notably, Arab nationalism prevented most Arab states from negotiating bilateral peace deals with Israel until the Palestinians had first negotiated their own peace deal. The chapter demonstrated that ideological threats can pose as much of a threat to regime security as conventional threats, particularly in post-colonial states ruled by authoritarian regimes.

The chapter demonstrated the extent to which political and economic considerations are interdependent and interconnected in the Middle East. It also identified the inter-related strengths and weaknesses of the Assad regime, which help explain both its resilience and its vulnerability. Finally, it suggested that the absence of justice, especially justice for the Palestinian people, can jeopardise order and sow the seeds for future conflict.



## Chapter Five: Bashar al-Assad's First Decade in Power

### 5.1 Introduction

Chapter five examines developments within Syria and the MENA region from Bashar's hereditary succession in 2000 up to the Arab Spring and the role played by international law therein. It also discusses how the actions of certain regional and international actors during this period increased the propensity for sectarianism and extremism in the region.

### 5.2 Domestic Developments

The domestic developments discussed include Syria's human rights record, authoritarian upgrading and the evolution of the Syrian opposition.

#### 5.2.i Syria's Human Rights Record

Bashar was elected president of Syria in July 2000. His initial months in power were marked by an easing of repression, a period known as the 'Damascus Spring'.<sup>1</sup> In his inaugural speech, Bashar implicitly criticised past policies and welcomed constructive criticism.<sup>2</sup> His speech motivated the publication of the Statement of 99 by 99 prominent Syrians in September 2000. It called, inter alia, for an end to the state of emergency, a general amnesty for political prisoners and the restoration of the rule of law.<sup>3</sup> Following its publication, informal political forums mushroomed in urban areas and restrictions on freedom of expression were relaxed.<sup>4</sup> Furthermore,

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<sup>1</sup> See eg HRW World Report 2001. At the same time, sporadic arrests of regime critics continued, hundreds of political prisoners remained arbitrarily detained, and released political prisoners and the families of exiles continued to suffer harassment. AI World Report 2001, 233–234.

<sup>2</sup> See discussion in HRW, *A Wasted Decade: Human Rights in Syria during Bashar al-Assad's First Ten Years in Power* (HRW 2010) 1; David W Lesch, 'The Arab spring – and winter – in Syria' (2011) 23 *Global Change, Peace and Security* 421, 421–422; Joe Pace and Joshua Landis, 'The Syrian Opposition: The struggle for unity and relevance, 2003–2008' in Fred H Lawson (ed), *Demystifying Syria* (Kindle edn, Saqi 2012) ch7, lcn2483-2484; Carsten Wieland, *Syria—A Decade of Lost Chances: Repression and Revolution from Damascus Spring to Arab Spring* (Kindle edn, Cune Press 2012) ch3, lcn1004–1009.

<sup>3</sup> HRW World Report 2001; Flynt Leverett, *Inheriting Syria: Bashar's Trial by Fire* (The Brookings Institution 2005) 91–92; Ignacio Alvarez-Ossorio, 'Syria's Struggling Civil Society' (2012) 19 *Middle EQ* 23, 23–24; Radwan Ziadeh, *Power and Policy in Syria* (revised edn, IB Tauris 2013) 63–64.

<sup>4</sup> Leverett (n3) 89; Ziadeh (n3) 64; Wieland (n2) ch6, lcn2665–2673.

hundreds of political prisoners were released and Bashar authorised the closure of the notoriously brutal Mezzeh and Tadmur prisons.<sup>5</sup> These developments emboldened the opposition culminating in the publication of the Statement of 1,000 in January 2001. It went further than its predecessor by calling for comprehensive political reforms and criticising aspects of Hafez's legacy.<sup>6</sup> Consequently, it triggered a crackdown known as the Damascus Winter.<sup>7</sup> The regime perceived the momentum that had gathered behind Syria's civil society movement as a threat to its survival.<sup>8</sup>

Under Bashar's leadership, Syria became a party to several additional human rights instruments, including the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)<sup>9</sup> and the Convention Against Torture (CAT).<sup>10</sup> Syria also signed the Rome Statute of the International Criminal Court in November 2000. Independent reports suggest that Syria's human rights record improved slightly but not dramatically during Bashar's first decade in power.<sup>11</sup> Slightly greater freedom of expression was permitted,<sup>12</sup> and sporadic amnesties of political prisoners

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<sup>5</sup> Leverett (n3); Pace and Landis (n2) ch7, lcn2486.

<sup>6</sup> Ziadeh (n3) 64–65. See also HRW World Report 2002; Leverett (n3) 92–93.

<sup>7</sup> Regarding the crackdown, see HRW World Report 2002; AI World Report 2002, 236; Leverett (n3) 94; Wieland (n2) ch6, lcn2685–2707; Alvarez-Ossorio (n3) 24; Ziadeh (n3) 65–75.

<sup>8</sup> For a discussion of the potential reasons for the crackdown, see Raymond Hinnebusch, 'Globalization and Generational Change: Syrian Foreign Policy between Regional Conflict and European Partnership' (2003) 3 *RevInt'l Aff* 190, 197–198; Eyal Zisser, 'Bashar Al-Assad: In or Out of the New World Order?' (2005) 28 *TWQ* 115, 116–118; Leverett (n3) 94–98; HRW, *A Wasted Decade* (n2) 1–4; Lesch, 'The Arab spring' (n2) 421–422; Alvarez-Ossorio (n3) 24; Pace and Landis (n2) ch7, lcn2498–2502; Wieland (n2) ch6, lcn2685–2707; Ziadeh (n3) 67.

<sup>9</sup> When acceding to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in 2003, Syria submitted reservations to several articles, which it stated were incompatible with Shariah law. Several countries objected to these reservations arguing that they were incompatible with the object and purpose of the treaty. See reservations and objections at <[https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtmsg\\_no=IV-8&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtmsg_no=IV-8&chapter=4&lang=en)> accessed 25 June 2018. Syria subsequently undertook to withdraw some of its reservations. See CEDAW, Summary Record of the 785th meeting of the Committee on the Elimination of Discrimination Against Women' (18 July 2007) UN Doc CEDAW/C/SR.785, para 3.

<sup>10</sup> For a full list, see <[http://tbinternet.ohchr.org/\\_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=170&Lang=EN](http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=170&Lang=EN)> accessed 11 May 2018.

<sup>11</sup> See generally AI World Reports 2001–2011; HRW World Reports 2001–2011; HRW, *A Wasted Decade* (n2). See also Wieland (n2) ch3, lcn973–984.

<sup>12</sup> Wieland (n2) ch3, lcn973–978.

were announced.<sup>13</sup> The UN special representatives on the right to food and the right to health were allowed to visit Syria in 2010 representing the first ever country visits by UN special procedures.<sup>14</sup>

At the same time, the regime continued to use emergency legislation as an instrument of repression.<sup>15</sup> It still refused to allow independent political parties or to register most independent civil society organisations.<sup>16</sup> It continued to arrest and otherwise repress civil society activists, human rights defenders, political opponents, journalists, lawyers and anyone who dared to publicly criticise the regime.<sup>17</sup> Political prisoners continued to be arbitrarily detained, some without charge and others following sentencing by irregular courts that failed to guarantee internationally recognised fair trial rights.<sup>18</sup> Widespread and consistent allegations of torture and inhumane treatment of detained persons were still made.<sup>19</sup> Furthermore, the regime continued to engage in extrajudicial executions and enforced disappearances.<sup>20</sup> It also declined to ensure an effective, independent and impartial investigation of the disappearance of up to 17,000 individuals from Syria and Syrian-occupied

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<sup>13</sup> See AI World Reports 2003, 240–1; 2005, 244; 2006, 249–9.

<sup>14</sup> Significantly, these special procedures dealt with socio-economic rights. The regime had a better record at upholding socio-economic rights than civil and political rights.

<sup>15</sup> CCPR, 'Concluding observations of the Human Rights Committee on the Second Periodic Report of the Syrian Arab Republic' (24 April 2001) UN Doc CCPR/CO/71/SYR (CCPR/CO/71/SYR) paras 6–7; CCPR, 'Concluding observations of the Human Rights Committee on the Third Periodic Report of the Syrian Arab Republic' (9 August 2005) UN Doc CCPR/CO/84/SYR (CCPR/CO/84/SYR), para 6; CAT, 'Consideration of reports submitted by States parties under article 19 of the Convention, Concluding observations: Syrian Arab Republic' (25 May 2010) UN Doc CAT/C/SYR/CO/1 (CAT/C/SYR/CO/1), para 10.

<sup>16</sup> See CCPR/CO/71/SYR, paras 11, 23–26; CCPR/CO/84/SYR, paras 5 and 12–15; CEDAW, 'Concluding observations of the Committee on the Elimination of Discrimination Against Women on the First Periodic Report of the Syrian Arab Republic' (11 June 2007) UN Doc CEDAW/C/SYR/CO/1 (CEDAW/C/SYR/CO/1), para 35; CAT/C/SYR/CO/1, paras 34–6; CRC, 'Concluding observations of the Committee on the Rights of the Child on the combined Third and Fourth Periodic Report of the Syrian Arab Republic' (9 February 2012) UN Doc CRC/C/SYR/CO/3-4 (CRC/C/SYR/CO/3-4), paras 28 and 48.

<sup>17</sup> See generally AI World Reports 2001–2011; HRW World Reports 2001–2011; HRW, *A Wasted Decade* (n2) 5–17.

<sup>18</sup> CCPR/CO/71/SYR paras 14–17; CCPR/CO/84/SYR, para 10; CAT/C/SYR/CO/1 paras 9, 11, 12, 15, 19, 22 and 24. See also generally AI World Reports 2001–2011; HRW World Reports 2001–2011; HRW, *A Wasted Decade* (n2) 29–35.

<sup>19</sup> CCPR/CO/71/SYR, paras 12–13; CCPR/CO/84/SYR, para 9; CAT/C/SYR/CO/1, paras 7, 13, 14, 16, 18, 23, 32 and 33. See also AI World Reports 2001, 233; 2003, 241–2; 2004, 303; 2005, 245; 2006, 249–250; 2009, 316–7; 2010, 315; 2011, 314. See also HRW World Reports 2005, 2006, 2007, 2009, 2010 and 2011; HRW, *A Wasted Decade* (n2) 18–23.

<sup>20</sup> CCPR/CO/71/SYR, para 10; CCPR/CO/84/SYR, para 8; CAT/C/SYR/CO/1, para 21.

Lebanon.<sup>21</sup> Palestinian and Iraqi refugees, women<sup>22</sup> and Kurds<sup>23</sup> remained subjected to discrimination, and up to 300,000 stateless Kurds continued to be deprived of their right to a nationality.<sup>24</sup>

### 5.2.i.a Theoretical Analysis of Syria's Human Rights Record

The above discussion supports Hathaway's argument that the worst human rights violators ratify human rights treaties to obtain the rewards that accrue from ratification without ever intending to comply with their obligations thereunder.<sup>25</sup> Significantly, Syria's ratification of CAT in 2004 coincided with allegations of torture by detained Kurdish activists.<sup>26</sup> The period also largely supports Hathaway's suggestion that states with poor human rights records are unlikely to ratify human rights instruments with effective monitoring and enforcement mechanisms.<sup>27</sup> When ratifying CEDAW, the regime submitted reservations rejecting provisions that afforded the International Court of Justice (ICJ) jurisdiction to settle disputes between

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<sup>21</sup> See HRW, *A Wasted Decade* (n2) 26–28; AI World Reports 2006, 250; 2009, 316; 2011, 315.

<sup>22</sup> CCPR/CO/71/SYR, paras 18–20; CESCR, 'Concluding observations of the Committee on Economic, Social and Cultural Rights on the Third Periodic Report of the Syrian Arab Republic' (24 September 2001) UN Doc E/C.12/1/Add.63 (E/C.12/1/Add.6), paras 12, 14, 24 and 31; CCPR/CO/84/SYR, paras 16–17; CEDAW/C/SYR/CO/1, paras 11, 15, 17, 19, 29 and 33; CAT/C/SYR/CO/1, paras 25–28; CRC/C/SYR/CO/3-4, paras 12, 30–32, 43–44, 55–56, 59, 67–68 and 80–81.

<sup>23</sup> UN Doc CCPR/CO/71/SYR, para 27; E/C.12/1/Add.63, paras 13, 30 and 45; CCPR/CO/84/SYR, paras 18–19; CRC, 'Consideration of Reports submitted by States Parties under Article 12, Paragraph 1, of the Optional Protocol to the Convention on the Rights of the Child On the Sale of Children, Child Prostitution and Child Pornography, Concluding observations: Syrian Arab Republic' (31 October 2006) UN Doc CRC/C/OPSC/SYR/CO/1, para 25; CAT/C/SYR/CO/1, para 8; CRC/C/SYR/CO/3-4, paras 33 and 42; UNHRC, 'Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover' (2011) UN Doc A/HRC/17/25/Add.3 (A/HRC/17/25/Add.3), paras 56–57, 59, 64 and 83; UNHRC, 'Report of the Special Representative on the right to food, Olivier De Schutter: Mission to the Syrian Arab Republic (27 January 2011) UN Doc A/HRC/16/49/Add.2 (HRC/16/49/Add.2) paras 47 and 49–50. See also HRW, *Group Denial: Repression of Kurdish Political and Cultural Rights in Syria* (HRW 2009); HRW World Reports 2005, 2006, 2007, 2009, 2010, 2011, 2012. See also AI World Reports 2002, 327; 2004; 302; 2005, 244–5; 2006, 250; 2009, 317; 2010, 316; 2011, 315.

<sup>24</sup> HRW Reports 2005, 2006, 2007, 2009 2010; AI World Reports 2006, 250; 2010, 316; 2011, 315.

<sup>25</sup> Oona A Hathaway, 'Do Human Rights Treaties Make a Difference?' (2002) 111 Yale LJ 1935, 2009.

<sup>26</sup> Wieland (n2) ch6, lcn3462–3471.

<sup>27</sup> Hathaway, 'Do Human Rights Treaties Make a Difference?' (n25) 1982, 1999–2000, 2011–2016; Oona A Hathaway, 'The Cost of Commitment' (2003) 55 Stanford Law Review 1821, 1841, 1847–1848.

States parties.<sup>28</sup> Also, when ratifying CAT and the Optional Protocol to the Convention on the Rights of Persons with Disabilities (OP-CRPD), Syria submitted reservations opting out of their respective inquiry procedures.<sup>29</sup> Although admittedly by ratifying the OP-CRPD Syria submitted to the Convention's individual complaints mechanism.

### 5.2.ii Authoritarian Upgrading

After Hafez's death, elites within the armed forces, intelligence community, Ba'ath party and government cooperated to ensure a seamless hereditary succession.<sup>30</sup> They seemingly wished to avoid an inter-regime leadership struggle as it could have threatened the regime's survival and their own privileged positions.<sup>31</sup> Once in power, Bashar performed an 'authoritarian upgrading',<sup>32</sup> which aimed at ensuring the regime's survival in the new millennium. It combined traditional authoritarian strategies, such as co-optation, with contemporary variations, including the appropriation of civil society functions.

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<sup>28</sup> Syria's reservation to the Convention on the Elimination of All Forms of Discrimination against Women' (28 March 2003) <[https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-8&chapter=4&clang=\\_en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&clang=_en)> accessed 30 June 2017.

<sup>29</sup> See Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1977, entered into force 26 June 1987) 1465 UNTS 85 (CAT), art 20; 'Syria's reservation to the Convention Against Torture' (19 August 2004) <[https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-9&chapter=4&clang=\\_en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&clang=_en)> accessed 30 June 2017. See also OP-CRPD, arts 6 and 7; 'Syria's reservation to the Optional Protocol to the Convention on the Rights of Persons with Disabilities' (10 July 2009) <[https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-15-a&chapter=4&clang=\\_e](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15-a&chapter=4&clang=_e)> accessed 30 June 2017.

<sup>30</sup> See Joshua Stacher, 'Reinterpreting Authoritarian Power' (2011) 65 Middle EJ 197, 197–199; Nikolaos van Dam, *The Struggle for Power in Syria* (4th edn, IB Tauris 2011) 132–133.

<sup>31</sup> Van Dam, *The Struggle for Power* (n30) 133–134; Stacher (n30) 199; Ziadeh (n3) 46; Raymond Hinnebusch, 'President and Party in Post-Baathist Syria: From the Struggle for "Reform" to Regime Deconstruction' in Raymond Hinnebusch and Tina Zintl (eds), *Syria from Reform to Revolt: Volume I* (Kindle edn, Syracuse UP 2015) ch2, lcn290–299. See also the discussion of authoritarian regime transition in Barbara Geddes, Joseph Wright, and Erica Frantz, 'Autocratic Breakdown and Regime Transitions: A New Data Set' (2014) 12 Perspectives on Politics 313. Notably, prior to his death, Hafez ensured that Bashar had a personal support base within the armed forces, the intelligence community and the Ba'ath party. See Eyal Zisser, 'Clues to the Syrian Puzzle' (2000) 23 TWQ 79, 81–84; Leverett (n3) 60–65 and 100.

<sup>32</sup> Heydemann seemingly coined this term. Steven Heydemann, 'Upgrading Authoritarianism in the Arab World' (2007) Saban Center for Middle East Policy at the Brookings Institution Analysis Paper 13, October 2007 <<http://www.brookings.edu/wp-content/uploads/2016/06/10arabworld.pdf>> accessed 3 December 2014.

### 5.2.ii.a Coup-proofing, Co-optation and Ideational Politics

The collapse of the Syrian-Israeli peace process, the provisional inclusion of Syria on the G.W. Bush Administration's<sup>33</sup> Axis of Evil and the 2003 intervention in Iraq enabled the regime to justify the retention of a disproportionately large military. Bashar strengthened the elite and predominantly Alawi armed units charged with regime protection<sup>34</sup> and ensured that Alawis continued to dominate the officers corps.<sup>35</sup> He also reinforced the immunity enjoyed by the *Mukhabarat*.<sup>36</sup> Like his father, he ensured that the most influential positions in the armed forces and intelligence and security agencies were filled with individuals loyal to him personally who tended to be Alawis from his own family.<sup>37</sup> Nevertheless, it has been suggested that he did not enjoy the same degree of control over the *Mukhabarat* as his father.<sup>38</sup>

As part of his authoritarian upgrading, Bashar wished to implement liberalising economic reforms. However, regime stalwarts who benefitted from the status quo, the so-called 'Old Guard', opposed them. This gave rise to an intra-regime power struggle, which culminated in the Tenth Ba'ath Party Congress in June 2005 when the remaining Old Guard dissenters were replaced.<sup>39</sup> By this time, Bashar had consolidated his support base in the armed forces and the intelligence community. As part of his efforts to undermine the Old Guard, Bashar weakened the Ba'ath party and its corporatist organisations as they tended to oppose his reforms.<sup>40</sup> Accordingly,

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<sup>33</sup> Henceforth referred to as the Bush Administration.

<sup>34</sup> These included the Republican Guard, the Third Corps and the Fourth Armoured Division. Christopher Phillips, *The Battle for Syria: International Rivalry in the New Middle East* (Yale UP 2016) 52.

<sup>35</sup> Jomana Qaddour, 'Unlocking the Alawite Conundrum in Syria' (2012) 36 TWQ 67, 69.

<sup>36</sup> In 2008, he enacted a legislative decree, which stipulated that the General Command of the Armed Forces must consent to the prosecution of any member of the internal security forces, political security or customs police.

<sup>37</sup> For example, Bashar's brother Maher was commander of the Republican Guard and the Fourth Armoured Division. His brother-in-law, Asef Shawqat, was chief of military intelligence and his cousin, Hafez Makhoul, was head of internal security.

<sup>38</sup> Lesch, 'The Arab spring' (n2) 424.

<sup>39</sup> See generally Hinnebusch, 'President and Party' (n31) ch2, lcn228–507.

<sup>40</sup> Raymond Hinnebusch, 'Authoritarian Upgrading and the Arab Uprising: Syria in Comparative Perspective' (BRISMES Conference, London, March 2012) 8 <<https://brismes2012.files.wordpress.com/2012/02/raymond-hinnebusch-syria-authoritarian-upgrading.pdf>> accessed 2 December 2014; Laura Ruiz de Elvira and Tina Zintl, 'The End of the Ba'athist Social Contract in Bashar al-Asad's Syria: Reading

he reduced the party's role in policy making and denied trade unions and peasant associations funding and representation.<sup>41</sup> He also ended obligatory ideological education at the secondary and tertiary levels and the practice of guaranteeing Ba'athist university graduates public sector employment.<sup>42</sup> These policies contributed to a decrease in party membership, including amongst peasants, worker and students.<sup>43</sup> The weakening of the Ba'ath party was ill-advised as it had helped the regime to construct a support base that transcended sectarian and class divisions. Furthermore, its corporatist organisations were vital for distributing patronage and maintaining the link to workers and peasants. However, Bashar's policies caused this traditional regime constituency hardship whilst concurrently stripping them of an outlet to voice their discontent.<sup>44</sup>

Despite downgrading the Ba'ath party, Bashar still sought to derive domestic legitimacy from Ba'athism's core tenets: Arab nationalism, secularism and socialism. After the failure of the Syrian track of the Madrid Peace Process, Bashar equated Arab nationalism with resistance. Accordingly, he developed close relations with rejectionist Palestinian groups, opposed the 2003 intervention in Iraq and strengthened Syria's relationship with Iran and Hezbollah. Despite advocating a 'nationalist-Islamist alliance' in an effort to capitalise upon a popular Islamist current in the Arab world, he retained the regime's commitment to secularism in order to maintain a support base amongst religious minorities.<sup>45</sup> He also retained the regime's rhetorical commitment to socialism; however, in reality his economic reforms deprived Ba'athist socialism of any practical relevance.

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Sociopolitical Transformations through Charities and Broader Benevolent Activism (2014) 46 *Int'l JMidEStud* 329, 335. See also generally Hinnebusch, 'President and Party' (n31) ch2, lcn228–507; Samer N Abboud, 'Locating the Social in the Social Market Economy' in Hinnebusch and Zintl (eds) (n31) ch3, lcn508–737.

<sup>41</sup> Raymond Hinnebusch, 'Syria: from 'authoritarian upgrading' to revolution?' (2012) 88 *International Affairs* 95, 98–99; Hinnebusch, 'President and Party' (n31) ch2, lcn352–359 and lcn487–493.

<sup>42</sup> Hinnebusch, 'President and Party' (n31) ch2, lcn484–486.

<sup>43</sup> *ibid* ch2, lcn484–488; Hinnebusch, 'Syria: from 'authoritarian upgrading' to revolution?' (n41) 99.

<sup>44</sup> Hinnebusch, 'Authoritarian Upgrading and the Arab Uprising' (n40) 8; Abboud, 'Locating the Social' (n40) ch3, lcn508–738.

<sup>45</sup> Ziadeh (n3) 155. See also Hinnebusch, 'President and Party' (n31) ch2 lcn480–482.

The regime's abandonment of socialism and its traditional constituency of peasants and workers ultimately threatened its survival.<sup>46</sup>

Bashar re-organised state-business networks to eliminate opponents of his reform agenda and any Sunni businessmen whom he felt were developing too much independent influence.<sup>47</sup> He allowed the most lucrative rent-seeking opportunities to be captured by a small circle of businessmen dominated by his own family.<sup>48</sup> Regime-connected businessmen continued to exercise disproportionate influence over economic policy formation by acquiring seats in parliament and participating in private sector associations, including Al-Cham, Al-Sourya and the Syrian Business Council.<sup>49</sup> These organisations were not truly representative as they were dominated by regime insiders.<sup>50</sup> Like his father, Bashar tolerated corruption within his inner circle as a means of securing loyalty. Indeed, corruption actually increased under his leadership.<sup>51</sup> However, he also retained contradictory laws that could be

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<sup>46</sup> See Hinnebusch, 'Syria: from 'authoritarian upgrading' to revolution?' (n41) 99 and 102; Wieland (n2) ch6, lcn3361–3370; Caroline Donati, 'The Economics of Authoritarian Upgrading in Syria: Liberalization and the Reconfiguration of Economic Networks' in Steven Heydemann and Reinoud Leenders (eds), *Middle East Authoritarianisms: Governance, Contestation and Regime Resilience in Syria and Iran* (Stanford UP 2013) 51–60; Anoushiravan Ehteshami and others, 'Authoritarian Resilience and International Linkages in Iran and Syria' in Steven Heydemann and Reinoud Leenders (eds), *Middle East Authoritarianisms: Governance, Contestation, and Regime Resilience in Syria and Iran* (Stanford UP 2013) 240–242; Eyal Zisser, 'Can Assad's Syria Survive Revolution' (2013) 20 *Middle EQ* 65, 65–69; Philippe Droz-Vincent, "'State of Barbary" (Take Two): From the Arab Spring to the Return of Violence in Syria' (2014) 68 *Middle EJ* 33, 36; Abboud, 'Locating the Social' (n40) ch3, lcn726–738; Aurora Sottimano, 'Nationalism and Reform under Bashar al-Asad: Reading the Legitimacy of the Syrian Regime' in Hinnebusch and Zintl (eds) (n31) ch4, lcn759–762 and lcn867–930.

<sup>47</sup> Bassam Haddad, *Business Networks in Syria: The Political Economy of Authoritarian Resilience* (Stanford UP 2012) ch4, lcn2396–2418.

<sup>48</sup> Hinnebusch, 'Syria: from 'authoritarian upgrading' to revolution?' (n41) 98–99 and 101–102. The al-Jud, al-Tun and Tlas families also benefitted disproportionately from the economic reforms. Salwa Ismail, 'Changing Social Structure, Shifting Alliances and Authoritarianism in Syria' in Lawson (ed) (n2) ch1, lcn248–250.

<sup>49</sup> Bassam Haddad, 'Enduring Legacies: The politics of private sector development in Syria' in Lawson (ed) (n2) ch3, lcn879–888.

<sup>50</sup> Haddad, *Business Networks in Syria* (n47) ch3, lcn879–888; Donati (n46) 40–42.

<sup>51</sup> Syria's position in Transparency International's Perception of Corruption Index declined from 70 out of 163 countries in 2005 to 127 out of 178 countries in 2010. Of the 19 MENA states included, only Yemen, Libya, Iran and Iraq scored lower than Syria in 2010. See Lesch, 'The Arab spring' (n2) 64–65. See also ENPI, 'Syrian Arab Republic Strategy Paper 2007–2013 & National Indicative Programme 2007–2010' 6 <[https://ec.europa.eu/europeaid/strategy-paper-2007-2013-and-national-indicative-programme-2007-2010-syria\\_en](https://ec.europa.eu/europeaid/strategy-paper-2007-2013-and-national-indicative-programme-2007-2010-syria_en)> accessed 7 July 2018.



selectively applied to sanction businessmen who crossed red lines.<sup>52</sup>

Bashar initially increased the regime's efforts to co-opt conservative Sunnis, including by allowing more public manifestations of religiosity and by allowing Islamic charities and some conservative Islamic groups to expand their non-political activities.<sup>53</sup> The regime also postponed the reform of Syria's controversial personal status law after it provoked opposition from conservative Sunnis.<sup>54</sup> Furthermore, Bashar cultivated close relations with Islamist resistance movements and Islamic parties in Turkey and Jordan.<sup>55</sup> He preserved existing relationships with co-opted moderate *ulama* whilst also cultivating new allies in Syria's Islamic community.<sup>56</sup> Nevertheless, he refused to authorise a moderate Islamic party as moderate Islam was considered a greater threat to regime security than conservative Islam.<sup>57</sup> Like his father, Bashar worked to prevent the consolidation of a unified Islamic opposition by accommodating Islamic actors who supported the regime's policies and repressing those who opposed them. The former lost credibility, whereas the latter were pushed underground.<sup>58</sup>

In 2008, the regime dramatically reversed its historic policy of seeking

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<sup>52</sup> Haddad, *Business Networks in Syria* (n47) ch3, lcn749–761.

<sup>53</sup> Thomas Pierret and Kjetil Selvik, 'Limits of "Authoritarian Upgrading" in Syria: Private Welfare, Islamic Charities, and the Rise of the Zayd Movement' (2009) 41 *Int'l JMidEstud* 595; Thomas Pierret, 'Sunni Clergy Politics in the Cities of Ba'thi Syria' in Lawson (ed) (n2) ch4, lcn1552–1554; Hinnebusch, 'Syria: from 'authoritarian upgrading' to revolution?' (n41) 104–105; Raphaël Lefèvre, *Ashes of Hama: the Muslim Brotherhood in Syria* (OUP 2013) 156–160; Thomas Pierret, 'The State Management of Religion in Syria: The End of "Indirect Rule"?' in Heydemann and Leenders (eds) (n46) 94–97; Thomas Pierret, 'The Syrian Baath Party and Sunni Islam: Conflicts and Connivance' (2014) 77 *Middle East Brief* 1, 4 <<https://www.brandeis.edu/crown/publications/meb/MEB77.pdf>> accessed 22 June 2018; Phillips, *The Battle for Syria* (n34) 47

<sup>54</sup> See Wieland (n2) ch7, lcn4586–4693; Teije Hidde Donker, 'Islamic Social Movements and The Syrian Authoritarian Regime: Shifting Patterns of Control and Accommodation' in Heydemann and Leenders (eds) (n46) 113 and 120–121. The existing personal status law has been criticised by UN treaty monitoring bodies for condoning discrimination against non-Muslims and women. See CEDAW/C/SYR/CO/1, para 17; CRC/C/SYR/CO/3-4, paras 30–32, 43–44 and 55–56.

<sup>55</sup> Ziadeh (n3) 155. This coincided with his strategic alliance building strategy.

<sup>56</sup> Pierret, 'Sunni Clergy Politics' (n53) ch4, lcn1598–1603 and lcn1652–1653. See also Pierret and Selvik (n53).

<sup>57</sup> Pierret, 'The Syrian Baath Party' (n53) 1.

<sup>58</sup> Hinnebusch, 'Syria: from 'authoritarian upgrading' to revolution?' (n41) 105.

to indirectly control the Islamic community.<sup>59</sup> Accordingly, it radically expanded the Ministry of Religious Endowments and began to directly involve itself in Islamic education.<sup>60</sup> It utilised an alleged Islamist terrorist attack in September 2008 to justify a crackdown on Islamic elites.<sup>61</sup> Additional repressive measures were introduced in 2010, including a prohibition on the wearing of face-covering veils (*niqab*) in schools.<sup>62</sup> The reasons for the U-turn have been debated. Sunni *ulama* may have crossed a red line by publicly criticising secular elements of the regime and alleged Iranian-sponsored Shiitisation (*tashayyu*).<sup>63</sup> Furthermore, the regime may have felt that it no longer needed to work so hard to appease Sunni *ulama* after its escaped regional and international isolation in the late 2000s.<sup>64</sup> The regime may also have been attempting to appease secularists, religious minorities and moderate Sunnis.<sup>65</sup> Despite the U-turn, Syria's conservative Sunni community did not completely turn against the regime as many Sunni merchants and *ulama* continued to benefit from the regime's economic reform programme and their interests were well represented in parliament.<sup>66</sup>

### 5.2.ii.b Appropriation of Civil Society Functions

Bashar sought to impede independent civil society development through a mixture of appropriation, regulation and repression.<sup>67</sup> Under his leadership, multiple government-sponsored NGOs (GONGOs) were established often under the patronage of the First Lady. These GONGOS sought to appropriate civil society functions, improve the regime's international image and balance against the growing influence of Islamic charities.<sup>68</sup> Their emergence coincided with a crackdown on genuine civil society organisations, which

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<sup>59</sup> See generally Pierret, 'The State Management of Religion' (n53). Regarding the pre-2008 situation, see generally Pierret, 'Sunni Clergy Politics' (n53).

<sup>60</sup> Pierret, 'The State Management of Religion' (n53) 97–103.

<sup>61</sup> Ibid 98–99; Pierret and Selvik (n53) 609–611.

<sup>62</sup> Pierret, 'The State Management of Religion' (n53) 99–103.

<sup>63</sup> Ibid 96; Pierret, 'The Syrian Baath Party' (n53) 4–5.

<sup>64</sup> Pierret and Selvik (n53) 609; Wieland (n2), ch7, lcn4678–4701; Steven Heydemann and Reinoud Leenders 'Authoritarian Governance in Syria and Iran' in Heydemann and Leenders (eds) (n46) 96–98.

<sup>65</sup> Pierret, 'The State Management of Religion' (n53) 105.

<sup>66</sup> Pierret, 'The Syrian Baath Party' (n53) 5.

<sup>67</sup> Heydemann, 'Upgrading Authoritarianism' (n32) 5–10.

<sup>68</sup> Donati (n46) 44–48; Ehteshami and others (n46) 233–234; Ruiz de Elvira and Zintl (n40) 334–345.

were forced to operate in legal limbo due to the regime's refusal to introduce a much-anticipated NGO law.<sup>69</sup> GONGOs were afforded privileged access to private sector funding and international aid.<sup>70</sup> Consequently, funding for their initiatives became a new source of rent.<sup>71</sup> Indeed, the EU was criticised for funding GONGOs instead of autonomous civil society organisations.<sup>72</sup>

### **5.2.ii.c Diversification of External Alliances**

Bashar strengthened the Assad regime's existing alliances and also developed new partners partially in order to offset Syria's regional and international isolation during the 2000s.

#### *Iran-Syria-Hezbollah Axis and Iranian-Saudi Rivalry*

The 2003 US intervention in Iraq reinforced the Syrian-Iranian alliance as the allies had a shared interest in preventing the installation of a US-aligned regime in Baghdad. The intervention ultimately enabled Iran to increase its influence in Iraq much to Riyadh's unease. It also facilitated a Shia resurgence in Iraq that threatened to embolden Saudi's own Shia minority.<sup>73</sup> To balance against these threats, the Saudi monarchy supported the Sunni insurgency in Iraq and promoted the Western-aligned politician, Rafiq Hariri, in Lebanon as a counterweight to Iran's allies, Syria and Hezbollah. It sought to use Hariri's assassination in 2005, in which Syria was implicated, to indirectly weaken Iran. Accordingly, it supported Lebanon's Cedar Revolution and UNSC resolutions demanding a Syrian withdrawal from Lebanon. It was also accused of supporting Islamist opposition groups in Syria and of attempting to create divisions within the Syrian armed forces.<sup>74</sup>

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<sup>69</sup> Regarding the crackdown, see CCPR/CO/84/SYR paras 12–15; CEDAW/C/SYR/CO/1 paras 35–36; CRC/C/SYR/CO/3-4 paras 28–29; HRW, *A Wasted Decade* (n2) 1 and 5–6.

<sup>70</sup> Donati (n46) 44–46.

<sup>71</sup> *ibid.*

<sup>72</sup> *ibid* 46; Ehteshami and others (n46) 233.

<sup>73</sup> F Gregory Gause III, 'The Foreign Policy of Saudi Arabia' in Raymond Hinnebusch and Anoushiravan Ehteshami (eds), *The Foreign Policies of Middle East States* (2nd edn, Lynne Rienner Publishers 2014) 191.

<sup>74</sup> Bassel F Salloukh, 'Demystifying Syrian Foreign Policy under Bashar al-Asad' in Lawson (ed) (n2) ch9, lcn3645–3646.

Syria's relationship with Iran and Hezbollah was strengthened by Hezbollah's perceived victory in its 2006 armed conflict with Israel in Lebanon and by Hezbollah's refusal to disarm pursuant to UNSC Resolution 1701.<sup>75</sup> After the war, Jordan and Saudi Arabia began to refer to the Iran-Syria-Hezbollah alliance as a Shia crescent/axis. However, in reality the alliance was primarily strategic as opposed to sectarian in character. The Assad regime facilitated the transfer of weaponry and support from Iran to Hezbollah and Hamas. Furthermore, Iran's relationship with 'Arab' Syria and 'Sunni' Hamas helped it to offset accusations of Persian Shia expansionism. On the other hand, the alliance enabled the Assad regime to apply pressure on Israel in Lebanon and Palestine via Hezbollah and Hamas. Bashar's domestic legitimacy was also boosted by his relationship with Hezbollah's leader, Hassan Nasrallah, as the majority of Syrians – including Sunnis – rallied behind Hezbollah during the 2006 war.<sup>76</sup> The regime's alliance with Hezbollah also helped it to recover some of its lost influence in Lebanon after its forced withdrawal in 2006. Significantly, Hezbollah became part of the Lebanese government in 2008 in accordance with the Doha Agreement.<sup>77</sup>

### *Russia*

Syria's Cold War alliance with Russia was reinvigorated during the 2000s as a result of the failure of the Madrid Peace Process and the allies' shared opposition to the 2003 US-led intervention in Iraq.<sup>78</sup> Accordingly, Russia

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<sup>75</sup> UNSC Res 1701 (11 August 2006) UN Doc S/RES/1701.

<sup>76</sup> Thomas Pierret, 'Karbala in the Umayyad Mosque: Sunni Panic at the 'Shiitization' of Syria in the 2000s' in B Maréchal and S Zemni (eds), *The Dynamics of Sunni-Shia Relationships: Doctrine, Transnationalism, Intellectuals and the Media* (Hurst 2013) 99–116. Unlike his father, Bashar tended to deal with Hezbollah directly rather than through the medium of military intelligence. See Ziadeh (n3) 82.

<sup>77</sup> The Doha Agreement was negotiated by Qatar with Syrian involvement. Qatar's sovereign wealth fund, the Qatar Investment Authority, had significant investments in Syria. Qatar, like Syria, had congenial relations with Iran. Qatar challenged Saudi Arabia's dominant position in the Gulf. See Mehran Kamrava, 'The Foreign Policy of Qatar' in Hinnebusch and Ehteshami (eds) (n73) 167, 170 and 178. See also David W Lesch, *The Fall of the House of Assad* (Updated edn, Yale UP 2013) 145.

<sup>78</sup> Emile Hokayem, *Syria's Uprising and the Fracturing of the Levant* (Routledge 2013) ch5, lcn2924–2929; Roy Allison, 'Russia and Syria: explaining alignment with a regime in crisis' (2013) 89 *International Affairs* 795, 803; Antonio Perra, 'From the Arab Spring to the Damascus Winter: The United States, Russia, and the New Cold War' (2016) 3 *Contemporary Review of the Middle East* 363, 370.

forgave Syria most of its outstanding debt,<sup>79</sup> became Syria's biggest weapons supplier and supported Syria after the Hariri assassination.<sup>80</sup> Syria in turn awarded Tatneft, a Russian oil company, the concession to develop new oil and gas deposits, supported Russia's 2008 military intervention in Georgia and agreed to the development of Russia's naval facilities at Tartous.<sup>81</sup> For Putin, the relationship provided an opportunity to revive Russia's regional influence, whereas for Bashar it was a means of offsetting Syria's international isolation.<sup>82</sup>

### *Turkey*

Syria and Turkey's tentative rapprochement developed dramatically after the Justice and Development Party (AKP) ascended to power in Turkey in 2001. The AKP's foreign policy strategist, Ahmet Davutoğlu, promoted an expansionist, pan-Islamic foreign policy.<sup>83</sup> His 'strategic depth' doctrine posited that Turkey, due to its Ottoman/Islamic heritage and geographical position, was ideally placed to exert soft power in former Ottoman territories and Sunni majority states.<sup>84</sup> His 'zero problems with neighbours' policy required Turkey to pursue congenial relations with Arab states, Iran, Israel, the EU and the US.<sup>85</sup> This policy was not unproblematic as it proved difficult to please everyone simultaneously.

As part of the Syrian-Turkish rapprochement, numerous high-level visits took place between Ankara and Damascus and their leaders reportedly

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<sup>79</sup> Haddad, *Business Networks in Syria* (n47) ch1, lcn820–821.

<sup>80</sup> Wieland (n2) ch6, lcn3216–3248; Hokayem, *Syria's Uprising* (n78) ch5, lcn2963–2965.

<sup>81</sup> Wieland (n2) ch6, lcn3216–3248; Hokayem, *Syria's Uprising* (n78) ch5, lcn2960–2967; Allison (n78) 803–808; Henry Hogger, 'Syria: Hope or Despair?' (2014) 45 *Asian Affairs* 1, 5.

<sup>82</sup> See Wieland (n2) ch6, lcn3216–3248; Allison (n78) 809.

<sup>83</sup> Some commentators deemed it neo-Ottoman. See Alexander Murinson, 'The Strategic Depth Doctrine of Turkish Foreign Policy' (2006) 42 *Middle East Stud* 945, 953–961; Ömer Taspınar, 'Turkey's Strategic Vision and Syria' (2012) 35 *TWQ* 127, 128–130. However, see also Behlül Ozkan, 'Turkey, Davutoglu and the Idea of Pan-Islamism' (2014) 56 *Survival* 119, 128.

<sup>84</sup> Regarding Turkey's strategic depth doctrine, see Murinson (n83); Taspınar (n83) 128–130; Jamal Wakim, 'End of Asad, or of Erdogan?' (2014) 36 *Arab Studies Quarterly* 186, 189–190; Ozkan (n83) 119–124.

<sup>85</sup> Taspınar (n83) 128–130 and 135.

became friendly.<sup>86</sup> Additional confidence building measures were introduced<sup>87</sup> and progress was even achieved on the contentious issue of water-sharing.<sup>88</sup> The border dispute over Alexandretta (Hatay) was also implicitly resolved.<sup>89</sup> A free trade agreement between Turkey and Syria became operational in 2007 resulting in a fourfold increase in Turkish exports to Syria.<sup>90</sup> This had negative ramifications for Syrian industries.<sup>91</sup> However, for the regime the political gains of the rapprochement outweighed the economic costs.<sup>92</sup> The regime's friendship with the Sunni AKP party helped it to downplay allegations of sectarianism as a result of its minoritarian leadership and alliance with Iran.<sup>93</sup> Recep Erdoğan and the AKP were respected in the Arab world for their sympathetic attitude toward the Palestinians and Turkey's economic success. Furthermore, Syria's friendship with Turkey helped it to avoid total regional isolation.<sup>94</sup>

### China

Bashar enhanced Syria's diplomatic and trade relations with China partly in order to offset Syria's deteriorating relations with the US and the EU. Syria supported China's position on Taiwan, Xinjiang and Tibet, and China in turn

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<sup>86</sup> Fred H Lawson, 'The Beginning of a Beautiful Friendship: Syrian–Turkish relations since 1998' in Lawson (ed) (n2) ch10, lcn4196–4205; Christopher Phillips, 'Turkey's Syria problem' (2012) 19 Public Policy Research 137, 137; Ozkan (n83) 132–133.

<sup>87</sup> Phillips, 'Turkey's Syria problem' (n86) 137; Wieland (n2) ch8, lcn5306–5353; Taspınar (n83) 37.

<sup>88</sup> Bülent Aras and Rabia Karakaya Polat, 'From Conflict to Cooperation: Desecuritization of Turkey's Relations with Syria and Iran' (2008) 39 Sec Dialogue 495, 509; Lawson, 'The Beginning of a Beautiful Friendship' (n86) ch10, lcn4087–4097, lcn4212–4216 and lcn4352–4356.

<sup>89</sup> For example, in January 2004 Bashar signed a document that explicitly referred to Turkey within its present-day borders. See Lawson, 'The Beginning of a Beautiful Friendship' (n86) ch10, lcn4203–4204; Wieland (n2) ch8, lcn5317–5321; Emma Lundgren Jörum, 'Syria's "Lost Province": The Hatay Question Returns' (*Syria in Crisis: Carnegie Endowment for International Peace Blog*, 28 January 2014) <<http://carnegieendowment.org/syriaincrisis/?fa=54340>> accessed 10 February 2016.

<sup>90</sup> Phillips, 'Turkey's Syria problem' (n86) 137. Regarding Syrian-Turkish trade, see Lawson, 'The Beginning of a Beautiful Friendship' (n86) ch10. By 2008, Turkey was one of the top four sources of FDI in Syria. See Kjetil Selvik, 'It's the Mentality, Stupid: Syria's Turn to the Private Sector' (2008) 1 Syria Studies 33, 37 <<https://ojs.st-andrews.ac.uk/index.php/syria/article/view/705/592>> accessed 22 June 2018.

<sup>91</sup> Wieland (n2) ch8, lcn5236–5328; Hokayem, *Syria's Uprising* (n78) ch4, lcn1824–1826.

<sup>92</sup> Wieland (n2) ch8, lcn5236–5328.

<sup>93</sup> Hokayem, *Syria's Uprising* (n78) ch4, lcn1827–1832.

<sup>94</sup> Murinson (n83) 956–957; Taspınar (n83) 137; Hokayem, *Syria's Uprising* (n78) ch4, lcn1813–1827; Raymond Hinnebusch, 'The Foreign Policy of Syria' in Hinnebusch and Ehteshami (eds) (n73) 229.

supported Syria's position on the Golan Heights.<sup>95</sup> Bashar relied upon China's authoritarian capitalist model of economic development to justify his postponement of political reforms. The Chinese model posits that pursuing political and economic reform simultaneously can undermine societal stability and, accordingly, democratisation should follow, not precede or accompany, economic liberalisation.<sup>96</sup> Nevertheless, Hinnebusch suggested that the regime's failure to authorise new political parties enhanced its vulnerability.<sup>97</sup>

#### 5.2.ii.d Economic Reform and the Social Contract

By 2000, the structural weaknesses of the Syrian economy had manifested themselves in high unemployment,<sup>98</sup> an inefficient and bloated public sector, and low economic growth. Syria's economy remained over-reliant on declining rent<sup>99</sup> and focused on unproductive sectors. Bashar believed that liberalising economic reforms were necessary to generate private sector investment and prepare Syria for accession to the global economic order. However, there were formidable obstacles deriving from the geo-political context and the regime's populist-authoritarian character. From an external perspective, the failure of the Madrid Process precluded an anticipated economic rapprochement with the US.<sup>100</sup> In its place, Bashar expedited Syria's economic rapprochement with Iraq.<sup>101</sup> However, the 2003 intervention deprived Syria of Iraqi rents and burdened it with Iraqi refugees.<sup>102</sup> The regime's opposition to the intervention also generated

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<sup>95</sup> Lesch, *The Fall* (n77) 137.

<sup>96</sup> Although Syria diverged from the Chinese capitalist model in crucial respects. See Ehteshami and others (n46) 231. See also Heydemann, 'Upgrading Authoritarianism' (n32) 2 and 25; Selvik (n90); Volker Perthes, 'Europe and the Arab Spring' (2011) 53 *Survival* 73, 82–83.

<sup>97</sup> Hinnebusch, 'Syria: from 'authoritarian upgrading' to revolution?' (n41) 103–104 and 112.

<sup>98</sup> Unemployment was exacerbated by population growth. Syria's population reportedly increased from approximately 6 million in 1970 to approximately 20 million in 2003. Zisser, 'Bashar Al-Assad' (n8) 118.

<sup>99</sup> Syria's oil reserves were rapidly declining and Arab aid largely dried up after the peace process collapsed.

<sup>100</sup> Hinnebusch, 'Globalization and Generational Change' (n8) 194–195.

<sup>101</sup> For a discussion of Syria's lucrative illicit trade with Iraq, see Volker Perthes, 'Syrian Regional Policy under Bashar al-Asad: Realignment or Economic Rationalization?' (Autumn, 2001) 220 *Middle East Report* 36, 38–40; Hinnebusch, 'Globalization and Generational Change' (n8) 200–201; Leverett (n3) 86–88.

<sup>102</sup> Raymond Hinnebusch, 'Syrian Foreign Policy under Bashar al-Asad' (2009) 1 *Ortadoğu*

financial costs in the form of US sanctions, which made it more difficult for Syria to access the technology and financial services it needed to modernise its economy.<sup>103</sup> From an internal perspective, comprehensive liberalisation would require a curtailment of subsidies and a contraction of the public sector contrary to the regime's socialist ideology. It would also open existing state-business networks up to competition and thus was opposed by the Old Guard.

Due to these obstacles, up to 2005 economic reform was relatively piecemeal.<sup>104</sup> However, after 2005 it was expedited due to a convergence of internal possibility and external necessity. From an internal perspective, reform was possible as Bashar had removed members of the Old Guard from influential regime positions. From an external perspective, reform was necessary to escape isolation following the Hariri assassination and gain access to foreign currency.<sup>105</sup> The sense of urgency prompted the regime to grant disproportionate concessions to its new trading partners.<sup>106</sup>

In 2005, Bashar announced that Syria would transition from a centrally planned to a social market economy.<sup>107</sup> The private sector was to be afforded a primary role in economic development under this new model.<sup>108</sup> The term 'social market economy' suggested a commitment to market reform

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Etütleri 7, 11.

<sup>103</sup> For a discussion, see Alison N Kurth, 'Rethinking the Syria Accountability Act: Are Sanctions on Syria in the Best Interest of the United States?' (2011) 20 *Transnat'l L& ContempProbs* 239; Andrew Thomas, "'Pariah States" and Sanctions: the case of Syria' (2013) 20 *Middle EPol'y* 27. See also Hinnebusch, 'Syrian Foreign Policy' (n102) 12 and 25; Wieland (n2) ch6, lcn3199–3214; Hinnebusch, 'Authoritarian Upgrading and the Arab Uprising' (n40) 7; Ehteshami and others (n46) 228–229.

<sup>104</sup> See EMP, 'Syria Country Strategy Paper 2002–2006 & National Indicative Programme 2002–2004' 4–11 <[http://eeas.europa.eu/archives/docs/syria/csp/02\\_06\\_en.pdf](http://eeas.europa.eu/archives/docs/syria/csp/02_06_en.pdf)> accessed 7 July 2018; Anja Zorob, 'Trade Liberalization and Adjustment via Regional Integration: The Syrian-European Association Agreement' (2009) 1 *Syria Studies* 37, 40–44 <<https://ojs.st-andrews.ac.uk/index.php/syria/article/view/711/607>> accessed 24 June 2018.

<sup>105</sup> Selvik (n90) 37; Ehteshami and others (n46) 230–231.

<sup>106</sup> Hinnebusch, 'Authoritarian Upgrading and the Arab Uprising' (n40) 7.

<sup>107</sup> The social market economy approach was originally implemented in Germany in 1948. See generally Nils Goldschmidt and Michael Wohlgemuth, 'Social Market Economy: origins, meanings and interpretations' (2008) 19 *Constitutional Political Economy* 261; Wieland (n2) ch6, lcn3296–3325.

<sup>108</sup> Regarding Syria's social market economy, see ENPI (n51) 17–18; Selvik (n90) 33–55; Hinnebusch, 'Syria: from 'authoritarian upgrading' to revolution?' (n41) 98–99 and 101–102; Abboud, 'Locating the Social' (n40) ch3, lcn508–738.



without sacrificing the regime's socialist orientation.<sup>109</sup> However, in reality the regime's commitment to a social market economy was merely a rhetorical device that sought to placate the regime's traditional constituency of peasants and workers whilst expanding its support base in the private sector. In practice, the 'social' aspect was sacrificed causing significant hardship for low-middle income Syrians.

The new reforms contributed to a substantial increase in FDI.<sup>110</sup> The increase was also attributable to the reluctance of Gulf investors to invest in America, because of the Bush Administration's policies, and in Iraq and Lebanon, because of internal instability.<sup>111</sup> Foreign trade also increased. However, imports grew at a faster rate than exports causing a balance of payments deficit in 2008.<sup>112</sup> Small domestic manufacturers were negatively impacted by an influx of cheap imports from China and Turkey.<sup>113</sup> Furthermore, intra-Arab trade remained limited and Syrian products struggled to compete on international markets.<sup>114</sup> Crucially, the economic opening was not an opening to the private sector as whole. The regime was afraid to implement a full economic opening in case private sector actors, especially Sunnis, grew powerful enough to threaten its security.<sup>115</sup> Hence, it ensured that the most lucrative opportunities were monopolised by a few, predominantly Alawi, regime-connected businessmen,<sup>116</sup> whereas the real private sector was allowed to compete for small scale opportunities.<sup>117</sup> Due to concerns over political instability, corruption, the contradictory regulatory

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<sup>109</sup> Sottimano (n46) ch4, lcn878–889.

<sup>110</sup> Selvik (n90) 37.

<sup>111</sup> *ibid* 37; Donati (n46) 43; Ehteshami and others (n46) 231.

<sup>112</sup> Foreign trade reportedly increased from 48% of GDP in 2000 to 62% in 2008. See ILO and UNICEF, 'National Study on Worst Forms of Child Labour in Syria' (ILO 2012) 46.

<sup>113</sup> Bassam Haddad, 'The Political Economy of Syria: Realities and Challenges' (2011) XVIII Middle EPol'y 46, 52; Hinnebusch, 'Syria: from 'authoritarian upgrading' to revolution?' (n41) 101.

<sup>114</sup> Haddad, 'The Political Economy of Syria' (n113) 48 and 50.

<sup>115</sup> Haddad, *Business Networks in Syria* (n47) ch3, lcn501–502, lcn769–814 and lcn947–983.

<sup>116</sup> Hinnebusch, 'Syria: from 'authoritarian upgrading' to revolution?' (n41) 98–99 and 101–102.

<sup>117</sup> Donati (n46) 42; Selvik (n90) 47–48.

regime and capacity deficits, private investors still refrained from investing in productive sectors and the real private sector remained underdeveloped.<sup>118</sup>

The regime's economic reform programme contributed to economic growth, but it was accompanied by increasing inequality.<sup>119</sup> Significantly, Syria's Human Development Index (HDI) for 2012 was 0.648; however, its Inequality-Adjusted HDI was only 0.515.<sup>120</sup> Traditionally, the regime had ensured that all Syrians could obtain basic necessities through a system of socialist-inspired subsidies. The system, which was universal in coverage, was criticised by IFIs and the EU.<sup>121</sup> A targeted social security programme based on prior needs mapping would have been a more economically efficient way of providing for the poor.<sup>122</sup> However, at the same time many low-income Syrians relied upon subsidies to survive. During the 2000s, the regime began reducing subsidies in an effort to end 'price distorting practices' and render Syria eligible for full participation in the EU Mediterranean Partnership (EMP) and accession to the World Trade Organization (WTO).<sup>123</sup> However, it didn't ensure that an effective social security net was in place in

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<sup>118</sup> Instead of investing in industry, manufacturing and agriculture, they invested in tertiary sectors, including tourism, trade, finance, construction and real estate. The contribution of the services sector to GDP increased from 38.6% in 1980 to 58.9% in 2008, whereas the percentage of the labour force employed in production declined from 54.2% in 1994 to 47.12% in 2008. See ILO and UNICEF (n112) 42 and 45. Only 13% of FDI after 2000 was directed towards manufacturing. See Hinnebusch, 'Syria: from 'authoritarian upgrading' to revolution?' (n41) 101. See also Haddad, 'The Political Economy of Syria' (n113) 50–53.

<sup>119</sup> The percentage of Syrians living in extreme poverty below the lower national poverty line increased from 11.4% in 2003–2004 to 12.2% in 2007, whereas the percentage living in poverty below the upper national poverty line increased from 30.1% to 33.6%. In 2010, a further 20% of Syrians were at risk of falling into extreme poverty in the event of further price hikes. See UNDP, 'Syrian Arab Republic Third National MDGs Progress Report' (UNDP 2010) 20; ILO and UNICEF (n112) 31 and 47. The State Planning Commission indicated that extreme poverty had reached 17.4% by 2008. See A/HRC/16/49/Add.2, para 8.

<sup>120</sup> The IHDI, unlike the HDI, takes account of differences in the distribution of development across the population. UNDP, 'Human Development Report 2013, The Rise of the South: Human Progress in a Diverse World – Explanatory note on 2013 HDR composite indices: Syrian Arab Republic HDI values and rank changes in the 2013 Human Development Report' (UNDP 2013).

<sup>121</sup> Subsidies reportedly cost 10–15% of GDP per annum and subsidised fuel was often smuggled to Lebanon and Turkey. See ENPI (n51) 9–10; Jörg Michael Dostal, 'The European Union and Economic Reform in Syria' (2009) 1 *Syria Studies* 5, 22–23 and 27 <<https://ojs.st-andrews.ac.uk/index.php/syria/article/view/711/607>> accessed 24 June 2018; Haddad, 'The Political Economy of Syria' (n113) 50–51; Wieland (n2) ch6, lcn3140.

<sup>122</sup> A/HRC/16/49/Add.2, para 20.

<sup>123</sup> Syria was granted observer status at the WTO in 2010.

advance. Consequently, the most vulnerable were disproportionately affected by the changes.<sup>124</sup>

The regime spoke of ambitious plans to replace subsidies with targeted measures.<sup>125</sup> However, given its declining oil resources and low tax intake it lacked the capital required to pay for them. Syria's tax system became even more regressive during Bashar's tenure.<sup>126</sup> The avenues for tax evasion for wealthy businessmen were increased<sup>127</sup> whilst low paid public sector workers continued to contribute the lion's share of tax income (almost 90% in 2004).<sup>128</sup> The regime planned to introduce Value Added Tax (VAT) in 2011; however, VAT disproportionately impacts the most vulnerable.

The regime also reduced its expenditure on public healthcare and education relative to demographic growth during the 2000s whilst concurrently authorising private hospitals and universities.<sup>129</sup> In an effort to tackle the bloated public sector, it stopped guaranteeing third level graduates public sector jobs. However, this exacerbated Syria's unemployment problem as the private sector was unable to plug the gap.<sup>130</sup> Elizabeth Buckner's research indicates that changes to the tertiary education sector under Bashar's tenure increased inequality and generated resentment over the growing role

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<sup>124</sup> The general consumer price index reported an index of 148.38 for foods in 2008 as compared with 100 in 2005. See A/HRC/16/49/Add.2, para 15. One report suggested that the price of industrial diesel increased by 450% in October 2004. See Wieland (n2) ch6, lcn3143.

<sup>125</sup> A/HRC/16/49/Add.2, para 19; Donati (n46) 55; Abboud, 'Locating the Social' (n40) ch3, lcn587–594.

<sup>126</sup> Haddad, *Business Networks in Syria* (n47) ch6; Hinnebusch, 'Syria: from 'authoritarian upgrading' to revolution?' (n41) 102; Donati (n46) 55–56.

<sup>127</sup> The maximum tax rate on net profits over 3 million Syrian Pounds was reduced to 28%, whereas private sector enterprises that offered at least half of the company's share capital for public subscription were relieved of the requirement to pay local taxes and only subjected to a 14% corporate tax rate. See Legislative Decree No 51 of 2006; Selvik (n90) 39. In 2003, the corporate tax rate was reduced from 65% to 35%. Elizabeth Buckner, 'The seeds of discontent: examining youth perceptions of higher education in Syria' (2013) 49 *Comparative Education* 440, 443.

<sup>128</sup> Haddad, *Business Networks in Syria* (n47) ch6, lcn3262.

<sup>129</sup> Hinnebusch, 'Syria: from 'authoritarian upgrading' to revolution?' (n41) 102; Abboud, 'Locating the Social' (n40) ch3, lcn626–629; Buckner (n127).

<sup>130</sup> By the late 2000s, some independent estimates placed the unemployment rate at 20–30% and as high as 60% for under 25 years olds. See Wieland (n2) ch6, lcn3116; Lesch, *The Fall* (n77) 57 and 62. For a discussion of Syria's unemployment problem, see Haddad, 'The Political Economy of Syria' (n113) 47 and 55; Haddad, *Business Networks in Syria* (n47) ch5, lcn3047–3053.

played by wealth and connections in determining access to university courses and graduate jobs.<sup>131</sup> Indeed, unemployed graduates represented a core constituency of the Arab Spring protesters.<sup>132</sup> The regime also failed to address shortcomings in primary and secondary education.<sup>133</sup> Consequently, drop-out and illiteracy levels remained high, particularly in disadvantaged regions.<sup>134</sup> Increasing unemployment exacerbated the drop-out problem as children had to work to subsidise family income.<sup>135</sup> This in turn perpetuated the poverty cycle given the correlation between low educational attainment and poverty.<sup>136</sup>

Ba'athist development policies had traditionally focussed on improving living standards in disadvantaged rural areas. However, Bashar focussed on developing Syria's urban centres to the benefit of the upper classes. Poverty was particularly extreme in the north-east region which was home to 55% of Syria's poor.<sup>137</sup> In 2010, the UNDP determined that disparities in development between regions and between rural and urban areas could prevent Syria from achieving its Millennium Development Goals.<sup>138</sup> The agricultural sector, traditionally a key pillar of the Syrian economy, experienced a 4.8% decline in annual growth from 2005 to 2008 due to successive droughts, the mismanagement of water supplies and generally unfavourable government policies.<sup>139</sup> Small farmers in the north-east were disproportionately impacted with many forced to abandon farming.<sup>140</sup> At the

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<sup>131</sup> See generally Buckner (n127).

<sup>132</sup> Buckner's research suggests that male third level graduates were more likely to be unemployed than males with primary school education. Buckner (n127) 447 and 454–455. See also Donati (n46) 53–55.

<sup>133</sup> See generally ILO and UNICEF (n112).

<sup>134</sup> The illiteracy rate for over 15 year olds declined from 27% in 1994 to 16% in 2005 but increased to 16.8% in 2008. ILO and UNICEF (n112) 28. The literacy rate for 15–24 years old increased from 88% in 1990 to 95.7% in 2006 but declined to 94.5% in 2008. UNDP (n119) 29.

<sup>135</sup> ILO and UNICEF (n112) 31, 36, 43 and 120–121.

<sup>136</sup> ENPI (n51) 12; A/HRC/17/25/Add.3, para 32; ILO and UNICEF (n112) 30.

<sup>137</sup> 15.4% of the north-east's population lived in extreme poverty with the figure rising to 19.7% in rural areas in 2007. See UNDP (n119) 20.

<sup>138</sup> UNDP (n119) 14 and 18. See also ILO and UNICEF (n112) 13; A/HRC/17/25/Add.3 paras 32, 37, 43, 51 and 54; CRC/C/SYR/CO/3-4 paras 63, 69, 70, 71 and 76.

<sup>139</sup> A/HRC/16/49/Add.2 paras 8–13, 21–23, 38, and 51–55; UNDP (n119) 71–72; Hinnebusch, 'Syria: from 'authoritarian upgrading' to revolution?' (n41) 102.

<sup>140</sup> 1.3 million people were impacted by the droughts, 95% of whom lived in these governates. 460,000 workers left the agricultural sector between 2001 and 2007. A/HRC/16/49/Add.2,

same time, the dismantling of state farms created new opportunities for corruption.<sup>141</sup>

Many newly unemployed farmers were forced to migrate to Syria's overcrowded cities giving rise to an urban migration epidemic.<sup>142</sup> This contributed to the 'urbanisation of poverty' with poverty prevalence in the urban south doubling between 2004 and 2007.<sup>143</sup> Most rural migrants lived in informal housing on the peripheries of towns and cities putting further pressure on the already limited services and employment available for poor people.<sup>144</sup> The shortage of affordable urban housing was exacerbated by the inflow of Iraqi refugees and the regime's economic policies, which contributed to speculation and a real estate boom in urban centres.<sup>145</sup> The explosion in house prices and removal of rent controls<sup>146</sup> forced many Syrians into informal housing.<sup>147</sup> Notably, some of the earliest Arab Spring protests in Damascus suburbs occurred in Douma where 70% of the population live in informal housing.<sup>148</sup>

The regime used terms such as 'social responsibility' to persuade businessmen and civil society actors to discharge the welfare-related functions that it no longer wished to pay for.<sup>149</sup> It tried to preserve some semblance of populist legitimacy by visibly promoting GONGOs, which

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paras 11 and 54. The percentage of workers employed in agriculture declined from 23.7% in 1994 to 16.8% in 2008. See ILO and UNICEF (n112) 43.

<sup>141</sup> A/HRC/16/49/Add.2, para 56; Donati (n46) 53.

<sup>142</sup> It is estimated that 29–30,000 families migrated from rural areas in 2009 and a further 50,000 in 2010. A/HRC/16/49/Add.2, para 13. The UNDP suggested that the drought caused the migration of 300,000 Syrians between 2006 and 2010. UNDP (n119) 72.

<sup>143</sup> The urban South, which had the lowest poverty level in 2004, had the second highest by 2007. See UNDP (n119) 14.

<sup>144</sup> UNDP (n119) 17–18. For a comprehensive discussion of Syria's housing crisis, see Robert Goulden, 'Housing, Inequality, and Economic Change in Syria' (2012) 38 *British Journal of Middle Eastern Studies* 187.

<sup>145</sup> Goulden (n144) 191–192; Heydemann and Leenders (n64) 13; 102; Donati (n46) 43.

<sup>146</sup> Omar S Dahi and Yasser Munif, 'Revolts in Syria: Tracking the Convergence Between Authoritarianism and Neoliberalism' (2012) 47 *JAAS* 323, 327.

<sup>147</sup> Hinnebusch, 'Syria: from 'authoritarian upgrading' to revolution?' (n41) 102.

<sup>148</sup> Goulden (n144) 201.

<sup>149</sup> Ruiz de Elvira and Zintl (n40) 336–337; Abboud, 'Locating the Social' (n40) ch3, lcn670–680. Alternatively, the regime has been praised for maintaining most hospital beds in the public sector. See Kasturi Sen, Waleed Al-Faisal, Yaser Al Saleh, 'Syria: effects of conflict and sanctions on public health' (2012) 35 *Journal of Public Health* 195, 196.

were meant to replace the weakened Ba'athist corporatist associations and discharge the development-related functions traditionally performed by the state.<sup>150</sup> However, they proved ill-equipped to perform these tasks.<sup>151</sup> Consequently, poverty alleviation was largely outsourced to Islamic charities.<sup>152</sup> Indeed, the main reason that Islamic charities were allowed to increase their non-political activities under Bashar's tenure was to offset the state's abandonment of its redistributive function.<sup>153</sup> However, they could not completely fill the void left by the evaporation of Ba'athist socialism.

### **5.2.ii.e The IFIs, the EU and Economic Reform**

Due to the Assad regime's Arab nationalist foreign policy, which precluded it from receiving assistance from the US-controlled IFIs, and its reliance upon socialism for domestic legitimacy, economic reform had traditionally not been as drastic in Syria as elsewhere in the Arab world.<sup>154</sup> However, this changed under Bashar's leadership. Part of the inspiration for his economic reform programme derived from Syria's participation in the Euro-Mediterranean Partnership (EMP), which sought to establish a free trade area between the EU and participating non-EU Mediterranean countries (MNCs).<sup>155</sup>

The EMP required the negotiation of bilateral association agreements between the EU and individual MNCs. Negotiations on Syria's association agreement acquired an urgency after the 2003 intervention in Iraq as the Assad regime was eager to avoid international isolation. A draft agreement was initialled in October 2004. It was criticised for its asymmetrical nature, which reflected the power imbalance between Syria and the EU, and led some

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<sup>150</sup> Ruiz de Elvira and Zintl (n40) 334–338.

<sup>151</sup> *ibid* 334–345.

<sup>152</sup> *ibid* 334, 337 and 345.

<sup>153</sup> See generally Pierret and Selvik (n53); Pierret, 'Sunni Clergy Politics' (n53) ch4, *lcn*1552–1554.

<sup>154</sup> Regarding the negative impact of structural adjustment style loans on human development in the Arab world, see Hamed El-Said and Jane Harrigan, 'Globalization, International Finance, and Political Islam in the Arab World' (2006) 60 *Middle EJ* 445.

<sup>155</sup> Regarding Bashar's reasons for participating in the EMP, see Hinnebusch, 'Globalization and Generational Change' (n8) 203–207; Leverett (n3) 85; Raymond Hinnebusch, 'Europe and the Middle East: From Imperialism to Liberal Peace?' (2012) 4 *Review of European Studies* 18, 26; Ehteshami and others (n46) 229–230.

commentators to suggest that it would cause more harm than good to Syrians overall.<sup>156</sup> It also contained provisions that required Syria to cooperate with the EU in countering the proliferation of weapons of mass destruction (WMDs) and suppressing terrorism, which were not included in other association agreements.<sup>157</sup> Ultimately, the agreement was never ratified due initially to the opposition of certain EU member states, especially France, and after 2009 to the Assad regime's cold feet.<sup>158</sup> By this point, Syria had escaped isolation and reduced its economic dependence on the EU.<sup>159</sup>

As the draft association agreement was never ratified, bilateral economic relations remained governed primarily by the 1977 Cooperation Agreement.<sup>160</sup> It afforded most Syrian industrial exports duty free access to the EU market on a non-reciprocal basis. Syria also received funding from the EU to achieve objectives outlined in periodic Country Strategy Papers (CSPs) and National Indicative Programmes (NIPs), which were drafted within the context of the EMP. They tended to prioritise economic over social and political reform.<sup>161</sup> The 2007–2013 CSP acknowledged that economic

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<sup>156</sup> See generally Hinnebusch, 'Globalization and Generational Change' (n8) 203–207; Dostal (n121) 5; Hinnebusch, 'Europe and the Middle East' (n155) 23–24 and 26. Although Zorob opined that, from a purely economic perspective, the short-term losses were outweighed by the potential long-term gains. See Anja Zorob, 'Partnership with the European Union: Hopes, risks and challenges for the Syrian economy' in Lawson (ed) (n2) ch8, lcn3228–3312. See also, regarding the EMP, Hinnebusch, 'Globalization and Generational Change' (n8) 203–207; Zorob, 'Trade Liberalization' (n104) 46–70.

<sup>157</sup> Council of the European Union Decision 9921/09 INIT, 'Council Decision on the signing, on behalf of the European Community, and provisional application of certain provisions of the Euro-Mediterranean Agreement establishing an association between the European Community and its Member States, on the one part, and the Syrian Arab Republic, on the other part' (17 August 2009) Appendix: 'Euro-Mediterranean Agreement establishing an Association between the European Community and its Member States, on the one part, and the Syrian Arab Republic, on the other part', arts 2, 5 and 120.

<sup>158</sup> Ratification was also complicated by the accession of ten new EU member states. See Dostal (n121) 17–18; Zorob, 'Trade Liberalization' (n104) 45; Hinnebusch, 'Syrian Foreign Policy' (n102) 12–13, 15, 21–22 and 24; Hinnebusch, 'Europe and the Middle East' (n155) 26; Ehteshami and others (n46) 230.

<sup>159</sup> Zorob, 'Partnership with the European Union' (n156) ch8, lcn3074–3128; Wieland (n2) ch6, lcn3272–3275.

<sup>160</sup> Cooperation Agreement between the European Economic Community and the Syrian Arab Republic, Official Journal L 269 (27 September 1978) 2–87 <[http://eeas.europa.eu/delegations/syria/eu\\_syria/political\\_relations/agreements/index\\_en.htm](http://eeas.europa.eu/delegations/syria/eu_syria/political_relations/agreements/index_en.htm)> accessed 24 January 2016.

<sup>161</sup> For example, the 2007–2010 NIP allocated €50 million (38.5%) of its budget to economic reform, €40 million (30.8%) to social reform, €30 million (23.1%) to political and administrative reform, and €10 million (7.7%) to interest-rate subsidies for European Investment Bank loans. The 2011–2013 NIP allocated €57 million (44%) of its budget to

reform was likely to exacerbate existing inequalities and increase poverty and unemployment, particularly amongst the most vulnerable.<sup>162</sup> Nonetheless, it insisted that existing fuel and food subsidies be replaced with a more efficient social safety net.<sup>163</sup> From a staging perspective, it should have recommended that this net be in place prior to the curtailment of subsidies.<sup>164</sup> From a geographical perspective, the 2007–2010 NIP's social reform policies focussed disproportionately on Damascus.<sup>165</sup> Although admittedly the 2011–2013 NIP sought to remedy this by identifying 'sustainable development of targeted rural areas' as a core priority of its social reform agenda.<sup>166</sup>

### 5.2.ii.f Theoretical Analysis of Authoritarian Upgrading

The above analysis revealed how authoritarian upgrading enhanced both the Assad regime's resilience and its vulnerability. Bashar's saturation of the repressive apparatus with loyalists, efforts to co-opt Sunni business and religious elites, and reinforcement of Syria's external alliances paid off during the Arab Spring. However, his concurrent weakening of the Ba'ath party proved ill-advised as the regime's increasingly minoritarian and nepotistic character under his leadership enhanced its importance as a mechanism for co-opting the masses, especially Sunnis.<sup>167</sup>

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economic reform, €47 million (37%) to social reform, and €25 million (19%) to political and administrative reform. ENPI, 'European Neighbourhood and Partnership Instrument: Syrian Arab Republic National Indicative Programme 2011–2013' 19 and 22 <[https://ec.europa.eu/europeaid/sites/devco/files/nip-syria-2011-2013\\_en.pdf](https://ec.europa.eu/europeaid/sites/devco/files/nip-syria-2011-2013_en.pdf)> accessed 7 July 2018.

<sup>162</sup> ENPI (n51) 8, 10, 12–13 and 27–29.

<sup>163</sup> *ibid* 8, 10 and 12.

<sup>164</sup> A draft 2000–2001 World Bank Development Report subtitled 'Attacking Poverty' recommended that social safety nets be put in place prior to the introduction of free market reforms. See Su Ming Khoo, 'Globalization, Terror and the Future of Development' in Maurice Mullard and Bankole A Cole (eds), *Globalization, Citizenship and the War on Terror* (Edward Elgar Publishing Inc 2007) 200.

<sup>165</sup> ENPI (n161) 13.

<sup>166</sup> *ibid* 6 and 13.

<sup>167</sup> On the importance of parties and corporatist organisations for co-opting supporters, see Jason Brownlee, *Authoritarianism in an Age of Democratization* (CUP 2007) 2 and 10–12; Jennifer Gandhi and Adam Przeworski, 'Authoritarian Institutions and the Survival of Autocrats' (2007) 40 *CompPolStud* 1279.



The analysis suggests that liberalising economic reform sustains, if not deepens, rent-seeking in countries ruled by authoritarian regimes.<sup>168</sup> It demonstrated that economic reform can necessitate a re-organisation of state-business networks creating new winners and losers. In Syria, this re-organisation negatively impacted many of the regime's former Sunni allies in the business community.<sup>169</sup> Some of these disenfranchised businessmen became financiers of the post-Arab Spring opposition.<sup>170</sup> The regime's policies also generated frustration amongst small manufacturers and traders who were negatively impacted by trade liberalisation and continued to operate on an uneven playing field. They would form a component of the opposition in small urban areas.<sup>171</sup>

Bashar's reliance upon the Chinese authoritarian capitalist model to justify his postponement of political reforms supports the contention that authoritarian regimes learn from each other. Furthermore, the analysis again demonstrated that authoritarian regimes sometimes cooperate to combat shared threats, including those posed by external pressures to implement political reforms.<sup>172</sup> The Assad regime was able to avoid a Western capitulation during the 2000s because of Russian debt relief and an economic opening eastward, most notably to China. China also negotiated bilateral economic agreements with authoritarian regimes in Egypt and Tunisia and offered loans free of Western-style conditionalities.<sup>173</sup> Chinese and Arab authoritarian leaders share a mutual hostility to human rights and democratic reform and a mutual commitment to the international legal principle of non-interference as reiterated in the China-Arab Friendship Association.<sup>174</sup> In the post-Arab Spring environment, China used its UNSC veto to defend Syria's

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<sup>168</sup> Regarding this argument, see Steven Heydemann, 'Networks of Privilege: Rethinking the Politics of Economic Reform in the Middle East' in *Networks of Privilege in the Middle East: the Politics of Economic Reform Revisited* (Palgrave MacMillan 2004).

<sup>169</sup> Ismail (n48) ch1, lcn271–335.

<sup>170</sup> Wieland (n2) ch6, lcn3046–3048; Hinnebusch, 'Authoritarian Upgrading and the Arab Uprising' (n40) 10.

<sup>171</sup> Hinnebusch, 'Authoritarian Upgrading and the Arab Uprising' (n40) 9.

<sup>172</sup> Heydemann, 'Upgrading Authoritarianism' (n32) 23–25. See also Raymond Hinnebusch, 'Globalization, democratization, and the Arab uprising: the international factor in MENA's failed democratization' (2015) 22 *Democratization* 335, 342.

<sup>173</sup> Heydemann, 'Upgrading Authoritarianism' (n32) 24.

<sup>174</sup> *ibid.*

right to non-interference.<sup>175</sup>

The analysis supports Davis' suggestion that ideologies and identities are more effective at reinforcing authoritarian rule when they accord with the ruling regime's actual behaviour and are supplemented by material benefits.<sup>176</sup> Under Bashar's leadership, the Ba'ath regime rescinded its social contract with low-middle income Syrians under which the state guaranteed minimal social welfare in return for a renouncement of popular political participation.<sup>177</sup> By 2011, it could no longer rely on its Arab nationalist foreign policy to distract attention from its abandonment of its redistributive role under Ba'athist socialism.

The analysis arguably reinforces the argument made by some TWAIL and structuralist scholars that international and regional trade regimes, such as the WTO and EMP, enable the structural domination and exploitation of weak states and peoples.<sup>178</sup> The EMP prioritised absolute over pro-poor economic growth despite the fact that it had already been proven that the benefits of economic growth do not automatically trickle down to the least well off.<sup>179</sup> It also prioritised economic reform over political reform perhaps in the expectation that the EMP would give rise to democratisation over the long term through dialogue and incentives.<sup>180</sup> However, some observers suggested that the EU and other Western actors actually needed authoritarian regimes to implement neoliberal economic policies and guarantee access to Middle Eastern markets and oil.<sup>181</sup> Truly democratic governments would

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<sup>175</sup> UNSC Verbatim Record (31 January 2012) UN Doc S/PV.6710, 25; UNSC Verbatim Record (22 May 2014) UN Doc S/PV.71, 13–14.

<sup>176</sup> Eric Davis, *Memories of State: Politics, History and Collective Identity in Modern Iraq* (University of California Press 2005) 272 and Conclusion generally.

<sup>177</sup> See generally Ruiz de Elvira and Zintl (n40).

<sup>178</sup> See generally Hinnebusch, 'Europe and the Middle East' (n155); Gerry Simpson, 'International Law in Diplomatic History' in James Crawford and Martti Koskenniemi (eds), *The Cambridge Companion to International Law* (CUP 2012) 34; Anne Orford, 'Constituting Order' in James Crawford and Martti Koskenniemi (eds), *The Cambridge Companion to International Law* (CUP 2012) 283.

<sup>179</sup> As was again demonstrated in Syria; see UNDP (n119) 19–26 and 70–71; ILO and UNICEF (n112) 44–46.

<sup>180</sup> Hinnebusch, 'Globalization, democratization, and the Arab uprising' (n172) 343.

<sup>181</sup> *ibid*; Hinnebusch, 'Europe and the Middle East' (n155) 23–24. See also Perthes, 'Europe and the Arab Spring' (n96) 81; Thomas Pogge, 'Divided Against Itself: aspiration and reality of International Law' in Crawford and Koskenniemi (eds) (n178) 384–388. For example,

have been answerable to the masses who were disenfranchised by economic reforms. On the contrary, authoritarian regimes were often willing accomplices in neoliberalism as it enabled the appropriation of state assets by corrupt regime elites.<sup>182</sup>

### 5.2.iii The Syrian Opposition

Prior to the Arab Spring, the Syrian opposition was divided between exiled and domestic opposition actors. Relations between these blocs were strained due largely to the exiled opposition's links to external actors.<sup>183</sup> The opposition included political parties, human rights organisations, the secular Civil Society Movement and a variety of Islamic and Kurdish actors. Joe Pace and Joshua Landis described political parties as 'the weakest link in the opposition'.<sup>184</sup> Legal parties that formed part of the National Progressive Front lacked legitimacy, whereas unauthorised parties faced repression.<sup>185</sup> Domestic human rights organisations were also weak as a result of regime repression, limited resources and internal conflicts.<sup>186</sup> The Civil Society Movement had a cross-sectarian membership and a secular orientation. It advocated political reform and non-violent opposition.<sup>187</sup> Whilst it was criticised for its elitist membership, it was arguably denied the opportunity to attract a popular following due to unrelenting regime repression.<sup>188</sup> Some of its leaders acquired prominent positions in post-Arab Spring opposition coalitions.

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despite criticising the Ben Ali regime's human rights record, France remained Tunisia's primary source of trade, credit and investment. Ali's authoritarian regime was considered a core regional ally of the EU and US in the fight against global terrorism and implementation of liberalising economic reforms. See Emma C Murphy, 'The Foreign Policy of Tunisia' in Hinnebusch and Ehteshami (eds) (n73) 240, 243–244 and 248–249.

<sup>182</sup> Hinnebusch, 'Europe and the Middle East' (n155) 23–24.

<sup>183</sup> Wieland (n2) ch7, lcn3805–3831.

<sup>184</sup> Pace and Landis (n2) ch7, lcn2556–2558.

<sup>185</sup> Ziadeh (n3) 27–28. See also Patrick Seale, *Asad: the Struggle for the Middle East* (University of California Press 1995) 175–176.

<sup>186</sup> Pace and Landis (n2) ch7, lcn2513–2536.

<sup>187</sup> Wieland (n2) ch7, lcn3711–3970.

<sup>188</sup> *ibid* ch7, lcn3962–3970 and lcn4039–4055; Joe Macaron, 'Syria: The Opposition and its Troubled Relationship with Washington' (2008) 6 Arab Reform Bulletin <<http://carnegieendowment.org/2008/02/05/arab-reform-bulletin-february-2008#macaron>> accessed 26 July 2015

The Kurdish opposition had traditionally been fragmented and weak as a result of both regime repression and appeasement.<sup>189</sup> Kurdish political parties had historically pursued a *détente* with the regime as the latter had provided support to both Abdullah Öcalan, the leader of the Turkish PKK, and Jalal Talabani, the leader of the Iraqi Patriotic Union of Kurdistan party (PUK).<sup>190</sup> However, during the late 1990s the regime reversed its traditional policy in order to facilitate a rapprochement with Turkey and Iraq. As a result of this U-turn, the momentum gathered during the Damascus Spring and developments in neighbouring Iraq,<sup>191</sup> the Kurdish opposition experienced an awakening during the 2000s. Several new Kurdish political parties emerged, including the PKK-linked Democratic Union Party (PYD).<sup>192</sup> These new parties began to actively demand respect for Kurdish rights and citizenship for stateless Kurds.

On the one hand, the Kurdish revival brought Kurdish and Arab opposition actors closer together with both occasionally participating together in peaceful demonstrations against the regime.<sup>193</sup> On the other hand, the Kurdish renaissance re-ignited Kurdish-Arab tensions as some Arabs accused Kurds of supporting the US intervention in Iraq.<sup>194</sup> Clashes took place between Kurdish and Arab soccer fans in Qamishli in 2004.<sup>195</sup> Security forces used lethal force against the Kurdish supporters causing fatalities. They again used live fire to disperse a peaceful protest at the victims' funerals.<sup>196</sup> In response, riots and demonstrations erupted in Kurdish majority areas. The regime deployed the army to repress the protests. It was assisted by Ba'athist militias comprised mainly of poor Arab farmers who had been granted

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<sup>189</sup> The regime appointed individual Kurds to prominent positions, including the positions of Grand Mufti and Prime Minister, and allowed some Kurds to take up seats in parliament provided that they refrained from promoting Kurdish rights.

<sup>190</sup> HRW, *Group Denial* (n23) 12; Julie Gauthier (Diana V Galbraith tr), 'The 2004 Events in al-Qamishli: Has the Kurdish question erupted in Syria?' in Lawson (ed) (n2) ch6, lcn2208–2225.

<sup>191</sup> These included the replacement of the reviled Hussein with a Kurdish president and the establishment of three semi-autonomous Kurdish provinces in northern Iraq. See HRW, *Group Denial* (n23) 14–15; Pace and Landis (n2) ch7, lcn2631; Wieland (n2) ch7, lcn2835.

<sup>192</sup> Gauthier (n190) ch6, lcn2228–2234.

<sup>193</sup> *ibid* ch6, lcn2261–2291.

<sup>194</sup> HRW, *Group Denial* (n23) 15.

<sup>195</sup> See Gauthier (n190) ch6, lcn2303–2431; Wieland (n2) ch6, lcn2818–2833.

<sup>196</sup> Gauthier (n190) ch6, lcn2311–2313.

misappropriated Kurdish land as part of the government's 'Arabisation' policy.<sup>197</sup>

The PKK was suspected of playing a role in this so-called Kurdish *intifada*, whereas the traditional Kurdish parties were seemingly caught off guard.<sup>198</sup> Afterwards, the regime intensified its repression of Kurds and sought to ensure that the Kurdish opposition remained fragmented.<sup>199</sup> Internal divisions in the Kurdish opposition movement would re-emerge in the post-Arab Spring context. The regime alleged that Kurdish political parties were pursuing Kurdish secession, whereas in reality most Kurdish parties sought democratic reform and respect for Kurdish minority rights *within* the existing Syrian state.<sup>200</sup> Nevertheless, the Kurdish *intifada* had symbolic significance as it mapped the geographical boundaries of a potential Syrian Kurdistan and gave Syrian Kurds the confidence to dream that it might one day become a reality.<sup>201</sup>

The exiled Syrian Muslim Brotherhood regained influence in Syrian opposition circles during the 2000s and even engaged in a short-lived rapprochement with the regime.<sup>202</sup> This rapprochement ended after the Brotherhood published a political programme in December 2004 in which it reaffirmed its commitment to non-violent opposition, democracy, human rights and minority rights.<sup>203</sup> The Brotherhood's more radical members, many of whom lived in exile in Saudi Arabia, rejected the Ikhwan's return to moderation. On the other hand, some secularists, religious minorities and moderate Muslims suspected that the Brotherhood's rediscovered moderation was purely strategic and that once in power it would establish a theocracy.<sup>204</sup>

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<sup>197</sup> *ibid* ch6, lcn2320–2325; HRW, *Group Denial* (n23) 15–16.

<sup>198</sup> Gauthier (n190) ch6, lcn2392–2431.

<sup>199</sup> HRW, *Group Denial* (n23) 1–7 and 18–59. Wieland suggested that 12 significant Kurdish political parties existed linked to 12 different Kurdish tribes. Wieland (n2) ch6, lcn2687.

<sup>200</sup> HRW, *Group Denial* (n23) 6; Pace and Landis (n2) ch7, lcn2625–2632.

<sup>201</sup> Gauthier (n190) ch6, lcn2433–2454.

<sup>202</sup> Thomas Pierret, 'Syria: Old-timers and Newcomers' in Robin Wright (ed), *The Islamists Are Coming: Who They Really Are* (Woodrow Wilson Center Press 2012) 75; Wieland (n2) ch7, lcn4140–4183.

<sup>203</sup> 'The Political Perspective for Syria: The Muslim Brotherhood's Vision of the Future' (London, 16 December 2004) reproduced in Lefèvre (n53) Appendix 6.

<sup>204</sup> Pace and Landis (n2) ch7, lcn2714–2718; Wieland (n2) ch7, lcn4247–4278.

Significantly, the Brotherhood did not discount the possibility of a gradual Islamisation of Syria's legal system if this was the will of the majority.<sup>205</sup> The Brotherhood's political programme stressed Syria's Islamic *and* Arab identity. Consequently, some Kurds considered it incompatible with Kurdish self-determination.<sup>206</sup>

Twelve opposition groups, including secularists, moderate Islamic actors, Kurds, Assyrians, Arabs, socialists, communists and liberals, formed a coalition in 2005, which issued the Damascus Declaration for Democratic and National Change. The Damascus Declaration criticised the regime's policies and called for an end to the state of emergency and political reform.<sup>207</sup> Its core principles were inclusion, non-violence, unity of the opposition, tolerance and democratic change.<sup>208</sup> Due to the imperative of achieving consensus, it ignored many contentious issues, including the relationship between religion and the state and between Syria's 'Arab' identity and Kurdish minority.<sup>209</sup> Consequently, it was criticised by hardliners in the Arab nationalist, Kurdish nationalist and secularist camps.<sup>210</sup> Nonetheless, it was an important step forward. It suggested that the opposition could potentially overcome their differences and pose a credible alternative to the regime.

The regime accused the signatories of the Damascus Declaration of complicity in a Western-sponsored conspiracy to destabilise the regime. Unfortunately, given the regional climate, this smear campaign did not entirely fall on deaf ears.<sup>211</sup> Even more detrimental to the coalition was the announcement in March 2006 of an alliance between the Syrian Muslim

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<sup>205</sup> Its political programme also stressed that 'appropriate values must be put in place to ensure that men and women continue to fulfil the mutually complementary roles God has assigned to them'. See Lefèvre (n53) 170–174 and Appendix 6. See also Pierret, 'Syria: Old-timers and Newcomers' (n202) 77. Furthermore, in 2006 it made somewhat sectarian statements denouncing Iranian-sponsored Shiitization in Syria. See Pierret, 'Karbala in the Umayyad Mosque' (n76) 99–116.

<sup>206</sup> Pierret, 'Syria: Old-timers and Newcomers' (n202) 75.

<sup>207</sup> HRW World Report 2006; Pace and Landis (n2) ch7, lcn2684–2734; Wieland (n2) ch7, lcn3832–3853.

<sup>208</sup> Pace and Landis (n2) ch7, lcn2688; Wieland (n2) ch7, lcn3832–3857.

<sup>209</sup> Pace and Landis (n2) ch7, lcn2703–2707; Wieland (n2) ch7, lcn3859–3864.

<sup>210</sup> Pace and Landis (n2) ch7, lcn2708–2721.

<sup>211</sup> *ibid* ch7, lcn2726–2734.

Brotherhood and the exiled former Vice President of Syria, Abdul Halim Khaddam. The alliance, called the National Salvation Front (NSF), gained support from many exiled opposition groups.<sup>212</sup> However, most domestic activists opposed it both because of its links to a former regime stalwart and because it shifted the core of the opposition outside of Syria.<sup>213</sup> The NSF collapsed in January 2009.

The Damascus-Beirut Declaration was released in May 2006. It was signed by 300 Lebanese and Syrian intellectuals and called upon the Assad regime to respect Lebanon's sovereignty and right to non-interference.<sup>214</sup> Many of its signatories were subsequently arrested. In 2007, the National Council of the Damascus Declaration for Democratic Change was formed as a successor to the Damascus Declaration.<sup>215</sup> However, its leaders were also arrested.<sup>216</sup> By this time, the regime had begun a rapprochement with the West and felt secure enough to repress the domestic opposition without fear of international condemnation. Indeed, the American and European response to the crackdown was predictably muted.<sup>217</sup>

Many domestic activists felt betrayed as European politicians and diplomats had encouraged them to actively oppose the regime after the Hariri assassination.<sup>218</sup> However, by the end of the decade overt human rights promotion in the Middle East was considered contrary to the West's economic and security interests.<sup>219</sup> Western leaders prioritised the maintenance of regional stability over the imperative of securing respect for human rights. However, in doing so they ignored the link between domestic human rights violations and international terrorism.

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<sup>212</sup> *ibid* ch7, lcn2807–2815.

<sup>213</sup> *ibid* ch7, lcn2790–2806; Pierret, 'Syria: Old-timers and Newcomers' (n202) 75.

<sup>214</sup> Pace and Landis (n2) ch7, lcn2840.

<sup>215</sup> Wieland (n2) ch7, lcn3948.

<sup>216</sup> *ibid* ch7, lcn3959–3961.

<sup>217</sup> Macaron (n188). HRW reports suggest that the EU and its member states were reluctant to exert overt substantial pressure on the Assad to improve its human rights performance during the 2000s. HRW World Reports 2002, 2003, 2005, 2010 and 2011.

<sup>218</sup> Wieland (n2) ch3, lcn1164–1175, ch6, lcn2946–2953 and ch13, lcn7245.

<sup>219</sup> Heydemann, 'Upgrading Authoritarianism' (n32) 32–33; HRW World Reports 2010 and 2011; Hokayem, *Syria's Uprising* (n78) Introduction, lcn234–244.

### 5.3 Regional Developments

This section discusses the Arab-Israeli peace process, the 2003 military intervention in Iraq and Syria's escape from isolation following the Hariri assassination.

#### 5.3.i Syrian-Israeli Peace Process

Bashar's succession coincided with a deterioration in American-Syrian relations as the US blamed Syria for the collapse of the Syrian track of the peace process.<sup>220</sup> Bashar initially indicated that he would resume negotiations on the basis of the Rabin deposit, but Israel refused to negotiate with preconditions.<sup>221</sup> The ascension of Ariel Sharon to power in Israel and the outbreak of the second Palestinian *intifada* rendered a resumption of peace talks unfeasible for the Assad regime in the near term.<sup>222</sup> Instead, Bashar reverted to Syria's pre-Oslo position and indicated that any Syrian-Israeli peace settlement was contingent upon a satisfactory resolution of the Palestinian question.<sup>223</sup> He also supported the *intifada*, upgraded Syria's relations with Islamist rejectionist groups, engaged in inflammatory anti-Israeli rhetoric and used Syria's membership of the UNSC from 2002 to 2003 to criticise Israel.<sup>224</sup>

Syria's ability to exert pressure on Israel was curtailed when Israel withdrew from southern Lebanon in May 2000. In response, Bashar sought to upgrade Syria's military deterrence by developing its chemical weapons programme and supporting Hezbollah attacks against Israeli positions in Shebaa Farms.<sup>225</sup> However, these attacks were controversial as several

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<sup>220</sup> Hinnebusch, 'Syrian Foreign Policy' (n102) 16–17.

<sup>221</sup> Leverett (n3) 120–122. The former Israeli Prime Minister, Yitzhak Rabin, reportedly undertook to make a full Israeli withdrawal from the Golan to the 1967 borders if Israeli security demands were met and Israeli-Syrian relations were fully normalised. See text to fn269 in ch4.

<sup>222</sup> Sharon had consistently stated his opposition to a full Israeli withdrawal from the Golan Heights. See Leverett (n3) 122–123; Hinnebusch, 'Syrian Foreign Policy' (n102) 15.

<sup>223</sup> A satisfactory settlement encompassed the establishment of a Palestinian state with Jerusalem as its capital and respect for the Palestinians' rights of return or adequate compensation. See Hinnebusch, 'Globalization and Generational Change' (n8) 198; Ziadeh (n3) 85.

<sup>224</sup> Hinnebusch, 'Globalization and Generational Change' (n8) 198–200; Leverett (n3) 124–125; Ziadeh (n3) 85–87.

<sup>225</sup> Leverett (n3); Hinnebusch, 'Syrian Foreign Policy' (n102) 15–16.



influential international actors, including the UNSC,<sup>226</sup> had determined that Shebaa Farms formed part of the occupied Golan rather than Lebanon. Syria and Lebanon contested this determination.<sup>227</sup> Crucially, if Shebaa Farms were considered part of the occupied Golan, the Assad regime would no longer be able to legally defend its support for Hezbollah as legitimate resistance against the Israeli occupation of Lebanon as Israel would have completed a full withdrawal.<sup>228</sup>

Bashar's support for Hezbollah rendered Syria vulnerable to Israeli attacks in both Lebanon and Syria.<sup>229</sup> Israel defended these attacks as preventative self-defence.<sup>230</sup> The Bush Administration declined to criticise them or Israel's violations of international law in the occupied Golan.<sup>231</sup> At the same time, it subjected Syria to additional economic sanctions. This combination of Israeli and American pressure convinced the Assad regime to moderate its position and call for a resumption of peace negotiations based upon the Rabin deposit. It has been suggested that Syria even offered to resume peace talks without preconditions.<sup>232</sup> However, Israel and the US rejected Syria's overtures both because they interpreted them as evidence of the Assad regime's weakness<sup>233</sup> and because they doubted Bashar's sincerity.<sup>234</sup> Accordingly, the Bush Administration excluded Syria and Lebanon from its Roadmap to Peace.<sup>235</sup>

During the 2000s, Israel expanded settlement construction in the occupied Golan and began constructing a security barrier in the West Bank.

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<sup>226</sup> In June 2000, the UNSC confirmed that Israel had completed a full withdrawal from Lebanon. See UNSC PRST 2000/21 (18 June 2000) UN Doc S/PRST/2000/21.

<sup>227</sup> UNGA/UNSC, 'Letter dated 12 June 2000 from the Permanent Representative of Lebanon to the United Nations addressed to the Secretary-General' (12 June 2000) UN Doc A/54/914-S/2000/564; Leverett (n3) 101.

<sup>228</sup> Leverett (n3) 112–113; Wieland (n2) ch12, lcn6721–6726.

<sup>229</sup> Leverett (n3) 114–115 and 118; Ziadeh (n3) 86–87 and 96.

<sup>230</sup> Wieland (n2) ch12, lcn6576–6577.

<sup>231</sup> Regarding these violations, see A/HRC/16/49/Add.2 paras 61–64.

<sup>232</sup> Leverett (n3) 128; Zisser, 'Bashar Al-Assad' (n8) 125; Raymond Hinnebusch and Neil Quilliam, 'Contrary Siblings: Syria, Jordan and the Iraq War' (2006) 19 *Cambridge Review of International Affairs* 513, 523; Wieland (n2) ch5, lcn2034.

<sup>233</sup> Zisser, 'Bashar Al-Assad' (n8) 125; Hinnebusch, 'Syrian Foreign Policy' (n102) 16 and 19–20. See also Wieland (n2) ch5, lcn2036–2041.

<sup>234</sup> Leverett (n3) 128.

<sup>235</sup> Regarding the Roadmap, see Ziadeh (n3) 90 and 95–96.

These actions rendered a peace settlement more elusive and indirectly boosted hard-liners in the Palestinian resistance. Nevertheless, Israel's actions were implicitly supported by neoconservatives in the Bush administration with links to the Likud party who opposed any bilateral peace settlement that would necessitate an Israeli withdrawal from the Golan Heights.<sup>236</sup> The EU criticised Israel's Security Wall and blockade on Gaza.<sup>237</sup> However, due in part to its inability to reach a unified position, it allowed the US to play a dominant role in the peace process.<sup>238</sup> Consequently, many Arabs lost confidence in the EU.<sup>239</sup>

Syria and Israel agreed to participate in Turkish-mediated peace negotiations in 2008.<sup>240</sup> Ultimately, the negotiations came to naught due to Israel's initiation of Operation Cast Lead in December. Hopes for peace increased in the Arab world after the new US President, Barack Obama, indicated his desire to restart the peace process based upon the 1967 borders and halt Israel's construction of illegal settlements. However, due to the opposition of the Likud-led Israeli government and domestic obstacles, including a struggling economy and divided Congress, Obama failed to achieve his goals leading to further disillusionment amongst Arabs.<sup>241</sup>

Some commentators have speculated whether Syrian and Israeli politicians were genuinely committed to peace.<sup>242</sup> For the Assad regime, anything less than a full recovery of the Golan Heights would undermine

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<sup>236</sup> Hinnebusch and Quilliam (n232) 521–522; Hinnebusch, 'Syrian Foreign Policy' (n102) 17.

<sup>237</sup> Hinnebusch, 'Europe and the Middle East' (n155) 24.

<sup>238</sup> *ibid* 21 and 24–25.

<sup>239</sup> Volker Perthes, 'America's "Greater Middle East" and Europe: Key Issues for Dialogue' (2004) XI Middle EPol'y 85, 93 and 97; Hinnebusch, 'Europe and the Middle East' (n155) 25 and 27–28.

<sup>240</sup> For a discussion of the potential reasons underlying their respective decisions to participate, see Hinnebusch, 'Syrian Foreign Policy' (n102) 16; Josef Olmert, 'Israel–Syria: The Elusive Peace' (2011) 20 Digest of Middle East Studies 202, 205–206.

<sup>241</sup> Charles Smith, 'The Arab Israeli Conflict' in Louise Fawcett (ed), *International Relations of the Middle East* (4th edn, OUP 2015) 277–278. See also Scott McConnell and others, 'Symposium: Policy choices for the New Administration' (2012) 19 Middle EPol'y 1, 2–6; Wieland (n2) ch8, lcn5439–5480 and ch13, lcn7180–7206; Jülide Karakoç, 'US Policy Towards Syria Since the Early 2000s' (2013) 41 Critique: Journal of Socialist Theory 223, 229 and 233–235.

<sup>242</sup> See eg Wieland (n2) ch8, lcn5216–5304.

regime legitimacy. Furthermore, a peace agreement would remove the rationale for Syria's repressive apparatus – a core source of internal security. From an Israeli perspective, the settler community in the occupied Golan and water-related concerns posed considerable hurdles.<sup>243</sup> Furthermore, after the al-Aqsa *intifada* Israeli popular opinion swung to the right and appeared opposed to a full withdrawal from the occupied Arab territories.<sup>244</sup> In November 2010, Likud secured the adoption of a National Referendum Law, which precluded any land for peace deal that did not have the support of at least two thirds of the Knesset or a national referendum. This law made it even more difficult for Israel to agree a peace deal with Syria.<sup>245</sup>

### **5.3.i.a Theoretical Analysis of the Peace Process**

As constructivists would expect, the analysis again demonstrated the impact of domestic level factors on foreign policy formation. Due to the failure of the Madrid Peace Process, the Assad regime was unable to moderate its Arab nationalist ideology as popular opinion in Syria had turned against Israel and the US. Israel and the Bush Administration's refusal to accept the Assad regime's various invitations to negotiate suggests that they prioritised their respective national interests over the imperative of achieving peace as realism would anticipate. The absence of accountability for Israel's construction of illegal settlements in the occupied Arab territories also supports the realist argument that international law is dependent upon powerful states for its enforcement. Instead of condemning Israel's actions, the Bush Administration implicitly supported them. The failure to achieve a peaceful resolution to the Arab-Israeli conflict contributed to a rise in support for Islamist extremists in the Arab world as they were seen as the only entities capable of standing up to Israel and the US.

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<sup>243</sup> A return to the 1967 borders would afford Syria access to Lake Tiberias. See A/HRC/16/49/Add.2, para 63; Olmert (n240) 208.

<sup>244</sup> Clive Jones, 'The Foreign Policy of Israel' in Hinnebusch and Ehteshami (eds) (n73) 305–306 and 310.

<sup>245</sup> Kurth (n103) 265; Wieland (n2) ch8, lcn5260–5267.

### 5.3.ii Lebanon and Escape from Isolation

For much of Bashar's first decade in power, the Assad regime was virtually isolated at the regional and international levels due to its opposition to the 2003 intervention in Iraq, de facto occupation of southern Lebanon and support for Islamist rejectionist groups. In September 2004, the UNSC adopted Resolution 1559 which demanded Syria's evacuation from Lebanon.<sup>246</sup> Even the regime's allies, Russia and China, and Algeria, the only Arab member of the UNSC, abstained from the vote signalling the extent of Syria's isolation.<sup>247</sup> The resolution was triggered by excessive Syrian interference in Lebanon's internal affairs.<sup>248</sup>

After the Hariri assassination in February 2005, the Assad regime's very survival appeared to be in jeopardy.<sup>249</sup> The US withdrew its Ambassador to Syria, the EU suspended negotiations over the draft EU-Syrian association agreement, and Syria was forced to evacuate Lebanon amidst a wave of domestic protests. In October, an independent commission established by the UNSC determined that it was likely that senior Syrian security officials had been involved in Hariri's murder.<sup>250</sup> In May 2006, the UNSC adopted resolution 1680 which 'strongly encouraged' Syria to re-establish full diplomatic relations with Lebanon and delineate the Lebanese-Syrian border.<sup>251</sup>

Syria managed to avoid complete isolation by maintaining links with Iran, Russia, Turkey, Hezbollah and Palestinian rejectionist groups. After Hezbollah's perceived triumph in its 2006 war with Israel and Hamas' victory in Palestine's 2006 parliamentary elections, Western leaders began to perceive isolation as counterproductive.<sup>252</sup> Accordingly, Obama sought to engage the Assad regime in an effort to kick-start the Middle East peace

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<sup>246</sup> UNSC Res 1559 (2 September 2004) UN Doc S/RES/1559, para 2.

<sup>247</sup> Although the Lebanese government defended Syria's presence as a legitimate intervention by invitation. Christine Gray, *International Law and the Use of Force* (OUP 2018) 102.

<sup>248</sup> Leverett (n3) 110–111; Wakim (n84) 191–192.

<sup>249</sup> Leverett (n3) 108–111.

<sup>250</sup> 'Report of the International Independent Investigation Commission established pursuant to Security Council Resolution 1595 (2005)' (19 October 2005) paras 8 and 209.

<sup>251</sup> UNSC Res 1680 (17 May 2006) UN Doc S/RES/1680.

<sup>252</sup> HRW World Report 2007. See also Wieland (n2) ch3, lcn1200–1229.

process and wean Syria away from Iran. In 2010, he appointed the first US Ambassador to Syria since 2005.<sup>253</sup> His administration also eased US sanctions against Syria<sup>254</sup> and allowed Syria's application for observer status at the WTO. In return, the Assad regime undertook to tighten control of the Syrian-Iraqi border.<sup>255</sup> The EU, led by France, also pursued a détente with the Assad regime. The Assad regime in turn restored diplomatic relations with Lebanon, participated in Turkish-facilitated peace talks with Israel and engaged in a tentative reconciliation with Iraq and Saudi Arabia.<sup>256</sup>

### 5.3.iii 2003 Intervention in Iraq

After 9/11, in a break with past policy, the Bush Administration began to forcibly promote democratisation in the Middle East as a means of undercutting support for terrorism. In 2002, it included Syria on a list of rogue states that supported terrorism and pursued WMDs. Syria's supposed WMD capability derived from its chemical warfare programme, which it pursued primarily to enhance its military deterrent capacity, and its alleged pursuit of biological weapons.<sup>257</sup> The Bush Administration's 2002 National Security Strategy indicated that the US would take pre-emptive action against terrorist threats before they were unleashed.<sup>258</sup> The first target of this pre-emptive self-defence policy was Iraq.

The UK, Poland and Australia supported America's proposed military intervention in Iraq, including by offering troops.<sup>259</sup> Germany, France, Russia and Syria actively opposed it in the UNSC, whereas Turkey refused to allow the US to launch attacks from its territory. Most Arab leaders felt that the

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<sup>253</sup> Robert Ford's appointment following his nomination in 2010 was delayed until 2011 due to the opposition of Republican senators.

<sup>254</sup> Kurth (n103) 243–244. Although it renewed existing sanctions in 2009 due to suspicions that the Assad regime was still allowing terrorists to enter Iraq from Syria. Hinnebusch, 'Syrian Foreign Policy' (n102) 25.

<sup>255</sup> Michael Weiss and Hassan Hassan, *ISIS: Inside the Army of Terror* (Regan Arts 2015) 111–113.

<sup>256</sup> ENPI (n161) 3; Hokayem, *Syria's Uprising* (n78) ch4, lcn1804–1886.

<sup>257</sup> HRW World Report 2003; Leverett (n3) 13–14; Hinnebusch, 'Syrian Foreign Policy' (n102) 9, 15 and 17; Karakoç (n241) 233–234.

<sup>258</sup> 'The National Security Strategy of the United States of America' (17 September 2002) 15 <<https://www.state.gov/documents/organization/63562.pdf>> accessed 9 July 2018.

<sup>259</sup> Marc Weller, *Iraq and the Use of Force in International Law* (OUP 2010) 182.

intervention was ill-advised. Nevertheless, apart from Syria, they did not actively oppose it. Egypt, Jordan and Saudi Arabia even provided secret support, initially in order to avoid antagonising the US and later to curtail Iran's influence in Iraq.<sup>260</sup> Iran predictably opposed the intervention, which brought US troops to its Western border. It feared that a US-aligned Iraqi regime would establish economic and diplomatic relations with Israel, operate outside of OPEC and generally act as a proxy for US interests.<sup>261</sup> It also feared that if regime change was achieved in Iraq with minimal effort, the US would attempt a similar feat in Iran. Accordingly, it supported Shiite militias in Iraq in order to increase the costs of the intervention for the US.<sup>262</sup>

The Assad regime voted in favour of UNSC Resolution 1441 in November 2002, which demanded that Iraq re-admit UN weapons inspectors.<sup>263</sup> The regime expected that the inspections would remove the justification for the proposed US intervention.<sup>264</sup> It actively opposed the intervention at the UNSC<sup>265</sup> and attempted to trigger the Arab League Collective Security Pact in an effort to prevent the launching of attacks from Arab territory.<sup>266</sup> Like Iran, it sought to increase the costs of the intervention, including by facilitating the flow of weapons and resistance fighters across

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<sup>260</sup> Regarding Egypt's support, see Hinnebusch and Quilliam (n232) 518–520; Raymond Hinnebusch and Nael Shama, 'The Foreign Policy of Egypt' in Hinnebusch and Ehteshami (eds) (n73) 95. Regarding Saudi Arabia's support, see Matteo Legrenzi and F Gregory Gause III, 'The International Politics of the Gulf' in Fawcett (ed) (n241) 313–314. Regarding Jordan's support, see Curtis R Ryan, 'The Foreign Policy of Jordan' in Hinnebusch and Ehteshami (eds) (n73) 143–149.

<sup>261</sup> Anoushiravan Ehteshami, 'The Foreign Policy of Iran' in Hinnebusch and Ehteshami (eds) (n73) 274–276.

<sup>262</sup> Jubin M Goodarzi, *Syria and Iran: Diplomatic Alliance and Power Politics in the Middle East* (2nd edn, IB Tauris 2009) 293–294; Volker Perthes, 'Ambition and Fear: Iran's Foreign Policy and Nuclear Programme' (2010) 52 *Survival* 95, 99; Daniel Byman, 'Sectarianism Afflicts the New Middle East' (2014) 56 *Survival* 79, 80–81 and 89–91; Weiss and Hassan (n255) ch4.

<sup>263</sup> UNSC Res 1441 (8 November 2002) UN Doc S/RES/1441 (S/RES/1441).

<sup>264</sup> The US Secretary of State, Colin Powell, reportedly secured Syria's vote by arguing that the resolution was designed to prevent a military intervention. See Leverett (n3) 136; Hinnebusch and Quilliam (n232) 521; Hinnebusch, 'Syrian Foreign Policy' (n102) 17–18.

<sup>265</sup> See Leverett (n3) 136–138; Hinnebusch, 'Syrian Foreign Policy' (n102) 18.

<sup>266</sup> Hinnebusch and Quilliam (n232) 521.

the Syrian-Iraqi border and allowing jihadists and deposed Iraqi Ba'athists to take refuge in Syria.<sup>267</sup>

Bashar's response to the intervention was compared unfavourably with his father's response to the 1991 Gulf War.<sup>268</sup> However, the circumstances were very different. The 2003 intervention sought to violate, not restore, the sovereignty of an Arab state and consequently was massively unpopular amongst Arab publics.<sup>269</sup> A military intervention could engender sectarian conflict and Kurdish separatism in Iraq, which could spill-over into Syria.<sup>270</sup> Finally, unlike in 1991, Syria was offered no reward to support the intervention.<sup>271</sup> Instead, it was likely that once Hussein's regime was removed, the Bush Administration would turn its attention to Syria.

Indeed, after toppling Saddam's regime the Bush Administration indicated that the Assad regime would be next unless it complied with a list of non-negotiable demands. These demands required the regime to cease its support for Hezbollah and Palestinian rejectionist groups, allow independent verification of its supposed WMD capability, withdraw from Lebanon and cooperate with the US in its war on terror.<sup>272</sup> The Assad regime could not accept these demands without jeopardising its survival as they effectively required it to relinquish its Arab nationalist legitimacy and bargaining cards in any future Syrian-Israeli negotiations.<sup>273</sup> Instead, the regime offered limited concessions in an attempt to demonstrate how easy or difficult it could make life for the Occupying Forces depending on whether or not they took Syria's interests into account.<sup>274</sup> However, the Bush Administration interpreted these concessions as a sign of weakness and sought to increase the

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<sup>267</sup> See *ibid*; F Gregory Gause III, 'Balancing What? Threat Perception and Alliance Choice in the Gulf' (2003) 13 *Security Studies* 273, 305; Goodarzi, *Syria and Iran* (n262) 293–294; Leverett (n3) 137; Wieland (n2) ch8, lcn5932–5421; Weiss and Hassan (n255) ch7.

<sup>268</sup> See Hinnebusch and Quilliam (n232) 521–523; Salloukh (n74) ch9, lcn3420–3453; Leverett (n3) 136–137; Hinnebusch, 'Syrian Foreign Policy' (n102) 18–20.

<sup>269</sup> See *eg* Wieland (n2) ch3, lcn1090–1099 and ch5, lcn2049–2078.

<sup>270</sup> Salloukh (n74) ch9, lcn3469–3478

<sup>271</sup> Hinnebusch, 'The Foreign Policy of Syria' (n94) 228.

<sup>272</sup> Hinnebusch and Quilliam (n232) 522; Salloukh (n74) ch9, lcn3488–3493.

<sup>273</sup> Hinnebusch and Quilliam (n232) 522; Hinnebusch, 'Syrian Foreign Policy' (n102) 19; Ehteshami and others (n46) 228.

<sup>274</sup> Hinnebusch and Quilliam (n232), 522–524.

pressure on the Assad regime by implementing further sanctions against Syria.<sup>275</sup> These sanctions failed to change the regime's behaviour or secure regime change.<sup>276</sup> However, they did heighten anti-American sentiment in Syria.

Ultimately, the Bush Administration's attempt to forcibly export democracy to the Middle East ended up bolstering support for Islamist extremism and reinforcing authoritarian rule in the region. The Bush Administration's double standards deprived its campaign of credibility. It targeted Saddam's ostensibly secular regime whilst ignoring the theocratic Saudi monarchy whose Wahhabi ideology may have inspired the 9/11 bombers – the majority of whom were Saudi nationals.<sup>277</sup> Its campaign to 'emancipate' Iraqis contrasted with its complicity in the denial of Palestinian rights. Its criticism of Iraq and Syria's 'alleged' WMD capabilities amplified its silence over Israel's 'definite' WMD capability.<sup>278</sup> Its war on terror contravened international law and its own liberal values by attempting to create 'rights free zones'.<sup>279</sup> Finally, its actual efforts at democracy promotion were shallow. They focused on the hosting of elections and ignored the results if they didn't accord with Western interests.

The regional turmoil unleashed by the intervention reinforced the essentialist myth that Middle Eastern states cannot 'do democracy'. Furthermore, the victory of Hamas in the 2006 Palestinian parliamentary elections alarmed Western actors as it demonstrated that democratisation

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<sup>275</sup> *ibid* 523–524; Hinnebusch, 'Syrian Foreign Policy' (n102) 20. Regarding the sanctions, see US Department of the Treasury Office of Foreign Assets Control, Syria Sanctions Program (updated 2 August 2013) <<http://www.treasury.gov/resource-center/sanctions/Programs/Documents/syria.pdf>> accessed 31 July 2015; Kurth (n103) 242–3.

<sup>276</sup> See Leverett (n3) 149–151; Kurth (n103) 253–267.

<sup>277</sup> Patrick Cockburn, *The Rise of Islamic State: ISIS and the New Sunni Revolution* (Kindle edn, Verso 2015) ch1, lcn179–199.

<sup>278</sup> Hinnebusch, 'Syrian Foreign Policy' (n102) 9 and 17; Karakoç (n241) 233–234. The EU also demonstrated double standards with regard to WMDs. It insisted upon the inclusion of a provision requiring Syria to cooperate with the EU in countering the proliferation of WMDs in the draft EU-Syrian Association Agreement. However, no equivalent provision was included in the EU-Israeli Association Agreement. Wieland (n2) lcn3253–3264 and ch12, lcn7013–7017.

<sup>279</sup> Kathleen Cavanaugh and Joshua Castellino, *Minority Rights in the Middle East: A Comparative Legal Analysis* (OUP 2013) 28–29.



could end up empowering Islamists. Consequently, many Western powers came to view authoritarian regimes, even traditional foes, as the best means of protecting their interests. Indeed, the increase in Islamist extremism triggered by the intervention enabled authoritarian regimes to portray themselves as bastions of stability to international and domestic audiences.

The intervention ultimately helped Bashar to consolidate his rule. His staunch opposition to the intervention boosted his popularity in Syria and the Arab world.<sup>280</sup> The Bush Administration's exploitation of the language of democracy and human rights to justify its neo-imperial adventure enabled the Assad regime to delegitimise domestic pro-democracy and human rights activists by labelling them as US/Israeli conspirators.<sup>281</sup> The regime also exploited the resulting upsurge in Islamist extremism to discredit all Islamic opposition actors as radicals and terrorists. It relied upon the instability that followed America's forcible exportation of democracy to Iraq to justify its failure to implement political reforms.<sup>282</sup> The influx of Iraqi refugees served as a potent reminder of the risks associated with political reform and regime change.<sup>283</sup> Finally, the de-Ba'athification policies implemented by the new Shia-dominated Iraqi government prompted Alawis and Ba'athists, even those who had not benefitted under the Assad regime, to rally behind the regime for fear of blanket retribution based on sectarian and/or political affiliation should the regime fall.<sup>284</sup>

### 5.3.iii.a Legality of the 2003 Intervention in Iraq

The international legal rules governing the use of force, *jus ad bellum*, stipulate that the threat or use of force against another state is only legitimate when it is authorised by the UNSC in response to a threat to the peace, breach of the peace or act of aggression or where a state is legitimately exercising

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<sup>280</sup> Hinnebusch, 'Syrian Foreign Policy' (n102) 23–24; Wieland (n2) ch5, lcn2048–2069; Ehteshami and others (n46) 227–228.

<sup>281</sup> Ziadeh (n3) 74; Pace and Landis (n2) ch7, lcn2612–2613; Ehteshami and others (n46) 228.

<sup>282</sup> HRW, *A Wasted Decade* (n2) 3–4; Hinnebusch, 'Syrian Foreign Policy' (n102) 22–23. See also Wieland (n2) ch3, lcn1085–1089, ch5, lcn2573–2584 and ch6, lcn2599–2609.

<sup>283</sup> Hinnebusch, 'Syrian Foreign Policy' (n102) 23; Pace and Landis (n2) ch7, lcn2885–2887.

<sup>284</sup> Jomana Qaddour, 'Unlocking the Alawite Conundrum in Syria' (2012) 36 TWQ 67, 70.

the right of individual or collective self-defence.<sup>285</sup> The US sought to rely upon the material breach doctrine and an asserted right of pre-emptive/preventative self-defence to justify its intervention in Iraq. However, the majority of the international community opposed the intervention as a violation of Iraqi sovereignty.<sup>286</sup>

Borrowing from the international law of treaties, the material breach doctrine suggests that a material breach of a ceasefire agreement could revive an original UNSC authorisation to use force. The US<sup>287</sup> argued that Iraq had not utilised the 'final opportunity' afforded to it under UNSC Resolution 1441 to comply with its disarmament obligations,<sup>288</sup> that Iraq was in 'material breach' of the conditions of the 1991 ceasefire outlined in UNSC Resolution 687,<sup>289</sup> and that this material breach revived the authority to use force contained in UNSC Resolution 678.<sup>290</sup> It further argued that the 2003 military intervention was necessary to secure compliance with Iraq's disarmament obligations.<sup>291</sup>

The material breach doctrine has been challenged.<sup>292</sup> As originally conceived, it stipulated that it was up to the UNSC to decide if '(a) a breach had occurred, (b) the breach was of sufficient gravity to suspend the ceasefire and (c) the authority to use force revived in relation to certain former

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<sup>285</sup> Charter of the United Nations (adopted 25 June 1945, entered into force 24 October 1945) 1 UNTS XVI, arts 2 (4), 39–51 and 53. Art 53 provides for the use of force by regional arrangements or regional agencies acting in pursuance of a UNSC mandate and in accordance with the principles and purposes of the UN Charter.

<sup>286</sup> The intervention was opposed by the League of Arab States, the Non-Aligned Movement, the Organisation of the Islamic Conference and most of the then members of the UNSC. See UNSC Verbatim Record (27 March 2013) UN Doc S/PV.4726; UNSC Verbatim Record (27 March 2013) UN Doc S/PV.4726 (Resumption 1) (S/PV.4726 (Resumption 1)).

<sup>287</sup> For America's legal argument, see UNSC, 'Letter dated 20 March 2003 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council' (21 March 2003) UN Doc S/2003/351 (S/2003/351).

<sup>288</sup> S/RES/1441 paras 1 and 2.

<sup>289</sup> UNSC Res 687 (3 April 1991) UN Doc S/RES/687.

<sup>290</sup> UNSC Res 678 authorised 'Member States co-operating with the Government of Kuwait, unless Iraq on or before 15 January 1991 fully implements, as set forth in paragraph 1 above, the foregoing resolutions, to use all necessary means to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area'. See S/RES/678, para 2.

<sup>291</sup> See arguments by UK and Australia in S/PV.4726 (Resumption 1) 23 and 27; Weller (n259) 183.

<sup>292</sup> See eg Weller (n259) ch4.

coalition powers'.<sup>293</sup> These conditions were not satisfied prior to the 2003 intervention. There was no agreement amongst UNSC members that Iraq was still in material breach of its disarmament obligations and, even if there had been, in accordance with the terms of Resolution 1441<sup>294</sup> and the doctrine itself, it was up to the UNSC to determine what action to take in response thereto.<sup>295</sup> The majority of the then UNSC members, including three permanent members – Russia, China and France – had explicitly declined to authorise the use of force.<sup>296</sup>

The US also argued that the coalition's actions were necessary to 'defend the United States and the international community from the threat posed by Iraq'.<sup>297</sup> Forcible measures taken in the name of individual or collective self-defence are allowed where a state has been subjected to an armed attack and the measures 'are proportional to the armed attack and necessary to respond to it'.<sup>298</sup> However, the US had not been subjected to an armed attack by Iraq nor had it adduced credible evidence to suggest that al Qaeda had been acting on behalf of the Iraqi Ba'athist regime when it launched the 9/11 attacks or that al Qaeda was operating from inside Iraq. States have invoked a right of anticipatory self-defence under customary international law in response to an imminent armed attack where the necessity for self-defence was 'instant, overwhelming, and leaving no choice of means, and no moment for deliberation'.<sup>299</sup> The UNSG declared in 2005 that 'Imminent threats are fully covered by Article 51'.<sup>300</sup> However, there was no evidence that Iraq, whose military power had been dramatically reduced

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<sup>293</sup> *ibid* 130.

<sup>294</sup> S/RES/1441 paras 11–12.

<sup>295</sup> Weller (n259) 152–182.

<sup>296</sup> *ibid* 173–182.

<sup>297</sup> S/2003/351 2.

<sup>298</sup> *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* (Merits Judgment) [1986] ICJ Rep 14 [176].

<sup>299</sup> *The Caroline Standard*. See 'Letter, dated 6 August 1842, from Mr. Webster to Lord Ashburton, Department of State, Washington' <[http://avalon.law.yale.edu/19th\\_century/br-1842d.asp#web1](http://avalon.law.yale.edu/19th_century/br-1842d.asp#web1)> accessed 14 October 2014. See also Derek Bowett, *Self-Defence in International Law* (Manchester UP 1958) 191–2; Noam Lubell, *Extraterritorial Use of Force Against Non-State Actors* (OUP 2010) 59.

<sup>300</sup> UNGA, 'Report of the UNSG – In Larger Freedom: Towards Security, Development and Human Rights for All' (21 March 2005) UN Doc A/59/2005, para 124.

following a decade of punitive sanctions, posed an imminent threat to the US or to any other state in the Middle East.

The Bush Administration argued that the criterion of imminent threat must be replaced by 'sufficient threat' in the modern era in which rogue states and terrorists use terrorism and WMDs to secure their aims.<sup>301</sup> Accordingly, it asserted a right of pre-emptive/preventative self-defence against states and non-state actors that had demonstrated hostile intentions toward the US and the willingness to attack it.<sup>302</sup> It included the Iraqi Ba'athist regime in this bracket on the grounds that (i) it possessed WMDs, (ii) it had demonstrated hostile intentions towards the US by attempting to assassinate former President G.H.W. Bush and providing aid to international terrorist organisations, and (iii) al Qaeda operatives were in Iraq.<sup>303</sup> At least two of these claims were subsequently proven to be false. Furthermore, the doctrine of pre-emptive self-defence was rejected by the majority of the international community<sup>304</sup>, including America's coalition ally, the UK.<sup>305</sup>

Even if the US had been subjected to an actual or imminent armed attack, it is difficult to see how the coalition's actions in forcing regime change and occupying Iraq could be deemed a necessary or proportionate response. The requirement of necessity dictates that a state may only take forcible measures in self-defence where peaceful measures have been exhausted or are likely to be ineffective in ending an actual armed attack or averting an imminent one. In this case, peaceful measures had not been exhausted as UN weapons inspections were still ongoing.<sup>306</sup> Furthermore, the

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<sup>301</sup> 2002 US NSS (n258) 15.

<sup>302</sup> *ibid* 15–16; HJ Res 114 'Authorization for Use of Military Force Against Iraq Resolution of 2002' (107th Congress, 16 October 2002) <<https://www.congress.gov/bill/107th-congress/house-joint-resolution/114>> accessed 12 July 2017.

<sup>303</sup> HJ Res 114 (n302).

<sup>304</sup> UNGA, 'A more secure world: Our shared responsibility – Report of the High-level Panel on Threats, Challenges and Change' (2 December 2004) UN Doc A/59/565, paras 188–192; UNGA Res 60/1 'World Summit Outcome' (24 October 2005) UN Doc A/RES/60/1, paras 77–80 and 85. See also Elizabeth Wilmschurst, 'The Chatham House Principles of International Law on the Use of Force in Self-Defence' (2006) 55 ICLQ 963, 968; Lubell (n299) 55–63; Weller (n259) 136–144.

<sup>305</sup> 'Memo from Michael Wood (Foreign and Commonwealth Office Legal Adviser) to Stephen Wright re Iraq: legality of use of force' (15 August 2002) para 5.

<sup>306</sup> Weller (n259) 173–182.

requirement of necessity also limits the nature, intensity and temporal length of the forcible response to what is required to end an actual attack or avert an imminent one.<sup>307</sup>

### 5.3.iii.b Theoretical Analysis of the 2003 Intervention in Iraq

Hinnebusch suggested that the following factors converged to enable the 2003 intervention in Iraq: a domestic and international environment conducive to an aggressive form of American exceptionalism, the capture of the US administration by extremist wings of special interest lobby groups, and the absence of systemic restraints on a global hegemon with imperial aspirations.<sup>308</sup> Multilateral institutions and international law proved incapable of containing hegemonic power as liberal internationalism would anticipate. Instead, the intervention supports the realist contention that strong states will contravene international law and the rights of weak states with impunity unless another strong state(s) decides that it is in their interests to protect the weak state.<sup>309</sup> Some regional states, most notably Syria and Iran, balanced against the US by supporting resistance fighters. However, there was little balancing against America's imperial ambitions by the world's most powerful states. The UK seemingly even 'bandwagoned' with the US.<sup>310</sup> Hence the episode suggests that imperial overreach is the main restraint on hegemonic power.<sup>311</sup>

Domestic factors played a pivotal role in enabling the war as constructivists would expect. In this regard, the episode again highlights the limits of neorealism. Extremist elements of the American oil, armaments and pro-Israel lobbies – whose interests for once coincided – were able to exert a

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<sup>307</sup> Wilmshurst (n304) 966–967.

<sup>308</sup> See generally Raymond Hinnebusch, 'The Iraq War and International Relations: Implications for Small States' (2006) 19 *Cambridge Review of International Affairs* 451; Raymond Hinnebusch, 'The US Invasion of Iraq: Explanations and Implications' (2007) 16 *Critique: Critical Middle Eastern Studies* 209.

<sup>309</sup> Edward H Carr, *The Twenty Years' Crisis 1919–1939: An Introduction to the Study of International Relations* (2nd edn, Macmillan and Co Ltd 1946) 176; Hans Morgenthau, 'The Main Problems of International Law' in *Politics among Nations: The Struggle for Power and Peace* (6th edn, McGraw Hill 1985) 312; Christian Reus-Smit, 'The Politics of International Law' in Christian Reus-Smit (ed), *The Politics of International Law* (CUP 2004) 16.

<sup>310</sup> Hinnebusch, 'The Iraq War' (n308) 459.

<sup>311</sup> *ibid* 451.

direct and disproportionate influence on foreign policy formation during President G.W. Bush's first term in office.<sup>312</sup> They anticipated that the Iraq intervention would secure the installation of a US-aligned regime in Baghdad, which in turn would promote their respective objectives.<sup>313</sup> The Bush Administration utilised the fear of the Islamist other after 9/11 and a WMD deception to generate support for the intervention amongst the US public, the US Congress and an international coalition of the willing. Contrary to what Kantian liberalism would predict, the US Parliament and public opinion failed to restrain the arbitrary exercise of power by an Administration dominated by extremists.<sup>314</sup> Domestic factors also impacted the response to the intervention. Syria's Arab nationalist identity and popular opposition to the intervention rendered it ideologically impossible for the Assad regime to support the intervention without sacrificing its domestic legitimacy and threatening its survival.

The intervention revealed the risks of democratic peace theory and the concept of humanitarian intervention. It demonstrated, as realists, TWAIL scholars, critical legal scholars and English School pluralists have insinuated, that supposedly liberal states sometimes hide behind supposedly liberal aims to fight illegal wars for self-interested purposes. It also highlighted the risks posed by purely instrumental approaches to international law, which suggest that international legal rules may be disregarded by foreign policy-makers if their implementation is unlikely to secure 'community values'.<sup>315</sup>

From an Orientalist perspective, the Bush Doctrine presented America as morally superior and thereby entitled and morally required to forcibly export its liberal values to the inferior Orient.<sup>316</sup> It revived the civilising mission by portraying the Islamic Middle East in monolithic terms

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<sup>312</sup> *ibid* 453; Hinnebusch, 'The US Invasion of Iraq' (n308) 224.

<sup>313</sup> For a discussion of their respective objectives, see Hinnebusch, 'The Iraq War' (n308) 453; Hinnebusch, 'The US Invasion of Iraq' (n308) 224–225; Raymond Hinnebusch, 'The Middle East Regional System' in Hinnebusch and Ehteshami (eds) (n73) 63–64.

<sup>314</sup> Hinnebusch, 'The US Invasion of Iraq' (n308) 210 and 225. For a description of American exceptionalism and its various manifestations, see Robert R. Tomes, 'American Exceptionalism in the Twenty-First Century' (2014) 56 *Survival* 27.

<sup>315</sup> See s2.10 of ch2.

<sup>316</sup> Hinnebusch, 'The US Invasion of Iraq' (n308) 211; Wieland (n2) ch11, lcn6381–6404.

as an illiberal mass producer of terrorists that the principled and Christian West needed to control and democratise.<sup>317</sup> Simplistic references to an Axis of Evil inspired by Huntington's 'Clash of Civilizations' thesis appealed to religious mores and heightened the fear of the non-Western 'other'.

The legal arguments that the US-led coalition advanced to justify the intervention suggest that international law may have a socialising function as some constructivists have argued. However, realists might counter that the Bush Administration selectively relied upon international law to justify their self-interested actions and ignored it when it conflicted with their interests. From this perspective, the Iraq intervention reinforced Simpson's argument that whilst international law impacts official discourse, it does not necessarily follow that it impacts state behaviour.<sup>318</sup> Nevertheless, the refusal of the majority of the international community, including the UK, to recognise the Bush Administration's assertion of a right of pre-emptive/preventative self-defence suggests that there are limits to the ability of powerful states to unilaterally determine the content of international law – as the radical constructivist scholar, Kratochwil, has suggested.<sup>319</sup>

The intervention challenged the assumption inherent in Hegemonic Stability Theory (HST) that global hegemons are inclined to maintain the status quo because they benefit from the prevailing international order.<sup>320</sup> HST also infers that states consent to the hegemon's role because of the legitimacy that the hegemon derives from its adherence to the rules of the international system, including international law.<sup>321</sup> The Iraq intervention arguably supports this aspect of HST as America lost some of the soft power it derives from its liberal values after the Bush Administration's neo-imperial

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<sup>317</sup> Edward Said, *Orientalism* (Penguin 2003 edn) Preface; Karakoç (n241) 229–236.

<sup>318</sup> Simpson (n178) 44. The English School scholar, Hedley Bull, made a similar observation. See Hedley Bull, *The Anarchical Society* (3rd edn, Palgrave 2002) 43.

<sup>319</sup> Friedrich V Kratochwil, 'How Do Norms Matter?' in Michael Byers (ed), *The Role of Law in International Politics: Essays in International Relations and International Law* (OUP 2000) 52.

<sup>320</sup> Hinnebusch, 'The Iraq War' (n308) 455–557; Hinnebusch, 'The US Invasion of Iraq' (n308) 213–214.

<sup>321</sup> Hinnebusch, 'The Iraq War' (n308) 455; Hinnebusch, 'The US Invasion of Iraq' (n308) 213.

adventure. This suggests, as liberals and neo-liberal institutionalists have argued, that violations of international law can have costs. It challenges Kratochwil's suggestion that powerful states can afford to worry less about reputational damage than weak states.<sup>322</sup> The Obama Administration's rhetorical commitment to multilateralism and international law was arguably part of an attempt to recover some of this soft power.

#### **5.4 Increasing Sectarianism and Extremism in the Middle East**

Numerous actors contributed to the rise in sectarianism and Islamist terrorism in the Middle East during the 2000s, including Israel, the Iraqi Ba'athist regime, Nouri al-Maliki's government, the US, Saudi Arabia, the Assad regime, Iran and al Qaeda in Iraq (AQI).

##### *Israel*

Israel's policies fuelled support for Islamist extremism. Israel's illegal occupation of Arab territories and violations of the human rights of Arabs and Muslims arguably constituted the most powerful recruitment tool of all for jihadists.<sup>323</sup>

##### *The Iraqi Ba'athist Regime*

Saddam Hussein exacerbated sectarianism in Iraq by deliberately favouring members of his own Sunni Tikriti tribe and preventing Shias from accessing centres of power. After the 1991 Gulf War, he sought to deflect criticism of Iraq's deteriorating economy by 'Islamising' his ostensibly secular regime.<sup>324</sup> This Islamisation programme was overseen by Hussein's Vice-President, Izzat Ibrahim al-Douri, a member of the Sufi Naqshbandi Order.<sup>325</sup> Hussein's real goal was to infiltrate the Islamist opposition; however, according to Weiss and Hassan, the reverse occurred with many officers developing a stronger commitment to Salafism than they had to secular Ba'athism.<sup>326</sup> After

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<sup>322</sup> Kratochwil, 'How Do Norms Matter?' (n319) 55.

<sup>323</sup> Perthes, 'Europe and the Arab Spring' (n96) 99.

<sup>324</sup> Weiss and Hassan (n255) 22–25.

<sup>325</sup> *ibid* 22–25.

<sup>326</sup> Salafism considers Shias to be apostates and the Western way of life and governance to be fundamentally incompatible with Islam. Weiss and Hassan (n255) 2.



Hussein's overthrow, Douri took refuge in Syria where he developed the Army of the Men of the Naqshbandi Order, a prominent Sunni insurgent group which supported ISIS in its 2014 capture of Mosul.<sup>327</sup>

### *The US and the Occupying Forces*

Phillips suggested that prior to the 2003 Iraq intervention, support for jihadism in the Middle East had been decreasing.<sup>328</sup> However, as part of its war on terror, the US perpetrated numerous, much publicised human rights violations.<sup>329</sup> The suffering that US policies caused to Muslims indirectly boosted support for Islamist extremists who portrayed the war on terror as a war on Muslims. Furthermore, Patrick Cockburn asserted that the Bush Administration's failure to tackle al Qaeda's core support base in Pakistan and the Gulf after the 9/11 attacks helped the network to survive.<sup>330</sup>

After occupying Iraq, the coalition forces established a Coalition Provisional Authority (the CPA). The CPA's policies contravened the international law governing occupation.<sup>331</sup> The CPA implemented a de'Ba'athification policy, which resulted in the disbanding of the Iraqi army and intelligence agencies and the removal of Ba'athists from all government and public sector positions. This generated a security vacuum that was exploited by both radical Sunni insurgent groups and Iranian-backed Shia militias.<sup>332</sup> The security vacuum was exacerbated by the coalition's failure to commit a sufficient number of ground troops and its impatience to transfer control of internal security to the embryonic Iraqi regime.<sup>333</sup> The

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<sup>327</sup> *ibid* 25.

<sup>328</sup> Phillips, *The Battle for Syria* (n34) 21–22.

<sup>329</sup> See eg CAT/C/SYR/CO/1 paras 18 and 33; HRW World Reports 2003 and 2004; AI World Reports 2003, 240; 2004, 301–2; 2006, 249; 2009, 316.

<sup>330</sup> Cockburn (n227) ch1, lcn179–202 and ch4, lcn640–670.

<sup>331</sup> Cavanaugh and Castellino (n279) 182. The laws of occupation include: Hague Convention (IV) respecting the Laws and Customs of War on Land (adopted 18 October 1907, entered into force 26 January 1910) 205 CTS 227, arts 42–56; Geneva Convention relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (Geneva IV), arts 27–34 and 47–78.

<sup>332</sup> See Hinnebusch, 'The Middle East Regional System' (n313) 64–67; Kathleen Cavanaugh, 'Sectarian Entrepreneurs: How the U.S. Broke Iraq' *Dissent* (26 August 2014) <[https://www.dissentmagazine.org/online\\_articles/sectarian-entrepreneurs-how-the-u-s-broke-iraq](https://www.dissentmagazine.org/online_articles/sectarian-entrepreneurs-how-the-u-s-broke-iraq)> accessed 17 July 2017.

<sup>333</sup> Jubin Goodarzi, 'Iran and the Syrian and Iraqi Crises' (2014) Wilson Center Middle East Program, Viewpoint No 66, October 2014, 3

de'Ba'athification policy generated a cadre of unemployed and predominantly Sunni former Ba'athists, many of whom were soldiers. It was rescinded in 2004. However, Sunni Ba'athists continued to be discriminated against by the new Shia-dominated regime.

The CPA established a Lebanese inspired political system, the *muhasasa* system, which distributed the main governmental positions along ethno-sectarian lines.<sup>334</sup> It exacerbated corruption and promoted identity-based politics by enabling 'sectarian entrepreneurs', including Maliki and Aqi, to manipulate sectarian, tribal and ethnic discourse to enhance their popular appeal.<sup>335</sup>

The CPA also introduced neoliberal economic policies, which arguably contravened Iraq's economic sovereignty by removing protective tariffs and allowing concessions to be granted to multinational corporations at a time when Iraq had one of the most corrupt governments in the world.<sup>336</sup> Endemic corruption exacerbated impoverishment, particularly amongst Sunnis.<sup>337</sup> Consequently, whilst many Sunnis joined the Sunni insurgency because they rejected the US occupation and the Shia-dominated political system, many others joined simply because they needed the money to survive. The occupying forces were also accused of indirectly fuelling jihadism by failing to engage the prominent Sunni tribes from the outset and allowing

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<[https://www.wilsoncenter.org/sites/default/files/iran\\_syrian\\_iraqi\\_crises.pdf](https://www.wilsoncenter.org/sites/default/files/iran_syrian_iraqi_crises.pdf)> accessed 9 July 2018.

<sup>334</sup> Adham Saouli, 'The Foreign Policies of Iraq and Lebanon' in Hinnebusch and Ehteshami (eds) (n73) 121; Toby Dodge, 'Can Iraq Be Saved?' (2014) 56 *Survival* 7, 13–17; Cavanaugh, 'Sectarian Entrepreneurs' (n332).

<sup>335</sup> Saouli (n334) 121; Dodge (n334) 12–17; Kathleen Cavanaugh, 'Did the U.S. Really Break Iraq? Response to Michael Walzer' *Dissent* (9 September 2014) <<https://www.dissentmagazine.org/blog/did-the-u-s-really-break-iraq-response-to-michael-walzer>> accessed 17 July 2017.

<sup>336</sup> Goodarzi, 'Iran and the Syrian and Iraqi Crises' (n333) 3; Cavanaugh, 'Sectarian Entrepreneurs' (n332). Independent reports suggest that corruption increased after the intervention and since then Iraq has consistently ranked amongst the most corrupt states in the world. See Transparency International, 'Iraq: overview of corruption and anti-corruption' 2–3

<[https://www.transparency.org/files/content/corruptionqas/374\\_Iraq\\_overview\\_of\\_corruption\\_and\\_anticorruption.pdf](https://www.transparency.org/files/content/corruptionqas/374_Iraq_overview_of_corruption_and_anticorruption.pdf)> accessed 17 July 2017.

<sup>337</sup> Dodge (n334) 14–17.

jihadists to transform US-run prisons into 'terrorist academies'.<sup>338</sup> Many dangerous jihadists were released prematurely prior to the Arab Spring.<sup>339</sup>

#### *Nouri al-Maliki's government*

Maliki was Prime Minister of Iraq from 2006 to 2014. In an effort to consolidate his leadership, he filled influential positions in the armed forces and the government with his own, predominantly Shia, allies and ignored corruption amongst his supporters.<sup>340</sup> He tolerated indiscriminate sectarian attacks by Shia militias against Sunnis and the non-delivery of state services to Sunni-dominated areas.<sup>341</sup> He was also suspected of interfering in Iraq's March 2010 election.<sup>342</sup> After the Sunni 'Sons of Iraq' volunteers helped oust AQI during the Sunni Awakening (*Sahwa*), Maliki failed to ensure that they were integrated into the state apparatus. Instead, his regime stopped paying their salaries and arrested many of them on questionable terrorism-related charges.<sup>343</sup> Consequently, many former volunteers joined AQI. Maliki's policies promoted sectarianism and corruption, disenfranchised Iraqi Sunnis, weakened state institutions and rendered it difficult to galvanise a second Sunni Awakening in opposition to ISIS in 2014.<sup>344</sup>

#### *Saudi Arabia*

Saudi Arabia fuelled sectarianism and extremism, including by financing the construction of mosques and Islamic schools throughout the region that promoted its extreme Wahhabi ideology.<sup>345</sup> Wahhabism reportedly shares much in common with the ideologies of ISIS and al Qaeda.<sup>346</sup> Syrian expats

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<sup>338</sup> Until at least 2007, jihadists used their time in prison to develop their networks and radicalise new recruits. See Weiss and Hassan (n255) 42–43, 66–67 and 83–88.

<sup>339</sup> *ibid* 86–89.

<sup>340</sup> Dodge (n334) 12–13; Goodarzi, 'Iran and the Syrian and Iraqi Crises' (n333) 3–4.

<sup>341</sup> Weiss and Hassan (n255) 60.

<sup>342</sup> *ibid* 91–93.

<sup>343</sup> *ibid* 89–91; Qaddour (n248) 70.

<sup>344</sup> See Byman, 'Sectarianism' (n262) 85; Weiss and Hassan (n255) ch6; Samer N Abboud, *Syria* (Kindle edn, Polity 2016) ch3, lcn2009–2029.

<sup>345</sup> Byman, 'Sectarianism' (n262) 85–86; Dodge (n334) 12–13; Cavanaugh, 'Sectarian Entrepreneurs' (n332).

<sup>346</sup> Cockburn (n277) ch1, lcn194–199 and ch7, lcn997–1005; Volker Perthes, 'Islamic State (IS): A totalitarian, expansive and hegemonic project' (*Qantara*, 30 September 2015) <<http://en.qantara.de/content/islamic-state-is-a-totalitarian-expansive-and-hegemonic-project>> accessed 10 June 2016.

and exiles in Saudi Arabia were directly exposed to Wahhabism and Syrian clerics trained in Saudi-funded madrasas. Saudi clerics have produced fatwas against 'heretical' sects, including Shias.<sup>347</sup> They increased their sectarian rhetoric after the 2003 intervention in an attempt to dilute Iran's growing regional influence.<sup>348</sup> The Saudi monarchy itself directly criticised Iranian-sponsored Shiite proselytising in Syria.<sup>349</sup> Furthermore, Saudi Arabia has been a core source of funding and fighters for jihadi groups.<sup>350</sup>

### *Iran*

After the 2003 intervention, Iran deliberately promoted sectarian conflict in Iraq. Ironically, the ideological opposites Iran and al Qaeda reportedly even cooperated on occasion to prevent America from consolidating its influence in Iraq.<sup>351</sup> The intervention dramatically altered the regional balance of power in Iran's favour as Saddam Hussein's regime was replaced with a Shia-dominated, Iranian-aligned alternative. Iran had historically provided refuge to Hussein's Shia opponents. These returning exiles acquired prominent positions in Iraq's new institutions and formed Shia paramilitary groups.<sup>352</sup> This enabled Iran to exert disproportionate influence over Iraq's internal affairs. It has been asserted that the Islamic Supreme Council of Iraq, an Iraqi Shia political party, was manufactured by Iranian intelligence.<sup>353</sup> Furthermore, the Mahdi army, an Iraqi Shia armed group, reportedly modelled itself on Hezbollah and received assistance from Iran.<sup>354</sup>

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<sup>347</sup> Toby Matthiesen, *Sectarian Gulf: Bahrain, Saudi Arabia, and the Arab Spring that wasn't* (Kindle edn, Stanford UP 2013) ch2, lcn446–448.

<sup>348</sup> Rolf Tanner, 'Narrative and Conflict in the Middle East' (2014) 56 *Survival* 89, 103.

<sup>349</sup> Pierret, 'Karbala in the Umayyad Mosque' (n76) 99–116. See also Volker Perthes, 'The Syrian Solution' (01 November 2006) 85 *Foreign Affairs* 33.

<sup>350</sup> The monarchy has been accused of failing to adequately police the flow of financial support to Islamist terrorist groups. Goodarzi, 'Iran and the Syrian and Iraqi Crises' (n333) 2–3. Although improvements were reportedly made after 2005. See Scott McConnell and others, 'Symposium: Policy choices for the New Administration' (2012) 19 *Middle EPol'y* 1, 9–10.

<sup>351</sup> Weiss and Hassan (n255) 17–19 and 53–54.

<sup>352</sup> *ibid* 51.

<sup>353</sup> Formerly known as the Supreme Council for the Islamic Revolution in Iraq. See *ibid* 29 and 51.

<sup>354</sup> *ibid* 50–56; Goodarzi, *Syria and Iran* (n262) 293.

*The Assad Regime*

The Assad regime's policies directly and indirectly promoted sectarianism and extremism in Syria and the region. Despite its rhetorical commitment to secularism, the regime subtly ensured the survival of sectarian divisions in Syria lest its role as saviour of stability and protector of religious minorities became obsolete.<sup>355</sup> It was suspected of staging Islamist terrorist attacks in Syria to promote a fear of Islamisation amongst religious minorities and moderate Sunnis.<sup>356</sup> It was helped by growing sectarian violence and instability in newly 'democratic' Iraq.

Bashar almost exclusively restricted his inner circle to Alawis thereby increasing the perception of sectarian rule. By continuing to proscribe the Muslim Brotherhood and refusing to licence an alternative, he ensured that moderate Islam had no outlet for political expression.<sup>357</sup> Islamists were able to capitalise upon this void to attract moderate Sunnis. The regime also failed to adequately incorporate Syria's tribes into its support base, some of which supported Salafism due to their tribal linkages to the Gulf.<sup>358</sup> Notably, some of the first protests in Deraa were driven by local tribes and ISIS was able to develop a stronghold in tribal regions along the Syrian-Iraqi border.<sup>359</sup>

Nevertheless, Wieland, Pace and Landis argued that there wasn't much popular support for Islamist extremism in Syria prior to the Arab Spring due to memories of the 1970s/1980s insurgency, decades of secular rule and the potential impact of Islamisation on the Syrian economy.<sup>360</sup> Ziadeh and Wieland suggested that relations between the Sunni majority and religious minorities were generally marked by tolerance, respect and even friendship.<sup>361</sup> Nevertheless, the regime's facilitation of extremist violence in

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<sup>355</sup> Christopher Phillips, 'Syria's Torment' (2012) 54 *Survival* 67, 76.

<sup>356</sup> Pace and Landis (n2) ch7, lcn2602.

<sup>357</sup> Wieland (n2) ch7, lcn4122–4701; Lefèvre (n53) 204–205.

<sup>358</sup> Weiss and Hassan (n255) 201–202.

<sup>359</sup> *ibid* 201–202.

<sup>360</sup> Wieland (n2) ch7, lcn4135–4139 and lcn4203–4222; Pace and Landis (n2) ch7, lcn2589–2607.

<sup>361</sup> Radwan Ziadeh, *Power and Policy in Syria* (revised edn, IB Tauris 2013) 155; Wieland (n2) Foreword, lcn122–132, ch5, lcn2306–2308, ch14, lcn7592–7596 and lcn7870–7874.

Iraq as late as August 2009 rendered Syria vulnerable to returning jihadists.<sup>362</sup> The regime proved adept at disingenuously portraying itself the victim of the extremist violence that it had in fact facilitated.

### *AQI/ISIS*

The origins of ISIS can be traced to the 2003 intervention in Iraq. In justifying the intervention, the Bush Administration argued that Saddam's regime was harbouring an al-Qaeda-linked terrorist network in Iraq led by Abu Musab al-Zarqawi, a Jordanian of Palestinian origin.<sup>363</sup> This allegation was subsequently shown to be incorrect.<sup>364</sup> However, after the intervention it was transformed into a self-fulfilling prophecy. Zarqawi had established an Islamist terrorist network in the early 2000s, Tawhid wa'al-Jihad (TWJ). He had initially focussed on overthrowing the Jordanian monarchy; however, after he became aware of America's intention to invade Iraq, he redirected his attention there.<sup>365</sup> TWJ's ultimate objective was to establish an Islamic state in Iraq.<sup>366</sup> As part of its strategy, it sought to incite a sectarian conflict in Iraq by portraying the intervention as a joint Western/Shia conspiracy and by targeting Shias in an attempt to provoke them into reacting violently against Sunnis, which in turn would validate this thesis.<sup>367</sup> It also disseminated videos of its brutality online to attract foreign fighters and frighten its opponents.<sup>368</sup>

In December 2004, TWJ evolved into AQI after bin Laden accepted Zarqawi's pledge of allegiance (*bayat*).<sup>369</sup> However, tensions emerged due to Zarqawi and bin Laden's differing interpretations of jihad. Bin Laden believed that jihad should primarily be directed toward non-Muslims and the

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<sup>362</sup> Weiss and Hassan (n255) 110–112.

<sup>363</sup> UNSC Verbatim Record (5 February 2003) UN Doc S/PV.4701, 14–17.

<sup>364</sup> According to Weiss and Hassan, prior to the invasion: Hussein did not support Zarqawi's network, Zarqawi's network was not a fully-fledged al-Qaeda affiliate and Zarqawi's links with Ansar al-Islam – a terrorist cell based in northern Iraq – were less formal than the US made out. Weiss and Hassan (n255) 14–19. See also Charles River Editors, *The Islamic State of Iraq and Syria: The History of ISIL/ISIS* (Charles Rivers Editors 2014) 9–18.

<sup>365</sup> Charles River Editors (n364) 12–14.

<sup>366</sup> *ibid* 18; Weiss and Hassan (n255) 13–14.

<sup>367</sup> Weiss and Hassan (n255) 28–32.

<sup>368</sup> *ibid* 30–31. ISIS inherited these tactics.

<sup>369</sup> *ibid* 34.

far enemy, principally the US.<sup>370</sup> However, Zarqawi focussed on the near enemy, namely Western-aligned Middle Eastern regimes and non-believers (*kuffar*), including non-Sunnis and Sunnis who did not adhere to Salafism.<sup>371</sup> AQI's brutal tactics and predominantly foreign membership alienated many Iraqis. In an attempt to remedy this problem, AQI was brought under an umbrella group of Iraqi insurgent groups known as the Mujahidin Advisory Council (Shura Council). After Zarqawi was killed in 2006, the Shura Council was brought within another newly-established umbrella, the Islamic State of Iraq (ISI).<sup>372</sup>

The attempt to rebrand AQI as an Iraqi group was ultimately unsuccessful due to the continuing predominance of foreign fighters in its ranks and its implementation of a radical strain of Shariah law in areas it captured.<sup>373</sup> Sunni tribes in the Anbar province, together with some Iraqi policemen and rival insurgents, formed a coalition known as the National Council for the Salvation of Iraq (Sons of Iraq), which sought to rid their localities of ISI extremists.<sup>374</sup> The US deployed 20,000 additional US troops in June 2009 to support this Sunni 'Awakening'. AQI was dramatically weakened as a result.<sup>375</sup>

## 5.5 Conclusion

The authoritarian upgrading that took place during the 2000s helps explain the Assad regime's vulnerability and its resilience. By filling influential positions in the repressive apparatus with loyalists, Bashar helped prevent mass defections after the uprising commenced. Furthermore, due to the successful co-optation of conservative Islamic forces and Sunni businessmen, the *ulama-souk* axis did not uniformly support the opposition.<sup>376</sup> Bashar's reinforcement of the regime's external alliances also paid off as Iran, Hezbollah and Russia proved to be vital allies. China, Iraq and Lebanon also

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<sup>370</sup> *ibid* 11–12.

<sup>371</sup> *ibid*.

<sup>372</sup> See *ibid* 61–62.

<sup>373</sup> *ibid* 68–72.

<sup>374</sup> Abboud, *Syria* (n344) ch3, lcn2002–2008.

<sup>375</sup> Weiss and Hassan (n255) 72–81.

<sup>376</sup> Pierret, 'The Syrian Baath Party' (n53) 5–7.

provided diplomatic assistance. However, the regime's alliance with Iran and Hezbollah prompted Saudi Arabia to interfere in an effort to undermine Iran. Furthermore, Bashar and Erdoğan ultimately found themselves on opposing sides of Syria's armed conflict suggesting that the Syrian-Turkish rapprochement was driven primarily by opportunism.

Authoritarian upgrading created a new constituency of disenfranchised Syrians, which would form the backbone of Syria's Arab Spring protest movement. It involved a transition from a populist to a post-populist authoritarian regime and a restructuring of the regime's inner circle and state-business networks. As the restructuring resounded primarily to the benefit of Alawi members of the Assad-Makhlouf clan,<sup>377</sup> it increased the perception of sectarian rule. Crucially, the economic reforms enacted during Bashar's tenure stripped Ba'athist socialism of any practical relevance. They disenfranchised small manufacturers and industrialists, and alienated university graduates. They also caused disproportionate hardship to the regime's traditional constituency of low income workers and peasants. Consequently, in contrast to the 1970s/1980s insurgency, this constituency largely joined the 2011 protests.<sup>378</sup>

The analysis arguably supports the argument made by some structuralists and TWAIL scholars that IFIs and functional trade regimes enable the structural domination of weak states and peoples. The EMP purportedly sought to enhance stability in the MENA region by promoting prosperity, democracy and respect for human rights. This in turn was meant to prevent societal discontent in the region from infiltrating Europe in the form of mass migration and Islamist terrorism.<sup>379</sup> However, by prioritising economic over political reform, the EMP indirectly reinforced authoritarian rule. It allowed authoritarian rulers who implemented economic reforms to repress internal opponents without fear of external rebuke. The economic

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<sup>377</sup> Hafez al-Assad's wife was born into the Makhlouf family.

<sup>378</sup> Hinnebusch, 'Authoritarian Upgrading and the Arab Uprising' (n40) 10.

<sup>379</sup> Perthes, 'America's "Greater Middle East"' (n239) 90; Hinnebusch, 'Europe and the Middle East' (n155) 22.



liberalisation measures that it advocated increased inequality, poverty and corruption in Arab states.<sup>380</sup> These grievances were amongst the key triggers of the Arab Spring protests. Accordingly, the protests challenge the assumption implicit in neoliberal institutionalism that international regimes contribute to international order. Instead, they support Bull's suggestion that the absence of distributive justice could jeopardise global order.<sup>381</sup> The deterioration of the regime's performance in the area of socio-economic rights as a result of its rescission of the social contract reinvigorated demands for civil and political rights.

The analysis again reinforced Hathaway's argument that repressive states ratify international human rights treaties with weak monitoring and compliance mechanisms in order to attain the reputational benefits associated with ratification without ever intending to comply with their obligations thereunder.<sup>382</sup> It revealed that the traditional Syrian opposition was fragmented and weak by 2011 as a result of regime repression and the age-old manipulation of ethno-sectarian differences for political ends. Divisions in the opposition, including between domestic and exiled opposition groups and Arabs and Kurds, re-emerged in the post Arab Spring context.

The analysis supports the realist contention that states instrumentalise ideational tools for strategic ends. The Bush Administration exploited the fear of the 'Islamist other' after the 9/11 attacks to generate support for its intervention in Iraq. The ostensibly secular Assad regime also sought to manipulate the fear of the 'Islamist other' to retain the support of religious minorities and moderate Sunnis. However, the analysis also demonstrated that ideational factors are not mere instruments. For example, Syria's Arab

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<sup>380</sup> A 2011 review of the EMP acknowledged, but failed to adequately review, these shortcomings. See Silvia Colombo and Nathalie Tocci, 'The EU Response to the Arab Uprising: Old Wine in New Bottles?' in Riccardo Alcaro and Miguel Haubrich-Seco (eds), *Re-thinking Western Policies in Light of the Arab Uprising* (Edizioni Nuova Cultura 2012) 85–96; Ahmed Driss, 'The EU Response to the Arab Uprising: a Show of Ambivalence' in Riccardo Alcaro and Miguel Haubrich-Seco (eds), *Re-thinking Western Policies in Light of the Arab Uprising* (Edizioni Nuova Cultura 2012) 103–109.

<sup>381</sup> Andrew Linklater, 'The English School' in Scott Burchill and others (eds), *Theories of International Relations* (3rd edn, Palgrave MacMillan 2005) 101.

<sup>382</sup> Hathaway, 'Do Human Rights Treaties Make a Difference?' (n25) 2011–2012.

nationalist identity rendered it impossible for the Assad regime to support the Iraq intervention without jeopardising its own survival.

The intervention had a dramatic impact on Syria's future trajectory. It contributed to increasing sectarianism and support for Islamist extremism in the MENA region. It altered the regional balance of power in Iran's favour and contributed to the polarisation of the region along largely sectarian lines.<sup>383</sup> It reinforced authoritarian rule by allowing authoritarian regimes to portray themselves as bulwarks against Islamist extremism. It also demonstrated the limits of international law as a mechanism for restraining hegemonic power as realism would expect. It revealed the risks posed by democratic peace theory, the concept of humanitarian intervention and purely instrumental approaches to international law. From a TWAIL perspective, the CPA's policies appeared like a contemporary manifestation of the civilising mission.<sup>384</sup>

Nevertheless, the US-led coalition's efforts to legally justify the intervention indicates that international law may have a socialising function as some constructivists have suggested. Furthermore, the refusal of the majority of the international community to recognise the Bush Administration's assertion of a right of pre-emptive/preventative self-defence suggests that there are limits to the ability of powerful states to unilaterally determine the content of international law. The soft power that America lost as a result of its contravention of international law intimates, as liberals and neo-liberal institutionalists have argued, that violations of international law can have costs.

Finally, the analysis revealed the manner in which various regional and international actors contributed to an increase in sectarianism and Islamist extremism in the Middle East and helped construct the foundations of the sectarian conflict that erupted in Syria after 2011.

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<sup>383</sup> Hinnebusch, 'The Middle East Regional System' (n313) 65–67.

<sup>384</sup> Karen Knop, 'Statehood: territory, people, government' in Crawford and Koskenniemi (eds) (n178) 105–106.

## Part III

### Chapter Six: Post-Arab Spring Context

#### 6.1 Introduction

Chapter six focuses on the post-Arab Spring context. First, it analyses the triggers for the protests, the composition of the protest movement and the initial response of both the Assad regime and the international community. It then examines the factors that have contributed to regime resilience. Finally, it critically appraises the various peace initiatives that have been undertaken since 2011.

#### 6.2 Unfolding of Protests and Initial Response

##### 6.2.i Triggers and Composition of Protest Movement

Protests erupted in Deraa in south-western Syria on 15 March 2011 definitively marking the arrival of the Arab Spring in Syria. The final trigger was the arrest and torture of children by *Mukhabarat* agents for writing anti-regime graffiti on a wall. By the end of April, the protests had spread almost nationwide.<sup>1</sup> Like protesters in other Arab states, Syrians demanded justice, freedom and dignity (*karama*). In practical terms, this meant political, economic and judicial reforms, a dismantling of the *Mukhabarat* and the lifting of the emergency law.<sup>2</sup>

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<sup>1</sup> See UNSC Verbatim Record (27 April 2011) UN Doc S/PV.652 (S/PV.652); Carsten Wieland, *Syria—A Decade of Lost Chances: Repression and Revolution from Damascus Spring to Arab Spring* (Kindle edn, Cune Press 2012) ch1, lcn355–397; Raphaël Lefèvre, *Ashes of Hama: the Muslim Brotherhood in Syria* (OUP 2013) 192–193; David W Lesch, *The Fall of the House of Assad* (Updated edn, Yale UP 2013) 55–57; Michael Weiss and Hassan Hassan, *ISIS: Inside the Army of Terror* (Regan Arts 2015) 132; Christopher Phillips, *The Battle for Syria: International Rivalry in the New Middle East* (Yale UP 2016) 49–50; Samer N Abboud, *Syria* (Kindle edn, Polity 2016) ch2, lcn1205–1215.

<sup>2</sup> UNHRC, ‘Preliminary report of the High Commissioner on the situation of human rights in the Syrian Arab Republic’ (14 June 2011) UN Doc A/HRC/17/CRP.1 (A/HRC/17/CRP.1), para 4; Radwan Ziadeh, *Power and Policy in Syria* (revised edn, IB Tauris 2013) xv; Philippe Droz-Vincent, ‘“State of Barbary” (Take Two): From the Arab Spring to the Return of Violence in Syria’ (2014) 68 Middle EJ 33, 46; Phillips, *The Battle for Syria* (n1) 49.

Whilst the protests often emerged out of localised grievances, they shared a common trait, resentment over regime neglect.<sup>3</sup> Consequently, Hinnebusch traced their origins to the authoritarian upgrading that took place during the 2000s.<sup>4</sup> It was no coincidence that the early protests occurred in poor areas that had been disproportionately negatively impacted by drought and liberalising economic reforms, including Deraa, Damascene suburbs and commuter towns bursting with rural immigrants.<sup>5</sup> On the contrary, central Damascus and Aleppo, whose inhabitants had mainly benefitted from Bashar's policies,<sup>6</sup> were initially relatively quiet.<sup>7</sup> Protests occurred in some middle class, Sunni-majority Damascene neighbourhoods, which were home to merchants who had been excluded from state-business networks.<sup>8</sup> Many protesters in Homs and Hama also derived from this socio-economic group.<sup>9</sup>

The protest movement included Syrians from all classes, religious denominations and age groups, although overall it was dominated by young Sunnis.<sup>10</sup> While some protesters used sectarian slogans, many others used slogans highlighting the unity of the Syrian people.<sup>11</sup> Many observers concluded that ethno-sectarian factors were not significant drivers of the

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<sup>3</sup> Raymond Hinnebusch, 'Syria: from 'authoritarian upgrading' to revolution?' (2012) 88 *International Affairs* 95, 107; Phillips, *The Battle for Syria* (n1) 50.

<sup>4</sup> See s5.2.ii in ch5. See also Raymond Hinnebusch, 'Authoritarian Upgrading and the Arab Uprising: Syria in Comparative Perspective' (BRISMES Conference, London, March 2012) 3 <<https://brismes2012.files.wordpress.com/2012/02/raymond-hinnebusch-syria-authoritarian-upgrading.pdf>> accessed 2 December 2014.

<sup>5</sup> Christopher Phillips, 'Syria's Torment' (2012) 54 *Survival* 67, 70; Emile Hokayem, *Syria's Uprising and the Fracturing of the Levant* (Routledge 2013) ch2, lcn734–766.

<sup>6</sup> Hokayem, *Syria's Uprising* (n5) ch2, lcn785–792.

<sup>7</sup> UNSC Verbatim Record (27 April 2011) UN Doc S/PV.6524 (S/PV.6524); Phillips, *The Battle for Syria* (n1) 50.

<sup>8</sup> Hokayem, *Syria's Uprising* (n5) ch2, lcn779–781.

<sup>9</sup> Raymond Hinnebusch, 'Syria-Iraq Relations: State Construction and Deconstruction and the MENA States System' (2014) LSE Middle East Centre Paper Series, October 2014, 21 <<http://eprints.lse.ac.uk/60004/>> accessed 9 September 2014.

<sup>10</sup> Wieland (n1) ch2, lcn805–822 and lcn892; Hokayem, *Syria's Uprising* (n5) ch2, lcn825–846; Droz-Vincent (n2) 42; Weiss and Hassan (n1) 135; Abboud, *Syria* (n1) ch2, lcn1320–1365.

<sup>11</sup> Wieland (n1) ch2, lcn870–876; Phillips, 'Syria's Torment' (n5) 76; Hokayem, *Syria's Uprising* (n5) ch2, lcn835–837; Christa Salamandra, 'Sectarianism in Syria: Anthropological Reflections' (2013) 22 *Middle East Critique* 303, 303; Droz-Vincent (n2) 42; Phillips, *The Battle for Syria* (n1) 130; Abboud, *Syria* (n1) ch5, lcn3305–3332; Nikolaos van Dam, *Destroying a Nation: the Civil War in Syria* (Kindle edn, IB Tauris 2017) Introduction, lcn173–175 and ch2, lcn1051–1055.

initial protests.<sup>12</sup> However, this is not to say that they did not play a part in their evolution.

### 6.2.ii The Regime's Response

The regime implemented a three-pronged response to the protests encompassing repression, conciliation and fearmongering. Overall, the initial protesters were peaceful and unarmed.<sup>13</sup> Nonetheless, the regime dispatched the military supported by *Mukhabarat* agents, *shabiha* gangs<sup>14</sup> and foreign fighters to repress them.<sup>15</sup> Unarmed protesters were subjected to extrajudicial executions, arbitrary detention, torture, blockade and looting.<sup>16</sup> By the middle of June, the number of civilian fatalities was estimated at 1,100.<sup>17</sup> By early November, it had grown to 3,500.<sup>18</sup> The regime's escalating use of violence was meant to demonstrate its willingness to use all possible means to quench the protests.<sup>19</sup> Its discourse included phrases such as 'Asad, or we will set the country on fire' (*al-Asad aw nahriq al-bilad*).<sup>20</sup> It played upon memories of

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<sup>12</sup> Wieland (n1) ch2, lcn858–882 and ch13, lcn7320–7322; Phillips, *Syria's Torment* (n5) 76; Teije Hidde Donker, 'Islamic Social Movements and The Syrian Authoritarian Regime: Shifting Patterns of Control and Accommodation' in Steven Heydemann and Reinoud Leenders (eds), *Middle East Authoritarianisms: Governance, Contestation, and Regime Resilience in Syria and Iran* (Stanford UP 2013) 124; Hokayem, *Syria's Uprising* (n5) ch2, lcn835–837; Droz-Vincent (n2) 42–43; Abboud, *Syria* (n1) ch5, lcn3305–3332; Phillips, *The Battle for Syria* (n1) 189.

<sup>13</sup> S/PV.6524; UNHRC, 'Report of the independent international commission of inquiry on the Syrian Arab Republic' (23 November 2011) UN Doc A/HRC/S-17/2/Add.1 (A/HRC/S-17/2/Add.1), paras 43 and 45; van Dam, *Destroying a Nation* (n11) ch2, lcn1311–1320.

<sup>14</sup> The *shabiha* are regime-aligned armed groups that prior to the uprising engaged in criminal activities, including smuggling and protection racketeering. See UNHRC, 'Report of the United Nations High Commissioner for Human Rights on the situation of human rights in the Syrian Arab Republic' (15 September 2011) UN Doc A/HRC/18/53 (A/HRC/18/53), paras 28 and 32 and fn25; UNHRC, 'Report of the independent international commission of inquiry on the Syrian Arab Republic' (22 February 2012) UN Doc A/HRC/19/69 (A/HRC/19/69), para 93; Wieland (n1) ch2, lcn720–725; Lefèvre (n1) 185; Lesch, *The Fall* (n1) 177–178; Droz-Vincent (n2) 39; Weiss and Hassan (n1) 136–137; Abboud, *Syria* (n1) ch3, lcn2084–2095; Phillips, *The Battle for Syria* (n1) 53–54 and 161.

<sup>15</sup> A/HRC/18/53, paras 28, 32 and 45–47; Phillips, *The Battle for Syria* (n1) 2 and 53.

<sup>16</sup> See A/HRC/17/CRP.1, paras 4–12; A/HRC/18/53, paras 28 and 32–60; A/HRC/S-17/2/Add.1, paras 27–28, 39 and 84–96; Lesch, *The Fall* (n1) 96–97; Hokayem, *Syria's Uprising* (n5) ch2, lcn973–981; Abboud, *Syria* (n1) ch2, lcn1235–1241 and lcn1266–1272; Phillips, *The Battle for Syria* (n1) 53.

<sup>17</sup> A/HRC/17/CRP.1, para 6.

<sup>18</sup> A/HRC/S-17/2/Add.1, para 28.

<sup>19</sup> David W Lesch, 'The Arab spring – and winter – in Syria' (2011) 23 *Global Change, Peace and Security* 421, 423; Hokayem, *Syria's Uprising* (n5) ch2, lcn973–981; Droz-Vincent (n2) 38 and 52–53.

<sup>20</sup> Droz-Vincent (n2) 51.

Hama to dissuade older Syrians from joining the protests.<sup>21</sup> However, its brutality merely spurred the younger protestors on.<sup>22</sup>

As part of its conciliation strategy, the regime enacted selective political and economic reforms. The political reforms included the rescission of the emergency law, the abolition of the Higher State Security Court and the introduction of the long-awaited political party and media laws.<sup>23</sup> Economic appeasement measures included public sector wage increases and income tax reductions.<sup>24</sup> The regime also took measures to appease conservative Sunnis and Kurds. For example, it revoked the *niqab* ban in schools<sup>25</sup> and granted citizenship to stateless Kurds registered as Foreigners (*Ajanib*).<sup>26</sup> The regime's conciliatory measures failed to mollify the protesters as they were perceived as overdue, insufficient and disingenuous.<sup>27</sup> Their impact was largely nullified by pre-existing and newly enacted contradictory laws.<sup>28</sup>

As part of its fearmongering strategy, the regime undertook efforts to delegitimise the protesters, provoke sectarian discord and incubate a fear of instability in the event of regime collapse.<sup>29</sup> It argued that the protests were pioneered by criminal gangs and foreign-backed Islamist terrorists.<sup>30</sup> The 'Islamist terrorism' narrative was designed to generate fear of the Islamist 'other' amongst religious minorities, secular Sunnis and the international

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<sup>21</sup> *ibid* 50–56; Lesch, 'The Arab spring' (n19) 423; Lesch, *The Fall* (n1) 50.

<sup>22</sup> Lesch, 'The Arab spring' (n19) 423; Hokayem, *Syria's Uprising* (n5) ch2, lcn973–981; Droz-Vincent (n2) 38 and 52–53.

<sup>23</sup> See A/HRC/17/CRP.1, para 5; A/HRC/S-17/2/Add.1, paras 31–32, 34 and 38; A/HRC/19/69, para 14. See also Lesch, *The Fall* (n1) 84–85, 115 and 202–203.

<sup>24</sup> See Lesch, *The Fall* (n1) 70 and 84; Laura Ruiz de Elvira and Tina Zintl, 'The End of the Ba'thist Social Contract in Bashar al-Asad's Syria: Reading Sociopolitical Transformations through Charities and Broader Benevolent Activism' (2014) 46 *Int'l JMidEStud* 329, 332 and 345

<sup>25</sup> See Lesch, *The Fall* (n1) 84; Thomas Pierret, 'The State Management of Religion in Syria: The End of "Indirect Rule"?' in Heydemann and Leenders (eds) (n12) 105–106.

<sup>26</sup> Unregistered stateless Kurds (*maktumeen*) were still denied citizenship.

<sup>27</sup> See Wieland (n1) ch2, lcn639–642; Hokayem, *Syria's Uprising* (n5) ch2, lcn946–967; Droz-Vincent (n2) 41 fn28; Phillips, *The Battle for Syria* (n1) 55 and 66.

<sup>28</sup> Wieland (n1) ch2, lcn932–941.

<sup>29</sup> Bashar reportedly even threatened to attack Israel in response to any foreign intervention in support of the Syrian opposition. See Wieland (n1) ch3, lcn1349–1352.

<sup>30</sup> A/HRC/S-17/2/Add.1, paras 30 and 37; Phillips, *The Battle for Syria* (n1) 55. For the official regime narrative, see A/HRC/18/53, Annexes II-VI.

community. A conservative Islamic trend in Syrian society prior to the uprising meant that this fear was easier to manipulate.<sup>31</sup> The ‘foreign conspiracy’ narrative still touched a nerve amongst some Syrians as a result of Syria’s history of external interference.<sup>32</sup> The ‘instability’ narrative sought to deter Syrians and external actors from supporting the opposition by inferring that democratic transition would trigger an Iraq-type civil war.<sup>33</sup>

The regime used the state-controlled media to perpetuate its narratives and took several actions to transform them into reality.<sup>34</sup> It reportedly endeavoured to militarise the protest movement to support its ‘criminal gangs’ narrative by implanting armed saboteurs amongst the protesters.<sup>35</sup> It orchestrated pro-regime demonstrations in the Golan Heights to reinforce its ‘foreign conspiracy’ narrative.<sup>36</sup> It sought to stoke sectarian discord to buttress its ‘Islamist terrorism’ narrative. Accordingly, under the guise of amnesties, it released hundreds of imprisoned Islamist terrorists many of whom went on to join extremist armed groups.<sup>37</sup> *Shabiha* gangs were also dispatched to perpetrate sectarian attacks against Sunnis.<sup>38</sup> Mosques and imams were reportedly targeted.<sup>39</sup> Furthermore, Alawi security officials

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<sup>31</sup> Phillips, *The Battle for Syria* (n1) 47–48.

<sup>32</sup> Lesch, ‘The Arab spring’ (n19) 423–424; Hokayem, *Syria’s Uprising* (n5) ch2, lcn869–879.

<sup>33</sup> Hinnebusch, ‘Syria: from ‘authoritarian upgrading’ to revolution?’ (n3) 108.

<sup>34</sup> Omar S Dahi and Yasser Munif, ‘Revolts in Syria: Tracking the Convergence Between Authoritarianism and Neoliberalism’ (2012) 47 JAAS 323, 330; Droz-Vincent (n2) 41 and 46–47.

<sup>35</sup> Phillips, *The Battle for Syria* (n1) 2. See also Droz-Vincent (n2) 33, 54–55; Reinoud Leenders, ‘Repression is not a ‘Stupid Thing’ – Regime Responses to the Syrian Uprising and Insurgency’ in Michael Kerr and Craig Larkin (eds), *The Alawis of Syria: War, Faith, Politics in the Levant* (OUP 2015) 245–274. However, van Dam and Fisk have challenged this claim. See van Dam, *Destroying a Nation* (n11) ch2, lcn1086–1092 and lcn1316–1333; Robert Fisk, ‘When did protest against the Assad government turn to war in Syria?’ *The Independent* (31 August 2017) <<http://www.independent.co.uk/voices/syria-civil-war-rebellion-isis-assad-western-intervention-arms-a7921526.html>> accessed 21 September 2017.

<sup>36</sup> Hinnebusch, ‘Syria: from ‘authoritarian upgrading’ to revolution?’ (n3) 108.

<sup>37</sup> Weiss and Hassan asserted that these terrorists were released in the expectation that they would contribute to sectarian violence. Weiss and Hassan (n1) 144–149. However, van Dam counter-argued that their release may merely have been part of the regime’s effort to appease the conservative Islamic community. Van Dam, *Destroying a Nation* (n11) ch2, lcn1207–1238. The regime also allegedly released the Syrian jihadist and al-Qaeda ideologue, Abu Mus’ab al-Suri, in February 2012. See Lefèvre (n1) 187.

<sup>38</sup> Phillips, ‘Syria’s Torment’ (n5) 76; Droz-Vincent (n2) 39.

<sup>39</sup> Wieland (n1) ch2, lcn894–896; Thomas Pierret, ‘The Role of the Mosque in the Syrian Revolution’ (2012) 7 Near East Quarterly 1, 2 <[http://www.academia.edu/1493604/The\\_Role\\_of\\_the\\_Mosque\\_in\\_the\\_Syrian\\_Revolution](http://www.academia.edu/1493604/The_Role_of_the_Mosque_in_the_Syrian_Revolution)

subjected detained Sunni protesters to torture, inhumane treatment and sectarian rhetoric in an attempt to radicalise them.<sup>40</sup> The regime also sought to engender a fear amongst Alawis of retribution against the Alawi sect as a whole in the event of regime collapse. Accordingly, it reportedly ordered *shabiha* gangs to deliver sandbags to Alawi communities to enable them to ‘protect themselves’ against imminent ‘Sunni’ attacks.<sup>41</sup> Bombings in Alawi neighbourhoods reinforced the fear of retribution.<sup>42</sup> The regime was even accused of cooperating with al-Qaeda to facilitate terrorist attacks.<sup>43</sup>

Initially, the protesters called for reform – rather than overthrow – of the regime. At this point Bashar still retained some credibility amongst Syrians.<sup>44</sup> However, the regime’s violent reaction prompted the protesters to demand regime change.<sup>45</sup> Some commentators suggested that had the regime promptly and peacefully implemented the political reforms requested it could have survived the turmoil and Syria’s devastating armed conflict could have been avoided.<sup>46</sup> However, van Dam counter-argued that any genuine reforms would have incentivised the opposition to demand more and more far-reaching reforms until ultimately the regime’s survival was no longer tenable.<sup>47</sup> Significantly, reform of the regime would have required disenfranchising and possibly even prosecuting former elites, including

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> accessed 10 July 2018.

<sup>40</sup> Weiss and Hassan (n1) 135. See also Lefèvre (n1) 184–185.

<sup>41</sup> Phillips, ‘Syria’s Torment’ (n5) 76; Droz-Vincent (n2) 39; Phillips, *The Battle for Syria* (n1) 55.

<sup>42</sup> Hokayem, *Syria’s Uprising* (n5) ch2, lcn900–902.

<sup>43</sup> Weiss and Hassan (n1) 147–149. See also Lefèvre (n1) xiii and 181–182.

<sup>44</sup> Lesch, ‘The Arab spring’ (n19) 423; Hinnebusch, ‘Syria: from ‘authoritarian upgrading’ to revolution?’ (n3) 106; Musa al-Gharbi, ‘Syria Contextualized: the numbers game’ (2013) 20 Middle East Pol’y 56, 59–60; Droz-Vincent (n2) 46; Phillips, *The Battle for Syria* (n1) 42–43.

<sup>45</sup> Hinnebusch, ‘Syria: from ‘authoritarian upgrading’ to revolution?’ (n3) 106; Lesch, *The Fall* (n1) 75; Droz-Vincent (n2) 48; Aurora Sottimano, ‘Nationalism and Reform under Bashar al-Asad: Reading the Legitimacy of the Syrian Regime’ in Heydemann and Leenders (eds) (n12) ch4, lcn945–953.

<sup>46</sup> See Wieland (n1) ch3, lcn1266–1287; Phillips, ‘Syria’s Torment’ (n5) 71; Hinnebusch, ‘Syria: from ‘authoritarian upgrading’ to revolution?’ (n3) 106, 109 and 112–113; Hinnebusch, ‘Authoritarian Upgrading and the Arab Uprising’ (n4) 9; David W Lesch, ‘Assad’s fateful choice’ (*Syria Comment*, 9 April 2016) <<http://www.joshualandis.com/blog/assads-fateful-choice-david-w-lesch/>> accessed 24 November 2017;

<sup>47</sup> Van Dam, *Destroying a Nation* (n11) ch2, lcn1023–1041.



members of Bashar's own family.<sup>48</sup> Furthermore, multiple risk factors for armed conflict were already present at the outset of the protests.<sup>49</sup>

### 6.2.iii International Response

At the multilateral level, the UNSC's response to the Syrian crisis was impeded from the outset by internal divisions between China and Russia, on the one hand, and France, the UK and the US, on the other.<sup>50</sup> Consequently, the UNSC only adopted its first Presidential Statement on the crisis in August 2011.<sup>51</sup> The UNGA was also slow to react and only adopted its first resolution on Syria in December.<sup>52</sup> In contrast, the UNHRC responded relatively rapidly. On 29 April, it adopted a resolution condemning the regime's use of lethal force against unarmed protesters and established a fact-finding mission.<sup>53</sup> It subsequently established the Independent International Commission of Inquiry on the Syrian Arab Republic (UNCOI) in August.<sup>54</sup>

After the Syrian protests erupted, Russia and Iran predictably parroted the regime's official narrative. Other influential external actors were distracted by what was happening elsewhere in the Arab world and were wary of the potential impact that regime change in Syria could have on regional

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<sup>48</sup> *ibid* ch2, lcn1013–1019 and lcn1033–1041. See also Hinnebusch, 'Authoritarian Upgrading and the Arab Uprising' (n4) 9.

<sup>49</sup> These included 'absolute (objective) and relative (subjective) levels of socioeconomic deprivation, ethnic/sectarian fragmentation, and unfavourable governance indicators including corruption and low institutional capacity'. World Bank Group, *The Toll of War: the Economic and Social Consequences of the Conflict in Syria* (World Bank Group 2017) 9.

<sup>50</sup> Saira Mohamed, 'The U.N. Security Council and the Crisis in Syria' (2012) 16 (11) ASIL Insights <<https://www.asil.org/insights/volume/16/issue/11/un-security-council-and-crisis-syria>> accessed 16 August 2013; Lesch, *The Fall* (n1) 181-183; Thilo Marauhn, 'Sailing close to the wind: Human Rights Council fact-finding in cases of armed conflict – the case of Syria' (2012) 43 *CalWIntlL* 401, 415–421; Neil MacFarquhar, 'Push in U.N. for Criticism of Syria Is Rejected' *The New York Times* (New York, 28 April 2011) A12; Abboud, *Syria* (n1) ch4, lcn2729–2759.

<sup>51</sup> UNSC PRST 2011/16 (3 August 2011) UN Doc S/PRST/2011/16.

<sup>52</sup> UNGA Res 66/176 (19 December 2011) UN Doc A/RES/66/176.

<sup>53</sup> UNHRC Res S-16/1 (29 April 2011) UN Doc A/HRC/RES/S-16/1.

<sup>54</sup> UNHRC Res S-17/1 (22 August 2011) UN Doc A/HRC/S-17/1.

stability.<sup>55</sup> Consequently, the immediate response ‘was guarded and muted’<sup>56</sup> as ‘a better the devil you know’ attitude prevailed.<sup>57</sup>

The Arab League, sometimes labelled a ‘dictators’ club’<sup>58</sup>, has traditionally been reluctant to intervene in the internal affairs of its member states.<sup>59</sup> However, the League’s consensus in requesting the UNSC to impose a no-fly zone over Libya marked a potential sea-change in its *modus operandi*.<sup>60</sup> Nonetheless, its initial response to the Syrian protests was stereotypically non-interventionist.<sup>61</sup> It may have been hesitant to get embroiled in another regional crisis given the uncertain aftermath of the Egyptian and Libyan uprisings.<sup>62</sup> Furthermore, the Gulf states, which due to Qatar’s chairmanship and unrest in Egypt and Syria exerted considerable influence over the League at the time,<sup>63</sup> were reluctant to condemn the Assad regime at a time when they themselves were combatting domestic protests.<sup>64</sup> Qatar and Turkey, whose leaders enjoyed close personal relations with Bashar, sought to convince him to implement the reforms requested. However, their efforts were rebuffed.

The Arab states and Turkey came under increasing pressure from domestic constituencies to condemn the Assad regime after it escalated its

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<sup>55</sup> Lesch, ‘The Arab spring’ (n19) 425; Eyal Zisser, ‘The ‘Struggle for Syria’: Return to the Past?’ (2012) 17 *Mediterranean Politics* 105, 108; Dahi and Munif (n34) 329; Hokayem, *Syria’s Uprising* (n5) ch5, lcn2580–2650; Phillips, *The Battle for Syria* (n1) 59–60 and 64–65.

<sup>56</sup> Lesch, *The Fall* (n1) 122 and ch7 generally.

<sup>57</sup> Zisser, ‘The ‘Struggle for Syria’ (n55) 108.

<sup>58</sup> Lesch, *The Fall* (n1) 183.

<sup>59</sup> Müjge Küçükkeleş, ‘Arab League’s Syria Policy’ (2012) Foundation for Political, Economic and Social Research Policy Brief No 56, April 2012, 3 <<http://file.setav.org/Files/Pdf/arab-league's-syrian-policy.pdf>> accessed 11 September 2014; Phillips, *The Battle for Syria* (n1) 88.

<sup>60</sup> *ibid* 4.

<sup>61</sup> See eg Arab Group statement in UNHRC, ‘Human Rights Council debates situation of human rights in the Syrian Arab Republic in Special Session’ (29 April 2011) Press Release HRC11/099E.

<sup>62</sup> Küçükkeleş (n59) 6.

<sup>63</sup> *ibid* 16.

<sup>64</sup> They reportedly agreed not to criticise Bashar and in return he agreed not to criticise their military intervention in support of the Bahraini monarchy in March 2011. Hokayem, *Syria’s Uprising* (n5) ch4, lcn1891–1903; Phillips, *The Battle for Syria* (n1) 64–65 and 68.

repression during Ramadan.<sup>65</sup> By this point, the Gulf states had largely quelled their own domestic protests and Saudi Arabia had begun to view the Syrian unrest as an opportunity to undermine Iran.<sup>66</sup> Turkey in turn saw it as an opportunity to extend its regional influence by promoting its ally, the Syrian Muslim Brotherhood. Accordingly, the Arab monarchies and Turkey started to publicly criticise the Assad regime. King Abdullah of Jordan became the first Arab leader to call for Bashar's resignation on 14 November 2011.<sup>67</sup> Erdoğan made a similar demand a week later.

The response of the US and EU to the Syrian crisis has been criticised as confused, reactive and based upon a poor understanding of Syrian politics and society.<sup>68</sup> Apart from applying sanctions against Syria, their initial response was restrained as they hoped that Bashar's 'reformer' image would transpire to be true.<sup>69</sup> Significantly, the Assad regime had maintained a cold peace with Israel for decades and had recently pursued a rapprochement with the West.<sup>70</sup> However, as the situation in Syria deteriorated, they came under pressure from domestic constituencies, the media and international human rights organisations to 'do something'. Finally, on 18 August 2011 the EU Minister for Foreign Affairs and the leaders of the US, France, the UK, Germany and Canada called for Bashar to step down.<sup>71</sup> By this point Israel's

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<sup>65</sup> Küçükkeleş (n59) 4 and 17; Hokayem, *Syria's Uprising* (n5) ch4, lcn1930–1934; Daniel Byman, 'Sectarianism Afflicts the New Middle East' (2014) 91–92; Phillips, *The Battle for Syria* (n1) 66–67 and 117–118.

<sup>66</sup> Hokayem, *Syria's Uprising* (n5) ch4, lcn2036–2039; Toby Matthiesen, *Sectarian Gulf: Bahrain, Saudi Arabia, and the Arab Spring that wasn't* (Kindle edn, Stanford UP 2013) Preface, lcn153–159; Byman, 'Sectarianism' (n65) 91; Phillips, *The Battle for Syria* (n1) 68.

<sup>67</sup> Küçükkeleş (n59) 8.

<sup>68</sup> Hokayem, *Syria's Uprising* (n5) ch5, lcn2588–2713; Abboud, *Syria* (n1) ch4, lcn2507–2559; and see generally van Dam, *Destroying a Nation* (n11) ch4.

<sup>69</sup> Hokayem, *Syria's Uprising* (n5) ch5, lcn2636 and generally lcn2588–2650. See also Phillips, *The Battle for Syria* (n1) 65.

<sup>70</sup> Robert Springborg, 'The US Response to the Arab Uprising: Leadership Missing' in Riccardo Alcaro and Miguel Haubrich-Seco (eds), *Re-thinking Western Policies in Light of the Arab Uprising* (Edizioni Nuova Cultura 2012) 44; Lesch, *The Fall* (n1) 148; Hokayem, *Syria's Uprising* (n5) ch4, lcn2391–2395 and ch5, lcn2911–2913; Phillips, *The Battle for Syria* (n1) 173.

<sup>71</sup> 'Statement by President Obama on the Situation in Syria' (White House Press Release, 18 August 2011) <<https://obamawhitehouse.archives.gov/the-press-office/2011/08/18/statement-president-obama-situation-syria>> accessed 16 May 2018; 'Joint UK, French and German statement on Syria' (*UK Government website*, 18 August 2011) <<https://www.gov.uk/government/news/joint-uk-french-and-german-statement-on-syria>> accessed 18 December 2017; 'Syria unrest: World leaders call for Assad to step down' (*BBC Middle East*, 18 August 2011) <<http://www.bbc.co.uk/news/world-middle-east-14577333>>

President had already indicated that Bashar should resign.<sup>72</sup> Obama's statement was somewhat ambiguous as regards the assistance that the US was willing to give to the Syrian opposition. On the one hand, he stated that 'The United States cannot and will not impose this transition upon Syria'.<sup>73</sup> On the other hand, he indicated that the US would assist by 'pressuring President Assad to get out of the way of this transition, and standing up for the universal rights of the Syrian people'.<sup>74</sup>

Phillips suggested that when these Western leaders called for Bashar's resignation they believed that his regime was close to collapse.<sup>75</sup> In making this miscalculation, they ignored the advice of Western diplomats inside Syria who argued against calling for something that might not materialise.<sup>76</sup> Some observers suggested that their statements expedited the march toward war by implying that the US and its allies were willing to use their political and military power to secure regime change.<sup>77</sup> They argued that these statements emboldened the Syrian opposition and their regional backers and convinced the Assad regime that it was in a zero sum battle for survival.<sup>78</sup>

#### 6.2.iv Sanctions

Numerous states and regional organisations imposed diplomatic and economic sanctions against Syria in response to the Syrian crisis, most notably Turkey, the Arab League, the US and the EU.<sup>79</sup> The UNSC also imposed targeted sanctions against individuals affiliated with ISIS and Jabhat

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accessed 10 October 2017; Catherine Ashton, 'Declaration by the High Representative, Catherine Ashton, on behalf of the European Union on EU action following the escalation of violent repression in Syria' (18 August 2011) 13488/1/11 REV 1 PRESSE 282.

<sup>72</sup> Regarding Israel's position, see Hokayem, *Syria's Uprising* (n5) ch4, lcn2391–2434.

<sup>73</sup> Obama Statement, 18 August 2011 (n71).

<sup>74</sup> *ibid* (n71).

<sup>75</sup> Hokayem, *Syria's Uprising* (n5) ch5, lcn2686–2690; Phillips, *The Battle for Syria* (n1) 60 and 76–77; van Dam, *Destroying a Nation* (n11) ch4, lcn1791–1798 and Conclusions, lcn2547–2564.

<sup>76</sup> Phillips, *The Battle for Syria* (n1) 77–81.

<sup>77</sup> *ibid* (n1) 60, 76–77, 81–82 and 84.

<sup>78</sup> Samuel Charap, 'Russia, Syria and the Doctrine of Intervention' (2013) 55 *Survival* 35, 39; Phillips, *The Battle for Syria* (n1) 76 and 81; van Dam, *Destroying a Nation* (n11) ch2, lcn1186–1188, ch4, lcn1834–1839 and lcn1967–1976, and Conclusions, lcn2518–2522.

<sup>79</sup> The ILC considers the term 'sanctions' to be insufficiently precise. ILC, 'Draft articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries 2001' (2001) II (2) UNYBILC 31–143, UN Doc A/CN.4/SER.A/2001/Add.1 (Part 2) (ILC 2001 Draft Articles), 128.

al Nusra (JAN).<sup>80</sup> However, it declined to impose sanctions against Syria due to Russian and Chinese opposition.<sup>81</sup> Economic sanctions may be comprehensive, selective or targeted. Comprehensive sanctions are broadly defined and target entire states, for example, trade embargoes.<sup>82</sup> Selective sanctions restrict the flow of particular products, sectors or financial streams, for example, oil embargoes.<sup>83</sup> Targeted sanctions are directed towards entities and individuals allegedly responsible for wrongdoing, for example, travel bans.<sup>84</sup> Selective and targeted sanctions are preferable due to the adverse humanitarian effects of comprehensive sanctions.<sup>85</sup>

The US was the first state to impose economic sanctions against Syria on 29 April 2011 followed by the EU in May. The US<sup>86</sup> and EU<sup>87</sup> imposed several additional rounds of sanctions against Syria in 2011 and 2012. The sanctions imposed included oil and arms embargoes, government asset freezes and targeted sanctions against regime elites and regime-affiliated enterprises. The EU also suspended all bilateral cooperation programmes between the EU and Syria under the EMP and prohibited the European Investment Bank and EU member states from providing new loans to the

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<sup>80</sup> See eg UNSC Res 2170 (15 August 2014) UN Doc S/RES/2170, paras 18–21.

<sup>81</sup> On 19 July 2012, Russia and China vetoed a draft resolution tabled under Chapter VII, which threatened to impose sanctions against the Syrian government if it continued to use heavy weapons against civilians. For their official reasons, see UNSC Verbatim Record (19 July 2012) UN Doc S/PV/6810, 8 and 13–14.

<sup>82</sup> Erica S Moret, 'Humanitarian impacts of economic sanctions on Iran and Syria' (2015) 24 *European Security* 120, 121.

<sup>83</sup> Gary Clyde Hufbauer and Barbara Oegg, 'Targeted Sanctions: a Policy Alternative?' (Symposium on Sanctions Reform: Evaluating the Economic Weapon in Asia and the World, Peterson Institute for International Economics, Washington DC, 23 February 2000) <<http://www.iie.com/publications/papers/paper.cfm?ResearchID=371>> accessed 15 September 2014; Moret (n82) 122.

<sup>84</sup> Moret (n82) 122.

<sup>85</sup> *ibid* 122.

<sup>86</sup> For a list of US sanctions, see US Department of the Treasury Office of Foreign Assets Control, 'Syria Sanctions Program' (updated 2 August 2013) <<https://www.treasury.gov/resource-center/sanctions/Programs/Documents/syria.pdf>> accessed 10 January 2017; US Department of State, 'Syria Sanctions' <<http://www.state.gov/e/eb/tfs/spi/syria/>> accessed 10 January 2017.

<sup>87</sup> For a list of EU sanctions, see EU Commission, 'European Union Restrictive measures (sanctions) in force (Regulations based on Article 215 TFEU and Decisions adopted in the framework of the Common Foreign and Security Policy)' (updated as of 7 July 2016) <[http://eeas.europa.eu/cfsp/sanctions/docs/measure\\_en.pdf](http://eeas.europa.eu/cfsp/sanctions/docs/measure_en.pdf)> accessed 10 January 2018; 'EU arms embargo on Syria' (*Stockholm International Peace Research Institute*, 13 November 2013) <[https://www.sipri.org/databases/embargoes/eu\\_arms\\_embargoes/syria\\_LAS/eu-embargo-on-Syria](https://www.sipri.org/databases/embargoes/eu_arms_embargoes/syria_LAS/eu-embargo-on-Syria)> accessed 8 November 2017.

Syrian government.<sup>88</sup> The US and numerous EU member states also withdrew their ambassadors to Syria. Turkey implemented an arms embargo against Syria in September 2011. Since then, Turkey has frozen the Syrian government's assets, prohibited transactions with the Syrian government and Central Bank and closed border crossings for trade.<sup>89</sup>

The Arab League suspended Syria's membership in November 2011.<sup>90</sup> Lebanon and Yemen voted against the suspension whilst Iraq abstained. Consequently, the decision was controversial from a legal perspective as Article 18 of the League's Charter appears to require a unanimous decision of the League's member states, not counting the state concerned.<sup>91</sup> Furthermore, Syria's repression of protesters did not necessarily amount to a failure to fulfil its obligations under the Charter, which contains no mention of human rights.<sup>92</sup> The League imposed unprecedented economic sanctions against Syria on 27 November 2011, including targeted sanctions, asset freezes and a ban on transactions with the Syrian Central Bank. Lebanon opposed the decision whilst Iraq abstained.<sup>93</sup> The League urged its members to sever diplomatic relations with Syria in February 2012 and its foreign ministers officially called upon Bashar to step aside in July 2012.<sup>94</sup> The Organization of the Islamic Conference suspended Syria's membership in August 2012.<sup>95</sup>

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<sup>88</sup> Clara Portela, 'The EU's Sanctions against Syria: Conflict Management by Other Means' (2012) Egmont Security Policy Brief 38, September 2012, 4 <<http://aei.pitt.edu/39406/1/SPB38.pdf>> accessed 10 January 2018.

<sup>89</sup> A/HRC/19/69, para 28; Portela, 'The EU's Sanctions against Syria' (n88) 4; Phillips, *The Battle for Syria* (n1) 86.

<sup>90</sup> Küçükkeleş (n59) 7.

<sup>91</sup> Charter of the League of Arab States (adopted 22 March 1945) 70 UNTS 237, art XVIII.

<sup>92</sup> Martin Dawidowicz, 'Third-party countermeasures: A progressive development of international law?' (2016) 29 QIL Zoom-in 3, 7–8 <<http://www.qil-qdi.org/third-party-countermeasures-progressive-development-international-law/>> accessed 10 July 2018.

<sup>93</sup> Lesch, *The Fall* (n1) 188.

<sup>94</sup> 'Arab League calls on Syria president to quit' (*Euronews*, 23 July 2012) <<http://www.euronews.com/2012/07/23/arab-league-calls-on-syria-president-to-quit/>> accessed 10 October 2017.

<sup>95</sup> OIC, 'Final Communiqué adopted by the Fourth Extraordinary Session of the Islamic Summit Conference "Promotion of Islamic Solidarity"' (14–15 August 2012) OIC/EX-SUM-4/2012/FC/FINAL, para 19. Iran and Algeria opposed the suspension. See 'Iran Balks at Syria's Suspension from Islamic Conference' (*USIP: The Iran Primer*, 17 August 2012) <<http://iranprimer.usip.org/blog/2012/aug/17/iran-balks-syria%E2%80%99s-suspension-islamic-conference>> accessed 10 October 2017.

In 2013, the EU and the US eased their respective sanctions programmes to enable the purchase of oil from the moderate opposition in an effort to shift the military balance in the opposition's favour.<sup>96</sup> However, this proved somewhat counterproductive as it enhanced intra-opposition competition for control of oil-rich areas.<sup>97</sup> Most parts of the EU arms embargo were also relaxed in June 2013 after the UK and France refused to support the extension of the existing embargo, which they felt was indirectly benefitting the Assad regime. However, several other EU member states and the UNCOI argued that lifting the embargo could trigger an arms race.<sup>98</sup> After 2013, the EU imposed few new sanctions against Syria due to their perceived ineffectiveness and intra-EU divisions over how to respond to the Syria crisis.<sup>99</sup> The US was also reluctant to impose new sanctions after 2013 in order to avoid derailing a potential diplomatic solution.<sup>100</sup> However, in 2017 the Trump Administration imposed additional targeted sanctions in response to the regime's alleged use of chemical weapons.<sup>101</sup>

The explicit objectives of the EU and US sanctions included deepening the regime's financial isolation, depriving it of the resources needed to sustain its repression and pressurising it into implementing democratic reforms or permitting a democratic transition.<sup>102</sup> An additional

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<sup>96</sup> 'Syria Sanctions Program' (n86); 'Syria Sanctions' (n86); 'EU arms embargo on Syria' (n87).

<sup>97</sup> Francesco Giumelli and Paul Ivan, 'The effectiveness of EU sanctions: an analysis of Iran, Belarus, Syria and Myanmar (Burma)' (2013) European Policy Centre Issue Paper 76, 23 <[http://www.epc.eu/documents/uploads/pub\\_3928\\_epc\\_issue\\_paper\\_76\\_-\\_the\\_effectiveness\\_of\\_eu\\_sanctions.pdf](http://www.epc.eu/documents/uploads/pub_3928_epc_issue_paper_76_-_the_effectiveness_of_eu_sanctions.pdf)> accessed 11 January 2018; Phillips, *The Battle for Syria* (n1) 198.

<sup>98</sup> 'Austrian Position on Arms Embargo in Syria as of 13 May 2013' *The Guardian* (15 May 2013) <<https://www.theguardian.com/world/julian-borger-global-security-blog/interactive/2013/may/15/austria-eu-syria-arms-embargo-pdf>> accessed 26 October 2017; Clara Portela, 'The EU's decision to lift the arms embargo against Syria's rebels is a dramatic departure from its previous policies' (*LSE Comment*, 23 July 2013) <<http://bit.ly/12RIxI0>> accessed 15 September 2014.

<sup>99</sup> Abboud, *Syria* (n1) ch4, lcn2527–2539.

<sup>100</sup> Josh Rogin, 'Congress launches Syria sanctions drive' *The Washington Post* (14 July 2016) <[https://www.washingtonpost.com/opinions/global-opinions/congress...a-49c8-11e6-90a8-fb84201e0645\\_story.html?utm\\_term=.abb0d56e50bf](https://www.washingtonpost.com/opinions/global-opinions/congress...a-49c8-11e6-90a8-fb84201e0645_story.html?utm_term=.abb0d56e50bf)> accessed 8 November 2017.

<sup>101</sup> Aria Bendix, 'U.S. Imposes Sanctions on Syria Amid Accusations of Mass Killings' *The Atlantic* (17 May 2017) <<https://www.theatlantic.com/news/archive/2017/05/us-syria-sanctions-human-rights-mass-killing/526956/>> accessed 8 November 2017.

<sup>102</sup> 'Syria Sanctions' (n86); Macon Phillips, 'President Obama: "The future of Syria must be determined by its people, but President Bashar al-Assad is standing in their way."' (*The White House Blog*, 18 August 2011)

unstated objective was to alleviate domestic pressure to respond to the Syrian crisis.<sup>103</sup> It was initially hoped that the accumulative pressure of the Western and Arab sanctions would force the Assad regime into implementing the political reforms requested.<sup>104</sup> If this failed, it was hoped that by politically and financially isolating the regime, more and more of its supporters would be persuaded to abandon it and consequently Bashar would be forced to resign.<sup>105</sup>

The sanctions failed to achieve their objectives. Their failure was foreseeable for several reasons. First, authoritarian governments are far less likely to comply with the demands of sanctioning ‘sender’ states than democracies.<sup>106</sup> Second, sanctions are less likely to be effective when influential states oppose them.<sup>107</sup> In this case, Russia, China, Iran, Iraq and Lebanon all opposed the sanctions and continued to trade with Syria and provide it with financial assistance.<sup>108</sup> Furthermore, Syria’s main arms suppliers – Russia, Iran, North Korea and Belarus – also opposed the sanctions thereby rendering the arms embargo entirely symbolic.<sup>109</sup> Third, sanctions with ambitious objectives, in this case democratic transition, are less likely to be effective.<sup>110</sup> Finally, the target state is unlikely to comply with the sending state’s demands if its ruling elites subjectively evaluate that

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<<https://obamawhitehouse.archives.gov/blog/2011/08/18/president-obama-future-syria-must-be-determined-its-people-president-bashar-al-assad>> accessed 10 October 2017; Portela, ‘The EU’s Sanctions against Syria’ (n88) 2; Andrew Thomas, ‘“Pariah States” and Sanctions: the case of Syria’ (2013) 20 Middle EPol’y 27, 30. See also ‘Statement by the Friends of the Syrian People International Working Group on Sanctions’ (Washington 6 June 2012) <<https://www.treasury.gov/press-center/press-releases/Pages/tg1606.aspx>> accessed 8 November 2017; ‘Statement by the Friends of the Syrian People International Working Group on Sanctions’ (Qatar 19 July 2012) <<https://www.state.gov/e/eb/tfs/spi/syria/documents/211642.htm>> accessed 8 November 2017.

<sup>103</sup> Phillips, *The Battle for Syria* (n1) 88.

<sup>104</sup> Lesch, *The Fall* (n1) 159.

<sup>105</sup> *ibid*; Hokayem, *Syria’s Uprising* (n5) ch5, lcn2676–2685.

<sup>106</sup> Gary Clyde Hufbauer and others, *Economic Sanctions Reconsidered* (3rd edn, Peterson Institute for International Economics 2007) 61 and 166–168.

<sup>107</sup> *ibid* 57–60 and 172–175.

<sup>108</sup> Andrew Thomas (n102) 30. See also Hilal Khashan, ‘Will Syria’s Strife Rip Lebanon Apart?’ (2013) 20 Middle EQ 75, 75–76; Giumelli and Ivan (n97) 23; ‘Sanctions against Syria: As effective as bullets, maybe’ *The Economist* (Damascus, 3 December 2011) <<http://www.economist.com/node/21541078>> accessed 8 November 2017.

<sup>109</sup> Portela, ‘The EU’s Sanctions against Syria’ (n88) 3.

<sup>110</sup> Hufbauer and others (n106) 158–159.



the costs of complying with those demands exceed the costs of defying them.<sup>111</sup> For regime elites, the potential costs of compliance included a loss of position, individual criminal accountability and sectarian retribution. On the other hand, the costs of defying the sanctions were limited as due to their privileged position regime elites could escape the worst effects of the sanctions.

The sanctions undermined Syria's economy<sup>112</sup> and were criticised for their adverse humanitarian consequences.<sup>113</sup> The EU sanctions were particularly painful as the EU was the main export market for Syrian oil and a core source of credit.<sup>114</sup> The Turkish and Arab sanctions also had a significant impact as Turkey was an important trading partner, and Turkey and the Gulf states were major sources of FDI.<sup>115</sup> The sanctions contributed to inflation, an increase in the cost of basic necessities and shortages of fuel, electricity, water and medicine.<sup>116</sup> These problems in turn rendered it more difficult for humanitarian agencies to perform their duties.<sup>117</sup>

## 6.2.v Theoretical Analysis of the Protests and the Initial Response

The Arab Spring protests reinforced liberalism's implicit assumption that authoritarian governments are more susceptible to internal violence than

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<sup>111</sup> *ibid* 50–52.

<sup>112</sup> See eg A/HRC/19/69, para 36; World Bank Group, *The Toll of War* (n49) 59, 63 and 67.

<sup>113</sup> Portela, 'The EU's Sanctions against Syria' (n88) 7; Kasturi Sen, Waleed Al-Faisal and Yaser Al-Saleh, 'Syria: effects of conflict and sanctions on public health' (2012) 35 *Journal of Public Health* 195; Andrew Thomas (n102) 31; Moret (n82) 128–131.

<sup>114</sup> Portela, 'The EU's Sanctions against Syria' (n88) 4 and 7; Giumelli and Ivan (n97) 23; Moret (n82) 129; Phillips, *The Battle for Syria* (n1) 86.

<sup>115</sup> Küçükkeleş (n59) 7; 'Sanctions against Syria: As effective as bullets, maybe'; Abboud, *Syria* (n1) ch4, lcn2296–2304; World Bank Group, *The Toll of War* (n49) 59 and 67.

<sup>116</sup> A/HRC/19/69, para 36; UNHRC, 'Oral Update of the Independent International Commission of Inquiry on the Syrian Arab Republic' (11 March 2012) UN Doc A/HRC/22/CRP.1, para 8; UNHRC, 'Report of the independent international commission of inquiry on the Syrian Arab Republic' (16 August 2012) UN Doc A/HRC/21/50 (A/HRC/21/50), para 35; UNHRC, 'Report of the independent international commission of inquiry on the Syrian Arab Republic' (5 February 2013) UN Doc A/HRC/22/59 (A/HRC/22/59), para 32 and Annex III, para 2; UNHRC, 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic' (18 July 2013) UN Doc A/HRC/23/58 (A/HRC/23/58), para 33; UNHRC, 'Report of the independent international commission of inquiry on the Syrian Arab Republic' (12 February 2014) UN Doc A/HRC/25/65 (A/HRC/25/65), Annex II, para 11.

<sup>117</sup> UNHRC, 'Report of the independent international commission of inquiry on the Syrian Arab Republic' (8 August 2017) UN Doc A/HRC/36/55 (A/HRC/36/55), para 14.

representative governments. However, they also suggested that cosmetic democracy is unlikely to generate sustainable stability, particularly when distributive justice is denied.<sup>118</sup> At the same time, the Syrian crisis revealed the resilience of neopatrimonial authoritarian regimes. Furthermore, the Assad regime's repressive response supported David's assertion that authoritarian regimes prioritise their own survival over the national interest.

The regime instrumentalised ideational politics and sectarian narratives to justify its repressive response to the protests and mobilise support amongst minorities and moderates as realists would expect. Nevertheless, the analysis also reinforced the constructivist argument that ideational factors are not mere instruments as they influenced the emergence and unfolding of the Syrian crisis. Ultimately, the regime's foreign policy of resistance did not offset concrete grievances over the liquidation of Ba'athist socialism. Furthermore, most Syrians saw through the regime's 'foreign conspiracy' narrative and asked why it was not fighting to recover the Golan Heights instead of murdering innocent civilians.<sup>119</sup>

The Arab Spring protests challenged essentialist approaches which suggest that the Middle East and Islam are incompatible with democracy. The differentiation that Koh's transnational legal process draws between social, political and legal internalisation of human rights norms helps explain the outbreak of the Arab Spring protests and the regime's response thereto. Societal actors in Syria socially internalised international human rights norms as evident from their reliance upon these norms during the Arab Spring protests. However, these norms had not been politically internalised by regime elites as evident from their suppression of pro-democracy protesters.

From a realist perspective, the evolution of Syria's initially peaceful, pro-democracy protests into a proxy war with sectarian undertones highlights the dangers of liberal idealism. Young Syrians engaged the language of

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<sup>118</sup> Volker Perthes, 'Europe and the Arab Spring' (2011) 53 *Survival* 73, 82–83.

<sup>119</sup> Wieland (n1) ch11, lcn6477–6486; Sottimano (n44) ch4, lcn940–945.

human rights in the expectation that the promises they contained would be fulfilled. Democratic Western governments seeking to appease domestic audiences and position themselves on the ‘right side of history’ voiced rhetorical support for the protests. However, they were later criticised for creating false expectations as their words did not always correspond with their actions.<sup>120</sup> Their economic sanctions also arguably had the unspoken objective of appeasing domestic constituencies. These sanctions somewhat foreseeably failed to achieve their official objectives whilst concurrently aggravating the humanitarian crisis inside Syria.

### 6.3 Regime Resilience

One factor that differentiated Syria from other Arab Spring states and rendered it more susceptible to protracted armed conflict was the resilience of the ruling regime. This resilience derived from the regime’s structure, tactics, external allies and domestic support base, as well as from the hopelessly fragmented nature of the opposition.

#### 6.3.i Regime Structure and Tactics

Unlike some of the other Arab Spring states, Syria had formidable armed forces. Its combined Army, Navy and Air Force had approximately 300,000 troops and 280,000 reservists in 2011.<sup>121</sup> The internal coup-proofing that Bashar had performed during his first decade in power paid off during the Arab Spring as the upper echelons of Syria’s armed forces and *Mukhabarat* generally remained loyal.<sup>122</sup> A few high level military defections occurred,<sup>123</sup> but no complete units defected with their military equipment.<sup>124</sup> Some

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<sup>120</sup> See Abboud, *Syria* (n1) ch4, lcn2514–2518; Phillips, *The Battle for Syria* (n1) 80–82; van Dam, *Destroying a Nation* (n11) ch4; Itamaer Rabinovich, ‘The Syrian crisis: A reckoning and a road map’ (*Markaz*, 12 September 2017) <<https://www.brookings.edu/blog/markaz/2017/09/12/the-syrian-crisis-a-reckoning-and-a-road-map/>> accessed 9 October 2017.

<sup>121</sup> A/HRC/S-17/2/Add.1, para 18; Hokayem, *Syria’s Uprising* (n5) ch2, lcn1002–1007.

<sup>122</sup> Phillips, ‘Syria’s Torment’ (n5) 72; Wieland (n1) ch4, lcn1832–1834; Lesch, *The Fall* (n1) 50; Phillips, *The Battle for Syria* (n1) 52–53.

<sup>123</sup> For example, Manaf Tlass, a Sunni former general in the Republican Guard and close friend of Bashar defected in July 2011.

<sup>124</sup> See Phillips, ‘Syria’s Torment’ (n5) 72; Hinnebusch, ‘Syria: from ‘authoritarian upgrading’ to revolution?’ (n3) 110; Hokayem, *Syria’s Uprising* (n5) ch2, lcn1014–1028; Droz-Vincent (n2) 49; Phillips, *The Battle for Syria* (n1) 148.

ministers, parliamentarians, diplomats and high-ranking Ba'athists also defected, albeit not on a comparable scale to Libya.<sup>125</sup>

In order to prevent the armed forces from splitting along sectarian lines, the regime primarily deployed its Alawi-dominated elite armed units<sup>126</sup> to suppress the initial protests.<sup>127</sup> When regular units were used, intelligence officials, *shabiha* gangs and loyalist officers were reportedly dispatched with them to shoot any soldiers who refused to execute orders to shoot unarmed protesters.<sup>128</sup> The regime's over-reliance on elite units presented logistical challenges and contributed to its tactical withdrawal from peripheral areas in 2012 and increasing reliance on aerial and artillery bombardment coupled with siege warfare.<sup>129</sup> The regime's monopoly of air power and disregard for civilian casualties would prove a key military advantage.

The regime was also supported by irregular domestic and foreign militias.<sup>130</sup> Its reliance upon irregular militias increased as the conflict developed into a war of attrition.<sup>131</sup> These irregular militias dramatically contributed to the militarisation and fragmentation of the conflict as they often operated outside the centralised control of the armed forces<sup>132</sup> and some were overtly sectarian.<sup>133</sup> Domestic pro-regime militias included the *shabiha*,

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<sup>125</sup> Wieland (n1) ch1, lcn444–448 and ch4, lcn1837–1864; Hinnebusch, 'Syria: from 'authoritarian upgrading' to revolution?' (n3) 110; Lesch, *The Fall* (n1) 97–98.

<sup>126</sup> Regarding these units, see A/HRC/S-17/2/Add.1, para 18; Droz-Vincent (n2) 39; van Dam, *Destroying a Nation* (n11) ch3, lcn1612–1632.

<sup>127</sup> Wieland (n1) ch1, lcn497–499; Hinnebusch, 'Syria: from 'authoritarian upgrading' to revolution?' (n3) 110; Lesch, *The Fall* (n1) 50–51; Hokayem, *Syria's Uprising* (n5) ch2, lcn907–909 and lcn986–991; Droz-Vincent (n2) 39; W Andrew Terrill, 'Iran's Strategy for Saving Asad' (2015) 69 Middle EJ 222, 225; van Dam, *Destroying a Nation* (n11) ch3, lcn1634–1637.

<sup>128</sup> See eg A/HRC/18/53, paras 30–31, 46, 52, 54 and 57.

<sup>129</sup> Hokayem, *Syria's Uprising* (n5) ch2, lcn986–1001; Terrill (n127) 225.

<sup>130</sup> A/HRC/23/58, para 22; A/HRC/25/65, para 12. See also Weiss and Hassan (n1) 137–138; Abboud, *Syria* (n1) ch3, lcn2059–2211; Phillips, *The Battle for Syria* (n1) 162.

<sup>131</sup> A/HRC/23/58 para 22; A/HRC/25/65, para 12; Hokayem, *Syria's Uprising* (n5) ch2, lcn1037–1044; Weiss and Hassan (n1) 137–138; Abboud, *Syria* (n1) ch3, lcn2125–2127 and lcn2178–2183; Phillips, *The Battle for Syria* (n1) 162. Goodarzi estimated that between 80,000 and 100,000 members of the Syrian armed forces were killed between 2011 and 2015. Jubin Goodarzi, 'Iran and Syria: The End of the Road?' (2015) Wilson Center Middle East Program, Viewpoints No 79, June 2015, 1–2 <[https://www.wilsoncenter.org/sites/default/files/iran\\_syria\\_end\\_of\\_road.pdf](https://www.wilsoncenter.org/sites/default/files/iran_syria_end_of_road.pdf)> accessed 24 July 2015.

<sup>132</sup> See van Dam, *Destroying a Nation* (n11) ch3, lcn1664–1702.

<sup>133</sup> Abboud, *Syria* (n1) ch3, lcn2118–2124; Phillips, *The Battle for Syria* (n1) 162 and 216.

the Popular Committees<sup>134</sup> and the Ba'ath party battalions. In 2013, they were incorporated into a hierarchical national paramilitary force, the National Defence Forces (NDF).<sup>135</sup> Nevertheless, most NDF units continued to operate relatively autonomously.<sup>136</sup> At its height, the NDF was estimated to have 100,000 members.<sup>137</sup>

### 6.3.ii Support of External Actors

#### 6.3.ii.a Iran and Hezbollah

After supporting uprisings in other Arab countries, Iran condemned the Syrian protests as a foreign conspiracy.<sup>138</sup> It immediately offered the Assad regime riot equipment, advice on crowd control and training on cyber warfare technologies.<sup>139</sup> It subsequently provided billions of dollars' worth of credit,<sup>140</sup> military equipment and advisors from the Quds Force of the Islamic Revolutionary Guard Corps (IRGC).<sup>141</sup> By mid-2013, the commander of the Quds Force, Qassem Suleimani, was reportedly running a military command centre in Damascus.<sup>142</sup> Suleimani purportedly devised the strategy of withdrawing Syria's armed forces from peripheral regions so as to enable them to concentrate on defending strategically important areas in Western

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<sup>134</sup> Pro-regime militias were reportedly armed, trained and supported by government forces and the Iranian Quds Forces. They were organised into the People's Army in 2012. See A/HRC/22/59, para 22 and Annex II, para 9; A/HRC/23/58, para 22; Phillips, *The Battle for Syria* (n1) 162.

<sup>135</sup> A/HRC/23/58, para 22; Weiss and Hassan (n1) 138; Abboud, *Syria* (n1) ch3, lcn2080–2119; Phillips, *The Battle for Syria* (n1) 161–162.

<sup>136</sup> Abboud, *Syria* (n1) ch3, lcn2107–2112.

<sup>137</sup> Weiss and Hassan (n1) 137; Phillips, *The Battle for Syria* (n1) 162. Although van Dam estimated that it had between 50,000 and 60,000 members in 2013. See van Dam, *Destroying a Nation* (n1) ch3, lcn1660–1662.

<sup>138</sup> Lesch, *The Fall* (n1) 128.

<sup>139</sup> Mohsen Milani, 'Why Tehran Won't Abandon Assad(ism)' (2013) 36 TWQ 79, 85; Phillips, *The Battle for Syria* (n1) 67.

<sup>140</sup> See Milani (n139) 87; Terrill (n127) 229; David Butter, 'Syria's Economy Picking up the Pieces' (2015) Chatham House Research Paper, June 2015, 19 <[https://www.chathamhouse.org/sites/files/chathamhouse/field/field\\_document/20150623SyriaEconomyButter.pdf](https://www.chathamhouse.org/sites/files/chathamhouse/field/field_document/20150623SyriaEconomyButter.pdf)> accessed 2 October 2017; Phillips, *The Battle for Syria* (n1) 148 and 164; World Bank Group, *The Toll of War* (n49) 56 and 67; Edward Wastnidge, 'Iran and Syria: An Enduring Axis' (2017) XXIV Middle EPol'y 148, 154.

<sup>141</sup> This was in breach of UN sanctions, which prohibited Iran from exporting weapons. Phillips, *The Battle for Syria* (n1) 149–150. See also Milani (n139) 85–86; Terrill (n127) 229.

<sup>142</sup> Phillips, *The Battle for Syria* (n1) 161.

Syria.<sup>143</sup> This overlapped with Iran's objective of securing key supply routes to Hezbollah. The Quds Forces also reportedly trained the NDF.<sup>144</sup> Iran seemingly wished to create an alternative support base in Syria should the regime fall.<sup>145</sup> Suleimani also recruited foreign Shia fighters for regime-aligned militias. The majority were Iraqi, but they also came from Afghanistan,<sup>146</sup> Iran, Lebanon and Pakistan.<sup>147</sup>

Hezbollah has helped the regime to defend strongholds, undertake military offensives and train pro-regime militias and conventional troops.<sup>148</sup> In June 2013, it helped the regime to recapture the strategically vital town of al-Qusayr.<sup>149</sup> At the height of its involvement, Hezbollah maintained 3,000 to 5,000 fighters in Syria.<sup>150</sup> Iran and Hezbollah's interventions in Syria were primarily motivated by the desire to secure Iranian-Hezbollah supply lines via Syria. According to Phillips, the collapse of the Assad regime posed a 'grave, even existential threat'<sup>151</sup> to Hezbollah. It would undermine Iran's ability to project influence in the Levant and potentially threaten its national

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<sup>143</sup> *ibid* 150.

<sup>144</sup> Hokayem, *Syria's Uprising* (n5) ch2, lcn893–895; Wastnidge (n140) 155; Goodarzi, 'Iran and Syria: The End of the Road?' (n131) 2; Weiss and Hassan (n1) 137–138.

<sup>145</sup> Hokayem, *Syria's Uprising* (n5) ch4, lcn2168–2170; Jubin Goodarzi, 'Iran and Syria at the Crossroads: The Fall of the Tehran-Damascus Axis?' (2013) Wilson Center Middle East Program, Viewpoints No 35, August 2013, 4–5 <[https://www.wilsoncenter.org/sites/default/files/iran\\_syria\\_crossroads\\_fall\\_tehran\\_damascus\\_axis.pdf](https://www.wilsoncenter.org/sites/default/files/iran_syria_crossroads_fall_tehran_damascus_axis.pdf)> accessed 22 June 2018; Goodarzi, 'Iran and Syria: The End of the Road?' (n131) 5.

<sup>146</sup> The recruitment of Afghans increased after the majority of Iraqis returned to Iraq to fight ISIS in 2014. The Afghans were mainly impoverished Hazaras who were recruited, sometimes forcibly, in Iranian refugee camps and prisons. See Christoph Reuter, 'The Afghans Fighting Assad's War' *Spiegel Online* (5 November 2015) <<http://www.spiegel.de/international/world/afghan-mercenaries-fighting-for-assad-and-stuck-in-syria-a-1032869-druck.html>> accessed 2 October 2017; Terrill (n127) 235; Weiss and Hassan (n1) 141.

<sup>147</sup> See Weiss and Hassan (n1) 141 and 236–237; Abboud, *Syria* (n1) ch3, lcn2184–2188; Phillips, *The Battle for Syria* (n1) 149 and 162–163; Wastnidge (n140) 155–156.

<sup>148</sup> Phillips, *The Battle for Syria* (n1) 157. On Hezbollah's contribution see also Khashan (n108) 78–79; Terrill (n127) 234; Abboud, *Syria* (n1) ch3, lcn2133–2183.

<sup>149</sup> Al-Qusayr was located on both an Iranian-Hezbollah supply route and an opposition supply route from Turkey to Homs. See Abboud, *Syria* (n1) ch3, lcn2144–2153; Phillips, *The Battle for Syria* (n1) 157.

<sup>150</sup> Phillips, *The Battle for Syria* (n1) 163; Terrill (n127) 234.

<sup>151</sup> Phillips, *The Battle for Syria* (n1) 157. See also Emile Hokayem, 'Syria and its Neighbours' (2012) 54 *Survival* 7, 12; Adham Saouli, 'The Foreign Policies of Iraq and Lebanon' in Raymond Hinnebusch and Anoushiravan Ehteshami (eds), *The Foreign Policies of Middle East States* (2nd edn, Lynne Rienner Publishers 2014) 128.

security.<sup>152</sup> Iran suspected that the US and the Gulf states were supporting the Syrian opposition as part of a conspiracy to weaken the Resistance Axis.<sup>153</sup> Consequently, Syria became embroiled in a proxy war between Iran and Saudi Arabia that also played out in Yemen and Bahrain. As Syria's conflict became increasingly fragmented, Iran also feared that Syria would become a base for anti-Shia jihadists. This in turn could negatively impact Iraq, which was even more strategically important to Iran than Syria.<sup>154</sup>

Whilst Iran and Hezbollah's motivations for intervening in Syria were primarily strategic, they justified their actions in sectarian terms: initially as necessary to protect Shia shrines and subsequently as part of a holy war against Sunni extremists.<sup>155</sup> In response, Sunni extremists mobilised to defeat pro-regime Shia militias in Syria.<sup>156</sup> As the situation deteriorated, more and more extremists on both sides travelled to Syria to participate in what they perceived to be a holy war.<sup>157</sup> Iran and Hezbollah's interventions in Syria undermined their ideological legitimacy as 'protectors of all Muslims'.<sup>158</sup> The associated costs to their soft power became apparent when the leader of Hamas severed ties with Iran in 2012. Furthermore, Hezbollah's intervention threatened to unravel Lebanon's delicate sectarian balance as radicalised Sunnis began perpetrating revenge attacks against Hezbollah and Iran inside Lebanon.<sup>159</sup> However, the short-term costs were arguably outweighed by the

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<sup>152</sup> Hezbollah's military capacity arguably deters Israel and the US from attacking Iran in order to terminate its nuclear programme. See Wastnidge (n140) 153; Goodarzi, 'Iran and Syria at the Crossroads' (n145) 5; Terrill (n127) 225, 227 and 236.

<sup>153</sup> The Resistance Axis was comprised of Syria, Iran, Hezbollah and Hamas. See Goodarzi, 'Iran and Syria at the Crossroads' (n145) 6.

<sup>154</sup> *ibid* 5; Goodarzi, 'Iran and Syria: The End of the Road?' (n131) 4; Terrill (n127) 228 and 236; Wastnidge (n140) 154.

<sup>155</sup> Byman, 'Sectarianism' (n65) 93; Weiss and Hassan (n1) 141; Abboud, *Syria* (n1) ch3, lcn2136–2144; Phillips, *The Battle for Syria* (n1) 158 and 163; Wastnidge (n140) 155–157. See also Milani (n139).

<sup>156</sup> Goodarzi, 'Iran and Syria at the Crossroads' (n145) 2; Fred H Lawson, 'Syria's mutating civil war and its impact on Turkey, Iraq and Iran' (2015) 90 *International Affairs* 1351, 1353.

<sup>157</sup> See Weiss and Hassan (n1) 141 and 236–237; Lawson, 'Syria's mutating civil war' (n156) 1353; Phillips, *The Battle for Syria* (n1) 163; Abboud, *Syria* (n1) ch3, lcn2189–2192.

<sup>158</sup> Byman, 'Sectarianism' (n65) 93 and 95; Shahram Akbarzadeh, 'Iran and Daesh: the case of a reluctant Shia power' (2015) XXII *Middle EPol'y* 44, 48–49; Phillips, *The Battle for Syria* (n1) 152, 159 and 232. See also Ayman Samir and Asma Alsharif, 'Arab League condemns Hezbollah's role in Syria' (*Reuters* 5 June 2013) <<https://www.reuters.com/article/uk-syria-crisis-arabs/arab-league-condemns-hezbollahs-role-in-syria-idUKBRE9541AC20130605>> accessed 10 October 2017.

<sup>159</sup> Terrill (n127) 234; Phillips, *The Battle for Syria* (n1) 159.

long-term gains. By 2018, Iran and Hezbollah's core objectives, securing Iranian-Hezbollah supply routes and preventing regime collapse, had been achieved. By this point, Iran had also reconciled with Hamas.

### 6.3.ii.b Russia

Russia has provided significant diplomatic, economic and military support to the Assad regime since 2011. It has vetoed UNSC resolutions considered unfavourable to the regime, reiterated Syria's right to non-intervention under international law and reproduced the regime's official narrative.<sup>160</sup> It has also provided credit, weaponry and advice.<sup>161</sup> Most significantly, it initiated a large-scale military intervention in September 2015 in order to prevent regime collapse.<sup>162</sup> It reportedly coordinated with Iran in advance of the intervention,<sup>163</sup> which dramatically altered the military balance of power in the regime's favour.<sup>164</sup> Russia's intervention has mainly consisted of airstrikes. However, it has also deployed special forces for training and support purposes<sup>165</sup> and private military contractors.<sup>166</sup> By 2016, Russia had approximately 4,000 military troops in Syria.<sup>167</sup> Since 2016, Russia has helped negotiate local ceasefire agreements as part of a strategy for recovering regime control of territory.

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<sup>160</sup> See eg S/PV.6524, 7; UNSC Verbatim Record (12 March 2012) UN Doc S/PV.6734, 9–10.

<sup>161</sup> Hokayem, *Syria's Uprising* (n5) ch5, lcn3001–3008; Phillips, *The Battle for Syria* (n1) 148–150.

<sup>162</sup> Bashar had publicly admitted in late July that the armed forces faced severe personnel shortages and had been forced to withdraw from some strategically important areas. See Phillips, *The Battle for Syria* (n1) 213–216; Emil Aslan Souleimanov, 'Mission Accomplished? Russia's Withdrawal from Syria' (2016) XXIII Middle EPol'y 108, 109; van Dam, *Destroying a Nation* (n11) ch3, lcn1637–1644.

<sup>163</sup> Souleimanov (n162) 110; Brian Glyn Williams and Robert Souza, "'Operation Retribution": Putin's Military Campaign in Syria, 2015–16' (2016) XXIII Middle EPol'y 42, 43–44; Jiri Valenta and Leni Friedman Valenta, 'Why Putin Wants Syria' (2016) 23 Middle EQ 1, 12.

<sup>164</sup> Phillips, *The Battle for Syria* (n1) 218–219 and 229–231; Williams and Souza (n163) 45, 49–51.

<sup>165</sup> 'Chapter 5: Russia and Eurasia' (2016) 116 The Military Balance 163, 163.

<sup>166</sup> Ammar Abdulhamid, 'Russia's Holy War in Syria' (*Lawfare*, 6 October 2015) <<https://www.lawfareblog.com/russias-holy-war-syria>> accessed 25 October 2017; Joshua Yaffa, 'Putin's Shadow Army Suffers a Setback in Syria' *The New Yorker* (Moscow, 16 February 2018) <<https://www.newyorker.com/news/news-desk/putins-shadow-army-suffers-a-setback-in-syria>> accessed 4 April 2018.

<sup>167</sup> Williams and Souza (n163) 49.



Russia's support for the Assad regime entailed risks, including the risk of revenge attacks by Islamist extremists and returning foreign fighters, the risk of getting stuck in a protracted armed conflict with detrimental ramifications for Russia's economy, and the risk of antagonising the opposition's core backers.<sup>168</sup> Although, with regard to the latter factor, Putin probably realised early on that Obama was unwilling to intervene militarily to overthrow the Assad regime.<sup>169</sup> Nevertheless, Russia risked jeopardising its not insignificant trade links with Turkey. This risk was realised when Turkey shot down a Russian fighter plane in November 2015 prompting Russia to implement economic sanctions against Turkey. Nevertheless, the two states ultimately prioritised their shared interest in restoring trade relations. Accordingly, Russia lifted most of the sanctions against Turkey in June 2017.<sup>170</sup>

Ultimately for Russia, the reasons for supporting the Assad regime outweighed the risks. One potential reason was surviving connections between Russia and Syria's respective military-intelligence communities and ministries of defence and foreign affairs.<sup>171</sup> Russia may also have been motivated by a desire to protect Russian and Orthodox Christian communities in Syria.<sup>172</sup> It may also have acted to protect its material interests, most

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<sup>168</sup> Phillips, *The Battle for Syria* (n1) 222–223 and 232; Souleimanov (n162) 113.

<sup>169</sup> Radwan Ziadeh and others, 'Conference: Crisis in Syria: What are the U.S Options?' (2012) 19 *Middle EPol'y* 1, 8 and 18; Lesch, *The Fall* (n1) 224; Roland Dannreuther, 'Russia and the Arab Spring: Supporting the Counter-Revolution' (2015) 37 *JEuropIntegration* 77, 84–85; Phillips, *The Battle for Syria* (n1) 96; Valenta and Friedman Valenta (n163) 15.

<sup>170</sup> For a discussion of Russian-Turkish economic relations and the impact of the Syrian crisis thereon, see Mark N Katz, 'Russia and the Conflict in Syria: four myths' (2013) 20 *Middle EPol'y* 32, 41; Bill Park, 'Turkey's isolated stance: an ally no more, or just the usual turbulence? The end of Turkey in NATO? And of the EU accession dream?' (2015) 91 *International Affairs* 581, 590–591; Dannreuther (n169) 88–89; Antonio Perra, 'From the Arab Spring to the Damascus Winter: The United States, Russia, and the New Cold War' (2016) 3 *Contemporary Review of the Middle East* 363, 377; Abboud, *Syria* (n1) ch4, lcn2402–2405; Phillips, *The Battle for Syria* (n1) 97 and 221; Williams and Souza (n163) 48–49; Elvin Aghayev and Hayati Aktaş 'Prospects of Cooperation between Russia and Turkey' (2017) 8 *European Researcher* 98, 100–103.

<sup>171</sup> Roy Allison, 'Russia and Syria: explaining alignment with a regime in crisis' (2013) 89 *International Affairs* 795, 801–803; Lesch, *The Fall* (n1) 136. Although Phillips suggested that these connections may have lapsed in the post-Cold War era. Phillips, *The Battle for Syria* (n1) 29.

<sup>172</sup> Wieland (n1) ch6, lcn3245–3248; Hokayem, *Syria's Uprising* (n5) ch5, lcn2967–2974; Allison (n171) 804; Valenta and Friedman Valenta (n163) 11; Isaac Kfir, 'NATO and Putin's Russia: Seeking to balance divergence and convergence' (2016) 35 *Comparative Strategy* 447, 453; Phillips, *The Battle for Syria* (n1) 96–97.

notably, its naval base at Tartous,<sup>173</sup> its arms trade with Syria<sup>174</sup> and its investments in Syria's oil and gas sector.<sup>175</sup> The intervention also provided an opportunity for Russia to showcase its weaponry and boost its arms sales.<sup>176</sup> Furthermore, it ensured that Russian companies were well-placed to secure reconstruction contracts in the event of regime survival.<sup>177</sup>

Numerous commentators suggested that Putin adopted an unyielding stance on Syria because he was determined not to allow another Libya scenario.<sup>178</sup> Russia accused NATO of abusing its UNSC 'civilian protection' mandate in Libya to achieve regime change. Russia believes that the US has manipulated the language of human rights to remove unfriendly authoritarian regimes, including in Russia's sphere of influence.<sup>179</sup> Russia may have suspected that America was merely exploiting the internal unrest in Syria to alter the regional balance of power in its favour.<sup>180</sup>

Some commentators suggested that Russia's response to the Syrian crisis derived from a principled opposition to forcible regime change based upon a pluralist worldview, which prioritises the legal principles of

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<sup>173</sup> This was Russia's last naval base in the Mediterranean. See Wieland (n1) ch6, lcn3219–3220; Lesch, *The Fall* (n1) 136; Valenta and Friedman Valenta (n163) 2–7; Ranjit Gupta, 'Understanding the War in Syria and the Roles of External Players: Way Out of the Quagmire?' (2016) 105 Round Table 29, 34; Kfir (n172) 455; Williams and Souza (n163) 43. However, Allison and Dannreuther suggested that Tartous was more of symbolic than practical value to Russia. See Allison (n171) 807; Dannreuther (n169) 88.

<sup>174</sup> Hokayem, *Syria's Uprising* (n5) ch5, lcn2964–2967.

<sup>175</sup> Butter (n140) 24; Abboud, *Syria* (n1) ch4, lcn2407–2416. Although Allison opined that these material interests were not significant enough to explain Russia's response to the Syrian crisis. Allison (n171) 805–807. See also Dannreuther (n169) 88.

<sup>176</sup> Phillips, *The Battle for Syria* (n1) 221.

<sup>177</sup> Malak Chabkoun, 'How Assad 'won the war'' (*Al Jazeera*, 3 November 2017) <<http://www.aljazeera.com/indepth/opinion/assad-won-war-171101114949181.html>> accessed 6 November 2017.

<sup>178</sup> Putin had opposed Medvedev's position not to veto the Libya resolution. See Radwan Ziadeh and others (n169) 8; Charap (n78) 37–38; Hokayem, *Syria's Uprising* (n5) ch5, lcn2937–2939; Allison (n171) 797–798; Jonathan Stevenson, 'The Syrian Tragedy and Precedent' (2014) 56 *Survival* 121, 133; Dannreuther (n169) 83–84; Abboud, *Syria* (n1) ch4, lcn2370–2388; Kfir (n172) 453–454; Phillips, *The Battle for Syria* (n1) 94–95; Valenta and Friedman Valenta (n163) 7–8.

<sup>179</sup> Lesch, *The Fall* (n1) 138; Allison (n171) 817; Dannreuther (n169) 82; Abboud, *Syria* (n1) ch4, lcn2358–2379; Kfir (n172) 449–450

<sup>180</sup> Charap (n78) 37; Allison (n171) 808; Lesch, *The Fall* (n1) 139. See also Hokayem, *Syria's Uprising* (n5) ch5, lcn2935–2937; Souleimanov (n162) 71–72.

sovereignty and non-intervention.<sup>181</sup> Nonetheless, this argument is difficult to reconcile with Russia's own interventions in Georgia in 2008 and Crimea in 2014.<sup>182</sup> Another perspective suggests that Russia's government opposes Western-backed ousters of 'illegitimate' regimes for fear that it might one day become a victim of such a manoeuvre.<sup>183</sup>

Putin has also been accused of exploiting the Syrian crisis to reassert Russia's status as a resurgent superpower.<sup>184</sup> Indeed, Russia's 2015 intervention in Syria arguably enabled it to escape international isolation following the Crimea crisis and forced the US to recognise it as a vital player in Syria's peace process.<sup>185</sup> Domestic considerations may also have influenced Putin's Syria policy. Indeed, his refusal to succumb to Western pressure to abandon the Assad regime boosted his domestic support base.<sup>186</sup>

A final argument posits that Russia genuinely feared that regime collapse in Syria would create a security void in which Islamist extremism would flourish with negative repercussions for Russia's own interests.<sup>187</sup> Significantly, Chechen jihadists have travelled to Syria to fight with ISIS.<sup>188</sup> They pose a security threat upon return to Russia.<sup>189</sup> Alternatively, it has been suggested that Russia merely manipulated the threat posed by jihadism to

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<sup>181</sup> See eg Hokayem, *Syria's Uprising* (n5) ch5, lcn2930–2940; Charap (n78) 36–37. Regarding Russia's pluralist worldview, see Allison (n171) 803–804 and 815.

<sup>182</sup> Derek Averre and Lance Davies, 'Russia, humanitarian intervention and the Responsibility to Protect: the case of Syria' (2015) 91 *International Affairs* 813, 833.

<sup>183</sup> Lesch, *The Fall* (n1) 138; Allison (n171) 817–819; Phillips, *The Battle for Syria* (n1) 95–96. See also Perra (n170) 371.

<sup>184</sup> Charap (n78) 40; Allison (n171) 821–833; Stevenson (n178) 133; Perra (n170) 377; Phillips, *The Battle for Syria* (n1) 219–220 and 232.

<sup>185</sup> Souleimanov (n162) 113; Phillips, *The Battle for Syria* (n1) 220 and 230; Uzi Rabi and Brandon Friedman, 'Weaponizing Sectarianism in Iraq and Syria' (2017) 61 *Orbis* 423, 433.

<sup>186</sup> Radwan Ziadeh and others (n169) 9–10; Perra (n170) 377; Williams and Souza (n163) 42 and 57–58. Regarding Putin's nationalist foreign policy and domestic support therefor, see Dannreuther (n169) 87–89; Kfir (n172) 449–450; Phillips, *The Battle for Syria* (n1) 28–29, 95 and 220.

<sup>187</sup> Allison (n171) 797–798 and 809–815; Hokayem, *Syria's Uprising* (n5) ch5, lcn2940–2951; Charap (n78) 36–37; Phillips, *The Battle for Syria* (n1) 97 and 220. See also Dannreuther (n169) 82; Kfir (n172) 453.

<sup>188</sup> Weiss and Hassan (n1) 126–127.

<sup>189</sup> Although Souleimanov suggested that the risk posed to Russia by returning foreign fighters may have been overstated. Souleimanov (n162).

justify its position on Syria.<sup>190</sup> The fact that Russia's initial airstrikes in 2015 focussed primarily on ostensibly moderate armed groups affiliated with the Free Syrian Army (FSA) instead of ISIS lends support to this argument.<sup>191</sup>

### 6.3.ii.c China, Iraq and Lebanon

China has provided diplomatic support to the Assad regime by vetoing crucial UNSC resolutions. China, like Russia, officially opposes forcible regime change and prioritises the international legal principles of non-intervention and sovereign equality.<sup>192</sup> China's response may also have been influenced by a desire to counter US influence in the Middle East, protect its economic interests in the region, and prevent the emergence of a security vacuum.<sup>193</sup>

Iraq and Lebanon also provided diplomatic support to the Assad regime, including by declining to support Arab League sanctions against Syria. The Maliki government also provided the Assad regime with discounted oil and allowed Iran to transport weapons to Syria via Iraq.<sup>194</sup> Both Iraq and Lebanon were wary of the potential impact of regime change on their own diverse ethno-sectarian populations and the risk of overspill should Syria descend into sectarian warfare.<sup>195</sup>

### 6.3.iii The Regime's Domestic Support Base

The regime maintained the acquiescence, if not support, of a significant multitude of cross-sectarian societal groups.<sup>196</sup> Overall, most members of religious minorities declined to join the protests either because they genuinely supported the regime, feared the instability that could accompany regime

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<sup>190</sup> See Hanna Notte, 'Russia in Chechnya and Syria: Pursuit of Strategic goals' (2016) 23 *Middle EPol'y* 59, 59, 62–66 and 69; Allison (n171) 819.

<sup>191</sup> Phillips, *The Battle for Syria* (n1) 213 and 217; Souleimanov (n162) 108–111; Williams and Souza (n163) 46–48 and 57; Rabi and Friedman (n185) 433.

<sup>192</sup> See generally Michael Swaine, 'Chinese Views of the Syrian Conflict' (2012) Carnegie Endowment for International Peace, China Leadership Monitor No 39, September 2012 <[https://carnegieendowment.org/files/Swaine\\_CLM\\_39\\_091312\\_2.pdf](https://carnegieendowment.org/files/Swaine_CLM_39_091312_2.pdf)> accessed 11 July 2018; Yoram Evron, 'China's diplomatic initiatives in the Middle East: the quest for a great-power role in the region' (2017) 31 *IntRel* 125.

<sup>193</sup> Evron (n192) 135.

<sup>194</sup> Hinnebusch, 'Syria-Iraq Relations' (n9) 21; Terrill (n127) 229–230; Lesch, *The Fall* (n1) 133.

<sup>195</sup> Küçükkeleş (n59) 16–17; Hokayem, *Syria's Uprising* (n5) ch4, lcn2186–2191; Saouli (n151) 125; Hinnebusch, 'Syria-Iraq Relations' (n9) 2.

<sup>196</sup> Phillips, *The Battle for Syria* (n1) 42 and 50–52.

collapse or feared persecution under a Sunni-dominated government.<sup>197</sup> Most Alawis declined to join the protests as they feared retribution against the sect as a whole.<sup>198</sup> Many Christians declined to participate as they feared persecution based upon the experience of Christians in Iraq and Egypt following the overthrow of Saddam Hussein and Hosni Mubarak respectively.<sup>199</sup> Many Shias supported the regime because of its relationship with Hezbollah.<sup>200</sup> Many Ismailis joined the protests, whereas the Druze initially declined to take sides.<sup>201</sup> Kurds also declined to join the protests en masse due to a combination of internal disunity within the Kurdish opposition, regime co-optation, fear of disproportionate repression and wariness of the Arab-dominated and Turkish-linked opposition.<sup>202</sup> Syrian Kurds later took advantage of the chaos to establish self-government in Kurdish majority areas.

A significant portion of the Sunni community also declined to protest. This constituency included co-opted *ulama*, regime-aligned businessmen, public sector workers, supporters of the regime's foreign policy of resistance, moderates who feared the Islamist 'other' and independent businessmen who feared the instability that regime change could bring.<sup>203</sup> The strong rural

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<sup>197</sup> See Lesch, 'The Arab spring' (n19) 423; Wieland (n1) ch2, lcn883–891, and ch5, lcn2073–2311; Hinnebusch, 'Syria: from 'authoritarian upgrading' to revolution?' (n3) 107–108; Kathleen Cavanaugh and Joshua Castellino, *Minority Rights in the Middle East: A Comparative Legal Analysis* (OUP 2013) 255; Charles Glass, *The State of Syria: Past, Present and Future* (Endeavour Press Ltd 2013) lcn114–157; van Dam, *Destroying a Nation* (n11) ch4, lcn1865–1872.

<sup>198</sup> See Phillips, 'Syria's Torment' (n5) 73; Jomana Qaddour, 'Unlocking the Alawite Conundrum in Syria' (2012) 36 TWQ 67, 67–72; Hokayem, *Syria's Uprising* (n5) ch2, lcn898–916; Lesch, *The Fall* (n1) 107; Droz-Vincent (n2) 40–42; Lawson, 'Syria's mutating civil war' (n156) 1351; Nikolaos van Dam, *The Struggle for Power in Syria* (4th edn, IB Tauris 2011) 135.

<sup>199</sup> Regarding the concerns of Christians, see Wieland (n1) ch5, lcn2257–2278 and ch14, lcn7784–7785; Phillips, 'Syria's Torment' (n5) 73; Hokayem, *Syria's Uprising* (n5) Introduction, lcn309–313 and ch2, lcn820–824; Glass (n197) lcn140–144 and lcn210–211.

<sup>200</sup> Hokayem, *Syria's Uprising* (n5) ch2, lcn813–819.

<sup>201</sup> *ibid* ch2, lcn813–819.

<sup>202</sup> *ibid* ch2, lcn804–809 and ch3, lcn1354–1358; Wieland (n1) ch7, lcn4936–4939; Lesch, *The Fall* (n1) 106; Droz-Vincent (n2) 41; Phillips, *The Battle for Syria* (n1) 110–111.

<sup>203</sup> Hinnebusch, 'Syria: from 'authoritarian upgrading' to revolution?' (n3) 108; Hokayem, *Syria's Uprising* (n5) ch2, lcn847–853; Thomas Pierret, 'The Syrian Baath Party and Sunni Islam: Conflicts and Connivance' (2014) 77 Middle East Brief 1, 5–6 <<https://www.brandeis.edu/crown/publications/meb/MEB77.pdf>> accessed 22 June 2018; Lefèvre (n1) 184; Lawson, 'Syria's mutating civil war' (n156) 1351; Phillips, *The Battle for Syria* (n1) 52.

colouring of the initial protest movement also deterred some middle class Sunnis from joining reflecting the traditional rural-urban divide.<sup>204</sup> Some Sunnis supported the regime simply because that was the policy of their tribe, although the reverse was also true.<sup>205</sup>

The above discussion suggests that factors such as class and rural-urban divisions impacted alignment decisions during the initial protests regardless of sectarian affiliations. It also suggests that the regime's historic strategy of co-optation was in part successful. Many Syrians, regardless of sect, still accepted the regime's Faustian bargain of stability for acquiescence to authoritarian rule.<sup>206</sup> The regime enjoyed what Haddad described as 'negative legitimacy', namely, 'the kind of legitimacy that authoritarian regimes/leaders enjoy as a result of the people's fear that the available alternative is a worse option'.<sup>207</sup> If a viable alternative had emerged, it was conceivable that a substantial proportion of the so-called 'silent majority' would have given it their support. However, this did not occur. Instead the country was engulfed by externally-backed sectarian violence, which served to reinforce the regime's narratives and cause Syria's minorities to largely withdraw to their own communities for self-preservation purposes.<sup>208</sup>

#### 6.3.iv The Divided Opposition

The hopelessly fragmented nature of the political and armed opposition has been one of the Assad regime's biggest assets.<sup>209</sup>

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<sup>204</sup> Hokayem, *Syria's Uprising* (n5) ch2, lcn789–795; Pierret, 'The State Management of Religion' (n25) 106; Pierret, 'The Syrian Baath Party' (n203) 6.

<sup>205</sup> Abboud, *Syria* (n1) ch2, lcn1326–1337. The key determinant appeared to be whether the regime had previously supported the tribe. See Phillips, *The Battle for Syria* (n1) 51.

<sup>206</sup> Lesch, 'The Arab spring' (n19) 423.

<sup>207</sup> Bassam Haddad, 'Syria's State Bourgeoisie: An Organic Backbone for the Regime' (2012) 21 *Middle East Critique* 231, 251 fn76.

<sup>208</sup> Hokayem, *Syria's Uprising* (n5) Conclusion, lcn3317–3348.

<sup>209</sup> Abboud, *Syria* (n1) ch2, lcn1066–1152; Phillips, *The Battle for Syria* (n1) 105–106.

### 6.3.iv.a The Political Opposition<sup>210</sup>

#### *Local Coordination Committees of Syria (LCC)*

Many of the initial protests were dominated by young Syrians with little connection to Syria's traditional opposition.<sup>211</sup> Gradually, local coordination committees (*tansiqiyat*) were formed to organise local protests, collaborate with protesters in other areas and represent the protesters' shared goals as the LCC.<sup>212</sup> The LCC highlighted the protest movement's inclusive character and advocated the use of non-violence and dialogue to achieve a peaceful democratic transition.<sup>213</sup> By 2014, over 400 such committees existed, but they lacked a centralised organisational hierarchy.<sup>214</sup>

#### *Syrian National Council (SNC)*

The SNC was officially launched in October 2011.<sup>215</sup> It included independents, tribes and representatives of both internal and exiled opposition groups.<sup>216</sup> It was modelled on Libya's National Transitional Council (NTC); however, unlike the NTC, it did not control any territory at the time of its formation. Furthermore, it lacked credibility on the ground in Syria, suffered from excessive external interference – particularly by Qatar and Turkey, and was not representative of Syria's diverse ethno-sectarian population.<sup>217</sup> Islamic actors, in particular the Muslim Brotherhood, were accused of exerting disproportionate influence over its internal decision-making.<sup>218</sup> It

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<sup>210</sup> Kurdish political and armed actors are considered separately. See s6.3.iv.c.

<sup>211</sup> Hokayem, *Syria's Uprising* (n5) ch3, lcn1174–1191; Abboud, *Syria* (n1) ch2, lcn1205–1226; Phillips, *The Battle for Syria* (n1) 105.

<sup>212</sup> See 'Local Coordination Committees of Syria' (*Diwan Middle East Insights from Carnegie*, 20 December 2012) <<http://carnegie-mec.org/diwan/50426?lang=en>> accessed 6 November 2017; Lesch, *The Fall* (n1) 113–114 and 220; Hokayem, *Syria's Uprising* (n5) ch3, lcn1174–1191; Ignacio Alvarez-Ossorio, 'Syria's Struggling Civil Society' (2012) 19 Middle EQ 23, 27; Abboud, *Syria* (n1) ch2, lcn1374–1436.

<sup>213</sup> Alvarez-Ossorio (n212) 27.

<sup>214</sup> Abboud, *Syria* (n1) ch2, lcn1418–1420.

<sup>215</sup> Alvarez-Ossorio (n212) 27; Lesch, *The Fall* (n1) 111–113; Phillips, *The Battle for Syria* (n1) 106.

<sup>216</sup> It included representatives of the Civil Society Movement, the Damascus Declaration, the Kurdish Future Movement party, the Syrian National Current, the Assyrian Democratic Organization, the Syrian Muslim Brotherhood, the LCC and the Syrian Revolution General Commission. The LCC subsequently left. See Lesch, *The Fall* (n1) 167; Abboud, *Syria* (n1) ch2, lcn1482–1492.

<sup>217</sup> Wieland (n1) ch7, lcn4933–4936 and lcn4994–4995; Hokayem, *Syria's Uprising* (n5) ch3, lcn1220–1277, and ch5, lcn2853–2861; Allison (n171) 800; Abboud, *Syria* (n1) ch2, lcn1482–1549; Phillips, *The Battle for Syria* (n1) 106–108, 110–112 and 134.

<sup>218</sup> See Thomas Pierret, 'Syria: Old-timers and Newcomers' in Robin Wright (ed), *The*

was riddled by internal divisions, including regarding whether or not to support the armed opposition,<sup>219</sup> and its members had no common vision regarding the post-Assad political order.<sup>220</sup>

*National Coalition of Syrian Revolutionary and Opposition Forces (SOC)*

The SOC was created in November 2012 in an effort to establish a more representative, unified and credible opposition.<sup>221</sup> It was based in Turkey and constituted an amalgamation of domestic and exiled opposition groups, both armed and unarmed, including the FSA and the SNC. However, it suffered from many of the SNC's shortcomings, including internal divisions,<sup>222</sup> excessive interference by regional states – especially Qatar and Saudi Arabia,<sup>223</sup> disproportionate influence by the Muslim Brotherhood,<sup>224</sup> a dearth of resources,<sup>225</sup> inadequate representation of religious and ethnic minorities<sup>226</sup> and domestic opposition actors,<sup>227</sup> and a lack of influence and credibility amongst the opposition on the ground.<sup>228</sup> The SOC was recognised by Arab League member states (apart from Algeria, Lebanon and Iraq) as Syria's 'legitimate representative',<sup>229</sup> and by 140 states as the 'sole representative of the Syrian people' at a Friends of Syria meeting in

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*Islamists Are Coming: Who They Really Are* (Woodrow Wilson Center Press 2012) 76; Lesch, *The Fall* (n1) 172; Hokayem, *Syria's Uprising* (n5) ch3, lcn1251–1252, lcn1271–1277 and lcn1621–1626; Phillips, *The Battle for Syria* (n1) 108–110. However, Lefèvre suggested that the Brotherhood's excessive influence was overstated. Lefèvre (n1) 188–190.  
<sup>219</sup> Having originally advocated non-violence, it established a military bureau in March 2012 under pressure from the Syrian Muslim Brotherhood. See Wieland (n1) ch7, lcn4988–4995; Lesch, *The Fall* (n1) 197; Abboud, *Syria* (n1) ch2, lcn1531–1543.

<sup>220</sup> Hokayem, *Syria's Uprising* (n5) ch3, lcn1242–1263; Abboud, *Syria* (n1) ch4, lcn2325–2330; Perra (n170) 375; Phillips, *The Battle for Syria* (n1) 106–107 and 114.

<sup>221</sup> Hokayem, *Syria's Uprising* (n5) ch3, lcn1282–1296; Phillips, *The Battle for Syria* (n1) 114–115.

<sup>222</sup> Lawson, *Syria's mutating civil war* (n156) 1351.

<sup>223</sup> Phillips, *The Battle for Syria* (n1) 116–117 and 121–124.

<sup>224</sup> Hokayem, *Syria's Uprising* (n5) ch3, lcn1301–1303; Lesch, *The Fall* (n1) 246.

<sup>225</sup> Hokayem, *Syria's Uprising* (n5) ch3, lcn1310–1318, and Conclusion, lcn3422–3434.

<sup>226</sup> *ibid* Conclusion, lcn3430–3432; Phillips, *The Battle for Syria* (n1) 115–116. The most powerful Syrian Kurdish political party, the PYD, remained outside the SOC.

<sup>227</sup> Van Dam, *Destroying a Nation* (n11) ch5, lcn2133–2146.

<sup>228</sup> A/HRC/22/59, para 14; Lesch, *The Fall* (n1) 247; Phillips, *The Battle for Syria* (n1) 185.

<sup>229</sup> It officially occupied the Syrian government's seat at the Arab League in March 2013.



December 2012.<sup>230</sup> Nevertheless, due to its shortcomings, its external backers declined to recognise it as the Syrian government in exile.<sup>231</sup>

*National Coordination Bureau for Democratic Change (NCB)*

The NCB was formed in June 2011. Its members were mainly Syrian-based.<sup>232</sup> It advocated a peaceful, negotiated transition of power and did not discount the possibility of Bashar playing a role in the transition.<sup>233</sup> Consequently, it was supported by Russia and China.<sup>234</sup> However, it failed to garner a substantial following amongst Sunnis due to its secular orientation and suspected Ba'athist links.<sup>235</sup> The SNC denounced it as a puppet of the Assad regime. The NCB in turn referred to the SNC as a 'Washington Club'.<sup>236</sup>

*High Negotiations Committee (HNC)*

The HNC was formed in Riyadh in December 2015 as an ostensibly more representative and unified opposition body.<sup>237</sup> Its members included independents and representatives of the SOC, the NCB, Building the Syrian State, the Kurdish National Council (KNC)<sup>238</sup> and various armed opposition

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<sup>230</sup> The Friends of Syria group was formed in February 2012 by the US and France in an effort to overcome UNSC deadlock and devise a coordinated response to the crisis. See Küçükkeleş (n59) 13; Lesch, *The Fall* (n1) 201; Jülide Karakoç, 'US Policy Towards Syria Since the Early 2000s' (2013) 41 Critique: Journal of Socialist Theory 223, 241–242; Hokayem, *Syria's Uprising* (n5) ch5, lcn2833–2864.

<sup>231</sup> The SOC appointed a Syrian Interim Government in March 2013. However, it was infected with the SOC's shortcomings. See Hokayem, *Syria's Uprising* (n5) Conclusion, lcn3448–3451; Abboud, *Syria* (n1) ch5, lcn3278–3305; van Dam, *Destroying a Nation* (n11) ch3, lcn1475–1478. Turkey subsequently sought to resurrect the SIG in 2017. See Charles Lister, 'Turkey's Idlib incursion and the HTS question: understanding the long game in Syria' (*War on the Rocks*, 31 October 2017) <<https://warontherocks.com/2017/10/turkeys-idlib-incursion-and-the-hts-question-understanding-the-long-game-in-syria/>> accessed 6 November 2017.

<sup>232</sup> Lesch, *The Fall* (n1) 170–172.

<sup>233</sup> Another opposition group, Building the Syrian State, takes a similar view. See *ibid* 170; van Dam, *Destroying a Nation* (n11) ch5, lcn2154–2166.

<sup>234</sup> Lesch, *The Fall* (n1) 171; Allison (n171) 800.

<sup>235</sup> Lesch, *The Fall* (n1) 171.

<sup>236</sup> *ibid* 170–171; van Dam, *Destroying a Nation* (n11) ch5, lcn2158–2162.

<sup>237</sup> UNHRC, 'Report of the independent international commission of inquiry on the Syrian Arab Republic: Advance Edited Version' (11 February 2016) UN Doc A/HRC/31/68 (A/HRC/31/68), para 10.

<sup>238</sup> Also sometimes referred to as ENKS.

groups, including the FSA, Ahrar al-Sham and Jaysh al-Islam.<sup>239</sup> It appointed a team to negotiate on its behalf at the 2016 Geneva III Conference.<sup>240</sup> JAN and ISIS were excluded from the HNC as was the PYD and its armed wing, the People's Protection Unit (YPG).<sup>241</sup> The exclusion of the YPG was due in large part to Turkey's protestations.<sup>242</sup> Some of the excluded opposition groups, including the YPG-dominated Syrian Democratic Forces (SDF), simultaneously established the Council of Democratic Syria (CDS) to represent their interests.<sup>243</sup>

### 6.3.iv.b The Armed Opposition

By 2015, approximately 1,500 armed opposition groups were operating inside Syria.<sup>244</sup> The UNCOI loosely differentiated these groups into four umbrellas: (i) FSA-affiliated moderate Islamic and secular armed groups seeking a democratic and pluralistic state, (ii) Islamic armed groups seeking the implementation of Shariah law and the establishment of an Islamic state, (iii) jihadist armed groups, and (iv) Kurdish armed groups.<sup>245</sup> However, the first three categories were extremely fluid due to the overlapping ideologies of the armed groups and the continual movement of fighters between them.<sup>246</sup>

#### *Free Syrian Army (FSA)*

On 29 July 2011, a group of defecting military officers formed the FSA in Turkey as an umbrella organisation for armed opposition groups.<sup>247</sup> The FSA's objective was to replace the Assad regime with an inclusive and democratic political order. By Autumn 2011, it had between 7,000 and 10,000

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<sup>239</sup> Although Ahrar's position was somewhat unclear as its representative, Labib Nahhas, may have been acting independently in signing the Riyadh declaration. See Phillips, *The Battle for Syria* (n1) 226; van Dam, *Destroying a Nation* (n11) ch5, lcn2193–2214.

<sup>240</sup> Van Dam, *Destroying a Nation* (n11) ch5, lcn2210–2214.

<sup>241</sup> A female version of the YPG, the Women's Protection Unit (YPJ), also exists.

<sup>242</sup> Phillips, *The Battle for Syria* (n1) 226; van Dam, *Destroying a Nation* (n11) ch5, lcn2174–2214 and lcn2223–2227.

<sup>243</sup> A/HRC/31/68, para 11; Phillips, *The Battle for Syria* (n1) 227. See also van Dam, *Destroying a Nation* (n11) ch5, lcn2205–2209.

<sup>244</sup> Van Dam, *Destroying a Nation* (n11) ch3, lcn1555–1556.

<sup>245</sup> A/HRC/25/65, para 16.

<sup>246</sup> *ibid* para 17. See also Abboud, *Syria* (n1) ch4, lcn2583–2625.

<sup>247</sup> Hokayem, *Syria's Uprising* (n5) ch3, lcn1386–1392; Abboud, *Syria* (n1) ch3, lcn1720–1728.

fighters.<sup>248</sup> They included military defectors and civilian combatants. By July 2012, approximately 30,000 to 60,000 soldiers had defected.<sup>249</sup> They mainly originated from the Sunni-dominated conscript and lower level ranks and were often from disadvantaged rural areas.<sup>250</sup> Discipline and coordination was poor and FSA fighters were accused of engaging in warlordism, reprisals and sectarian-motivated human rights abuses.<sup>251</sup>

The exiled leaders of the FSA undertook to uphold international law.<sup>252</sup> However, they struggled to exercise control over armed groups fighting in the FSA's name. This lack of centralised control was due to the foreign domicile and junior rank of the FSA's leaders,<sup>253</sup> the inadequate military training of FSA fighters, resource shortages and the increasing fragmentation and radicalisation of the conflict.<sup>254</sup> Many armed groups only pledged loyalty to the FSA in order to afford the opposition an illusion of cohesion as this was understood to be a prerequisite for Western assistance.<sup>255</sup> Consequently, in February 2013 the UNCOI described the FSA as 'a brand name only'.<sup>256</sup> Due to the FSA's many shortcomings and the inability of its leaders to secure a Western-backed intervention, many of its fighters switched allegiance to jihadist and ultra-conservative Islamic armed groups, which tended to be more successful on the battlefield and better armed, trained and paid.<sup>257</sup>

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<sup>248</sup> By November, this number had reportedly grown to 10,000–15,000. See Lesch, *The Fall* (n1) 175; Alvarez-Ossorio (n212) 31.

<sup>249</sup> Hokayem, *Syria's Uprising* (n5) ch3, lcn1417–1418.

<sup>250</sup> *ibid* (n5) ch3, lcn1386–1392; Phillips, 'Syria's Torment' (n5) 72; Caroline Donati, 'The Economics of Authoritarian Upgrading in Syria: Liberalization and the Reconfiguration of Economic Networks' in Heydemann and Leenders (eds) (n12) 57–58; Droz-Vincent (n2) 50 and 55; Augustus Richard Norton, 'The puzzle of political reform' in Louise Fawcett (ed), *International Relations of the Middle East* (4th edn, OUP 2016) 149; Gupta (n173) 30.

<sup>251</sup> A/HRC/19/69, paras 87, 113 and 118; Clement Hall, *The History of Syria: 1900–2012* (Charles River Editors 2012) lcn1436–1441; Hokayem, *Syria's Uprising* (n5) ch3, lcn1384–1444 and lcn1531–1533; Abboud, *Syria* (n1) ch3, lcn1856–68; Phillips, *The Battle for Syria* (n1) 130.

<sup>252</sup> A/HRC/19/69, para 107; Lesch, *The Fall* (n1) 176; Phillips, *The Battle for Syria* (n1) 127.

<sup>253</sup> A/HRC/19/69, paras 18 and 108; Hokayem, *Syria's Uprising* (n5) ch3, lcn1406–1409; Abboud, *Syria* (n1) ch3, lcn1742–1749.

<sup>254</sup> Hokayem, *Syria's Uprising* (n5) ch3, lcn1386–1392. Regarding fragmentation, see Abboud, *Syria* (n1) ch3, lcn1729–1742; Phillips, *The Battle for Syria* (n1) 127.

<sup>255</sup> Lesch, *The Fall* (n1) 176–177; Phillips, *The Battle for Syria* (n1) 127.

<sup>256</sup> A/HRC/22/59, para 25 and Annex II, para 15.

<sup>257</sup> Phillips, *The Battle for Syria* (n1) 2 and 129; Abboud, *Syria* (n1) ch3, lcn1649–1653 and lcn1862–1868; van Dam, *Destroying a Nation* (n11) ch3, lcn1501–1510.

### *Islamic Armed Groups*

Given the ascendant Islamic trend in the MENA region prior to 2011, it was not surprising that Islamic armed groups featured in Syria's opposition movement.<sup>258</sup> Ultra-conservative Islamic armed groups were able to gain disproportionate influence in Syria's armed opposition due to the Assad's regime's scaremongering tactics, the perceived ineffectiveness of the FSA, the support of regional actors and the transformation of Syria into a base for global jihad.<sup>259</sup> Some of these groups, especially Ahrar al-Sham, were very effective on the battlefield.<sup>260</sup> They framed their objectives in Syria-specific terms and consequently were more attractive to Syrians than jihadist groups with transnational objectives.

### *Jihadist Groups*<sup>261</sup>

#### *ISIS*

An Iraqi Islamic scholar, Abu Bakr al-Baghdadi, was appointed the new leader of the Islamic State of Iraq (ISI) in approximately 2010. He pledged *bayat* to bin Laden's successor, Ayman al-Zawahiri,<sup>262</sup> and reorganised ISI into a hierarchical structure with a governing Shura council and underlying ministries and councils at the national, provincial and local levels.<sup>263</sup> He also developed a sophisticated military and intelligence apparatus, whose upper ranks included former high-ranking Iraqi Ba'athists.<sup>264</sup> ISI's radical ideology depicted Iran as *rafida*, the Gulf states as apostates, and Western states as

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<sup>258</sup> Phillips, *The Battle for Syria* (n1) 129–130; Hokayem, *Syria's Uprising* (n5) ch3, lcn1581–1591.

<sup>259</sup> Phillips, *The Battle for Syria* (n1) 129–131; Hokayem, *Syria's Uprising* (n5) ch3, lcn1581–1591.

<sup>260</sup> Abboud, *Syria* (n1) ch3, lcn1815–1822

<sup>261</sup> This section focuses on ISIS and JAN. Regarding other jihadist actors, see eg Byman, 'Sectarianism' (n65) 104–105.

<sup>262</sup> Weiss and Hassan (n1) 117.

<sup>263</sup> UNHRC, 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, Rule of Terror: Living under ISIS in Syria' (19 November 2014) UN Doc A/HRC/27/CRP.3 (A/HRC/27/CRP.3), para 13; Charles Lister, 'Assessing Syria's Jihad' (2014) 56 *Survival* 87, 90–92; Ali Fuat Bahcavan, 'Legal aspects of using force against the Islamic State in Syria after Russian intervention' (2016) 224 *MillRev* 639, 644–645.

<sup>264</sup> Lister, 'Assessing Syria's Jihad' (n263) 89–92. Michael M Gunter, 'Iraq, Syria, ISIS and the Kurds: Geostrategic concerns for the U.S. and Turkey' (2015) 22 *Middle EPol'y* 102, 104; Abboud, *Syria* (n1) ch5, lcn3135–3140. Baghdadi himself had suspected Ba'athist links. See Weiss and Hassan (n1) 120–126 and 210–212.

infidels.<sup>265</sup> Like AQI, ISI prioritised fighting the near enemy and relied upon aberrant interpretations of Islam to justify the murder, persecution and enslavement of non-Sunnis.<sup>266</sup>

In April 2013, Baghdadi proclaimed the amalgamation of ISI and JAN as the Islamic State of Iraq and al Sham (ISIS).<sup>267</sup> ISIS rejected the prevailing system of nation states and sought to establish an Islamic Caliphate in the territory of Iraq and al Sham.<sup>268</sup> The choice of al Sham was symbolically significant as it is considered the cradle of Islamic civilisation and centre of the ancient Abbasid Empire. On 29 June 2014, Baghdadi declared himself Caliph of an Islamic caliphate encompassing much of Western Iraq and Eastern Syria.<sup>269</sup> He renamed ISIS the Islamic State, an ominous portent of its expansionary ambitions, and called upon all Muslims to pledge allegiance to the caliphate. ISIS proceeded to capture more territory, including the oil-rich Deir-ez-Zor and Raqqah governates in Western Syria.<sup>270</sup> Its progression toward Erbil, the capital of Iraqi Kurdistan, prompted the US to commence airstrikes against it in Iraq in August.

In September, Obama announced that the US was compiling an international coalition to degrade and destroy ISIS and other al Qaeda affiliates operating in Syria and Iraq.<sup>271</sup> In order to avoid accusations of neo-imperialism, he indicated that several Arab states would be participating.<sup>272</sup>

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<sup>265</sup> Daniel Byman, 'Six Bad Options for Syria' (2016) 38 TWQ 171, 173; Weiss and Hassan (n1) Introduction, lcn145–147.

<sup>266</sup> Weiss and Hassan (n1) 174–175 and 177; Gunter (n264) 103; van Dam, *Destroying a Nation* (n11) ch3, lcn1521–1526.

<sup>267</sup> JAN rejected the amalgamation. ISIS is also referred to the Islamic State of Iraq and the Levant (ISIL) and Daesh.

<sup>268</sup> Weiss and Hassan (n1) 1 and 176.

<sup>269</sup> *ibid* 175.

<sup>270</sup> Lister, 'Assessing Syria's Jihad' (n263) 90.

<sup>271</sup> 'Statement by the President on ISIL' (White House Press Release, 10 September 2014) <<https://obamawhitehouse.archives.gov/the-press-office/2014/09/10/statement-president-isil-1>> accessed 13 March 2018; 'Statement by the President on Airstrikes in Syria' (White House Press Release, 23 September 2014) <<https://obamawhitehouse.archives.gov/the-press-office/2014/09/23/statement-president-airstrikes-syria>> accessed 13 March 2018.

<sup>272</sup> 'Statement by the President on Airstrikes in Syria' (White House Press Release, 23 September 2014) <<https://obamawhitehouse.archives.gov/the-press-office/2014/09/23/statement-president-airstrikes-syria>> accessed 13 March 2018. There were also allegations of clandestine cooperation between the US and Iran to defeat ISIS. See

The coalition began airstrikes against ISIS in Syria on 23 September. Its main partners on the ground were the YPG/SDF in Syria and the Peshmerga and Iraqi army in Iraq. The Peshmerga and Iraqi army also received support from Iran and Iranian-sponsored Iraqi militias to combat ISIS. In Syria, ISIS also came under attack from armed opposition groups, Turkey and the Assad regime. Consequently, by 2018 ISIS had lost control of most of its territory in Iraq and Syria. Nevertheless, it continued to pose an insurgent threat and its ideology continued to inspire terrorist attacks in the region and beyond.<sup>273</sup>

*How did ISIS become so powerful?*

By September 2014, ISIS had between 20,000 and 31,500 fighters.<sup>274</sup> Some local fighters were attracted by the group's military success, superior resources and ideology,<sup>275</sup> whereas others joined simply due to fear or coercion.<sup>276</sup> Some local communities initially welcomed ISIS as it provided basic services and returned some semblance of law and order.<sup>277</sup> The caliphate operated as a magnet for actual and aspiring jihadists worldwide. The majority of foreign fighters originated from the MENA region, especially Libya, Tunisia and Saudi Arabia.<sup>278</sup> A crucial element of ISIS' success was its financial independence, which it sustained through oil and gas sales, religious taxes, Islamic alms (*zakat*), extortion, counterfeiting, private donations, agricultural activities and the illicit trade in antiquities.<sup>279</sup>

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Patrick Cockburn, *The Rise of Islamic State: ISIS and the New Sunni Revolution* (Kindle edn, Verso 2015) Preface, lcn93–103.

<sup>273</sup> Christopher Phillips, 'Syria after IS' (4 October 2017) IV Orient <<http://www.orient-online.com/sonstiges/ORIENT-ONLINE>> accessed 6 November 2017; Rabi and Friedman (n185) 438.

<sup>274</sup> 'The CIA Thinks ISIS Could Have Nearly 32,000 Fighters' (*Business Insider*, 11 September 2014) <<http://www.businessinsider.com/cia-islamic-state-2014-9?IR=T>> accessed 12 March 2018.

<sup>275</sup> Hinnebusch, 'Syria-Iraq Relations' (n9) 24; Weiss and Hassan (n1) 162–163, 165 and 167; Phillips, *The Battle for Syria* (n1) 198.

<sup>276</sup> Hinnebusch, 'Syria-Iraq Relations' (n9) 24.

<sup>277</sup> Lister, 'Assessing Syria's Jihad' (n263) 94; Weiss and Hassan (n1) 217 and 222–233. Although it ultimately ended up alienating most communities under its control as a result of its egregious human rights violations. See in particular A/HRC/27/CRP.3; UNHRC, "They came to destroy": ISIS Crimes Against the Yazidis' (15 June 2016) UN Doc A/HRC/32/CRP.2.

<sup>278</sup> Weiss and Hassan (n1) 167.

<sup>279</sup> See *ibid* 233–235; Lister, 'Assessing Syria's Jihad' (n263) 89–90, 92 and 95; Butter (n140) 19 and 21; Abboud, *Syria* (n1) ch5, lcn3140–3173. See also Charles River Editors, *The Islamic State of Iraq and Syria: The History of ISIL/ISIS* (Charles Rivers Editors 2014) 4 and 32.

ISIS' extraordinary growth after 2011 was due in part to Baghdadi's overhaul of ISI's organisational structure and astute use of social media to attract recruits and funding.<sup>280</sup> However, it was also due to the actions of various regional and international actors. The Maliki government's sectarian policies rendered ISIS an appealing alternative for disenfranchised Sunnis and contributed to the weakening of Iraqi institutions.<sup>281</sup> Iran also fuelled Sunni extremism in Iraq by sponsoring sectarian Shia militias. The US for its part arguably withdrew prematurely in 2011 at a time when Iraq's institutions, including its armed forces, were still riven with sectarianism, corruption and inefficiency. This left a security void that ISIS could exploit.<sup>282</sup> Furthermore, after withdrawing the US continued to supply the Maliki government with advanced weapons, many of which were seized by ISIS.<sup>283</sup> The Assad regime contributed to the rise of ISIS by releasing known jihadists in 2011. It also allowed ISIS to grow by withdrawing from Eastern Syria in 2012 and refraining from targeting ISIS until at least 2014.<sup>284</sup> Turkey for its part turned a blind eye to the smuggling of weapons and foreign fighters across its border until 2015.<sup>285</sup> The Gulf states in turn initially failed to prevent private actors from channelling assistance to jihadists, including ISIS. Finally, Russian intelligence was accused of enabling Islamists from Dagestan to travel to Syria in an attempt to outsource its domestic Islamist terrorism problem.<sup>286</sup>

### *Jabhat al Nusra (JAN)*

In 2011, Baghdadi dispatched Abu-Mohammad al-Jolani to Syria to activate dormant AQI cells and form JAN as an official al Qaeda affiliate. JAN's

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<sup>280</sup> See eg James P Farwell, 'The Media Strategy of ISIS' (2014) 56 *Survival* 49.

<sup>281</sup> Weiss and Hassan (n1) 76 and 94–98; Lawson, *Syria's mutating civil war* (n156) 1359–1362; Cockburn (n272) ch4, lcn540–576. See also Charles River Editors (n280) 30–32.

<sup>282</sup> ISI's *Breaking the Walls* jailbreak campaign in Iraq resulted in the release of hundreds of imprisoned AQI commanders between 2012 and 2013.

<sup>283</sup> Phillips, *The Battle for Syria* (n1) 202–203.

<sup>284</sup> Russia's 2015 military intervention initially declined to target ISIS. See Souleimanov (n162) 109. During the initial years of the uprising, a conspiracy theory gained popularity in opposition circles that the Assad regime and ISIS were in collusion. However, it has been strongly disputed and was particularly difficult to sustain after the Syrian armed forces and ISIS began to engage each other militarily in mid-2014. See Weiss and Hassan (n1) 99, 144–148, 194, 197–199 and 218–221; Phillips, *The Battle for Syria* (n1) 199–202.

<sup>285</sup> Hokayem, *Syria's Uprising* (n5) ch3, lcn1395–1397; Gunter (n264) 103; Cockburn (n272) ch1, lcn207–210 and ch3, lcn464–474.

<sup>286</sup> Phillips, *The Battle for Syria* (n1) 205.

ultimate aim was to create an Islamic emirate in Syria in consultation with local Islamists.<sup>287</sup> Having learned from AQI's mistakes, JAN sought to capture the hearts and minds of Syrians by providing local services, initially treating religious minorities with moderation and re-introducing law and order in areas under its control.<sup>288</sup> By 2013, it was one of the most effective armed opposition groups in Syria.<sup>289</sup> It frequently engaged in offensives alongside ultra-conservative Islamic armed opposition groups, including Ahrar al-Sham and also occasionally cooperated with moderate, FSA-affiliated Islamic armed groups.<sup>290</sup> However, these relationships were fluid and driven by pragmatism. Jolani rejected Baghdadi's announcement of a merger between ISI and JAN in April 2013 and instead publicly pledged bayat to al Qaeda's leader, Ayman al-Zawahiri.<sup>291</sup> This prompted the majority of JAN's foreign fighters to migrate to ISIS and triggered a turf war between the groups.<sup>292</sup> Zawahiri denounced ISIS in February 2014.<sup>293</sup>

By mid-2015, JAN had approximately 8,000 to 10,000 fighters.<sup>294</sup> Whilst less extreme than ISIS, JAN implemented Shariah law in areas under its control and was accused of perpetrating grave human rights violations against sexual minorities, religious minorities and regime-aligned armed forces.<sup>295</sup> Notably, some protesters availed of a short-lived cessation of

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<sup>287</sup> Lister, 'Assessing Syria's Jihad' (n263) 87, 98 and 102.

<sup>288</sup> *ibid* 102–103; Seth G Jones, 'Syria's Growing Jihad' (2013) 55 *Survival* 53, 56 and 59–62; Weiss and Hassan (n1) 150.

<sup>289</sup> On JAN's development during this time, see Jones (n288) 58–60; Hokayem, *Syria's Uprising* (n5) ch3, lcn1654–1664; Lister, 'Assessing Syria's Jihad' (n263) 87 and 98–101; Phillips, *The Battle for Syria* (n1) 132.

<sup>290</sup> Abboud, *Syria* (n1) ch3, lcn1882–1922 and ch5, lcn3188–3213.

<sup>291</sup> Weiss and Hassan (n1) 184.

<sup>292</sup> Although it maintained some non-Syrians in its leadership. See Lister, 'Assessing Syria's Jihad' (n263) 99–101; Weiss and Hassan (n1) 184–186 and 191–196.

<sup>293</sup> Regarding Zawahiri's response to the Syrian protests, see Lesch, *The Fall* (n1) 162–163; Jones (n288) 63; Hokayem, *Syria's Uprising* (n5) ch3, lcn1641–1644; Weiss and Hassan (n1) 151–152, 184–186 and 196.

<sup>294</sup> Charles Lister, 'Al-Qaeda's Turning Against its Syrian Affiliate' (*Middle East Institute Countering Terrorism Project*, 18 May 2017) <<http://www.mei.edu/content/article/al-qaeda-s-turning-against-its-syrian-affiliate?print=>> accessed 6 November 2017.

<sup>295</sup> UNHRC, 'Report of the independent international commission of inquiry on the Syrian Arab Republic' (13 August 2015) UN Doc A/HRC/30/48 (A/HRC/30/48), paras 129–131, 157 and 164; A/HRC/31/68, paras 26 and 106–108; UNHRC, 'Report of the independent international commission of inquiry on the Syrian Arab Republic' (11 August 2016) UN Doc A/HRC/33/35 (A/HRC/33/35), paras 71–72, 82 and 101.



hostilities in March 2016 to protest against JAN.<sup>296</sup> This suggests that considerable opposition to al Qaeda remained at the grassroots level.<sup>297</sup> In an effort to render JAN more attractive to Syrians, in July 2016 Jolani declared that JAN was no longer affiliated with al Qaeda and rebranded it as Jabhat Fatah al-Sham (JFS), an Islamist movement pursuing purely Syrian goals.<sup>298</sup> However, this move was rejected by al Qaeda and caused some of JAN's leaders to defect.<sup>299</sup> Al Qaeda subsequently developed a new affiliate in Idlib province.<sup>300</sup> JAN's defection from al Qaeda coalesced with a rupture in its relations with Ahrar al-Sham.<sup>301</sup> The two former allies adopted opposing positions with regard to Turkey's 2016 intervention in Syria and the Astana peace process.<sup>302</sup> JFS subsequently formed a new coalition of extremist groups, Hay'et Tahrir al Sham (HTS), in 2017.<sup>303</sup> HTS waged war against armed groups associated with the Astana process.<sup>304</sup> It established its stronghold in Idlib province. However, its actions undermined whatever legitimacy JAN had cultivated inside Syria.<sup>305</sup>

### 6.3.iv.c The Kurds

Syria's post-Arab Spring Kurdish community has two core political blocs, the PYD, which is ideologically affiliated with the PKK, and the Kurdish

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<sup>296</sup> Phillips, *The Battle for Syria* (n1) 229. See also Hokayem, *Syria's Uprising* (n5) ch3, lcn1548–1550; Weiss and Hassan (n1) 182.

<sup>297</sup> In support of this argument, see John Stafford, 'Syria's Divided Opposition' (January/February 2014) 33 Washington Report on Middle East Affairs 56, 56–57.

<sup>298</sup> Lister, 'Al-Qaeda's Turning' (n294).

<sup>299</sup> *ibid.*

<sup>300</sup> *ibid.*; Lister (n231); Jamie Dettmer, 'Turkey Deploys More Forces in Northern Syria' (*VOA News*, Middle East 3 November 2017) <<https://www.voanews.com/a/turkey-deploys-forces-northern-syria/4098874.html>> accessed 6 November 2017.

<sup>301</sup> Abboud suggested that Ahrar al-Sham's leaders began curtailing their interactions with JAN as early as March 2015. Abboud, *Syria* (n1) ch3, lcn1915–1924.

<sup>302</sup> JFS opposed these initiatives whilst Ahrar al-Sham supported them. See Lister, 'Al-Qaeda's Turning' (n294).

<sup>303</sup> *ibid.*

<sup>304</sup> UNHRC, 'Human rights abuses and international humanitarian law violations in the Syrian Arab Republic, 21 July 2016–28 February 2017: Conference room paper of the Independent International Commission of Inquiry on the Syrian Arab Republic' (10 March 2017) UN Doc A/HRC/34/CRP.3 (A/HRC/34/CRP.3), paras 8–9; Patrick Wintour, 'Russia in power-broking role as Syria peace talks begin in Astana' *The Guardian* (23 January 2017) <[https://www.theguardian.com/world/2017/jan/22/russia-syria-talks-astana-kazakhstan->](https://www.theguardian.com/world/2017/jan/22/russia-syria-talks-astana-kazakhstan-) accessed 24 September 2017.

<sup>305</sup> Lister estimated that it grew from approximately 14,000 fighters in May 2017 to approximately 25,000 fighters in October 2017. Lister, 'Al-Qaeda's Turning' (n294); Lister (n231).

National Council (KNC), an Erbil-based coalition of Syrian Kurdish political parties, which is ideologically affiliated with Iraq's Kurdish Democratic Party (KDP) and Patriotic Union of Kurdistan Party (PUK).<sup>306</sup> The PYD and KNC both claim to represent Syrian Kurds. The competition between them reflects a larger competition between their respective Iraqi and Turkish Kurdish patrons for control of the pan-Kurdish movement.<sup>307</sup> The PYD has proven more successful largely because of the military effectiveness of its armed wing, the YPG. A power-sharing agreement was negotiated between the PYD and KNC in July 2012, the Erbil Agreement. However, it was never fully implemented.<sup>308</sup> A second power-sharing agreement, the Duhok Agreement, was engineered by the KDP-dominated Kurdistan Regional Government (KRG) in October 2014.<sup>309</sup> It proved more successful due to improved relations between the PKK/PYD and the KRG as a result of intra-Kurdish cooperation between their armed wings to combat the shared threat posed by ISIS.<sup>310</sup>

The PYD/YPG took advantage of the regime's strategic withdrawal from Kurdish majority areas in northern and north-eastern Syria in July 2012 to establish Kurdish self-rule. In early 2014, the PYD proclaimed the existence of an autonomous region in northern Syria called Rojava (meaning West in Kurdish) as part of a federal, democratic Syrian state.<sup>311</sup> Rojava was comprised of three self-governing cantons, Afrin, Kobane and Cizre. It implemented Öcalan's 'democratic autonomy' model of governance, which

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<sup>306</sup> Cengiz Gunes and Robert Lowe, 'The Impact of the Syrian War on Kurdish Politics Across the Middle East' (2015) Chatham House Research Paper, July 2015, 3 and 5 <[https://www.chathamhouse.org/sites/files/chathamhouse/field/field\\_document/20150723SyriaKurdsGunesLowe.pdf](https://www.chathamhouse.org/sites/files/chathamhouse/field/field_document/20150723SyriaKurdsGunesLowe.pdf)> accessed 2 October 2017; Abboud, *Syria* (n1) ch3, lcn1942–1945.

<sup>307</sup> Abboud, *Syria* (n1) ch3, lcn1939–1947; Phillips, *The Battle for Syria* (n1) 111–112.

<sup>308</sup> Gunes and Lowe (n306) 11; Abboud, *Syria* (n1) ch3, lcn1953–1961; Phillips, *The Battle for Syria* (n1) 112 and 133–134.

<sup>309</sup> Gunes and Lowe (n306) 5 and 11.

<sup>310</sup> David Romano, 'Iraqi Kurdistan and Turkey: temporary marriage?' (2015) 22 *Middle East Pol'y* 89, 98; 11–12.

<sup>311</sup> The cantons are also referred to as Democratic-Autonomous Administrations (DAAs). See Ercan Ayboga, 'Solution for Syria en route: 'Democratic Federation of North Syria'' (*Open Democracy*, 8 March 2017) <<https://www.opendemocracy.net/ercan-ayboga/solution-for-syria-en-route-democratic-federation-of-north-syria>> accessed 10 April 2018. See also A/HRC/25/65, Annex II, para 4; Loqman Radpey, 'Letter to the Editors: The Kurdish Self-Rule Constitution in Syria' (2015) 14 *Chinese JIL* 835, 835–837; Abboud, *Syria* (n1) ch5, lcn2995–2998 and lcn3073–3083; Phillips, *The Battle for Syria* (n1) 134.

advocates bottom up autonomous administration within existing state boundaries rather than secession.<sup>312</sup> Non-Kurds were included in administrative structures and Rojava's provisional Constitution recognised the equality of all individuals regardless of ethnicity, religion or gender.<sup>313</sup> This is significant as non-Kurds actually outnumbered Kurds in Rojava due in part to its expansion into Arab majority areas.<sup>314</sup> Rojava was renamed the Democratic Federation of Northern Syria (DFNS) in 2016. The cantons were maintained and a new centralised governing structure, the Democratic People's Congress of North Syria, was established.<sup>315</sup> However, concerns have been expressed that the PYD dominates this new structure and that Arab participation is limited to the local level.<sup>316</sup>

Relations between Kurds and Arabs in northern Syria are complicated by historic tensions, the opposition of some conservative Muslims to the PYD's secular orientation, and suspected collusion between the PYD/YPG and the Assad regime.<sup>317</sup> Kurdish fighters have occasionally cooperated but more often clashed with non-Kurdish armed opposition groups, including the FSA and JAN.<sup>318</sup> Kurds have joined with Turkmen, Arabs, Assyrians, Shias, Christians and Bedouins to fight Islamist extremists as part of the Syrian Democratic Forces (SDF).<sup>319</sup> The SDF is dominated by the YPG. However,

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<sup>312</sup> Radpey (n311) 835–836; Gunes and Lowe (n306) 3, 5 and 14; Gunter (n264) 102; Abboud, *Syria* (n1) ch5, lcn3054–3083.

<sup>313</sup> Abboud, *Syria* (n1) ch5, lcn3048–3055; Radpey (n311) 837–838.

<sup>314</sup> Abboud, *Syria* (n1) ch5, lcn3050–3053.

<sup>315</sup> Ayboga (n311).

<sup>316</sup> Abboud, *Syria* (n1) ch5, lcn3088–3133; Emily Burchfield, 'Analysis: Washington Still Has Work to Do in Former ISIS Territories' (*Syria Deeply*, 4 April 2018) <<https://www.newsdeeply.com/syria/community/2018/04/04/analysis-washington-still-has-work-to-do-in-former-isis-territories>> accessed 10 April 2018. See also Gunes and Lowe (n306) 4; Phillips, 'Syria after IS' (n273).

<sup>317</sup> Despite allegations of collusion, any cooperation between the PYD/YPG and the regime was most likely driven by war expediency. See Hokayem, *Syria's Uprising* (n5) ch2, lcn806–813 and ch3, lcn1345–1367; Abboud, *Syria* (n1) ch3, lcn1975–1995.

<sup>318</sup> Hokayem, *Syria's Uprising* (n5) ch3, lcn1358–1367; Gunes and Lowe (n306) 6; Lawson, *Syria's mutating civil war*' (n156) 1354–1355; Phillips, *The Battle for Syria* (n1) 134. See also A/HRC/22/59, para 29 and Annex II, para 19; A/HRC/23/58, para 31; UNHRC, 'Report of the independent international commission of inquiry on the Syrian Arab Republic' (16 August 2013) UN Doc A/HRC/24/46 (A/HRC/24/46), para 34; A/HRC/30/48, para 19; A/HRC/31/68, para 31.

<sup>319</sup> Lawson, *Syria's mutating civil war*' (n156) 1352 and 1355; Phillips, 'Syria after IS' (n273).

its inclusion of non-Kurds has enabled the YPG to justify its expansion into non-Kurdish majority areas.<sup>320</sup>

The continuing viability of the DFNS will depend upon the ability of the Syrian Kurdish groups and their respective regional backers to reach a sustainable power sharing agreement.<sup>321</sup> Significantly, there appears to be considerable popular support for the DFNS amongst Kurds across the region.<sup>322</sup> However, the KRG's close political and economic links with Turkey<sup>323</sup> and continuing ideological differences between the PKK/PYD and the KRG/KNC could pose a problem.<sup>324</sup> Furthermore, the PYD will need to demonstrate a willingness and capacity to engage in genuine power sharing with the DFNS' non-Kurdish population. International actors are also likely to play a major role in determining the future of the DFNS.<sup>325</sup>

#### *Turkey, the US and the Syrian Kurds*

After the battle for Kobane, the YPG became the US-led coalition's main partner on the ground in Syria in the battle against ISIS.<sup>326</sup> Previously, the US had been reluctant to engage with the YPG out of deference to Turkey and because it viewed Rojava as a threat to Syria's territorial integrity.<sup>327</sup> Unlike Turkey, the US does not treat the PYD/YPG as an extension of the PKK, which the US has classified as a terrorist organisation. Nevertheless, it probably encouraged the YPG to form the SDF in October 2015 in order to

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<sup>320</sup> Phillips, *The Battle for Syria* (n1) 226.

<sup>321</sup> Gunes and Lowe (n306) 2–3.

<sup>322</sup> *ibid* 6.

<sup>323</sup> *ibid* 10–11; Nathalie Tocci, 'Turkey's Kurdish Gamble' (2013) 48 *The International Spectator* 67, 68–70 and 72–75; Saouli (n151) 127; Romano (n310) 91–93 and 95–97; Lawson, 'Syria's mutating civil war' (n156) 1356–1357; Phillips, *The Battle for Syria* (n1) 210.

<sup>324</sup> Romano (n310) 91–93 and 95–98; Gunes and Lowe (n306) 12 and 14.

<sup>325</sup> See Gunes and Lowe (n306) 14–15; Phillips, 'Syria after IS' (n273); Abdulrahman al-Masri, 'Lessons From Iraq: Syria's Kurds and the United States' (*Syria Deeply*, 2 November 2017) <<https://www.newsdeeply.com/syria/articles/2017/11/02/lessons-from-iraq-syrias-kurds-and-the-united-states>> accessed 6 November 2017.

<sup>326</sup> The battle for Kobane lasted from approximately September 2014 to March 2015. Regarding the YPG, SDF and US-Kurdish cooperation, see UNHRC, 'Report of the independent international commission of inquiry on the Syrian Arab Republic' (13 August 2014) UN Doc A/HRC/27/60 (A/HRC/27/60), para 18; A/HRC/30/48, para 18; A/HRC/31/68, para 30; A/HRC/33/35, para 16; A/HRC/34/CRP.3 paras 12–13 and 86; A/HRC/36/55, para 16. See also Phillips, 'Syria after IS' (n273).

<sup>327</sup> Gunes and Lowe (n306) 12; Gunter (n264) 105 and 109.

deflect Turkish accusations that it was supporting terrorists.<sup>328</sup> The US-Kurdish cooperation enhanced the PYD's international legitimacy as evident from its receipt of an invitation to participate in the 2016 Geneva III conference.<sup>329</sup> It also helped it to expand the territory under its control.<sup>330</sup> The SDF received training, weapons and assistance from the US. In May 2017, President Trump authorised the provision of weapons directly to the YPG.<sup>331</sup>

Turkey's AKP government viewed Rojava as a bigger threat to Turkey's interests than ISIS.<sup>332</sup> It argued that the PYD's real objective was to secure Rojava's secession and incorporation into a Kurdish state together with the Kurdish regions of Iraq, Iran and Turkey.<sup>333</sup> It feared that developments in Syria would embolden Turkish Kurdish nationalists and that the PKK would use Rojava as a safe zone from which to launch attacks against Turkey.<sup>334</sup> Until 2015, Turkey allegedly declined to adequately police its southern border as it hoped that the foreign fighters entering Syria would undermine both the Rojava project and the Assad regime.<sup>335</sup> During ISIS' siege of Kobane in 2014, Turkey refused to allow PKK fighters to cross into Syria from Turkey to help the YPG.<sup>336</sup> Turkey's obstinacy triggered the collapse of a fragile peace process between the Turkish government and the PKK.<sup>337</sup> In July 2015, Turkey allowed the US-led coalition to use Turkish

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<sup>328</sup> Phillips, 'Syria after IS' (n273).

<sup>329</sup> Gunes and Lowe (n306) 7 and 12–13.

<sup>330</sup> Rabi and Friedman (n185) 430 fn36.

<sup>331</sup> Phillips, 'Syria after IS' (n273).

<sup>332</sup> Gunes and Lowe (n306) 8; Park (n170) 586; Phillips, *The Battle for Syria* (n1) 209; Rabi and Friedman (n185) 430 and 431.

<sup>333</sup> Phillips, 'Syria after IS' (n273). See also Abboud, *Syria* (n1) ch5, lcn3055–3069.

<sup>334</sup> Christopher Phillips, 'Turkey's Syria problem' (2012) 19 Public Policy Research 137, 140; Özlem Demirtas-Bagdonas, 'Reading Turkey's Foreign Policy on Syria: The AKP's Construction of a Great Power Identity and the Politics of Grandeur' (2014) 15 Turkish Studies 139, 142; Gunes and Lowe (n306) 8–9; Park (n170) 585; Rabi and Friedman (n185) 430.

<sup>335</sup> Gunter (n264) 103 and 107; Gunes and Lowe (n306) 8–9; Romano (n310) 90 and 99; Lawson, Syria's mutating civil war' (n156) 1354–1355; Phillips, *The Battle for Syria* (n1) 209; Rabi and Friedman (n185) 431.

<sup>336</sup> The Turkish government may have been covertly negotiating with ISIS at the time to secure the release of 49 Turkish hostages. It finally allowed some pre-approved FSA and Peshmerga fighters to enter Syria six weeks after the crisis commenced. See Gunes and Lowe (n306) 8 and 10; Park (n170) 586; Gunter (n264) 106–107 and 109; Phillips, *The Battle for Syria* (n1) 209–210.

<sup>337</sup> Gunes and Lowe (n306) 10; Gunter (n264) 106, 109; Phillips, *The Battle for Syria* (n1) 209–210.

military bases. In return, the US largely refrained from criticising Turkey's repression of domestic Kurdish protests in 2015.<sup>338</sup>

In August 2016, Turkey initiated a unilateral military intervention in Syria – Operation Euphrates Shield – aimed at addressing the threat to Turkish security posed by ISIS and preventing the PYD/YPG from joining their three cantons in northern Syria.<sup>339</sup> In intervening, Erdoğan was also seeking to secure the support of right-wing nationalists for proposed constitutional amendments aimed at strengthening his presidential powers.<sup>340</sup> Turkey reportedly agreed with the US and Russia to maintain its operations within predefined areas.<sup>341</sup> Turkey ultimately exceeded these areas prompting both the US and Russia to withdraw their air cover. This in turn forced a Turkish withdrawal on 31 March 2017.<sup>342</sup>

Turkey, aided by FSA-aligned fighters, launched a second military intervention in Syria in January 2018, which aimed at combatting the threat to Turkish security posed by ISIS and the PYD/YPG.<sup>343</sup> The intervention, Operation Olive Branch, resulted in the capture of Afrin from the PYD/YPG in March. Since March, Afrin has been controlled by Turkish soldiers and Turkish-backed Arab opposition fighters. There have been allegations of

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<sup>338</sup> Rabi and Friedman (n185) 431. See also Romano (n310) 99; Phillips, *The Battle for Syria* (n1) 226.

<sup>339</sup> Van Dam, *Destroying a Nation* (n11) ch3, lcn1767–1773; Rabi and Friedman (n185) 431.

<sup>340</sup> Christopher Phillips, 'Turkey's Syria Intervention: A Sign Of Weakness Not Strength' *Newsweek* (22 September 2016) <<http://www.newsweek.com/turkeys-syria-intervention-sign-weakness-not-strength-501516>> accessed 3 October 2017. See also Romano (n310) 98; Phillips, *The Battle for Syria* (n1) 210 and 226. Regarding the link between domestic factors and Turkish foreign policy, see Ziya Onis, 'Turkey and the Arab Revolutions: Boundaries of Regional Power Influence in a Turbulent Middle East' (2014) 19 *Mediterranean Politics* 203.

<sup>341</sup> Sinan Ülgen and Can Kasapoğlu, 'Operation Euphrates Shield: Aims and Gains' (*Carnegie Endowment for International Peace*, 19 January 2017) <<http://carnegieeurope.eu/2017/01/19/operation-euphrates-shield-aims-and-gains-pub-67754>> accessed 4 October 2017; Phillips, 'Turkey's Syria Intervention' (n340); Cengiz Çandar, 'Operation Euphrates Shield: A postmortem' (*Al-Monitor*, 5 April 2017) <<http://www.al-monitor.com/pulse/originals/2017/04/turkey-post-mortem-in-syria.html>> accessed 3 October 2017.

<sup>342</sup> Can Kasapoğlu, 'Operation Euphrates Shield: Progress and scope' (*Al Jazeera*, 03 February 2017) <<http://www.aljazeera.com/indepth/opinion/2017/02/operation-euphrates-shield-progress-scope-170201133525121.html>> accessed 3 October 2017; Çandar (n341).

<sup>343</sup> UNSC 'Identical letters dated 20 January 2018 from the Chargé d'affaires a.i. of the Permanent Mission of Turkey to the United Nations addressed to the Secretary-General and the President of the Security Council' (22 January 2018) UN Doc S/2018/53. An incidental goal was to weaken HTS. See Lister (n231).

demographic engineering and looting with several former Kurdish residents claiming that their property has been confiscated.<sup>344</sup> The Afrin episode highlights the Kurdish region's long-term fragility should the US withdraw from Syria as Trump has threatened.<sup>345</sup> Russia, which controls the airspace over Afrin, allowed the Turkish operation perhaps because it believed that it would undermine Turkey's relations with the US<sup>346</sup> and strengthen the Assad regime.<sup>347</sup> Significantly, the US-led coalition failed to respond to Kurdish requests for assistance to defend Afrin.<sup>348</sup> A US withdrawal would leave the DFNS vulnerable to further incursions by Turkey and its Syrian allies. In order to protect itself against this eventuality, the SDF has reportedly sought a compromise with the Assad regime.<sup>349</sup> However, this is a risky endeavour as most commentators have predicted that the ascendant regime will ultimately seek to recapture Kurdish-controlled areas.<sup>350</sup>

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<sup>344</sup> See Martin Chulov and Kareem Shaheen, 'Nothing is ours anymore': Kurds forced out of Afrin after Turkish assault' *The Guardian* (Middle East, 7 June 2018) <<https://www.theguardian.com/world/2018/jun/07/too-many-strange-faces-kurds-fear-forced-demographic-shift-in-afrin>> accessed 28 July 2018; HRW, 'Syria: Turkey-Backed Groups Seizing Property' (14 June 2018) <<https://www.hrw.org/print/318848>> accessed 28 July 2018; 'Turkey struggles to keep the peace in Afrin' *The Economist* (MENA, 19 July 2018) <<https://www.economist.com/middle-east-and-africa/2018/07/19/turkey-struggles-to-keep-the-peace-in-afrin>> accessed 28 July 2018.

<sup>345</sup> Julie Hirschfeld Davis, 'Trump Drops Push for Immediate Withdrawal of Troops From Syria' *The New York Times* (4 April 2018) A12.

<sup>346</sup> Hashem Osseiran, 'How Russia Benefits From Turkey's Afrin Operation' (*Syria Deeply*, 30 January 2018) <<https://www.newsdeeply.com/syria/community/2018/01/30/how-russia-benefits-from-turkeys-afrin-operation>> accessed 10 April 2018. In contrast, according to Çandar, during Operation Euphrates Shield Russia indicated that it would not condone a Turkish attack on Afrin. Çandar (n341).

<sup>347</sup> Russia has since requested that Turkey return control of Afrin to Syria. See Ayla Jean Yackley, 'Erdogan rebuffs Moscow's call to hand Afrin to Syrian government' (*Al-Monitor*, 10 April 2018) <<https://www.al-monitor.com/pulse/originals/2018/04/turkey-erdogan-rebuff-call-turn-over-afrin-syria-government.html>> accessed 5 May 2018.

<sup>348</sup> Anne Peters, 'The Turkish Operation in Afrin (Syria) and the Silence of the Lambs' (*EJIL: Talk!*, 30 January 2018) <<https://www.ejiltalk.org/the-turkish-operation-in-afrin-syria-and-the-silence-of-the-lambs/>> accessed 29 March 2018.

<sup>349</sup> See eg Ellen Francis, 'Wary of U.S. ally, Syrian Kurds look to Damascus for talks' (Beirut, *Reuters* 25 July 2018) <<https://www.reuters.com/article/us-mideast-crisis-syria-kurds/wary-of-u-s-ally-syrian-kurds-look-to-damascus-for-talks-idUSKBN1KF2NN>> accessed 28 July 2018.

<sup>350</sup> See Gunes and Lowe (n306) 13; Abboud, *Syria* (n1) ch3, lcn1985–1995; van Dam, *Destroying a Nation* (n11) ch3, lcn1772–1773; Joyce Karam, 'Assad has won says former US ambassador to Syria' *The National* (28 August 2017) <<https://www.thenational.ae/world/the-americas/assad-has-won-says-former-us-ambassador-to-syria-1.623562>> accessed 21 September 2017; Phillips, 'Syria after IS' (n273); al-Masri (n325).

#### 6.3.iv.d External Supporters of the Opposition

Saudi Arabia, Turkey, Qatar and the US have been the most significant state supporters of the armed opposition.<sup>351</sup> Their actions indirectly reinforced the resilience of the Assad regime.

##### *Regional Actors*

In responding to the Syrian unrest, Saudi Arabia, Qatar and Turkey all demonstrated a poor knowledge of Syrian society, a lack of contacts on the ground and insufficient experience in supporting insurgencies.<sup>352</sup> They all underestimated the extent of internal and external support for the Assad regime whilst they overestimated the support that Western states were willing to provide to secure its removal.<sup>353</sup> By prioritising their own interests, they undermined the cohesiveness and effectiveness of the armed opposition and contributed to the radicalisation and fragmentation of the conflict. On the one hand, Qatar and Turkey directed most of their support towards armed groups affiliated with their ally, the Syrian Muslim Brotherhood, as a means of increasing their regional influence. On the other hand, Saudi Arabia and the United Arab Emirates (UAE) viewed the Brotherhood's growing regional influence as a threat to their security and consequently directed their support to competing armed groups.<sup>354</sup> This reflected a broader Qatari-Saudi battle for regional influence, which played out not only in Syria but also in Egypt and Libya.<sup>355</sup>

Qatar's response to the Arab Spring was purely opportunistic as, unlike many fellow Arab states, it did not face significant domestic

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<sup>351</sup> Other states, including Jordan, the UAE, the UK and France, also provided lethal and/or non-lethal support.

<sup>352</sup> Hokayem, *Syria's Uprising* (n5) ch4, lcn2049–2053; Emile Hokayem, 'Iran, the Gulf States and the Syrian Civil War' (2014) 56 *Survival* 59, 63 and 66; Phillips, *The Battle for Syria* (n1) 135–136 and 139.

<sup>353</sup> Hokayem, 'Iran' (n352) 65.

<sup>354</sup> *ibid* 66; Hokayem, *Syria's Uprising* (n5) ch4, lcn2076–2082; Mehran Kamrava, 'The Foreign Policy of Qatar' in Hinnebusch and Ehteshami (eds) (n151) 175–176; Phillips, *The Battle for Syria* (n1) 118–119 and 193–194.

<sup>355</sup> Abboud, *Syria* (n1) ch4, lcn2317–2350; Phillips, *The Battle for Syria* (n1) 122–123 and 139–140.



protests.<sup>356</sup> Qatar publicly supported the FSA, but also privately backed armed groups with conflicting objectives outside of the FSA's centralised structure, including some radical Islamist groups and possibly even JAN.<sup>357</sup> Qatar's Emir, Sheikh Hamid bin Khalifah Al Thani, was accused of encouraging the flow of foreign fighters to Syria.<sup>358</sup> The Saudi monarchy was concerned that jihadism in Syria could jeopardise its domestic security. Consequently, it primarily supported moderate armed opposition groups.<sup>359</sup> Nevertheless, in various ways it also fuelled extremism in Syria albeit not to the same extent as Qatar or Turkey.<sup>360</sup> It sometimes provided support outside of the FSA infrastructure, which in turn necessitated reliance upon middlemen some of whom redirected arms to jihadists.<sup>361</sup> Prince Bandar bin Sultan, the Saudi Intelligence Chief from July 2012 to April 2014, was suspected of channelling Saudi assistance to Salafist groups in order to combat the prominence of ISIS and JAN.<sup>362</sup> Prominent Saudi clerics used overtly sectarian rhetoric and called upon Sunnis to join or otherwise support the jihad in Syria.<sup>363</sup> Furthermore, both Saudi Arabia and Qatar initially took insufficient action to stem private donations to extremists in Syria via Kuwait.<sup>364</sup> Kuwait's lax legal framework didn't even criminalise terrorist financing until Spring 2013.<sup>365</sup>

Having supported the Arab Spring protests in Egypt and Tunisia, Turkey was criticised for its initial reluctance to support pro-democracy

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<sup>356</sup> See Matthiesen (n66) ch2, lcn399–400, and ch7, lcn1797–1825; Kamrava (n354) 175; Phillips, *The Battle for Syria* (n1) 36–38, 69, 135–140 and 203–204.

<sup>357</sup> Byman, 'Sectarianism' (n65) 91; Phillips, *The Battle for Syria* (n1) 139–140 and 203–204.

<sup>358</sup> Byman, 'Sectarianism' (n65) 91.

<sup>359</sup> *ibid* 92; Abboud, *Syria* (n1) ch4, lcn2631–2632; Phillips, *The Battle for Syria* (n1) 139.

<sup>360</sup> Phillips, *The Battle for Syria* (n1) 205.

<sup>361</sup> *ibid* 139; Hinnebusch, 'Authoritarian Upgrading and the Arab Uprising' (n4) 10–11; Hokayem, 'Syria and its Neighbours' (n151) 13.

<sup>362</sup> Phillips, *The Battle for Syria* (n1) 195 and 204.

<sup>363</sup> *ibid* (n1) 118, 120 and 141; Matthiesen (n66) ch7, lcn1887–1892.

<sup>364</sup> Elizabeth Dickinson, 'Playing with fire: why private Gulf financing for Syria's extremist rebels risks igniting sectarian conflict at home' (December 2013) The Brookings Project on US Relations with the Islamic World, Analysis Paper 16, 21–22 <https://www.brookings.edu/wp-content/uploads/2016/06/private-gulf-financing-syria-extremist-rebels-sectarian-conflict-dickinson.pdf> accessed 4 February 2018; Byman, 'Sectarianism' (n65) 92; Phillips, *The Battle for Syria* (n1) 120, 140 and 201.

<sup>365</sup> In this manner, Kuwait indirectly contributed to the fragmentation and radicalisation of Syria's armed opposition. See Dickinson (n364) 2 and 25–26.

protests in Bahrain and Libya, countries in which Turkey had considerable economic interests.<sup>366</sup> Consequently, Erdoğan seized upon the Syrian unrest as an opportunity to reassert Turkey's regional relevance.<sup>367</sup> After Bashar shunned his efforts to reach a negotiated solution, Turkey became one of the opposition's biggest supporters and sought to rally support for a Western-led intervention.<sup>368</sup> Turkey mistakenly expected the Assad regime to crumble quickly and anticipated that Turkey, by supporting the moderate Islamic opposition and having regard to its own Islamic government, would be well positioned to secure influence with a new Sunni-dominated government.<sup>369</sup> Erdoğan was accused of initially over-estimating his leverage over Bashar and then cutting ties too abruptly thereby depriving Turkey of any influence it did actually have.<sup>370</sup> Turkey also struggled to effectively coordinate the distribution of material support to the armed opposition.<sup>371</sup>

The AKP government was criticised for pursuing an overly interventionist policy in Syria,<sup>372</sup> which contravened its 'zero problems with neighbours' policy, and which some commentators suggested reflected the AKP's neo-imperialist and neo-Ottoman tendencies.<sup>373</sup> Nevertheless, whilst Erdoğan's initial activism was primarily opportunistic, Turkey also had rational reasons to intervene, which became more pressing as the conflict wore on. These included the need to protect Turkey's economic interests in Syria and combat the security threats posed by Kurdish separatism, ISIS and

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<sup>366</sup> Ömer Taspınar, 'Turkey's Strategic Vision and Syria' (2012) 35 *TWQ* 127, 135–136; Philip Robins, 'Turkey's 'double gravity' predicament: the foreign policy of a newly activist power' (2013) 89 *International Affairs* 381, 391–392 and 396; Onis (n340) 208 and 210; Park (n170) 587–588.

<sup>367</sup> Phillips, 'Turkey's Syria problem' (n334) 138; Taspınar (n366) 137–138.

<sup>368</sup> Phillips, 'Turkey's Syria problem' (n334) 138; Park (n170) 584 and 597–598.

<sup>369</sup> Robins (n366) 395; Raymond Hinnebusch, 'Globalization, democratization, and the Arab uprising: the international factor in MENA's failed democratization' (2015) 22 *Democratization* 335, 348; Phillips, 'Turkey's Syria problem' (n334) 138–139; Behlül Özkan, 'Turkey, Davutoğlu and the Idea of Pan-Islamism' (2014) 56 *Survival* 119, 133–137.

<sup>370</sup> Robins (n366) 394–395; Phillips, 'Turkey's Syria problem' (n334) 139.

<sup>371</sup> Hokayem, *Syria's Uprising* (n5) ch4, lcn1968–1982.

<sup>372</sup> Onis (n340) 205 and 211–212; Phillips, 'Turkey's Syria problem' (n334) 139–140.

<sup>373</sup> Taspınar (n366) 138–139; Demirtas-Bagdonas (n334) 142–143. See also Ozkan (n369) 130–137.

the influx of Syrian refugees into Turkey which threatened to unsettle Turkey's own ethno-sectarian balance.<sup>374</sup>

Turkey indirectly facilitated the militarisation and radicalisation of Syria's armed conflict by declining to adequately police its southern border until at least 2015.<sup>375</sup> Turkey was also accused of providing direct and indirect support to armed groups outside the centralised FSA framework, possibly including some Islamist groups.<sup>376</sup> It also gave the opposition false hope that a Western military intervention was forthcoming.<sup>377</sup> Finally, Erdoğan engaged in inflammatory rhetoric, which incited sectarianism.<sup>378</sup>

Qatar, Saudi Arabia and Turkey finally began cooperating to unify the opposition in 2014. This cooperation was enabled by the perceived need to combat the shared threat posed by ISIS and also by changes to the Qatari and Saudi ruling regimes.<sup>379</sup> It contributed to the formation of a new Idlib-based opposition coalition, Jaysh al-Fateh (Army of Conquest), in 2015.<sup>380</sup> The coalition was led by Ahrar al-Sham and JAN but also included some moderate FSA-affiliated Islamic armed groups.<sup>381</sup> Its military gains prompted Russia's intervention in September 2015. Its effectiveness derived from the unity of its regional backers and its advanced weapons, which it received from Turkey and CIA-backed moderate armed groups.<sup>382</sup>

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<sup>374</sup> Onis (340) 211–212; Henri J Barkey, 'Turkey's Syria Predicament' (2014) 56 *Survival* 113, 120–127; Robins (n366) 393. See also generally Oray Egin, 'The game changer: Syria, Iran, and Kurdish Independence' (2013) 176 *WldAff* 64.

<sup>375</sup> Hokayem, *Syria's Uprising* (n5) ch3, lcn1395–1396; Barkey (n374) 114; Cockburn (n272) ch1, lcn207–210 and ch3, lcn464–474; Gunter (n264) 103.

<sup>376</sup> Ozkan (n369) 134; Abboud, *Syria* (n1) ch4, lcn2482–2484; Phillips, *The Battle for Syria* (n1) 140.

<sup>377</sup> Phillips, *The Battle for Syria* (n1) 35, 137–138 and 171–172.

<sup>378</sup> Ozkan (n369) 134; Jamal Wakim, 'End of Asad, or of Erdoğan?' (2014) 36 *Arab Studies Quarterly* 186, 194–195; Barkey (n374) 123.

<sup>379</sup> Phillips, *The Battle for Syria* (n1) 214–216 and 232.

<sup>380</sup> *ibid* 195 and 216.

<sup>381</sup> *ibid* 214–215.

<sup>382</sup> Some of these weapons were seized from CIA-backed armed groups and some were provided voluntarily. See *ibid* 214–215.

*The US*

America initially limited its support to the provision of non-lethal assistance to ostensibly moderate FSA-aligned armed groups.<sup>383</sup> However, evidence substantiating the Assad regime's use of chemical weapons prompted the Obama Administration to authorise a covert CIA-administered 'train and equip' programme in June 2013. Under this programme, vetted, moderate FSA-affiliated armed groups were equipped with light weapons and trained by the US together with Saudi Arabia and Jordan in neighbouring states.<sup>384</sup> The programme was ultimately of limited effect as very few rebels satisfied its eligibility criteria. Furthermore, graduates of the programme were often defeated by jihadists on the battlefield who stole their weapons and/or convinced their members to defect.<sup>385</sup> The programme was terminated in July 2017.<sup>386</sup>

In 2014, President Obama secured congressional support for a US\$500 billion programme administered by the Department of Defense to train and equip vetted, moderate armed opposition groups specifically to fight ISIS.<sup>387</sup> This programme was also largely ineffective partly because it suffered from the same problems as its predecessor but also because most Syrian opposition groups and their regional backers viewed the Assad regime

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<sup>383</sup> Hokayem, *Syria's Uprising* (n5) ch5, lcn3160–3167; 'Syrian Crisis: U.S. Assistance and Support for the Transition' (*US Department of State Factsheet*, 29 September 2014) <<https://geneva.usmission.gov/2014/09/30/fact-sheet-on-the-syrian-crisis-u-s-assistance-and-support-for-the-transition/>> accessed 28 October 2017. France and the UK also provided non-lethal assistance to ostensibly moderate armed opposition groups. They indicated their intention to arm the rebels by pursuing the revocation of the EU arms embargo in May 2013. However, they ultimately declined to upgrade their support. See Ruys (n28) 15; Phillips, *The Battle for Syria* (n1) 143–144.

<sup>384</sup> Michael N Schmitt, 'Legitimacy versus Legality Redux: Arming the Syrian Rebels' (2014) 7 *Journal of National Security Law and Policy* 139, 139; Phillips, *The Battle for Syria* (n1) 144; Christopher M Ford, 'Syria: A Case Study in International Law' (2017) 85 *UCinLRev* 185, 203.

<sup>385</sup> Phillips, *The Battle for Syria* (n1) 144 and 208.

<sup>386</sup> Joshua Landis, 'Terminating CIA Support for Syrian Rebels Sounds Death Knell for Western Attempt to Roll Back Iran and Russia in Syria' (*Syria Comment*, 20 July 2017) <<http://www.joshualandis.com/blog/end-us-support-syrian-rebels-sounds-death-knell-attempt-roll-back-iran-russia-syria-joshua-landis/>> accessed 20 September 2017; Marty Lederman, 'The Important Legal Questions Regarding the Now-Shuttered "Covert" Program to Arm Syrian Rebels' (*Just Security*, 3 August 2017) <<https://www.justsecurity.org/43847/legal-questions-now-shuttered-program-arming-syrian-rebels/>> accessed 1 November 2017.

<sup>387</sup> Ford, 'Syria: A Case Study' (n384) 203; van Dam, *Destroying a Nation* (n11) ch3, lcn1551–1554.

as a bigger priority than ISIS.<sup>388</sup> Consequently, several opposition fighters declined to join the programme and regional actors continued to support extremist groups.<sup>389</sup> The programme was suspended in October 2015.

Some former US officials,<sup>390</sup> Republican senators,<sup>391</sup> and commentators<sup>392</sup> argued that had the US provided prompt and sufficient conditional military aid to moderate opposition fighters, it could have prevented the radicalisation of the opposition and provided the Assad regime with an incentive to negotiate.<sup>393</sup> In their view, by failing to promptly and sufficiently arm the moderates the West enabled extremists to gain the upper hand as they could procure support from regional sponsors with sectarian agendas.<sup>394</sup> As extremist groups proved the best equipped and most effective on the battlefield, they found it easier to attract recruits.

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<sup>388</sup> Nathalie Weizmann, 'What Happens if American-Trained Rebels Commit War' (*Just Security*, 18 August 2015) <<https://www.justsecurity.org/25469/responsible-american-trained-rebels-commit-war-crimes/>> accessed 25 October 2017; Weiss and Hassan (n1) 143-144; Phillips, *The Battle for Syria* (n1) 208-209; van Dam, *Destroying a Nation* (n11) ch3, lcn1551-1555.

<sup>389</sup> Phillips, *The Battle for Syria* (n1) 208.

<sup>390</sup> Including former US Secretary of State, Hillary Clinton – see Jeffrey Goldberg, 'Hillary Clinton: 'Failure' to Help Syrian Rebels Led to the Rise of ISIS' *The Atlantic* (10 August 2014) <<http://www.theatlantic.com/international/archive/2014/08/hillary-clinton-failure-to-help-syrian-rebels-led-to-the-rise-of-isis/375832/>> accessed 10 August 2014; former US Ambassador to Syria, Robert Ford – see Robert S Ford, 'Why We Must Arm Syria's Opposition' *The New York Times* (Washington, 11 June 2014) A23; and Alex Lazar, 'Former Syria Ambassador: I Could No Longer 'Defend The American Policy'' *The Huffington Post* (3 June 2014) <[https://www.huffingtonpost.com/2014/06/03/robert-ford-syria\\_n\\_5440796.html](https://www.huffingtonpost.com/2014/06/03/robert-ford-syria_n_5440796.html)> accessed 29 October 2017; and former CIA Director David Petraeus – see Perra (n170) 374. For Obama's counterview, see Jeffrey Goldberg, 'Obama to Israel: Time Is Running Out' (*Bloomberg View*, 2 March 2014) <<https://www.bloomberg.com/view/articles/2014-03-02/obama-to-israel-time-is-running-out>> accessed 21 August 2014.

<sup>391</sup> Carlo Munoz, 'McCain, Graham: Syria deal an 'act of weakness' by White House' (*The Hill*, 14 September 2013) <<http://thehill.com/policy/defense/322281-syria-deal-an-act-of-weakness-by-white-house-say-senate-republicans>> accessed 2 October 2017.

<sup>392</sup> See eg Michael J Totten, 'Syria's endgame: Prospects Dim, Options Narrow' (2012) 177 *WldAff* 28, 29; Andrew J Tabler, 'Syria's Collapse: And How Washington Can Stop It' (2013) 92 *Foreign Affairs* 90, 92-100; Steven Heydemann, 'Why the United States hasn't intervened in Syria' (*Markaz*, 17 March 2016) <<http://www.brookings.edu/blogs/markaz/posts/2016/03/17-us-non-intervention-syria-heydemann>> accessed 18 May 2016.

<sup>393</sup> Steven Heydemann, 'Managing militarization in Syria' *Foreign Policy* (22 February 2012) <<http://foreignpolicy.com/2012/02/22/managing-militarization-in-syria/>> accessed 21 August 2014; Hokayem, *Syria's Uprising* (n5) ch5, lcn3114-3128; Tabler (n392) 92-100; Ford, 'Why We Must Arm Syria's Opposition' (n390); Heydemann, 'Why the United States hasn't intervened' (n392).

<sup>394</sup> Totten (n392) 29; Tabler (n392) 92-100; Heydemann, 'Why the United States hasn't intervened' (n392).

However, opponents of militarisation argued that arming the opposition would merely escalate the conflict, trigger an arms race and render a diplomatic settlement more difficult to achieve.<sup>395</sup> The UNCOI repeatedly requested states to stop arming the belligerents, particularly given that there was a clear risk that those arms could be used to perpetrate war crimes.<sup>396</sup> It asserted that by arming both sides, external actors were responsible for escalating and radicalising the conflict.<sup>397</sup> Indeed, historic experience indicates that non-international armed conflicts are more protracted and costly when the belligerents receive weapons from multiple external sources with competing agendas.<sup>398</sup>

Many Western states feared that arming the opposition would fuel Islamist extremism.<sup>399</sup> This fear was not ill-founded given the fragmented nature of the opposition and the difficulty involved in identifying ‘moderate’ armed groups.<sup>400</sup> After decades of isolation, Western intelligence on Syrian

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<sup>395</sup> See A/HRC/23/58, para 164 (d); A/HRC/24/46, para 198; UNHRC, ‘Report of the independent international commission of inquiry on the Syrian Arab Republic’ (5 February 2015) UN Doc A/HRC/28/69 (A/HRC/28/69), paras 116–120. See also ‘Austrian Position on Arms Embargo’ (n98); Christopher Phillips, ‘Flawed Logic in Decision to Lift Syria Arms Embargo’ (*Chatham House Expert Comment*, 28 May 2013) <<https://www.chathamhouse.org/media/comment/view/191703>> accessed 31 January 2018; Patrick Seale and Fehmy Saddy, ‘What Lies Ahead for Syria? – Two Views’ (January/February 2013) 32 *Washington Report on Middle East Affairs* 24, 24–26; Goldberg, ‘Obama to Israel’ (n390); Phillips, *The Battle for Syria* (n1) 143–144.

<sup>396</sup> A/HRC/S-17/2/Add.1, para 116; A/HRC/22/59, para 175 (b); A/HRC/23/58, para 164 (d); A/HRC/24/46, paras 198 and 203 (c); A/HRC/25/65, para 161 (a); A/HRC/27/60 paras 139 and 146; A/HRC/30/48, para 182 (a); A/HRC/31/68, para 159 (a); A/HRC/34/CRP.3, paras 99–103 and 117 (a); A/HRC/36/55, para 90 (a).

<sup>397</sup> A/HRC/27/CRP.3, para 11; A/HRC/28/69, paras 116–127 and 135; A/HRC/33/35, para 10; A/HRC/34/CRP.3, para 14.

<sup>398</sup> Marc Lynch, ‘Shopping Option C for Syria: Arming the rebels is not a Goldilocks idea, it’s just wrong’ *Foreign Policy* (14 February 2014) <[http://www.foreignpolicy.com/articles/2013/02/14/shopping\\_option\\_c\\_for\\_syria\\_arm\\_rebels](http://www.foreignpolicy.com/articles/2013/02/14/shopping_option_c_for_syria_arm_rebels)> accessed 21 August 2014; Marc Lynch, ‘Would arming Syria’s rebels have stopped the Islamic State?’ *The Washington Post* (11 August 2014) <<https://www.washingtonpost.com/news/monkey-cage/wp/2014/08/11/would-arming-syrias-rebels-have-stopped-the-islamic-state/>> accessed 21 August 2014. See also David Rieff, ‘Reckless Ardor: Yesterday Iraq, Today Syria’ (2013) 140 *Commonweal* 9.

<sup>399</sup> A/HRC/27/CRP.3, para 11; Hokayem, *Syria’s Uprising* (n5) ch5, lcn3133–3144; ‘Austrian Position on Arms Embargo’ (n98); Phillips, ‘Flawed Logic’ (n395); Goodarzi J, ‘Iran and the Syrian and Iraqi Crises’ (2014) *Wilson Center Middle East Program, Viewpoints* No 66, October 2014, 5 <[https://www.wilsoncenter.org/sites/default/files/iran\\_syrian\\_iraqi\\_crises.pdf](https://www.wilsoncenter.org/sites/default/files/iran_syrian_iraqi_crises.pdf)> accessed 9 July 2018; Springborg (n70) 43.

<sup>400</sup> Hokayem, *Syria’s Uprising* (n5) ch3, lcn1450–1459; Cockburn (n272) ch1, lcn164–179; Abboud, *Syria* (n1) ch4, lcn2583–2625; Phillips, *The Battle for Syria* (n1) 145; Perra (n170) 374.

society was limited.<sup>401</sup> Many ostensibly moderate FSA-affiliated groups frequently collaborated with extremist armed groups, including JAN. Thus, there was a real risk that weapons provided to moderates would be shared with, or captured by, extremists or that moderates would themselves become radicalised. Indeed, opposition groups proved adept at changing their ideological stripes to suit the agendas of their external backers. Some armed groups adopted overtly Islamist profiles in order to attract support from private Gulf sponsors.<sup>402</sup> Heydemann argued that support from Western actors could have prevented radicalisation in these cases.<sup>403</sup> However, there was also a risk that extremists would pose as moderates in order to attract Western support.<sup>404</sup>

Obama feared that arming the rebels would escalate the pressure on the US to increase its involvement.<sup>405</sup> His administration was also wary of antagonising Russia and Iran and triggering a regional conflagration to the detriment of Israel.<sup>406</sup> Ultimately, it succumbed to the pressure to ‘do something’ resulting in the limited and ultimately unsuccessful train and equip programmes. However, it was reluctant to provide the advanced weapons needed to combat the regime’s superior airpower for fear that they would be acquired by jihadists.<sup>407</sup> Furthermore, there was little appetite in the White House or amongst the US public for a military intervention.<sup>408</sup> The

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<sup>401</sup> Phillips, *The Battle for Syria* (n1) 142.

<sup>402</sup> Dickinson (n364) 9.

<sup>403</sup> Heydemann, ‘Why the United States hasn’t intervened’ (n392).

<sup>404</sup> Some armed opposition groups reportedly reverted between Islamic and secular names in order to attract funding from both Salafist and Western donors. See Cockburn (n272) ch3, lcn360–362.

<sup>405</sup> Lesch, *The Fall* (n1) 252. See also Stevenson (n178) 124; Phillips, *The Battle for Syria* (n1) 143–144.

<sup>406</sup> Stevenson (n178) 124; Seale and Saddy (n395) 24–26.

<sup>407</sup> A limited number of anti-tank missiles were provided under the CIA programme. See Adam Entous, ‘Covert CIA Mission to Arm Syrian Rebels Goes Awry’ *Wall Street Journal* (26 January 2015) <<http://www.wsj.com/articles/covert-cia-mission-to-arm-syrian-rebels-goes-awry-1422329582>> accessed 1 February 2018. Israel and Turkey also opposed the provision of anti-aircraft missiles to the rebels. Israel feared that they would undercut its own airpower, whereas Turkey feared that Kurdish separatists would acquire them. Hokayem, *Syria’s Uprising* (n5) ch5, lcn3150–3153.

<sup>408</sup> Surveys collected between 2011 and 2013 suggest that the American public opposed a military intervention in Syria and were increasingly reluctant to arm the opposition as the conflict wore on due to the fear of indirectly promoting Islamist extremism. See Marc Lynch, ‘The problem with #WithSyria’ *The Washington Post* (3 March 2014) <<http://www.washingtonpost.com/blogs/monkey-cage/wp/2014/03/14/the-problem-with->

imposition of a no-fly zone or safe haven in northern Syria would most likely have required a substantial deployment of US troops on the ground, which Obama was unwilling to countenance. There was also a considerable risk that an intervention would do more harm than good and undermine US interests.<sup>409</sup> Furthermore, some US officials reportedly felt that a prolonged war in Syria, which exhausted both Iran and Hezbollah, could prove beneficial for Israel.<sup>410</sup>

Ultimately, Obama was unwilling to embroil the US in another potentially intractable Middle Eastern war unless America's vital interests were threatened.<sup>411</sup> These included maintaining the stability of global oil prices, ensuring Israeli security, countering nuclear proliferation and combatting Islamist terrorism.<sup>412</sup> Accordingly, Obama drew a red line when the Assad regime began using chemical weapons as they could pose a threat to Israel. Furthermore, the US intervened in 2014 to combat ISIS as it posed a threat to America's nationals, interests and allies in the region as well as to the homeland in the form of returning jihadists and ISIS-inspired terrorist attacks. The Trump administration's Syria policy has also been driven by strategic motivations. Accordingly, Trump continued to support the fight against ISIS and authorised military strikes against Syria in April 2017 and April 2018 in response to the regime's alleged use of chemical weapons. However, he proved unwilling to intervene in response to violations of a de-escalation agreement in southern Syrian in 2018, which had been negotiated jointly by the US and Russia.

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withsyria/> accessed 21 August 2014. See also Springborg (n70) 44; Byman, 'Six Bad Options' (n265) 174–175.

<sup>409</sup> See eg Byman, 'Six Bad Options' (n265) 177–178; Phillips, *The Battle for Syria* (n1) 184.

<sup>410</sup> Ian Williams, 'Decades of Knee-Jerk Vetos for Israel Limit U.S. Options on Syria at the U.N.' (October/November 2013) 32 *Washington Report on Middle East Affairs* 14, 14–15; Seale and Saddy (n395) 24–26; Phillips, *The Battle for Syria* (n1) 173–174 and 178.

<sup>411</sup> See Phillips, *The Battle for Syria* (n1) 178–179 and 184; Heydemann, 'Why the United States hasn't intervened' (n392).

<sup>412</sup> Byman, 'Six Bad Options' (n265) 173–175; Jeffrey Goldberg, 'The Obama Doctrine' *The Atlantic* (April 2016) <<https://www.theatlantic.com/magazine/archive/2016/04/the-obama-doctrine/471525/>> accessed 2 October 2017. Promoting US values was an additional strategic aim of US foreign policy in the region. See Issandr El Amrani, 'The US Response to the Arab Uprising: Part of the Problem?' in Alcaro and Haubrich-Seco (eds) (n70) 55–57.



*Obama's Red Line Diplomacy*

On 20 August 2012, Obama famously indicated that America would take action, possibly of a military nature, if chemical weapons were utilised or moved around in Syria.<sup>413</sup> He stressed that there would be 'enormous consequences' if this 'red line' were crossed<sup>414</sup> and that those responsible would be held accountable.<sup>415</sup> A brutal chemical weapons attack was launched against the opposition-held Ghouta neighbourhood in August 2013 causing approximately 1400 fatalities. The US administration claimed to have robust evidence that the Assad regime was responsible for the attack and on this basis began planning missile strikes against select regime positions.<sup>416</sup> Obama indicated that the strikes would be of limited scope and duration.<sup>417</sup> Accordingly, they were not intended or likely to substantially impact the military balance of power.<sup>418</sup> In fact, it was in no way certain that they could even achieve their stated aims of degrading the regime's capacity to use chemical weapons and deterring future chemical weapons attacks.

At the last minute, Obama sought congressional approval for the strikes.<sup>419</sup> In reality, there was limited support for the strikes amongst America's population, parliament and Western allies as became apparent when the UK Parliament voted against a military intervention.<sup>420</sup> In early

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<sup>413</sup> 'Remarks by the President to the White House Press Corps' (White House Press Release, 20 August 2012) <<https://obamawhitehouse.archives.gov/the-press-office/2012/08/20/remarks-president-white-house-press-corps>> accessed 6 February 2018.

<sup>414</sup> *ibid.*

<sup>415</sup> 'Remarks by the President at the Nunn-Lugar Cooperative Threat Reduction Symposium' (White House Press Release, 3 December 2012) <<https://obamawhitehouse.archives.gov/the-press-office/2012/12/03/remarks-president-nunn-lugar-cooperative-threat-reduction-symposium>> accessed 6 February 2018. See also Eric Sterner, 'Dictators and Deterrence: Syria's Assad, Chemical Weapons, and the Threat of U.S. Military Action' (2014) 33 *Comparative Strategy* 407, 409.

<sup>416</sup> Phillips, *The Battle for Syria* (n1) 179–180.

<sup>417</sup> 'Statement by the President on Syria' (White House Press Release, 31 August 2013) <<https://obamawhitehouse.archives.gov/the-press-office/2013/08/31/statement-president-syria>> accessed 14 February 2018; 'Remarks by the President in Address to the Nation on Syria' (White House Press Release, 10 September 2013) <<https://obamawhitehouse.archives.gov/the-press-office/2013/09/10/remarks-president-address-nation-syria>> accessed 14 February 2018

<sup>418</sup> Phillips, *The Battle for Syria* (n1) 183; Editorial, 'Known Unknowns: Why Armed Intervention in Syria is Unwarranted' (27 September 2013) 140 *Commonweal* <<https://www.commonwealmagazine.org/known-unknowns>> accessed 15 February 2018; Henry Hogger, 'Syria: Hope or Despair?' (2014) 45 *Asian Affairs* 1, 6.

<sup>419</sup> Sterner (n415) 412; Phillips, *The Battle for Syria* (n1) 179–180.

<sup>420</sup> Sterner (n415) 414; Perra (n170) 374–375.

September, the US and Russia devised a framework for the removal and destruction of Syria's chemical weapons arsenal by mid-2014, which averted the need for unilateral airstrikes.<sup>421</sup> Syria was required to accede to the Chemical Weapons Convention under the deal.<sup>422</sup>

The UNSC adopted Resolution 2118 on 27 September, which endorsed the US-Russian framework. The US emphasised that force could still be used in the event of non-compliance. However, the threat now sounded less credible than ever. UNSC Resolution 2118 indicated that any future action to enforce compliance with the framework agreement would have to be authorised by the UNSC, a highly unlikely eventuality given Russia's veto power. Nonetheless, this did not necessarily preclude a unilateral military intervention as, in its 2010 National Security Strategy, the Obama Administration had indicated that 'The United States must reserve the right to act unilaterally if necessary to defend our nation and our interests, yet we will also seek to adhere to standards that govern the use of force'.<sup>423</sup> The use of the phrase 'standards' in place of 'international law' and 'seek to adhere' instead of 'adhere' suggests a retention of a perceived right of unilateral action even where the right to self-defence had not been triggered and UNSC approval has not been provided.<sup>424</sup> Nevertheless, it was now blatantly clear that Obama did not consider that a military intervention against the Assad government was necessary to defend America and its interests.

In initially drawing his red line, Obama appears to have been primarily guided by the national interest in strengthening the international prohibition on the use of chemical weapons to the benefit of nuclear powers,

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<sup>421</sup> Phillips, *The Battle for Syria* (n1) 180–181.

<sup>422</sup> Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (adopted 13 January 1993, entered into force 29 April 1997) 1974 UNTS 45.

<sup>423</sup> 'The National Security Strategy of the United States of America' (May 2010) 22 <<http://nssarchive.us/NSSR/2010.pdf>> accessed 16 February 2018.

<sup>424</sup> Christine Gray, 'President Obama's 2010 United States National Security Strategy and International Law on the Use of Force' (2011) 10 Chinese JIL 35, 47–48. This interpretation is supported by both Obama's statements and the actions of his administration. See generally Henderson, 'The 2010 United States National Security Strategy' (n293); Curtis A Bradley and Jack L Goldsmith, 'Obama's AUMF Legacy' (2016) 110 AJIL 628.

including the US and Israel.<sup>425</sup> He defended his red line diplomacy asserting that it resulted in the agreement of a framework for destroying Syria's chemical weapons, America's core goal, without embroiling America in another costly Middle Eastern war that could have derailed the nuclear disarmament negotiations with Iran.<sup>426</sup> Nevertheless, his critics accused him of damaging America's international prestige by suggesting that America does not follow through on its threats.<sup>427</sup>

Obama's red line diplomacy and non-strike in September 2013<sup>428</sup> arguably reinforced the Assad regime and indirectly contributed to the radicalisation of Syria's armed conflict. The disproportionate emphasis that Obama placed on chemical weapons implicitly suggested that the Assad regime could continue killing innocent civilians with impunity so long as it used conventional weapons.<sup>429</sup> By drawing a red line in the first place, Obama may have escalated the conflict by incentivising the Assad regime to test his resolve and by giving the opposition grounds to hope for a Western intervention.<sup>430</sup> The Assad regime may have felt emboldened when Obama effectively ruled out the deployment of ground troops in May 2013.<sup>431</sup> At the same time, the red line may initially have had a moderating effect on the opposition given the incongruousness of a US intervention in favour of an opposition dominated by radicals.<sup>432</sup>

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<sup>425</sup> WA Schabas, 'Attacking Syria? This is the Crime of Aggression' (*PhD studies in Human Rights*, 30 August 2013) <<http://humanrightsdoctorate.blogspot.ie/2013/08/attacking-syria-this-is-crime-of.html>> accessed 20 October 2017. See also Aiden Warren and Ingvild Bode, 'Altering the Playing Field: The U.S. Redefinition of the Use-of-force' (2015) 36 *ContempSecPol'y* 174, 184–185.

<sup>426</sup> Goldberg, 'The Obama Doctrine' (n412). See also Milani (n139) 88; Phillips, *The Battle for Syria* (n1) 182–183.

<sup>427</sup> Munoz (n391); Goldberg, 'The Obama Doctrine' (n412); Sterner (n415) 417–418; van Dam, *Destroying a Nation* (n11) ch4, lcn1888 and Conclusions, lcn2498. See also Valenta and Friedman Valenta (n163) 14–15.

<sup>428</sup> The term non-strike is borrowed from Phillips. Phillips, *The Battle for Syria* (n1) 185.

<sup>429</sup> *ibid* 181–182; Carsten Stahn, 'Syria and the Semantics of Intervention, Aggression and Punishment: On 'Red Lines' and 'Blurred Lines'' (2013) 11 *JICJ* 955, 974; Schabas (n425); Editorial, 'Known Unknowns' (Nn18); Stevenson (n178) 130.

<sup>430</sup> See Sterner (n415) 407–410; Phillips, *The Battle for Syria* (n1) 176–177 and 187. See also Todd Robinson, Paul F Diehl and Tyler Pack, 'Crossing the Red Line: International Legal Limits on Policy Options' (2014) 9 *Yale Journal of International Affairs* 58, 59.

<sup>431</sup> Chelsea J Carter, 'Obama: 'Do not foresee scenario' of American boots on ground in Syria' (*CNN*, 4 May 2013) <[http://edition.cnn.com/2013/05/03/world/meast/us-syria-obama/index.html?hpt=hp\\_t1](http://edition.cnn.com/2013/05/03/world/meast/us-syria-obama/index.html?hpt=hp_t1)> accessed 15 February 2018.

<sup>432</sup> Phillips, *The Battle for Syria* (n1) 187.

Obama's non-strike was considered a major turning point in Syria's armed conflict as it demonstrated his aversion to intervening militarily.<sup>433</sup> This had a massively demoralising effect on the moderate armed opposition and their external backers.<sup>434</sup> When faced with the reality that this intervention would not be forthcoming, many moderates either quit the battlefield or transferred to more militarily effective extremist groups.<sup>435</sup> Furthermore, Saudi Arabia was less hesitant to support Salafist armed groups in Syria despite US disapproval<sup>436</sup> and Turkey allowed even more foreign fighters and weapons to flow across its border.<sup>437</sup> The Framework Agreement enhanced the regime's international legitimacy as it demonstrated that the Assad government was still capable of binding Syria under international law. It also implicitly supported maintaining the regime in power until at least the middle of 2014 given that disarmament was contingent upon the regime's cooperation.<sup>438</sup> After the non-strike, the regime was able to take advantage of the opposition's weakened position to consolidate its military gains.<sup>439</sup> According to Van Dam, it 'gave the regime the impression that it could get away with almost anything'.<sup>440</sup> This was apparent when it recommenced using chemical weapons as early as Spring 2014.<sup>441</sup>

### 6.3.v Theoretical Analysis of Regime Resilience

The above discussion examined the peculiar factors that rendered the Assad regime more resilient than its counterparts in other Arab Spring states and Syria more susceptible to protracted armed conflict. These included the regime's internal structure and its tried and tested strategy of manipulating

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<sup>433</sup> *ibid* 169 and 184; Abboud, *Syria* (n1) ch4, lcn2684–2700.

<sup>434</sup> Abboud, *Syria* (n1) ch4, lcn2678–2691; Cristina Roca, 'How the Syrian War Changed How War Crimes Are Documented' (*Syria Deeply*, 1 June 2017) <<https://www.newsdeeply.com/syria/articles/2017/06/01/long-read-how-the-syrian-war-changed-how-war-crimes-are-documented>> accessed 21 September 2017.

<sup>435</sup> Weiss and Hassan (n1) 144; Phillips, *The Battle for Syria* (n1) 185–186.

<sup>436</sup> Phillips, *The Battle for Syria* (n1) 184–185.

<sup>437</sup> *ibid* 185–186.

<sup>438</sup> *ibid* 183; Sterner (n415) 417; van Dam, *Destroying a Nation* (n11) ch4, lcn1890–1892.

<sup>439</sup> Sterner (n415) 414; Robert O Freedman, 'US Policy in the Middle East: Breakthrough or Breakdown?' (2014) 1 *Contemporary Review of the Middle East* 243, 248; Phillips, *The Battle for Syria* (n1) 186.

<sup>440</sup> Van Dam, *Destroying a Nation* (n11) Conclusions, lcn2499. See also Stevenson (n178) 130.

<sup>441</sup> Sterner (n415) 416.

ethno-sectarian differences to secure its own survival. However, perhaps more so than any other factor, the regime was assisted by the actions of external actors, including its allies – who intervened at decisive moments – and its opponents – who contributed to the hopelessly fragmented nature of the political and armed opposition.

Influential external actors viewed the Arab Spring through the prism of their own geopolitical interests as realists would expect. Consequently, their selective response often appeared schizophrenic as they simultaneously championed pro-democracy protesters in some states whilst condemning or ignoring them in others. At the international level, Russia had considerable economic and cultural interests in Syria. Perhaps even more importantly it did not want to lose its core regional ally as this would shift the regional and international balance of power in America's favour. Furthermore, like China, it did not wish to allow the crystallisation of a new norm permitting the forcible overthrow of undemocratic governments.

Obama was criticised for rendering the conflict more intractable by generating misplaced expectations in a US-backed intervention both through his idealistic rhetoric and hegemonic ultimatums.<sup>442</sup> His mixed messages may have derived from his commitment to 'pragmatic idealism'.<sup>443</sup> However, in the Middle East realism has historically overruled idealism in American foreign policy and Obama's response to the Arab Spring continued this trend.<sup>444</sup> Despite his stated preference for multilateralism, Obama indicated his willingness to intervene unilaterally in Syria if America's vital interests were threatened.<sup>445</sup> Similarly, Trump authorised military strikes in Syria in response to the Assad regime's alleged use of chemical weapons, yet failed to intervene to protect America's Kurdish allies in Afrin or to prevent

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<sup>442</sup> Phillips, *The Battle for Syria* (n1) 232.

<sup>443</sup> Pierre M Atlas, 'U.S. Foreign Policy and the Arab Spring: Balancing Values and Interests' (2012) 21 *Digest of Middle East Studies* 353, 360. See also Lesch, *The Fall* (n1) 158; Stevenson (n178) 121; Goldberg, 'The Obama Doctrine' (n412); Phillips, *The Battle for Syria* (n1) 26.

<sup>444</sup> America's selectivity was evident in its lacklustre response to repression in Bahrain where America has significant interests. See eg Atlas (n443) 355–364 and 377–381.

<sup>445</sup> See eg Goldberg, 'The Obama Doctrine' (n412).

violations of a de-escalation agreement in southern Syria in 2018. America's realist orientation could have negative ramifications for continuing Kurdish autonomy if America decides that its historic relationship with its NATO ally, Turkey, is more important than its more recent partnership with the Syrian Kurds to defeat ISIS.

At the regional level, Syria emerged as the central battlefield in a Saudi-Iranian power struggle that was often framed in sectarian terms. Turkey initially viewed the Syrian unrest as an opportunity to increase its own regional influence as offensive realists would expect. However, it subsequently omnibalanced against the potential internal threat to its territorial integrity posed by domestic Kurdish nationalists inspired by developments in neighbouring Syria. It calculated that Kurdish nationalism posed a greater threat to its security than both Islamist terrorism (at least until 2015) and the survival of the Assad regime. Turkey's response to the Syrian crisis again highlighted the impact of domestic level factors on the behaviour of states at the international level and, accordingly, the inherent limitations of neorealism.

Regional actors instrumentalised ideology, identity and sectarian narratives to mobilise support for their strategic objectives as realists would expect. Iran and Hezbollah utilised sectarian recruitment strategies to mobilise Shia fighters in support of the Assad regime. Saudi Arabia in turn allowed its clerics to use overtly sectarian rhetoric to undermine both Iran's revolutionary Islam and the Muslim Brotherhood's moderate Islamic governance model.<sup>446</sup> Gulf states also denigrated domestic protesters as Iranian agents in an effort to prevent the consolidation of a cross-sectarian domestic opposition to their authoritarian rule.<sup>447</sup> Jihadists also utilised sectarian ideology and historic symbols, including the flag of the Abbasid Caliphate, to justify and generate support for their actions. Their extremist ideology, which demonised non-Sunnis and embraced the notions of sacrifice

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<sup>446</sup> Matthiesen (n66) ch7, lcn1887–1892; Phillips, *The Battle for Syria* (n1) 118, 120 and 141.

<sup>447</sup> See generally *ibid.*

and martyrdom, offered a prism through which alienated Sunnis in Iraq and Syria could rationalise their perceived mistreatment by ruling elites and the suffering inflicted by war.

#### 6.4 The Peace Process

The following section examines the various peace initiatives that have been undertaken to resolve Syria's armed conflict, including the Arab League's mediation efforts, the Geneva Track and the Astana Process.

##### 6.4.i Arab League Mediation and the Geneva Track

Western states were initially happy for regional actors to take the lead in mediation efforts in order to avoid accusations of neo-imperialism.<sup>448</sup> The Arab League drafted an Action Plan to end the Syrian crisis in November 2011 and dispatched an observer mission to monitor compliance therewith in December.<sup>449</sup> However, the mission was understaffed, ill-equipped, inexperienced and led by a suspected war criminal.<sup>450</sup> It was terminated in January 2012 after the Gulf states withdrew their support.<sup>451</sup> The Arab League then submitted a second peace plan to the UNSC for approval. In its original format, it required Bashar to transfer power to his deputy and alluded to the potential imposition of an arms embargo. However, these provisions were later removed at Russia's request.<sup>452</sup> Russia and China vetoed the plan in any case inferring that it was unbalanced.<sup>453</sup> The regime interpreted the vetoes as a licence to intensify its crackdown.<sup>454</sup>

The UNGA endorsed the Arab League's peace plan in February 2012

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<sup>448</sup> Hokayem, *Syria's Uprising* (n5) ch5, lcn2690–2707.

<sup>449</sup> A/HRC/S-17/2/Add.1, para 38; A/HRC/19/69 paras 29–30. See also Lesch, *The Fall* (n1) 188; Magnus Lundgren, 'Mediation in Syria: initiatives, strategies, and obstacles, 2011–2016' (2016) 37 *ContempSecPol'y* 273, 275; Pinar Akpınar, 'The limits of mediation in the Arab Spring: the case of Syria' (2016) 37 *TWQ* 2288, 2293.

<sup>450</sup> Küçükkeleş (n59) 10; Lesch, *The Fall* (n1) 188–190; Hokayem, *Syria's Uprising* (n5) ch5, lcn2729–2734; Karakoç (n230) 240; Phillips, *The Battle for Syria* (n1) 89–90; Lundgren (n449) 275.

<sup>451</sup> Küçükkeleş (n59) 10–12; Phillips, *The Battle for Syria* (n1) 89–90.

<sup>452</sup> Küçükkeleş (n59) 12; Mohamed (n50); Lesch, *The Fall* (n1) 192–193.

<sup>453</sup> See Marauhn (n50) 416; Mohamed (n50); Lesch, *The Fall* (n1) 195; Hokayem, *Syria's Uprising* (n5) ch5, lcn2751–275.

<sup>454</sup> Küçükkeleş (n59) 13; Mohamed (n50); Lesch, *The Fall* (n1) 196; Hokayem, *Syria's Uprising* (n5) ch5, lcn2755–2758, and lcn2993–29944.

and requested the appointment of a joint Arab League/UNGA Special Envoy.<sup>455</sup> Kofi Annan was appointed two days later. He prepared a Six Point Plan based on the Arab League peace plan as a framework for achieving a ceasefire and a Syrian-led political transition.<sup>456</sup> In order to obtain Russia's support, it omitted the requirement that Assad surrender power to his deputy.<sup>457</sup> The UNSC endorsed the plan in a Presidential Statement in March.<sup>458</sup> The regime, the SNC and the FSA subsequently agreed to implement a ceasefire and a UN supervision mission (UNSMIS) was authorised to monitor compliance therewith.<sup>459</sup> For up to eight weeks there was a discernible reduction in violence.<sup>460</sup> However, both sides ultimately violated the ceasefire and it collapsed after the Houla massacre in May 2012. UNSMIS' mandate was terminated on 16 August 2012 amidst increasing violence.<sup>461</sup>

On 30 June 2012, Annan organised a meeting of an Action Group for Syria comprised of representatives of the UN, the EU, the P5, Turkey, Kuwait, Iraq and Qatar on behalf of the Arab League. It became known as the Geneva I Conference. No representatives of the Assad regime or the Syrian opposition were invited.<sup>462</sup> Iran was also excluded due to British and American protestations<sup>463</sup> as was Saudi Arabia in an attempt at balance.<sup>464</sup> The meeting resulted in the Geneva Communiqué, which endorsed Annan's Six Point Plan and established a roadmap for a Syrian-led transition to a democratic political system.<sup>465</sup> Russia and China vetoed a draft resolution

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<sup>455</sup> UNGA Res 66/253 (21 February 2012) UN Doc A/RES/66/253, para 11.

<sup>456</sup> UNSC Res 2042 (14 April 2012) UN Doc S/RES/2042 (S/RES/2042), Annex.

<sup>457</sup> Lesch, *The Fall* (n1) 227.

<sup>458</sup> UNSC Pres Statement 2012/6 (21 March 2012) UN Doc S/PRST/2012/6. It subsequently endorsed the plan in Resolution 2042. See S/RES/2042.

<sup>459</sup> S/RES/2042; UNSC Res 2043 (21 April 2012) UN Doc S/RES/2043.

<sup>460</sup> A/HRC/21/50, para 17; Raymond Hinnebusch, I William Zartman and others, 'UN Mediation in the Syrian Crisis: From Kofi Annan to Lakhdar Brahimi' (2016) International Peace Institute, March 2016, 8 <<https://www.ipinst.org/wp-content/uploads/2016/03/IPI-Rpt-Syrian-Crisis2.pdf>> accessed 8 September 2017; Phillips, *The Battle for Syria* (n1) 102; Lundgren (n449) 275.

<sup>461</sup> UNSC Res 2059 (20 July 2012) UN Doc S/RES/2059, para 3.

<sup>462</sup> Van Dam, *Destroying a Nation* (n11) ch5, lcn2067–2068.

<sup>463</sup> Phillips, *The Battle for Syria* (n1) 100.

<sup>464</sup> Hinnebusch, Zartman and others (n460) 9.

<sup>465</sup> 'Final communiqué of the Action Group for Syria' (30 June 2012) (Geneva Communiqué), para 6 (I) and (II)



endorsing the Communiqué in July because it threatened to impose non-violent sanctions against the regime under Chapter VII if it failed to stop using heavy weapons in population centres.<sup>466</sup> They feared that a Chapter VII resolution could be exploited to legitimise a future military intervention.<sup>467</sup>

Annan resigned after the vetoes. Lakhdar Brahimi was appointed as his replacement. He continued to use the Geneva Communiqué as the basis for his mediation. The pinnacle of his efforts was the Geneva II Conference, which took place in early 2014. The Conference was the product of a brief period of US/Russian cooperation following America's non-strike in September 2013. During this interlude, the UNSC finally endorsed the Geneva Communiqué.<sup>468</sup> The Geneva II Conference represented the first face-to-face negotiations between the regime and the opposition. However, the SNC and several influential armed opposition groups refused to participate insisting upon Bashar's resignation as a precursor to negotiations. Ultimately, the talks collapsed in mid-February having achieved little.<sup>469</sup> Afterwards, the Assad regime reinforced its territorial gains and US/Russian cooperation evaporated following the Crimea crisis.<sup>470</sup> Bashar was re-elected president in May 2014 in elections deemed illegitimate by the international community. Brahimi resigned shortly thereafter.

Staffan de Mistura was appointed as Brahimi's successor. He sought to achieve localised ceasefire agreements as a stepping stone to a broader political settlement.<sup>471</sup> However, after failing to achieve a ceasefire in

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<<http://www.un.org/News/dh/infocus/Syria/FinalCommuniqueActionGroupforSyria.pdf>> 1 September 2013.

<sup>466</sup> Marauhn (n50) 421; Hinnebusch, Zartman and others (n460) 9.

<sup>467</sup> Hinnebusch, Zartman and others (n460) 12.

<sup>468</sup> UNSC Res 2118 (27 September 2013) UN Doc S/RES/2118 (S/RES/2118), paras 16 and 17.

<sup>469</sup> A/HRC/27/60, Annex II, para 1; Hinnebusch, Zartman and others (n460) 16; Phillips, *The Battle for Syria* (n1) 191.

<sup>470</sup> Phillips, *The Battle for Syria* (n1) 191–192.

<sup>471</sup> Lundgren (n449) 277–278; Samer Araabi and Leila Hilal, 'Reconciliation, Reward and Revenge: Analyzing Syrian De-escalation Dynamics through Local Ceasefire Negotiations' (2016) Berghof Foundation, 7 <[http://www.berghof-foundation.org/fileadmin/redaktion/Publications/Papers/AraabiHilal\\_SyrianLocalCeasefireNegotiations.pdf](http://www.berghof-foundation.org/fileadmin/redaktion/Publications/Papers/AraabiHilal_SyrianLocalCeasefireNegotiations.pdf)> accessed 8 September 2017.

Aleppo, he focused on reviving the top-down Geneva process.<sup>472</sup> Russia's military intervention in September 2015 was a major turning point. Afterwards, a military victory no longer appeared within the opposition's reach. Consequently, its external supporters displayed a newfound willingness to compromise, including over Bashar's fate.<sup>473</sup> Domestic factors also played a part. Western governments were facing pressure from domestic populations to address the root causes of ISIS and the refugee crisis.<sup>474</sup> They were also anxious not to jeopardise the 2015 nuclear deal with Iran.<sup>475</sup>

The first manifestation of the U-turn was the extension of an invitation to Iran to attend peace talks in Vienna on 30 October 2015.<sup>476</sup> Representatives of the UN, the EU and all the key external states were in attendance.<sup>477</sup> The participants adopted a declaration affirming their support for Syria's 'unity, independence, territorial integrity, and secular character' and calling for 'inclusive, non-sectarian governance' in Syria.<sup>478</sup> On 14 November 2015, representatives of the UN, the Arab League, the EU and the most influential external states convened as the International Syria Support Group (ISSG) in Vienna.<sup>479</sup> The ISSG delineated a framework for a Syrian-led political transition based upon the Geneva Communiqué.<sup>480</sup> On 18 December 2015, the UNSC unanimously adopted Resolution 2254 in which it endorsed the Vienna declarations, supported a nationwide ceasefire, called upon the parties to implement confidence building measures and requested the UNSG to convene formal peace talks.<sup>481</sup>

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<sup>472</sup> Akpınar (n449) 2295.

<sup>473</sup> *ibid* 2296; Phillips, *The Battle for Syria* (n1) 213 and 224–225; Ingrid Hablets, 'Obstacles to Peace: the interference of interests' (2016) 15 *European View* 77, 81.

<sup>474</sup> Akpınar (n449) 2296; Lundgren (n449) 278; Phillips, *The Battle for Syria* (n1) 223–224.

<sup>475</sup> Akpınar (n449) 2296; Lundgren (n449) 278; Phillips, *The Battle for Syria* (n1) 223–224.

<sup>476</sup> Phillips, *The Battle for Syria* (n1) 224.

<sup>477</sup> A/HRC/31/68, para 8.

<sup>478</sup> *ibid*; Phillips, *The Battle for Syria* (n1) 225.

<sup>479</sup> Its members included China, France, Iran, Iraq, Qatar, Russia, Saudi Arabia, Turkey, the UK and the US.

<sup>480</sup> A/HRC/31/68, para 9; Phillips, *The Battle for Syria* (n1) 225.

<sup>481</sup> UNSC Res 2254 (18 December 2015) UN Doc S/RES/2254 (S/RES/2254), paras 1, 2, 4, 5 and 12.

The third round of UN-mediated peace talks, the Geneva III Conference, began on 1 February 2016. ISIS and JAN were excluded.<sup>482</sup> The Assad regime, supported by Russia, used the prelude to the Conference and the initial round of talks to consolidate its military gains and strengthen its negotiating position.<sup>483</sup> It also declined to implement any of the confidence building measures required under UNSC Resolution 2254.<sup>484</sup> These factors contributed to the suspension of the talks on 3 February 2016. The US and Russia subsequently pressurised the regime and over 40 armed opposition groups into accepting a Cessation of Hostilities Agreement, which came into effect on 27 February 2016.<sup>485</sup> The agreement led to a significant decrease in violence and generated the momentum necessary to resume the peace talks in March.<sup>486</sup> However, the exclusion of JAN and ISIS from the agreement enabled the regime to reinforce its military advantage by attacking areas jointly held by JAN and other armed opposition groups.<sup>487</sup> This led to retaliatory violations on the opposition side and ultimately the collapse of the agreement and the peace talks.<sup>488</sup>

Indirect negotiations between the regime and the opposition also took place in Geneva in 2017, but yet again they achieved little.<sup>489</sup> The changed military situation led some commentators to conclude that the Geneva track was now an irrelevant distraction.<sup>490</sup> By this point, the opposition's external backers had seemingly accepted the inevitability of the Assad regime's survival and curtailed their support for the armed opposition.<sup>491</sup>

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<sup>482</sup> As per S/RES/2254, para 8.

<sup>483</sup> Phillips, *The Battle for Syria* (n1) 219; Akpınar (n449) 2296.

<sup>484</sup> Van Dam, *Destroying a Nation* (n11) ch5, lcn2268–2293.

<sup>485</sup> A/HRC/33/35, paras 7 and 128; Phillips, *The Battle for Syria* (n1) 228; Lundgren (n449) 278; Akpınar (n449) 2296–2297.

<sup>486</sup> A/HRC/33/35, paras 8 and 129; Phillips, *The Battle for Syria* (n1) 229; Lundgren (n449) 279.

<sup>487</sup> Lundgren (n449) 279.

<sup>488</sup> A/HRC/33/35, paras 129 and 133.

<sup>489</sup> A/HRC/36/55, para 9.

<sup>490</sup> Maha Yahya, 'The Perils of Side Arrangements' (*Diwan Middle East Insights from Carnegie*, 23 August 2017) <<http://carnegie-mec.org/diwan/experts/926?lang=en>> accessed 1 July 2018; Jonathan Marcus, 'What will happen in Syria following IS defeats?' (*BBC Middle East*, 4 November 2017) <<http://www.bbc.com/news/world-middle-east-41849778>> accessed 6 November 2017.

<sup>491</sup> Lister, 'Al-Qaeda's Turning' (n294); Hassan Hassan, 'It's time for the Syrian opposition to realise that its regional backers have moved on' *The National* (9 August 2017) <<https://www.thenational.ae/opinion/it-s-time-for-the-syrian-opposition-to-realise-that-its->

#### 6.4.i.a Theoretical Analysis of Arab League Mediation and the Geneva Track

Hinnebusch and Zartman argued that effective mediators must overcome five overlapping challenges: (i) impartiality and inclusivity, (ii) mission and mandate, (iii) strategy, (iv) leverage, and (iv) entry and consent.<sup>492</sup>

A mediator that is perceived as impartial has a better chance of success. However, the Assad regime perceived the Arab League as biased toward the opposition.<sup>493</sup> This perception was not unfounded given that some of the League's members had already called for Bashar to step down and Qatar was reportedly already arming the opposition by the time the League submitted its peace plan to the UNSC.<sup>494</sup> The Special Envoys were also seen as prejudiced because they were jointly appointed by the UN *and* the Arab League and because Annan's Six Point Plan was based upon the Arab League peace plan.<sup>495</sup> Furthermore, the regime felt that the Six Point Plan and the Geneva Communiqué were biased toward the opposition as they required the regime not to use its military superiority.<sup>496</sup>

A foundational rule of mediation is that a possible outcome should not be treated as a precondition.<sup>497</sup> This rule was breached by the inclusion of Bashar's departure in the original Arab League peace plan.<sup>498</sup> Whilst the fate of Bashar and his inner circle was purposely excluded from the Geneva Communiqué and UNSC Resolution 2254, the opposition still demanded that

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regional-backers-have-moved-on-1.618276> accessed 19 December 2017; Karam (n350); Robert Fisk, 'The West might hardly believe it, but it now seems the Syrian war is ending – and Assad is the victor' *The Independent* (7 September 2017) <<http://www.independent.co.uk/voices/syrian-war-ending-bashar-al-ass...n-robert-fisk-syria-middle-east-israel-british-troops-a7933966.html>> accessed 21 September 2017; 'Syria's civil war is over and Assad has won, says the UN' (*The Week*, 8 September 2017) <<http://www.theweek.co.uk/syrian-civil-war/88268/syria-s-civil-war-is-over-and-assad-has-won-says-the-un>> accessed 21 September 2017; Marcus (n490).

<sup>492</sup> Hinnebusch, Zartman and others (n460) 1–4.

<sup>493</sup> Küçükkeleş (n59) 16; Phillips, *The Battle for Syria* (n1) 89. See also Akpınar (n449) 2293–2294.

<sup>494</sup> Lesch, *The Fall* (n1) 190–192; Phillips, *The Battle for Syria* (n1) 90–91.

<sup>495</sup> Hinnebusch, Zartman and others (n460) 7 and 19; Lundgren (n449) 281.

<sup>496</sup> Marauhn (n50) 421418; Hinnebusch, Zartman and others (n460) 6 and 10.

<sup>497</sup> Hinnebusch, Zartman and others (n460) 4 and 18; Van Dam, *Destroying a Nation* (n11) Conclusions, lcn2515–2538.

<sup>498</sup> Hinnebusch, Zartman and others (n460) 1–3, 6–7, 11 and 18.

these actors play no part in the political transition. The opposition feared that a united regime under Bashar's leadership would be able to take advantage of the opposition's own internal divisions.<sup>499</sup> However, the regime also refused to cede any ground on this precondition as it effectively required regime elites to negotiate their own downfall.<sup>500</sup> Furthermore, the inclusion of language on accountability in the Geneva Communiqué may have convinced regime elites to defend the regime at all costs.<sup>501</sup>

Mediation will be undermined if any parties are excluded that could potentially act as spoilers.<sup>502</sup> This was the case in Syria where influential actors, including Iran and the PYD/YPG, were excluded from early negotiations. Furthermore, the core frameworks for peace, including the Geneva Communiqué and Vienna declarations, were agreed without the participation of Syrians.<sup>503</sup> The challenge of inclusivity was exacerbated by the conflict's domestic, regional and international dimensions, which meant that potential spoilers existed at all three levels.<sup>504</sup> The achievement of a viable settlement was also complicated by increasing fragmentation, militarisation and sectarianism at the domestic level.<sup>505</sup> The problem of internal fragmentation proved particularly detrimental to the opposition, which struggled to present a unified position during negotiations.<sup>506</sup> The regime also suffered from fragmentation due to its reliance on irregular militias.<sup>507</sup> The problem of fragmentation means that even if a peace settlement is reached, its implementation will prove difficult to achieve.

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<sup>499</sup> *ibid* 19. See also Lundgren (n449) 274 and 283; Van Dam, *Destroying a Nation* (n11) Conclusions, lcn2451–2479.

<sup>500</sup> Akpınar (n449) 2294; Phillips, *The Battle for Syria* (n1) 100.

<sup>501</sup> Geneva Communiqué, para 10 (d). See also David W Lesch *The Fall of the House of Assad* (Updated edn, Yale UP 2013) 230.

<sup>502</sup> Hinnebusch, Zartman and others (n460) 3; Hablets (n473) 83–84.

<sup>503</sup> Lesch, *The Fall* (n1) 244.

<sup>504</sup> Hokayem, *Syria's Uprising* (n5) ch5, lcn3526–3543; Hablets (n473) 84.

<sup>505</sup> Craig Charney, "'Maybe We Can Reach a Solution': Syrian Perspectives on the Conflict and Local Initiatives for Peace, Justice and Reconciliation" (2015) Syria Justice and Accountability Centre Transitional Justice Series 2/2015, 1–3 <<http://www.charneyresearch.com/wp-content/uploads/2015/02/Report-Syrian-Perceptions-of-the-Conflict-and-Initiatives-20151.pdf>> accessed 23 September 2017; Hinnebusch, Zartman and others (n460) 13; Akpınar (n449) 2295; Lundgren (n449) 283; Abboud, *Syria* (n1) ch3, lcn1663–1702.

<sup>506</sup> Lundgren (n449) 283; Abboud, *Syria* (n1) ch3, lcn1793–1868; Van Dam, *Destroying a Nation* (n11) ch3, lcn1555–1583.

<sup>507</sup> Van Dam, *Destroying a Nation* (n11) ch3, lcn1660–1702.

The challenge of entry and consent concerns whether the conflict is 'ripe for mediation'.<sup>508</sup> The Arab League, Annan and Brahimi's respective initiatives failed because neither the parties nor their external supporters were genuinely committed to mediation as a mutually hurting stalemate had yet to be achieved.<sup>509</sup> Prior to Russia's 2015 military intervention, both sides and their respective external backers believed that a military victory was still within their reach.<sup>510</sup> Indeed, external actors continued to arm their respective allies even whilst mediation was on-going.<sup>511</sup> However, Russia's 2015 intervention altered the military balance of power in the regime's favour. Consequently, the opposition's external supporters were more willing to compromise. Nevertheless, Russia's intervention did not guarantee the regime a decisive military victory.<sup>512</sup> Accordingly, the regime also had an incentive to negotiate whilst it was in a position of strength. The Cessation of Hostilities Agreement succeeded due primarily to the pressure that the US and, even moreso, Russia exerted on the parties and their regional backers to implement it.<sup>513</sup> Nonetheless, the talks ultimately collapsed because the regime had no incentive to make concessions whilst it was on the offensive and because its objectives were better served by local agreements.

#### 6.4.ii Local Agreements and the Astana Process

The regime and opposition groups began negotiating local agreements in 2012. Russia and to a lesser extent Iran, Turkey and Qatar have also played a role in negotiating and monitoring local agreements, particularly since

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<sup>508</sup> Lundgren (n449) 281; Hinnebusch, Zartman and others (n460) 1.

<sup>509</sup> Hinnebusch, Zartman and others (n460) 1 and 3; Phillips, *The Battle for Syria* (n1) 84, 90–91 and 100–102; Lundgren (n449) 275; Akpınar (n449) 2294.

<sup>510</sup> Hinnebusch, Zartman and others (n460) 19; Phillips, *The Battle for Syria* (n1) 102–103; Lesch, 'Assad's fateful choice' (n46); Akpınar (n449) 2295.

<sup>511</sup> A/HRC/27/60, para 139; Rim Turkmani and others, "Hungry for Peace: Positives and Pitfalls of Local Truces and Ceasefires in Syria." (2014) LSE/SIT, 4–5 <<http://www.securityintransition.org/wp-content/uploads/2014/11/Home-Grown-Peace-in-Syria-report-final-1-3.pdf>> accessed 23 September 2017; Seale and Saddy (n395) 24–26; Lundgren (n449) 281–283; Phillips, *The Battle for Syria* (n1) 102 and 192–193; Hinnebusch, Zartman and others (n460) 18.

<sup>512</sup> Phillips, *The Battle for Syria* (n1) 231–232.

<sup>513</sup> *ibid* 229.

2016.<sup>514</sup> Local agreements initially aimed at securing local ceasefires.<sup>515</sup> Up until September 2015, they were frequently violated and, due to the politicisation of aid, often failed to alleviate the humanitarian situation.<sup>516</sup> Local actors often only agreed to local agreements for short-term advantages and violated them when the military balance of power shifted.<sup>517</sup> Furthermore, local actors who were excluded from negotiations or profited from the siege economy operated as spoilers.<sup>518</sup> External actors also acted as spoilers, including by fuelling the war economy, arming both sides and sabotaging agreements that threatened their interests.<sup>519</sup> Foreign fighters were less likely to respect local agreements as they had no connection to besieged communities.<sup>520</sup>

After Russia's 2015 intervention, Russia and Iran expedited the negotiation of local agreements in opposition-held neighbourhoods in rural Damascus and Homs governorate. These agreements proved more resilient.<sup>521</sup> There was greater political will for negotiation on the opposition side, given the growing unlikelihood of a military victory, and also on the regime side, given its strengthened negotiating position. Local agreements negotiated since 2016 have been heavily biased in the regime's favour.<sup>522</sup>

After the siege of Eastern Aleppo, Russia and Turkey mediated a nationwide ceasefire in December 2016. Russia, Turkey and Iran subsequently sponsored several rounds of indirect negotiations between the regime and the armed opposition in Astana. At Turkey's insistence, the

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<sup>514</sup> The US, EU, ISSG and Special Envoy have played a significantly less substantive role. See Araabi and Hilal (n471) 27–29; Fadi Adleh and Agnès Favier, “Local reconciliation agreements” in Syria: a non-starter for peacebuilding’ (2017) RSCAS-Middle East Directions/EUI Joint Research Paper, 8 <[http://cadmus.eui.eu/bitstream/handle/1814/46864/RSCAS\\_MED\\_RR\\_2017\\_01.pdf?sequence=1&isAllowed=y](http://cadmus.eui.eu/bitstream/handle/1814/46864/RSCAS_MED_RR_2017_01.pdf?sequence=1&isAllowed=y)> accessed 8 September 2017.

<sup>515</sup> Turkmani and others (n511) 39; Adleh and Favier (n514) 6.

<sup>516</sup> Integrity Research (n516) 11–13; Araabi and Hilal (n471) 11.

<sup>517</sup> Turkmani and others (n511) 40 and 43; Integrity Research (n516) 3–4.

<sup>518</sup> Turkmani and others (n511) 41–42; Integrity Research (n516) 9–10 and 13; Araabi and Hilal (n471) 27–28.

<sup>519</sup> Turkmani and others (n511) 41–42.

<sup>520</sup> Ibid 44; Integrity Research (n516) 9.

<sup>521</sup> Adleh and Favier (n514) 2.

<sup>522</sup> *ibid* 7.

PYD/YPG was excluded as were ISIS and JAN (now HTS). The UNSC endorsed the negotiations.<sup>523</sup> However, in reality the Astana process reflected an acknowledgment by the regime's external opponents, most notably Turkey, and the international community of the need to reach a compromise with the regime whose survival now appeared inevitable.<sup>524</sup> The main outcome was an agreement between Iran, Russia and Turkey to create de-escalation zones for a provisional period of six months in Homs governate, Eastern Ghouta and Idlib governate.<sup>525</sup> An additional de-escalation agreement was concluded between the US and Russia concerning the southern border region.<sup>526</sup> Russia and Turkey dispatched military and police observers to monitor the implementation of the de-escalation agreements.<sup>527</sup>

Some analysts have argued that given the fragmented character of the Syrian armed conflict, bottom-up local agreements are a necessary accompaniment to the top-down, nationwide Geneva peace process.<sup>528</sup> They asserted that local agreements could facilitate humanitarian access, achieve a de-escalation of hostilities and generate confidence in the feasibility of a political settlement.<sup>529</sup> However, critics have warned against 'whitewashing "starvation or surrender" tactics as positive solutions'.<sup>530</sup> Iran, Russia and

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<sup>523</sup> UNSC Res 2336 (31 December 2016) UN Doc S/RES/2336.

<sup>524</sup> Regarding Turkey's stance, see Wintour (n304).

<sup>525</sup> See eg A/HRC/36/55, paras 7–17; 'De-escalation Zones: A Cloak to Refocus on the East' (2017) Omran Center for Strategic Studies, June 2017 <<http://en.omrandirasat.org/publications/papers/de-escalation-zones-a-cloak-to-refocus-on-the-east.html>> accessed 23 September 2017; Yahya (n490); Anton Mardasov, 'Latest Syria peace talks solidify final de-escalation zone' (*AL Monitor*, 22 September 2017) <<http://www.al-monitor.com/pulse/originals/2017/09/syria-peace-astana-zones-opposition-kurds-assad-russia.html>> accessed 24 September 2017; Mona Alami, 'Is this the beginning of the end for Idlib's jihadi groups?' (*AL-Monitor*, 22 September 2017) <<http://www.al-monitor.com/pulse/originals/2017/09/syria-idlib-hayat-tahrir-al-sham-russia-iran-turkey.html>> accessed 24 September 2017.

<sup>526</sup> A/HRC/36/55, para 10; Yahya (n490).

<sup>527</sup> The Syrian opposition and America had opposed any monitoring mechanism involving Iranian participation. See A/HRC/36/55, para 8; Ece Toksabay and Raushan Nurshayeva, 'Turkey, Iran and Russia to deploy observers around Syria's Idlib' (*Reuters*, 15 September 2017) <<https://www.reuters.com/article/mideast-crisis-syria-idlib/turkey-iran-and-russia-to-deploy-observers-around-syrias-idlib-idUSKCN1BQ13E>> accessed 24 September 2017; Mardasov (n525); Alami (n525).

<sup>528</sup> Turkmani and others (n511) 44–45; Araabi and Hilal (n471).

<sup>529</sup> See generally Turkmani and others (n511); Araabi and Hilal (n471).

<sup>530</sup> Charney (n505) 4. Many Syrians share this view. See Integrity Research (n516) 3 and 7–8; Araabi and Hilal (n471) 7–8 and 10–11; Adleh and Favier (n514) 2 and 6. See also Karam (n350).



Turkey have been accused of using local agreements to secure their respective areas of influence and objectives.<sup>531</sup> Significantly, the regime and its external allies continued to use violence in de-escalation zones against alleged ‘terrorist groups’. This enabled the regime to regain control of former opposition strongholds in Eastern Ghouta and southern Syria in 2018.<sup>532</sup> Local agreements negotiated since 2016 often required the partial or complete evacuation of the local population usually to Idlib governate.<sup>533</sup> Civilian residents described these evacuations as forced and involuntary.<sup>534</sup> The UNCOI suggested that evacuation agreements were utilised to secure forcible displacement contrary to international law.<sup>535</sup> Any individuals who were classified as pro-opposition, including humanitarian workers, were required to evacuate as part of a deliberate regime strategy to re-establish control of strategic areas and push the rebellion into Idlib.<sup>536</sup> Any military-aged men who were not evacuated were required to enlist in the Syrian armed forces, local security units or pro-regime militias.<sup>537</sup> As enlistment was unconscionable for many opposition supporters, evacuation was their only option.<sup>538</sup>

The regime has enacted new laws that enable the appropriation of property in former opposition-held areas contrary to the rights of the original property owners under international law.<sup>539</sup> These areas were often repopulated with regime supporters. Some local agreements, including the

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<sup>531</sup> Adleh and Favier (n514) 8; Toksabay and Nurshayeva (n527); Alami (n525).

<sup>532</sup> See eg UNHRC, ‘The siege and recapture of eastern Ghouta: Conference room paper of the Independent International Commission of Inquiry on the Syrian Arab Republic’ (20 June 2018) UN Doc A/HRC/38/CRP.3

<sup>533</sup> Adleh and Favier (n514) 8–10.

<sup>534</sup> See eg A/HRC/36/55, paras 28–29.

<sup>535</sup> UNCOI, ‘Sieges as a Weapon of War: Encircle, starve, surrender, evacuate’ (29 May 2018)

<[http://www.ohchr.org/Documents/HRBodies/HRCouncil/CoISyria/PolicyPaperSieges\\_29May2018.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/CoISyria/PolicyPaperSieges_29May2018.pdf)> accessed 28 July 2018.

<sup>536</sup> A/HRC/36/55, paras 22–35; Adleh and Favier (n514) 6, 8–10 and 13.

<sup>537</sup> A/HRC/36/55, paras 20–21; Adleh and Favier (n514) 11–12.

<sup>538</sup> Adleh and Favier (n514) 14–15.

<sup>539</sup> *ibid* 16–17; A/HRC/36/55, paras 28 and 34; HRW, ‘Syria’s New Property Law: Questions and Answers’ (29 May 2018) <[https://www.hrw.org/sites/default/files/supporting\\_resources/20180529\\_syria\\_qa\\_1.pdf](https://www.hrw.org/sites/default/files/supporting_resources/20180529_syria_qa_1.pdf)> accessed 28 July 2018.

Four Towns Agreement,<sup>540</sup> mandated population transfers between opposition and government-held besieged towns. Iran has been accused of advocating demographic engineering on a sectarian basis in areas of strategic importance along the Lebanese border.<sup>541</sup> In this manner, local agreements have served to sharpen ethno-sectarian divisions in Syria.<sup>542</sup>

## 6.5 Conclusion

The Arab Spring tends to reinforce liberalism's assumption that authoritarian governments are more susceptible than representative governments to internal violence. It also suggests that cosmetic democracy is not conducive to sustainable stability. From a realist perspective, the evolution of the initially peaceful, pro-democracy protests in Syria into a proxy war with sectarian undertones demonstrated the dangers of liberal internationalism. Democratic western governments voiced rhetorical support for the protesters' demands while failing to match their words with actions. Furthermore, the Syrian crisis demonstrated the resilience of neo-patrimonial authoritarian regimes. It proved once again that democratic transition can be a long and bloody process with potential ramifications for regional and international order.

Influential external actors viewed the Arab Spring through the prism of their own geopolitical interests as realists would expect. Consequently, Syria once again became a proxy battleground for regional and international power struggles. The support that external actors provided to their respective Syrian allies was not enough to enable either side to achieve outright victory, but it was sufficient to prolong the violence and create a space in which sectarianism, jihadism and Kurdish nationalism could flourish.<sup>543</sup> Indeed, external interference proved one of the biggest obstacles to a sustainable

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<sup>540</sup> A/HRC/36/55, paras 28 and 34; Van Dam, *Destroying a Nation* (n11) ch2, lcn1119–1122; Adleh and Favier (n514) 8 fn11.

<sup>541</sup> Araabi and Hilal (n471) 13; Adleh and Favier (n514) 8–10.

<sup>542</sup> Araabi and Hilal (n471) 30–31; Adleh and Favier (n514) 8–10.

<sup>543</sup> A/HRC/31/68, para 32. See also Hinnebusch, 'Globalization, democratization, and the Arab uprising' (n369) 346–347; Phillips, *The Battle for Syria* (n1) 6–7, 38 and 232.

political settlement.<sup>544</sup> External actors were unwilling to prioritise the attainment of a diplomatic solution over the furtherance of their own respective interests as realists would expect.<sup>545</sup> The Astana process supports realism's contention that post-war settlements tend to reflect the victor's preferences. Turkey's cooperation with Iran and Russia in the Astana process supports Walt's argument that bandwagoning is more likely to occur when the outcome of an armed conflict is imminent.<sup>546</sup> However, the local agreements discussed do not constitute a pathway to sustainable peace.<sup>547</sup> They have not addressed the grievances that triggered the 2011 protests or the problems that were created during the subsequent armed conflict, including the security vacuum, war economy, refugee/IDP crisis and accountability deficit.<sup>548</sup> Accordingly, these problems are likely to continue triggering unrest in Syria and the broader region in the future. As Seale once observed, 'To ignore the reasons for local tension and its history, worse still to drive local forces to the wall, is to unleash the demons of terrorism against which even the mightiest have no adequate defence.'<sup>549</sup>

Regional actors, including the Assad regime, Iran, the Gulf states, Hezbollah and ISIS, instrumentalised ideology, identity and sectarian narratives to mobilise support for their strategic objectives during the Syrian crisis as realists would expect. All of these actors contradicted their respective sectarian narratives, including ISIS as evident from its inclusion of Ba'athists with questionable religious credentials in its leadership. Nevertheless, the

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<sup>544</sup> The UNCOI has repeatedly criticised external actors for prolonging the armed conflict and preventing a negotiated settlement. See A/HRC/21/50, para 19; A/HRC/23/58, para 16; A/HRC/25/65, Annex II, para 6; A/HRC/27/60, Annex II, para 4; A/HRC/28/69, paras 116–122 and 135; A/HRC/30/48, paras 9 and 175; A/HRC/31/68, paras 17–20 and 32; A/HRC/36/55, para 17. See also Abboud, *Syria* (n1) ch4, lcn2254–2263 and lcn2939–2957.

<sup>545</sup> Both sides continued to arm their respective allies whilst Annan and Brahimi's mediation efforts were ongoing. It has even been suggested that the US, the UK and France rejected a Russian proposal in February 2012 under which Bashar would resign after political negotiations had commenced because they miscalculated that the regime was on the verge of collapse. See Julian Borger and Bastien Inzaurrealde, 'West 'ignored Russian offer in 2012 to have Syria's Assad step aside'' *The Guardian* (15 September 2015) <<https://www.theguardian.com/world/2015/sep/15/west-ignored-russian-offer-in-2012-to-have-syrias-assad-step-aside>> accessed 31 December 2017.

<sup>546</sup> Stephen M Walt, *The Origins of Alliances* (Kindle edn, Cornell UP 1990) lcn772–783. See also Kenneth N Waltz, *Theory of International Politics* (McGraw-Hill 1979) 126.

<sup>547</sup> In support of this argument, see Adleh and Favier (n514) 15–16; Yahya (n490).

<sup>548</sup> Adleh and Favier (n514) 12 and 15–17.

<sup>549</sup> Patrick Seale, *The Struggle for Syria* (Yale UP 1986) xxii.

Syrian crisis again showed that ideology and identity are not mere instruments. Significantly, the regime's foreign policy of resistance did not offset concrete grievances over the liquidation of Ba'athist socialism. Indeed, the initial Arab Spring protests arguably reflected an attempt by Arab populations to recapture pan-Arabism and use it against authoritarian Arab regimes instead of some external enemy.<sup>550</sup>

Nevertheless, the Syrian opposition's reluctance to sacrifice its Arab identity alienated many Syrian Kurds. The Syrian unrest presented an opportunity for Syrian Kurds and triggered a resurgence of Kurdish nationalism across the Middle East as evident in Iraqi Kurdistan's unsuccessful attempt at secession in October 2017. The very proclamation of Rojava as an autonomous Kurdish region coupled with the success of Syrian and Iraqi Kurds fighting side by side in battles such as Kobane had major symbolic value for the pan-Kurdish movement.<sup>551</sup> This generated unease in other Middle Eastern states with Kurdish minority populations, especially Turkey.

The Arab Spring protests challenged essentialist approaches which suggest that the Middle East and Islam are incompatible with democracy. Nevertheless, as the initial optimism of the Arab Spring was displaced by armed violence, so too the initially dominant and inclusive democratic ideology was largely displaced by competing and divisive alternatives, including Islamist extremism and resurgent authoritarianism.<sup>552</sup> The democratic Islamic governance model promoted by the Syrian Muslim Brotherhood was gradually eclipsed by Salafist and jihadist ideologies due to the regime's deliberate provocation of sectarianism and the actions of external actors. In this climate, the perception that authoritarian rule was the least 'worst' option achieved something of a renaissance. The fragile Syrian

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<sup>550</sup> Steven C Roach, 'Critical Theory' in Tim Dunne, Mikja Kurki and Steve Smith (eds), *International Relations Theories: Discipline and Diversity* (3rd edn, OUP 2013) 181; Wieland (n1) ch11, lcn6458–6532, and ch12, lcn7115–7125.

<sup>551</sup> Gunes and Lowe (n306) 2–3 and 6–7.

<sup>552</sup> Hinnebusch, 'Globalization, democratization, and the Arab uprising' (n369) 335, 345–346 and 350–352.

national identity once again found itself competing with sub and supra-state alternatives, which pitted Sunnis against Shias, religious minorities against the Sunni majority, Kurds against Arabs, moderates against extremists, and secularists against devout Muslims.

The Syrian crisis reignited the order versus justice debate that originally divided English School scholars. The Arab Spring reinforced the solidarist argument, also made by TWAIL scholars, that the absence of justice, both for individuals and states may jeopardise international order.<sup>553</sup> However, the external response to the Syrian crisis reinforced the pluralist argument that states are unwilling to prioritise the interests of international society over their respective national interests. Furthermore, the securitised state-level response to the refugee crisis confirmed that a cosmopolitan society does not yet exist.<sup>554</sup> The tension between the pluralist and solidarist conceptions of international society reflects the inherent tension between cosmopolitanism and individualism in international law. The Arab Spring brought this tension into sharp focus as protesters demanded respect for cosmopolitan human rights norms, whereas authoritarian regimes and their external backers relied upon individualist statist rights to condemn external interference in their internal affairs.

Finally, from a poststructuralist perspective, the Syrian crisis once again demonstrated how the contemporary state constitutes itself through violence and exclusion. This was evident, for example, through the rise of nationalist rhetoric in the Western world as states sought to exclude the external other (Syrian refugees) and in Syria as the predominantly Arab opposition sought to exclude the internal other (the Kurds). The Syrian crisis reinforced the poststructuralist observation that internal minorities, asylum seekers, refugees and transnational movements pose challenges to the state-

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<sup>553</sup> Andrew Linklater, 'The English School' in Scott Burchill and others (eds), *Theories of International Relations* (3rd edn, Palgrave MacMillan 2005).

<sup>554</sup> Regarding the EU's securitised response, see Ahmed Driss, 'The EU Response to the Arab Uprising: a Show of Ambivalence' in Alcaro and Haubrich-Seco (eds) (n70) 100–102 and 107–110.

system.<sup>555</sup> They lead one to question whether the humanitarian costs of the crisis would have been less devastating in a more cosmopolitan global order.

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<sup>555</sup> Peter Nyers observed that the refugee ‘acts as a ‘limit-concept’, occupying the ambiguous zone between citizen and human’. See Richard Devetak, ‘Postmodernism’ in Scott Burchill and others (eds) (n553) 182–183.

## Chapter Seven: Adherence to International Law since 2011

### 7.1 Introduction

Chapter seven examines compliance with the international legal rules concerning the use of force (*jus ad bellum*) and the conduct of hostilities (*jus in bello*) in Syria since March 2011. It examines the lawfulness of: countermeasures imposed against Syria, military interventions by invitation and non-consensual military interventions in Syria. It identifies the various armed conflicts that have arisen in Syria since 2011, outlines the applicable legal frameworks, and critically appraises potential mechanisms for achieving accountability for violations of IHL and IHRL. It tests the assumption, arguably inherent in liberal internationalism, international legal positivism and some constructivist writing,<sup>1</sup> that international law is sufficiently determinate to operate as a benchmark against which the legitimacy of international behaviour can be measured, and the liberal assumption that international law can both restrain state behaviour and help secure justice.

### 7.2 Countermeasures

This section identifies the lawfulness of countermeasures imposed against Syria since 2011. Countermeasures are ‘measures that would otherwise be contrary to the international obligations of an injured State vis-à-vis the responsible State, if they were not taken by the former in response to an internationally wrongful act by the latter in order to procure cessation and reparation’.<sup>2</sup> International law is unclear as to whether third states, which have not suffered individual material harm as a result of a breach, may implement countermeasures against states that have breached peremptory norms or obligations owed to the international community as a whole. The International Law Commission’s 2001 Draft Articles on State Responsibility

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<sup>1</sup> Anthony Clark Arend, ‘Do Legal Rules Matter’ (1999) 38 VaJInt’l L 107, 142–146.

<sup>2</sup> Countermeasures may be distinguished from retorsion, namely, unfriendly conduct which is not contrary to any international obligation owed. Countermeasures and retorsion are sometimes collectively referred to as sanctions, although the ILC considers the term ‘sanctions’ to be insufficiently precise. See ILC, ‘Draft articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries 2001’ (2001) II (2) UNYBILC 31–143, UN Doc A/CN.4/SER.A/2001/Add.1 (Part 2) (ILC 2001 Draft Articles), 128 and 130.

(ILC'S 2001 Draft Articles) declined to explicitly recognise such a right suggesting that state practice in the area was 'sparse' and 'limited'.<sup>3</sup> However, they indicated that non-injured states were entitled to take 'lawful measures' against delinquent states in such circumstances.<sup>4</sup> Several commentators challenged the ILC's analysis and suggested that considerable state practice did in fact exist in support of such a third party right.<sup>5</sup> Notably, most of the countermeasures implemented by regional organisations and states in response to the Syrian crisis were third party countermeasures.<sup>6</sup>

The ILC's 2001 Draft Articles identify several criteria that countermeasures must satisfy in order to be legitimate. Whilst these criteria relate to countermeasures implemented by injured states, they are arguably equally applicable to third party countermeasures.<sup>7</sup> Most notably, countermeasures must be instrumental (aimed at enforcement not punishment), proportionate, necessary, reversible and temporary in nature.<sup>8</sup> Furthermore, they must not affect obligations concerning the protection of fundamental human rights or the upholding of peremptory norms or humanitarian obligations prohibiting reprisals.<sup>9</sup> This requirement is rooted in duties contained within international human rights treaties,<sup>10</sup> public

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<sup>3</sup> *ibid* 139.

<sup>4</sup> *ibid* 129 (art 48) and 137–138 (art 54)

<sup>5</sup> Martin Dawidowicz also implied that the *opinio juris* element of a customary rule in favour of such a third party right could be inferred from the sheer volume of state practice. Martin Dawidowicz, 'Third-party countermeasures: A progressive development of international law?' (2016) 29 QIL Zoom-in 3, 5 and 11–15 <<http://www.qil-qdi.org/third-party-countermeasures-progressive-development-international-law/>> accessed 10 July 2018. See also Pierre-Marie Dupuy, 'The Deficiencies of the Law of State Responsibility Relating to Breaches of 'Obligations Owed to the International Community as a Whole': Suggestions for Avoiding the Obsolescence of Aggravated Responsibility' in A Cassese (ed), *Realizing Utopia: the Future of International Law* (OUP 2012) 216; Christian J Tams and Antonios Tzanakopou, 'Barcelona Traction at 40: The ICJ as an Agent of Legal Development' (2010) 23 LJIL 781, 793–794; Santiago Villalpando, 'The Legal Dimension of the International Community: How Community Interests Are Protected in International Law' (2010) 21 EJIL 387, 418.

<sup>6</sup> See 6.2.iv in ch6.

<sup>7</sup> Dupuy (n5) 220.

<sup>8</sup> Regarding these and other criteria, see ILC 2001 Draft Articles, 128–139 (arts 49–54).

<sup>9</sup> *ibid* 131–134 (art 50). See also UNGA Res 68/162 (18 December 2013) UN Doc A/RES/68/162.

<sup>10</sup> For example, art 1 (2) of ICESCR which is non-derogable even during times of emergency, provides that 'in no case may a people be deprived of its own means of subsistence'. See International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR), art 1 (2).



international law<sup>11</sup> and customary IHL.<sup>12</sup> In order to ensure compliance with this requirement, many contemporary countermeasures incorporate humanitarian exceptions. However, even with these safeguards countermeasures can undermine the enjoyment of socio-economic rights<sup>13</sup> and impede civilian access to humanitarian relief.<sup>14</sup> Often the most vulnerable are the most detrimentally affected as ruling elites can usually escape the worst effects of countermeasures.<sup>15</sup> Before imposing countermeasures, states should investigate their potential effects and choose alternative strategies if they are likely to cause civilian suffering ‘that is *manifestly disproportionate* to the aim of stopping the State’s misconduct’.<sup>16</sup> Effective mechanisms should be incorporated for monitoring the impact of countermeasures on civilian populations, in particular vulnerable groups.<sup>17</sup> The likelihood of countermeasures achieving their objectives should be weighed up against their likely humanitarian consequences.

The countermeasures implemented against Syria somewhat foreseeably failed to achieve their explicit objectives.<sup>18</sup> They have been criticised for their detrimental impact on the enjoyment of human rights, especially by the most vulnerable,<sup>19</sup> and for failing to adapt to developments

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<sup>11</sup> For example, the Vienna Convention prohibits a State from suspending or terminating on account of material breach any provision ‘relating to the protection of the human person contained in treaties of a humanitarian character’. See Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art 60 (5).

<sup>12</sup> For example, the customary IHL rules aimed at ensuring humanitarian access and preventing the use of starvation as a method of warfare. See Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules* (3rd edn, CUP 2009) Rules 53–56.

<sup>13</sup> CESCR, ‘General Comment No 8: the relationship between economic sanctions and respect for economic, social and cultural rights’ (12 December 1997) UN Doc E/C.12/1997/8 (E/C.12/1997/8), paras 4–5.

<sup>14</sup> See eg Anna Segall, ‘Economic sanctions: legal and policy constraints’ (31 December 1999) 81 *The International Review of the Red Cross* 763.

<sup>15</sup> Alison N Kurth, ‘Rethinking the Syria Accountability Act: Are Sanctions on Syria in the Best Interest of the United States?’ (2011) 20 *TransnatlL&ContempProbs* 239, 247.

<sup>16</sup> Antonio Cassese, *International Law* (2nd edn, OUP 2005) 313 (emphasis in original).

<sup>17</sup> E/C.12/1997/8, para 13.

<sup>18</sup> See discussion regarding sanctions in s6.2.iv in ch6.

<sup>19</sup> See eg A/HRC/19/69, para 123; UNHRC, ‘Report of the independent international commission of inquiry on the Syrian Arab Republic’ (16 August 2012) UN Doc A/HRC/21/50 (A/HRC/21/50), para 144; UNHRC, ‘Report of the independent international commission of inquiry on the Syrian Arab Republic’ (12 February 2014) UN Doc A/HRC/25/65 (A/HRC/25/65), Annex II, para 11; UNHRC, ‘Report of the independent international

on the ground due in part to the initial failure of the sending states to include adequate monitoring mechanisms.<sup>20</sup> The sending states asserted that the Assad regime was responsible for Syria's dire economic and humanitarian situation and not their countermeasures, which they stressed included humanitarian exceptions.<sup>21</sup> Nevertheless, the UNCOI has implicitly questioned the legality of the countermeasures imposed against Syria.<sup>22</sup> Some commentators questioned whether the EU's countermeasures complied with its own internal guidelines, which advocate the use of targeted sanctions in order to minimise as far as possible any adverse humanitarian effects for innocent civilians.<sup>23</sup> Erica S. Moret suggested that the selective and targeted trade and sectoral sanctions imposed by the EU against Syria were 'so broad that they can be considered de facto comprehensive sanctions'.<sup>24</sup>

### 7.3 Interventions by Invitation on the side of the Assad regime

Russia and Iran have both relied on the intervention by invitation doctrine to justify their military interventions in Syria,<sup>25</sup> a position supported by the

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commission of inquiry on the Syrian Arab Republic: Advance Edited Version' (11 February 2016) UN Doc A/HRC/31/68 (A/HRC/31/68), para 130.

<sup>20</sup> Francesco Giumelli and Paul Ivan, 'The effectiveness of EU sanctions: an analysis of Iran, Belarus, Syria and Myanmar (Burma)' (2013) European Policy Centre Issue Paper 76, 45 <[http://www.epc.eu/documents/uploads/pub\\_3928\\_epc\\_issue\\_paper\\_76\\_-\\_the\\_effectiveness\\_of\\_eu\\_sanctions.pdf](http://www.epc.eu/documents/uploads/pub_3928_epc_issue_paper_76_-_the_effectiveness_of_eu_sanctions.pdf)> accessed 11 January 2018; Erica S Moret, 'Humanitarian impacts of economic sanctions on Iran and Syria' (2015) 24 European Security 120, 132.

<sup>21</sup> See eg 'Final Statement by the Co-chairs of the International Working Group on Sanctions' (17 April 2012, Paris) <<https://www.state.gov/e/eb/tfs/spi/syria/documents/211643.htm>> accessed 8 November 2017, para 4; 'Statement by the Friends of the Syrian People International Working Group on Sanctions' (30 November 2012, Tokyo) <<https://www.government.nl/documents/leaflets/2012/12/10/joint-statement-tokyo-30-nov-2012>> accessed 8 November 2017, para 12; Moret (n20) 130–131 and 134.

<sup>22</sup> UNHRC, 'Report of the independent international commission of inquiry on the Syrian Arab Republic' (8 August 2017) UN Doc A/HRC/36/55 (A/HRC/36/55), paras 14 and 90 (b). See also Kasturi Sen, Waleed Al-Faisal and Yaser Al-Saleh, 'Syria: effects of conflict and sanctions on public health' (2012) 35 Journal of Public Health 195, 198–199.

<sup>23</sup> Clara Portela, 'The EU's decision to lift the arms embargo against Syria's rebels is a dramatic departure from its previous policies' (*LSE Comment*, 23 July 2013) <<http://bit.ly/12RIxI0>> accessed 15 September 2014; Clara Portela, 'The EU's Sanctions against Syria: Conflict Management by Other Means' (2012) Egmont Security Policy Brief 38, September 2012, 4 <<http://aei.pitt.edu/39406/1/SPB38.pdf>> accessed 10 January 2018; Moret (n20) 131–132.

<sup>24</sup> Moret (n20) 120.

<sup>25</sup> UNSC, 'Letter dated 15 October 2015 from the Permanent Representative of the Russian Federation to the United Nations addressed to the President of the Security Council' (15 October 2015) UN Doc S/2015/792 (S/2015/792), Annex. Regarding Iran, see Karine Bannelier-Christakis, 'Military Interventions against ISIL in Iraq, Syria and Libya, and the Legal Basis of Consent' (2016) 29 LJIL 743, 760.

Assad regime.<sup>26</sup> States may intervene militarily in a state in response to a request from that state for assistance in responding to internal unrest. Such an intervention will be considered *prima facie* lawful if: (i) it is provided in response to an invitation from the legitimate authorities of the requesting state; (ii) it is not provided with the knowledge and intent that it will be used to commit an internationally wrongful act;<sup>27</sup> and (iii) the internal unrest does not amount to a ‘civil war’.<sup>28</sup> Academic opinion is divided regarding whether or not an intervention by invitation is permitted where the requesting government is actually embroiled in a ‘civil war’ as discussed below.

### *Legitimate Authorities*

The intervention must be initiated in response to a prior invitation issued free of coercion by the highest legitimate authorities of the inviting state and it must not exceed the scope of the latter’s consent.<sup>29</sup> During civil wars, it may be difficult to identify the authorities that are legitimately entitled to invite an external intervention on the people’s behalf. State practice suggests that regard will be had to the objective criterion of effectiveness and the subjective criterion of international recognition when identifying the ‘legitimate’ authorities.<sup>30</sup> Some commentators have suggested that account should also be taken of the inviting government’s ‘democratic legitimacy’.<sup>31</sup> However,

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<sup>26</sup> UNSC, ‘Identical letters dated 14 October 2015 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council’ (16 October 2015) UN Doc A/70/429–S/2015/789; Bannelier-Christakis (n25) 760–761.

<sup>27</sup> ILC 2001 Draft Articles, 65–66 (art 16); IDI, ‘Military Assistance on Request’ (Rhodes 2011) art 3 <[http://www.idi-iil.org/app/uploads/2017/06/2011\\_rhodes\\_10\\_C\\_en.pdf](http://www.idi-iil.org/app/uploads/2017/06/2011_rhodes_10_C_en.pdf)> accessed 11 February 2018 (IDI Rhodes Resolution).

<sup>28</sup> See UNGA Res 3314 (XXIX) ‘Definition of Aggression’ (14 December 1974) UN Doc A/RES/29/3314 (A/RES/29/3314), Annex, art 3 (e); UNSC Res 387 (31 March 1976) UN Doc S/RES/387, preambular para 4; *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* (Merits Judgment) [1986] ICJ Rep 14 [246]; Tom Ruys, ‘Of Arms, Funding and “Non-lethal Assistance”—Issues Surrounding Third-State Intervention in the Syrian Civil War’ (2014) 13 *ChiJInt’l L* 13, 16 and 40–41; Christine Gray, *International Law and the Use of Force* (OUP 2018) 90–91.

<sup>29</sup> Tom Ruys and Luca Ferr, ‘Weathering the storm: legality and legal implications of the Saudi-led military intervention in Yemen’ (2016) 65 *ICLQ* 61, 81. See also Karine Bannelier and Theodore Christakis, ‘Under the UN Security Council’s Watchful Eyes: Military Intervention by Invitation in the Malian Conflict’ (2013) 26 *LJIL* 855, 865; Gregory H Fox, ‘Intervention by Invitation’ in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (OUP 2015) 830.

<sup>30</sup> Ruys and Ferr (n29) 81–82.

<sup>31</sup> See *ibid* 83; Fox (n29) 827–828 and 833–839.

overall state practice suggests that this subjective criterion is not a strict legal requirement.<sup>32</sup> Rather, it indicates that a presumption in favour of the legitimacy of the de jure government still exists under international law, even in situations of civil war,<sup>33</sup> provided that the government satisfies a minimum threshold of effectiveness measured primarily by territorial control.<sup>34</sup> A government that enjoys effective control of some territory and is still recognised by the international community as the de jure government would appear to be legally entitled to invite an external intervention even if it lacks democratic legitimacy.<sup>35</sup> On the other hand, an intervention in favour of a leader who enjoys democratic legitimacy but lacks any effective control of territory will be considered unlawful unless it is explicitly endorsed by the UNSC.<sup>36</sup>

### *Negative Equality Principle*

The negative equality principle provides that military interventions by invitation are unlawful when their objective ‘is to settle an exclusively internal political strife in favor of the established government’.<sup>37</sup> Supporters of this principle interpret the right to self-determination as extending beyond peoples living under colonial domination, foreign occupation or racial regimes and encompassing the right of a people that already forms a state ‘freely to determine, without external interference, their political status’.<sup>38</sup> They argue that the provision of support to a government embroiled in a civil

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<sup>32</sup> This view has been supported by both supporters and deniers of the negative equality principle. See eg Bannelier-Christakis (n25) 761–763; Dapo Akande and Zachary Vermeer, ‘The Airstrikes against Islamic State in Iraq and the Alleged Prohibition on Military Assistance to Governments in Civil Wars’ (*EJIL: Talk!*, 2 February 2015) <<https://www.ejiltalk.org/the-airstrikes-against-islamic-state-in-iraq-and-the-alleged-prohibition-on-military-assistance-to-governments-in-civil-wars/>> accessed 27 October 2017.

<sup>33</sup> Hersch Lauterpacht, *Recognition in International Law* (CUP 1947) 93–94.

<sup>34</sup> Ruys and Ferr (n29) 106.

<sup>35</sup> See *ibid* 83–85; Gray (n28) 105. See also Bannelier and Christakis (n29) 865–866.

<sup>36</sup> Fox (n29) 837; Ruys and Ferr (n29) 83 and 95–96.

<sup>37</sup> Bannelier and Christakis (n29) 860.

<sup>38</sup> Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, UNGA Res 2625 (XXV) (24 October 1970) UN Doc A/RES/25/2625 (Friendly Relations Declaration). See also International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), art 1; ICESCR, art 1; Charter of the United Nations (adopted 25 June 1945, entered into force 24 October 1945) 1 UNTS XVI (UN Charter) arts 1 and 55. In support of this position, see Bannelier-Christakis (n25) 746.

war would interfere with the enjoyment of this right and contravene the non-intervention principle by tipping the scales in the government's favour.<sup>39</sup> Nevertheless, they accept that the principle may not be broad enough to prohibit the provision of lethal assistance short of the actual deployment of armed forces.<sup>40</sup>

Support for the negative equality principle is found in the 1975 'Wiesbaden' resolution of the Institut de Droit International (IDI). It requires states to refrain from providing assistance to the parties to a civil war save for humanitarian aid, UN-mandated assistance or technical or economic aid which is unlikely to substantially impact the outcome of the war.<sup>41</sup> However, due to the diverging views of its members, the IDI in its subsequent 2001 'Rhodes' resolution on 'Military Assistance on Request' declined to either affirm or reject this requirement.<sup>42</sup> Nevertheless, advocates of the negative equality principle assert that it is supported by state practice.<sup>43</sup> They argue that states generally refrain from asserting a right to intervene by invitation in a purely internal conflict to save a sitting government and instead take pains to justify their interventions on other grounds, such as the protection of nationals.<sup>44</sup>

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<sup>39</sup> Bannelier-Christakis (n25) 746–747; Ruys and Ferr (n29) 87–88. Support for the doctrine has also been evinced in Louise Doswald-Beck, 'The Legal Validity of Military Intervention by Invitation of the Government' (1985) 56 BYIL 189; Olivier Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (Bloomsbury 2010); George Nolte, 'Intervention by Invitation' in *Max Planck Encyclopaedia of Public International Law* (OUP, 2011 edn) para 22 <[https://scholar.princeton.edu/sites/default/files/slaughter/files/722\\_intrelprincipaltheories\\_slaughter\\_20110509zg.pdf](https://scholar.princeton.edu/sites/default/files/slaughter/files/722_intrelprincipaltheories_slaughter_20110509zg.pdf)> accessed 13 November 2017; Raphael Van Steenberghe, 'The Alleged Prohibition on Intervening in Civil Wars is Still Alive after the Airstrikes against Islamic State in Iraq: A Response to Dapo Akande and Zachary Vermeer' (*EJIL: Talk!*, 12 February 2015) <<https://www.ejiltalk.org/the-alleged-prohibition-on-intervening-in-civil-wars-is-still-alive-after-the-airstrikes-against-islamic-state-in-iraq-a-response-to-dapo-akande-and-zachary-vermeer/>> accessed 8 February 2018.

<sup>40</sup> Doswald-Beck (n39) 251; Corten, *The Law Against War* (n39) 306; Ruys (n28) 16 and 43–44; Ruys and Ferr (n29) 88 fn186.

<sup>41</sup> IDI, 'The Principle of Non-Intervention in Civil Wars' (Wiesbaden 1975) arts 2–3, <[http://www.idi-iil.org/app/uploads/2017/06/1975\\_wies\\_03\\_en.pdf](http://www.idi-iil.org/app/uploads/2017/06/1975_wies_03_en.pdf)> accessed 11 February 2018 (IDI Wiesbaden Resolution). Further support is found in a 1984 British Foreign Office policy document, which precludes the provision of assistance, apart from humanitarian aid, to the parties to a civil war. See Ruys (n28) 41–42.

<sup>42</sup> Bannelier and Christakis (n29) 862–863.

<sup>43</sup> See eg Doswald-Beck (n39) 251; Corten, *The Law Against War* (n39) 306.

<sup>44</sup> Ruys and Ferr (n29) 88–89 and 92; Bannelier and Christakis (n29) 863–864. See also Gray (n28) 93–95.

There has been some ambiguity regarding the appropriate test for establishing the existence of a ‘civil war’ for the purpose of the principle. The 1975 Wiesbaden Resolution suggested that the definition of a non-international armed conflict (NIAC) under customary international law (CIL) was the appropriate test.<sup>45</sup> However, the 2011 Rhodes Resolution equated a civil war with an NIAC as defined under Additional II Protocol to the Geneva Conventions (APII), which requires the involvement of a state actor and the armed opposition to enjoy effective control of territory.<sup>46</sup>

Advocates of the negative equality principle accept that there are some permissible exceptions to the general rule, including counter-interventions on the side of the de jure government following a previous external intervention on the side of the armed opposition,<sup>47</sup> interventions aimed at protecting third-state nationals that do not seek to influence the outcome of the war,<sup>48</sup> and interventions for other legitimate purposes, such as countering terrorism.<sup>49</sup> Counter-interventions may constitute a legitimate exercise of the right to collective self-defence where the previous external intervention on the side of the armed opposition was such as to transform the conflict into an international armed conflict.<sup>50</sup> Otherwise, state practice is unclear as to the exact level of external assistance required to trigger an entitlement to counter-intervene, although Tom Ruys and Luca Ferr suggested that it should be ‘likely to have a substantial impact’ on the outcome of the civil war.<sup>51</sup>

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<sup>45</sup> It excludes decolonisation conflicts from its scope. See IDI Wiesbaden Resolution, art 1.

<sup>46</sup> IDI Rhodes Resolution art 2; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609, art 1. A 1984 British Foreign Policy document also required effective control. See Ruys and Ferr (n29) 89 fn189. Van Steenberg, relying on the *travaux préparatoires* and purpose of the Wiesbaden resolution, argued that ‘insurgent movements’ must be interpreted as movements enjoying the support of a significant portion of the population and exercising the right to self-determination on their behalf. However, his restrictive interpretation does not appear to be widely shared. See Van Steenberghe (n39) post and comments in response thereto.

<sup>47</sup> As supported by: IDI Wiesbaden Resolution, art 5; and a 1984 British Foreign Policy document. See Ruys (n28) 45.

<sup>48</sup> Corten, *The Law Against War* (n39) 306; Ruys (n28) 41–43; Ruys and Ferr (n29) 88–89.

<sup>49</sup> Bannelier-Christakis (n25).

<sup>50</sup> Where the intervening state(s) exercised ‘overall control’ over the armed opposition groups they were assisting and the inviting government was subjected to an armed attack. See Fox (n29) 830–831; Ruys and Ferr (n29) 92–93.

<sup>51</sup> Ruys and Ferr (n29) 93.

Counter-interventions and interventions to protect nationals have proven highly prone to abuse. States have often justified interventions as aimed at protecting their nationals when their real aim was to either prevent or secure the overthrow of sitting governments.<sup>52</sup> Furthermore, states have frequently asserted a right of counter-intervention in circumstances where limited evidence has been adduced of a previous external intervention on the side of the armed opposition.<sup>53</sup> Counter-interventions are ostensibly aimed at rebalancing the scales and thereby restoring the right of the population to determine their political status free of external interference.<sup>54</sup> Bearing this logic in mind and having regard to the conditions attached to other self-help measures, Ruys and Ferr made a persuasive argument that counter-interventions should be subject to a proportionality test.<sup>55</sup>

Proponents of the purpose-based approach argue that interventions by invitation are allowed where they have a legitimate objective that does not involve the settlement of a purely internal dispute in the government's favour, for example, fighting terrorism or preventing armed groups from using the territory of the inviting state as a safe haven from which to launch armed attacks against the intervening state.<sup>56</sup> Interventions to fight terrorism are susceptible to abuse given that sitting governments have frequently sought to delegitimise armed opposition groups by indiscriminately labelling them all as terrorists.<sup>57</sup> However, Karine Bannelier and Theodore Christakis suggested that state practice infers that interventions by invitation to fight terrorism are only permissible against organisations that have been classified as terrorist organisations by the UNSC.<sup>58</sup>

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<sup>52</sup> Gray (n28) 93–95.

<sup>53</sup> *ibid* 95–100; Fox (n29) 830–831; Ruys and Ferr (n29) 93. Although Roth observed that more often than not there will have been a significant intervention on the side of the armed opposition as it would most likely be unable to engage in a civil war against the government's armed forces without it. See Brad Roth's comment in response to Akande and Vermeer (n32).

<sup>54</sup> Ruys and Ferr (n29) 92–93.

<sup>55</sup> *ibid* 93–94 and 97–98. See also Corten, *The Law Against War* (n39) 306.

<sup>56</sup> Bannelier-Christakis (n25) 745–747.

<sup>57</sup> *ibid* 747–748.

<sup>58</sup> They rely on France's 2013 intervention to fight terrorism in Mali in support of their argument. Notably, France's intervention was only directed against three UNSC-designated terrorist groups to the exclusion of the National Movement for the Liberation of Azawad (MNLA), a group fighting for the political rights of the Tuareg minority. See Bannelier and

Karine Bannelier-Christakis asserted that the purpose-based approach was reinforced by recent interventions by invitation to fight terrorism in Mali, Libya, Iraq and Syria.<sup>59</sup> She argued that the justifications provided by the intervening states indicated that they perceived the interventions to be legitimate because they were consensual *and* because they had the legitimate purpose of fighting terrorism.<sup>60</sup> However, several commentators challenged this argument. Dapo Akande and Zachary Vermeer observed that when legally justifying their participation in US-led airstrikes against ISIS in Iraq, the participating states made general, unqualified statements regarding the legality of interventions by invitation and avoided any reference to the negative equality principle.<sup>61</sup> Furthermore, Laura Visser observed that no state questioned the *prima facie* legality of Russia's intervention by invitation in Syria.<sup>62</sup> Christine Gray opined that the mere fact that an intervening state indicates that its aim is to fight terrorism does not necessarily mean that it implicitly accepts that its intervention would be illegal if it didn't have that purpose.<sup>63</sup>

Deniers of the negative equality principle argue that no rule currently exists, or perhaps ever existed, under CIL prohibiting states from intervening militarily in a civil war in response to a valid invitation from the *de jure* government.<sup>64</sup> They argue that insufficient state practice and *opinio juris* presently exists to support the principle.<sup>65</sup> In support of their argument, they

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Christakis (n29) 866–867. See also Ruys and Ferr (n29) 90–91. However, for an alternative interpretation of the Mali precedent, see Fox (n29) 828–829.

<sup>59</sup> Bannelier-Christakis (n25) 743.

<sup>60</sup> See generally *ibid.* In support of this argument, see generally Bannelier and Christakis (n29); Ruys and Ferr (n29) 91; Van Steenberghe (n39).

<sup>61</sup> Akande and Vermeer (n32).

<sup>62</sup> Laura Visser, 'Russia's Intervention in Syria' (*EJIL: Talk!*, 25 November 2015) <<https://www.ejiltalk.org/russias-intervention-in-syria/>> accessed 25 October 2017.

<sup>63</sup> Gray (n28) 89. See also Akande and Vermeer (n32).

<sup>64</sup> See eg Fox (n29).

<sup>65</sup> *ibid* 828; Eliav Lieblich, *International Law and Civil Wars: Intervention and Consent* (Routledge 2013); Yoram Dinstein, *Non-International Armed Conflicts in International Law* (CUP 2014) 76–79; Akande and Vermeer (n32); Claus Kreß, 'The Fine Line Between Collective Self-Defense and Intervention by Invitation: Reflections on the Use of Force against 'IS' in Syria' (*Just Security*, 17 February 2015) <<https://www.justsecurity.org/20118/clauss-krebs-force-isil-syria/>> accessed 11 February 2018; Visser (n62).



refer to the following passage from the ICJ's judgment in *Nicaragua*, which they interpret as encompassing interventions by invitation in civil wars:<sup>66</sup>

... it is difficult to see what would remain of the principle of non-intervention in international law if intervention, which is already allowable at the request of the government of a State, were also to be allowed at the request of the opposition.<sup>67</sup>

#### *Application to Syria*

Some commentators suggested that Bashar was not entitled to invite an external intervention as his regime did not represent the Syrian people.<sup>68</sup> However, the Assad government satisfied the tests of effectiveness and international recognition. It retained control over a substantial portion of territory, including Damascus, and was recognised as the de jure government by the international community as evident from the fact that it continued to occupy Syria's seat at the UN<sup>69</sup> and was considered legally capable of ratifying the Chemical Weapons Convention in October 2013.<sup>70</sup> Furthermore, no state challenged Bashar's legal entitlement to request assistance from Russia and Iran for the purpose of fighting terrorists.<sup>71</sup> Accordingly, Bashar would appear to have been prima facie entitled to consent to Russia and Iran's external interventions in Syria.

Since approximately 17 July 2012, a civil war has existed in Syria regardless of whether one applies the test outlined in the Wiesbaden or the Rhodes resolutions.<sup>72</sup> Accordingly, the question of whether a state is entitled to intervene by invitation in a civil war became relevant thereafter. It must be

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<sup>66</sup> See eg Fox (n29); Visser (n62). For an alternative interpretation, see Bannelier and Christakis (n29) 860; Bannelier-Christakis (n25) 745–746.

<sup>67</sup> *Nicaragua v USA* (n28) [246].

<sup>68</sup> See eg Marc Weller's comments in Nick Robins-Early, 'Russia says its Airstrikes in Syria are perfectly legal. Are they?' *The Huffington Post* (10 October 2015) <[https://www.huffingtonpost.com/entry/russia-airstrikes-syria-international-law\\_us\\_560d6448e4b0dd85030b0c08](https://www.huffingtonpost.com/entry/russia-airstrikes-syria-international-law_us_560d6448e4b0dd85030b0c08)> accessed 25 October 2017.

<sup>69</sup> Although, the Arab League did afford the National Coalition Syria's seat in March 2013.

<sup>70</sup> Bannelier-Christakis (n25) 761–763. See also Visser (n62).

<sup>71</sup> Bannelier-Christakis (n25) 762–763.

<sup>72</sup> ICRC, 'Syria: ICRC and Syrian Arab Red Crescent maintain aid effort amid increased fighting' (*ICRC*, 17 July 2012) <<http://www.icrc.org/eng/resources/documents/update/2012/syria-update-2012-07-17.htm>> accessed 21 June 2014. This view is supported by Ruys (n28) 41. See also 7.5.i in ch7.

recalled that the negative equality rule would not appear to prevent Russia and Iran from providing lethal support short of the deployment of troops even during a civil war. In support of this argument, whilst many states criticised Russia and Iran for escalating the armed conflict in Syria by arming the Assad regime, no state inferred that the arms transfers were *prima facie* illegal.<sup>73</sup>

In its official justification for its September 2015 intervention, Russia indicated that it had intervened in response to a request from Bashar for military assistance in combating ISIS and ‘*other terrorist groups operating in Syria*’.<sup>74</sup> By including the latter clause, Russia sought to maintain the prerogative to target groups that the Assad regime unilaterally classified as terrorists, including moderate FSA-affiliated armed groups. However, relying on the Mali precedent, Bannelier-Christakis suggested that Russian and Iranian interventions against armed groups other than ISIS and JAN – both UNSC-designated terrorist organisations – were not encompassed by the legitimate aim of ‘fighting terrorism’. In support of her argument, she observed that no state questioned the legality of Russia’s airstrikes against ISIS and JAN, whereas several states and the UNGA criticised its airstrikes against other ‘moderate’ armed opposition groups for escalating the conflict, exacerbating the humanitarian crisis and indirectly benefiting actual terrorists.<sup>75</sup> She argued that Russia’s own statements reinforced this argument as it never asserted a general right to intervene by invitation and instead repeatedly stressed that its only goal was combatting terrorism.<sup>76</sup>

Even if Russia’s airstrikes against moderate armed opposition groups did not fall within the ‘fighting terrorism’ exception, Russia could always seek to justify them as a counter-intervention in response to prior

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<sup>73</sup> Ruys (n28) 16–17, 43–48 and 52.

<sup>74</sup> S/2015/792, Annex (emphasis added). However, Phillips suggested that other statements by Russian officials indicated that the intervention was directed solely against ISIS. Christopher Phillips, *The Battle for Syria: International Rivalry in the New Middle East* (Yale UP 2016) 217.

<sup>75</sup> Bannelier-Christakis (n25) 763–764.

<sup>76</sup> *ibid* 764–766.

interventions by external actors in favour of the targeted groups.<sup>77</sup> It may be difficult to decisively prove which side first received external support, particularly as any intervention by invitation in favour of the Assad regime prior to the escalation of the situation into a civil war would be considered *prima facie* legal.<sup>78</sup> A case could be made that the airstrikes constituted a disproportionate counter-intervention; however, Ruys and Ferr's proportionality test<sup>79</sup> has arguably not yet crystallised into international law.

Accordingly, whilst the legal status of the negative equality principle appears to be unsettled, its operation would in any case be unlikely to impact the lawfulness of the Russian and Iranian interventions as a strong case could be made that they constituted legitimate counter-interventions and/or interventions to fight terrorism. Nevertheless, the Russian and Iranian interventions by invitation would still contravene international law if their support was provided with the knowledge and intent that it would be used to commit an internationally wrongful act, as will be discussed below.

#### **7.4 Non-consensual Military Interventions**

Various actors have intervened militarily in Syria since March 2011 without the consent of the Syrian government.<sup>80</sup> Several non-consensual interventions are examined below from a *jus ad bellum* perspective, including (i) the provision of lethal and/or non-lethal support to armed opposition groups to fight the Assad regime short of a major military intervention; (ii) threatened and actual military interventions in response to the use of chemical weapons; and (iii) interventions in the exercise of the individual and collective right of self-defence. This section also incorporates an examination of the humanitarian intervention principle and an analysis of the Syrian crisis through the responsibility to protect (R2P) prism.

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<sup>77</sup> Although it is accepted that the official legal justification that they provided for their intervention relied solely on the Assad government's invitation to help combat terrorists. See S/2015/792, Annex.

<sup>78</sup> Doswald-Beck (n39) 251; Corten, *The Law Against War* (n39) 306; Ruys (n28) 16 and 43–44; Ruys and Ferr (n29) 88 fn186.

<sup>79</sup> Ruys and Ferr (n29) 93–94 and 97–98.

<sup>80</sup> See s6.3.iv.d in ch6.

#### 7.4.i Assistance to Armed Opposition Groups to fight the Assad Regime

Several states have provided lethal and/or non-lethal support to armed opposition groups for the purpose of fighting the Assad regime, including Saudi Arabia, Qatar, the UAE, Turkey, the US, the UK and France.<sup>81</sup> CIL and the UN Charter require states to refrain from the threat or use of force in their international relations<sup>82</sup> and from directly or indirectly intervening in the internal or external affairs of another state.<sup>83</sup> In the *Nicaragua Merits* judgment, the ICJ held that the arming and training of armed opposition groups could involve the threat or use of force, but the mere provision of funding alone could not.<sup>84</sup> Nevertheless, it suggested that certain non-forcible interventions, including the provision of funding to armed opposition groups, would breach the non-intervention principle as would interventions involving the use of direct or indirect force, including ‘support for subversive or terrorist armed activities within another State’.<sup>85</sup>

The ICJ upheld these findings in the *Armed Activities* case.<sup>86</sup> Relying on the UN Declaration on Friendly Relations, the ICJ indicated that a state has a ‘duty of vigilance’ not to tolerate or acquiesce to the activities of armed groups within its territory, which are contrary to the rights of other states.<sup>87</sup> However, it determined that the mere failure of the territorial government to take action to end the activities of armed groups operating in a remote border region at a time when the government was not in a position to do so did not of itself amount to toleration or acquiescence.<sup>88</sup> Nor did subsequent ‘clear action’ taken by the government to end the activities of armed groups, which

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<sup>81</sup> *ibid.*

<sup>82</sup> UN Charter, art 2 (4).

<sup>83</sup> *Nicaragua v USA* (n28) [202]. See also Friendly Relations Declaration; Draft Declaration on Rights and Duties of States, UNGA Res 375 (6 December 1949) UN Doc A/RES/375, Annex, arts 3–4; Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, UNGA Res 2131 (XX) (21 December 1965) UN Doc A/RES/20/2131; UNSC Res 1234 (9 April 1999) UN Doc S/RES/1234, para 8.

<sup>84</sup> *Nicaragua v USA* (n28) [228].

<sup>85</sup> *ibid* [205] and [228]. Ruys suggested that any non-lethal aid ‘capable of influencing the course of the hostilities’ would most likely give rise to a breach of the non-intervention principle. See Ruys (n28) 50.

<sup>86</sup> *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Judgment) [2005] ICJ Rep 168 [161]–[163].

<sup>87</sup> *ibid* [300].

<sup>88</sup> *ibid* [301].

was ultimately unsuccessful due to the ‘difficulty and remoteness of the terrain’ in which the armed groups were operating.<sup>89</sup> Accordingly, it appears that proof of actual tolerance or acquiescence would need to be adduced in order to establish a breach of the duty of vigilance.<sup>90</sup>

In light of this discussion, states that provided arms and training to armed opposition groups to fight the Assad regime would appear to have prima facie breached the non-use of force and non-intervention principles.<sup>91</sup> Similarly, states that provided money alone and certain other forms of non-lethal support (other than strictly humanitarian aid) would also appear to have breached the non-intervention principle.<sup>92</sup> In addition, neighbouring states, including Turkey and Jordan, that allowed their territory to be used as a base for FSA operations would appear to have breached their ‘duty of vigilance’. Christopher M. Ford observed that in the *Nicaragua* case the assistance provided was ‘directed against a state’ as opposed to a non-state actor (NSA) and, accordingly, he suggested that an argument could be made that assistance provided for the specific purpose of fighting ISIS would not constitute a use of force against Syria.<sup>93</sup> In any case, the provision of assistance in such circumstances would appear to breach the non-intervention principle.

Nevertheless, academics have debated whether or not the above prima facie violations of international law could be justified on one of the following grounds: self-defence, intervention by invitation, self-determination, lawful countermeasure and counter-intervention.

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<sup>89</sup> *ibid* [303].

<sup>90</sup> Gray (n28) 83–84.

<sup>91</sup> See Michael N Schmitt, ‘Legitimacy versus Legality Redux: Arming the Syrian Rebels’ (2014) 7 *Journal of National Security Law and Policy* 139, 142–145 and 158; Christopher M Ford, ‘Syria: A Case Study in International Law’ (2017) 85 *UCinLRev* 185, 203–204; ‘Austrian Position on Arms Embargo in Syria as of 13 May 2013’ *The Guardian* (15 May 2013) <<https://www.theguardian.com/world/julian-borger-global-security-blog/interactive/2013/may/15/austria-eu-syria-arms-embargo-pdf>> accessed 26 October 2017.

<sup>92</sup> Ruys (n28) 47–50; Gray (n28) 114.

<sup>93</sup> Ford, ‘Syria’ (n91) 204–205.

### *Self-defence*

The *jus ad bellum* rules stipulate that the threat or use of force in international relations is only permitted where authorised by the UNSC or where a UN member state is legitimately exercising the right of individual or collective self-defence.<sup>94</sup> The UNSC has not authorised any forcible measures in response to the Syrian crisis hence this justification is unavailable. The self-defence argument is also difficult to sustain as forcible defensive measures will only be legitimate where a state has been subjected to an actual or imminent armed attack and the requirements of proportionality, necessity and immediacy have been satisfied.<sup>95</sup> Neither the Gulf states nor the US, UK or France were subjected to an actual or imminent armed attack by Syria. Accordingly, their provision of assistance to armed opposition groups engaged in an NIAC with the Assad government could not be justified as an act of individual self-defence. Although Turkey and Jordan have been subjected to cross-border incidents, it is questionable whether these incidents satisfied the gravity threshold for an armed attack and whether the requirements of proportionality, necessity and immediacy were satisfied.

### *Intervention by Invitation*

A tentative argument could be made that the provision of support to armed opposition groups constituted a legitimate intervention by invitation. This argument posits that if the main opposition bloc, the SOC, was considered the government of Syria, external states would be entitled to provide support to armed groups affiliated with it in their armed conflict with the Assad regime, which would then be considered the armed opposition.<sup>96</sup> However, in order for the SOC to qualify as the government of Syria under international law, it would need to satisfy the objective criterion of effectiveness and the subjective criterion of international recognition. The SOC did not satisfy the criterion of effectiveness as the Assad regime maintained effective control of most strategic areas, including Damascus.<sup>97</sup> Nor did it satisfy the subjective

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<sup>94</sup> UN Charter, arts 42 and 51.

<sup>95</sup> *Nicaragua v USA* (n28) [176] and [195].

<sup>96</sup> Schmitt (n91) 152.

<sup>97</sup> *ibid* 152–154; Tom Ruys (n28) 37–38. Regarding the effectiveness principle, see Malcolm Shaw, *International Law* (5th edn, CUP 2003) 377–379. Whereas the opposition in Libya

criterion of international recognition as no states recognised it as the government of Syria under international law, a point that the US explicitly stressed.<sup>98</sup>

### *Self-determination*

Akande advanced a tenuous argument that states may have been entitled to provide assistance to Syrian armed opposition groups, which represented a people exercising their right to ‘freely determine their political status’.<sup>99</sup> The UN Declaration on Friendly Relations provides that states are entitled to provide support ‘in accordance with the purposes and principles of the Charter’ to peoples seeking to exercise their right to self-determination.<sup>100</sup> This would appear to include by analogy the legitimate representatives of those peoples.<sup>101</sup> Nonetheless, applying the self-determination argument to Syria is problematic. First, it is unclear if the right to assist peoples exercising their right to self-determination encompasses a right to provide lethal assistance. During the 1960s and 1970s, several socialist and developing states asserted that it did and certain UNGA resolutions supported this contention.<sup>102</sup> However, numerous Western states rejected this argument leaving the legal status of the asserted right unsettled.<sup>103</sup>

Second, several commentators have suggested that state practice

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was recognised as the legitimate government of Libya before it exercised effective control over all strategic areas, including the capital, this might not necessarily represent a reliable precedent given the chaos that subsequently ensued.

<sup>98</sup> This is a view shared by several legal commentators. See *ibid* 154; Ruys (n28) 38; Fox (n29) 837–838; Bannelier-Christakis (n25) 761–763. See also Dapo Akande, ‘Self Determination and the Syrian Conflict – Recognition of Syrian Opposition as Sole Legitimate Representative of the Syrian People: What Does this Mean and What Implications Does it Have?’ (*EJIL: Talk!*, 6 December 2012) <<https://www.ejiltalk.org/self-determination-and-the-syrian-conflict-recognition-of-syrian-opposition-as-sole-legitimate-representative-of-the-syrian-people-what-does-this-mean-and-what-implications-does-it-have/>> accessed 20 October 2017; Rosa Brooks, ‘So You Want to Intervene in Syria Without Breaking the Law?’ *Foreign Policy* (20 June 2013) <<http://foreignpolicy.com/2013/06/20/so-you-want-to-intervene-in-syria-without-breaking-the-law/#>> accessed 28 October 2017; Visser (n62).

<sup>99</sup> Common Article 1(1) of ICCPR and ICESCR

<sup>100</sup> Friendly Relations Declaration.

<sup>101</sup> Akande, ‘Self Determination’ (n98).

<sup>102</sup> *ibid*; Schmitt (n91) 155; Ruys (n28) 34–35.

<sup>103</sup> Akande, ‘Self Determination’ (n98); Ruys (n28) 34–35. Cassese suggested that third states are allowed to provide ‘any assistance short of dispatching armed troops’. Cassese, *International Law* (n16) 62.

indicates that the right to self-determination is limited to peoples living under colonial domination, foreign occupation or racial regimes.<sup>104</sup> Akande made a tentative argument that the recognition of the SOC as the ‘legitimate’ or ‘sole legitimate’ representative of the Syrian people could feasibly reflect an implicit acknowledgement that Syrians are exercising their right to internal self-determination through the SOC.<sup>105</sup> However, he cautioned that there were persuasive reasons to oppose the crystallisation of a right to internal self-determination given the risks of abuse.<sup>106</sup> Furthermore, even if this argument were accepted it would not justify the provision of assistance to armed opposition groups not affiliated with the SOC. Finally, if one accepts the negative equality principle, the provision of support to armed opposition groups could in fact contravene the right of internal self-determination if it sought to settle an exclusively internal political strife in favour of the opposition.

#### *Counter-intervention*

If one accepts the negative equality principle, an argument could be made that the provision of arms to armed opposition groups constituted a legitimate counter-intervention in response to a prior external intervention on the side of the Assad government. This argument is difficult to sustain, however, as *opinio juris* does not appear to exist in support of a right of counter-intervention in favour of armed opposition groups.<sup>107</sup>

#### *Countermeasure*

A tentative argument could be made that the provision of non-lethal aid to armed opposition groups in Syria constituted a legitimate countermeasure.<sup>108</sup>

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<sup>104</sup> Akande, ‘Self Determination’ (n98); Cassese, *International Law* (n16) 61–63; Ruys (n28) 35–36; Schmitt (n91) 154–155.

<sup>105</sup> Akande, ‘Self Determination’ (n98).

<sup>106</sup> *ibid.*

<sup>107</sup> Corten, *The Law Against War* (n39) 260–261; 46 and 52; Ruys (n28). See also Dapo Akande, ‘Would it be Lawful for European (or other) States to Provide Arms to the Syrian Opposition?’ (*EJIL: Talk!*, 17 January 2013) <<https://www.ejiltalk.org/would-it-be-lawful-for-european-or-other-states-to-provide-arms-to-the-syrian-opposition/>> accessed 25 October 2017.

<sup>108</sup> Lethal assistance would automatically be excluded as countermeasures involving the threat or use of force constitute armed reprisals, which are prohibited under CIL. See ILC 2001 Draft Articles, 131 (art 50); Carsten Stahn, ‘Syria and the Semantics of Intervention,



However, it would need to be shown that the criteria for the implementation of countermeasures were satisfied. Accordingly, it would need to be demonstrated that the states providing the non-lethal aid had suffered individual harm as a result of an internationally wrongful act by Syria or that third states are allowed to implement countermeasures in response to violations of *erga omnes* obligations.<sup>109</sup> The states providing the aid would also need to demonstrate that the aid provided was aimed at remedying Syria's breach rather than overthrowing the Assad regime,<sup>110</sup> and that it did not affect their obligations with regard to the protection of fundamental human rights and peremptory norms.<sup>111</sup>

#### *Humanitarian Intervention*

States could not rely on a unilateral right of humanitarian intervention to justify the provision of assistance to Syrian armed opposition groups as no such right presently exists under international law as will be demonstrated below.

#### *Other Obligations*

Notably, all states are required under CIL not to encourage violations of IHL and 'to exert their influence, to the degree possible' to stop violations thereof.<sup>112</sup> Arguably, this rule requires states not to provide aid and assistance to armed groups if there is an expectation that it may be used to commit IHL

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Aggression and Punishment: On 'Red Lines' and 'Blurred Lines' (2013) 11 JICJ 955, 968; S Darcy, 'Military force against Syria would be a reprisal rather than humanitarian intervention, but that doesn't make it any more lawful' (*EJIL: Talk!*, 1 September 2013) <<https://www.ejiltalk.org/military-force-against-syria-would-be-a-reprisal-rather-than-humanitarian-intervention-but-that-doesnt-make-it-any-more-lawful/>> accessed 20 October 2017.

<sup>109</sup> Evidence has been adduced to show that the Assad regime has violated *erga omnes* obligations, including the obligation to refrain from torture. See eg UNHRC, 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic' (18 July 2013) UN Doc A/HRC/23/58 (A/HRC/23/58), para 87.

<sup>110</sup> André Nollkaemper, 'A Shared Responsibility Trap: Supplying Weapons to the Syrian Opposition' (*EJIL: Talk!*, 17 June 2013) <<https://www.ejiltalk.org/a-shared-responsibility-trap-supplying-weapons-to-the-syrian-opposition/>> accessed 25 October 2017.

<sup>111</sup> ILC 2001 Draft Articles, 131–134 (art 50).

<sup>112</sup> Henckaerts and Doswald-Beck, *Rules* (n12), Rule 144. The EU's internal regulations on the export of military equipment and technology include safeguards aimed at ensuring that military equipment and technology supplied by EU member states is not used in the perpetration of gross violations of IHL. See Austrian Position on Arms Embargo' (n91).

violations.<sup>113</sup> This would preclude the provision of assistance to armed groups that are suspected of having previously committed serious violations of IHL, including groups identified as suspected perpetrators in UNCOI reports. Furthermore, as a form of best practice, states should arguably perform advance risk assessments in order to determine if the intended recipient is likely to use the aid to perpetrate IHL violations and to refrain from providing the aid if it is.<sup>114</sup> States should also seek to provide training on IHL compliance to recipient armed groups, monitor their compliance with IHL and render any future assistance conditional upon proven compliance with IHL.<sup>115</sup>

In addition, UNSC resolutions impose positive obligations on states to ensure that no aid or assistance is provided to organisations, which it has designated as terrorist organisations, or to any individuals or entities, which are associated with any organisation so designated.<sup>116</sup> With regard to Syria, this includes JAN and ISIS. States that have directly supplied terrorist groups are automatically in breach of these obligations. However, these obligations also oblige states to take due care to ensure that arms transferred to armed groups in Syria do not ‘find their way to al Qaeda affiliated groups’ and where it were ‘reasonable in the circumstances to conclude that they would likely do so, transfer of the arms would be unlawful’.<sup>117</sup> States have sought to

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<sup>113</sup> UNHRC, ‘Human rights abuses and international humanitarian law violations in the Syrian Arab Republic, 21 July 2016–28 February 2017: Conference room paper of the Independent International Commission of Inquiry on the Syrian Arab Republic’ (10 March 2017) UN Doc A/HRC/34/CRP.3 (A/HRC/34/CRP.3), paras 100–101; Ruys (n28) 26–31 and 51.

<sup>114</sup> Parties to the Arms Trade Treaty are required to perform risk assessments of this nature. However, the main state suppliers of weaponry to armed opposition groups in Syria, including Qatar, Saudi Arabia, Turkey, the US and the UAE, are not parties to the Arms Trade Treaty, which in any case only came into effect on 24 December 2014. See Arms Trade Treaty (adopted 2 April 2013, entered into force 24 December 2014) 52373 UNTS, art 7. See also Nathalie Weizmann, ‘What Happens if American-Trained Rebels Commit War’ (*Just Security*, 18 August 2015) <<https://www.justsecurity.org/25469/responsible-american-trained-rebels-commit-war-crimes/>> accessed 25 October 2017; Abby Zeith, ‘The Arming of Syrian Rebels – Does it Breach the Arms Trade Treaty?’ (*Just Security*, 13 October 2014) <<https://www.justsecurity.org/16298/arming-syrian-rebels-breach-arms-trade-treaty/>> accessed 25 October 2017.

<sup>115</sup> Christopher M Ford, ‘Syria: Can International Law Cope? Workshop Report’ (2016) 92 *IntlLStud* 340, 350.

<sup>116</sup> See eg UNSC Res 2083 (17 December 2012) UN Doc S/RES/2083, para 1.

<sup>117</sup> Schmitt (n91) 146. See also ‘Austrian Position on Arms Embargo’ (n91); Ruys (n28).

discharge their obligations in this regard by channelling their weapons through the FSA's Supreme Military Council or by only providing weapons to vetted recipients. However, it is questionable whether these safeguards are sufficient given the extent of cooperation on the battlefield between FSA-affiliated groups and JAN, and the strong possibility of arms provided to moderates being seized by JAN and ISIS.

#### *Application to Syria*

The above discussion suggests that states that have provided assistance to Syrian armed opposition groups, particularly in the form of lethal aid, may struggle to justify their actions under international law.

#### **7.4.ii Military Action in response to the use of Chemical Weapons**

In 2012, Obama indicated that America would take action, possibly of a military nature, if chemical weapons were utilised or moved around in Syria<sup>118</sup> and that those responsible for their use would be held accountable.<sup>119</sup> He reportedly authorised the CIA-administered train and equip programme in June 2013 in response to the Assad regime's use of chemical weapons.<sup>120</sup> In response to the chemical weapons attack against Ghouta in August 2013, the US planned limited strikes against select regime positions aimed at degrading the Assad regime's capacity to use chemical weapons, holding it accountable for past use of chemical weapons, and deterring the future use of chemical weapons.<sup>121</sup> In a blatant display of unilateralism, Obama indicated that he would not seek UNSC approval for the strikes, inferring that the UNSC had proven itself unable and unwilling to hold the Assad regime accountable, nor

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<sup>118</sup> 'Remarks by the President to the White House Press Corps' (White House Press Release, 20 August 2012) <<https://obamawhitehouse.archives.gov/the-press-office/2012/08/20/remarks-president-white-house-press-corps>> accessed 6 February 2018.

<sup>119</sup> 'Remarks by the President at the Nunn-Lugar Cooperative Threat Reduction Symposium' (White House Press Release, 3 December 2012) <<https://obamawhitehouse.archives.gov/the-press-office/2012/12/03/remarks-president-nunn-lugar-cooperative-threat-reduction-symposium>> accessed 6 February 2018. See also Eric Sterner, 'Dictators and Deterrence: Syria's Assad, Chemical Weapons, and the Threat of U.S. Military Action' (2014) 33 *Comparative Strategy* 407, 409.

<sup>120</sup> Schmitt (n91) 139; Phillips (n74) 144; Ford, 'Syria' (n91) 203.

<sup>121</sup> 'Statement by the President on Syria' (White House Press Release, 31 August 2013) <<https://obamawhitehouse.archives.gov/the-press-office/2013/08/31/statement-president-syria>> accessed 14 February 2018.

would he await the findings of the UN Mission to Investigate Allegations of the Use of Chemical Weapons in the Syrian Arab Republic.<sup>122</sup>

As previously discussed, Obama ultimately declined to authorise the strikes. Instead, the US and Russia devised a framework for destroying Syria's chemical weapons arsenal in September 2013. The UNSC resolution endorsing the framework was not adopted under Chapter VII, but it threatened the imposition of measures under Chapter VII in the event of non-compliance.<sup>123</sup> It clarified that any future enforcement action would be decided by the UNSC rather than unilaterally.<sup>124</sup> It declared that the use of chemical weapons anywhere constituted a threat to international peace and security.<sup>125</sup> Accordingly, it sought to establish a universal prohibition on the use of chemical weapons and commit the UNSC to addressing future violations.<sup>126</sup>

Trump subsequently authorised limited military strikes in response to a chemical weapons attack on 4 April 2017, allegedly perpetrated by the Assad regime. Russia, Iran and Bolivia condemned the strikes as unlawful, whereas several Western and Middle Eastern states voiced political support.<sup>127</sup> Trump declined to give an official justification for the strikes under international law. However, he stated in a letter to the US Congress that

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<sup>122</sup> *ibid*; 'Senate Foreign Relations Committee Resolution on Syria' (3 September 2013) <<http://blogs.wsj.com/washwire/2013/09/03/full-text-senate-foreign-relations-committee-resolution-on-syria>> accessed 14 February 2018; 'Remarks by the President in Address to the Nation on Syria' (White House Press Release, 10 September 2013) <<https://obamawhitehouse.archives.gov/the-press-office/2013/09/10/remarks-president-address-nation-syria>> accessed 14 February 2018.

<sup>123</sup> UNSC Res 2118 (27 September 2013) UN Doc S/RES/2118 (S/RES/2118), para 21.

<sup>124</sup> Stahn, 'Syria and the Semantics of Intervention' (n108) 964.

<sup>125</sup> S/RES/2118, para 1.

<sup>126</sup> Stahn, 'Syria and the Semantics of Intervention' (n108) 973–974 and 977.

<sup>127</sup> According to Hakimi, the following states and regional organisations expressed support for the strikes: Australia, Bahrain, Canada, France, Germany, Israel, Italy, Kuwait, Jordan, the Netherlands, New Zealand, Poland, Qatar, Saudi Arabia, Spain Turkey, the EU, the UAE, the United Kingdom and Ukraine. See Monica Hakimi, 'The Attack on Syria and the Contemporary Jus ad Bellum' (*EJIL: Talk!*, 15 April 2018) <<https://www.ejiltalk.org/the-attack-on-syria-and-the-contemporary-jus-ad-bellum/>> accessed 20 April 2018. See also Gregor Aisch, Yonette Joseph and Anjali Singhvi, 'Which Countries Support and Which Oppose the U.S. Missile Strikes in Syria' *The New York Times* (Middle East, 9 April 2017) <<https://www.nytimes.com/interactive/2017/04/07/world/middleeast/world-reactions-syria-strike.html>> accessed 20 October 2017.

he had acted ‘in the vital national security and foreign policy interests of the United States’.<sup>128</sup> He indicated that the purpose of the strikes was to:

... degrade the Syrian military’s ability to conduct further chemical weapons attacks and to dissuade the Syrian regime from using or proliferating chemical weapons, thereby promoting the stability of the region and averting a worsening of the region’s current humanitarian catastrophe.<sup>129</sup>

In May 2017, the French President, Emmanuel Macron, declared that the use of chemical weapons by the Assad regime would result ‘in reprisals and an immediate riposte’.<sup>130</sup> In April 2018, the US, the UK and France launched military strikes in response to another alleged chemical weapon attack by the Assad regime. Statements by their respective leaders suggest that the purpose of the attacks was to degrade the Assad regime’s chemical weapons capability, halt its production and use of chemical weapons, deter the future use of chemical weapons and prevent the erosion of the international norm prohibiting their use.<sup>131</sup> The US and France declined to provide a justification for their actions under international law, whereas the UK sought to rely upon a right of unilateral humanitarian intervention ‘to alleviate the extreme humanitarian suffering of the Syrian people by degrading the Syrian regime’s chemical weapons capability and deterring their further use’.<sup>132</sup> Russia, China, Iran and Bolivia condemned the strikes as an act of aggression,

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<sup>128</sup> ‘Letter from the President to the Speaker of the House of Representatives and the President Pro Tempore of the Senate’ (White House Press Release, 8 April 2017) <<https://www.whitehouse.gov/briefings-statements/letter-president-speaker-house-representatives-president-pro-tempore-senate/>> accessed 27 February 2018.

<sup>129</sup> *ibid.*

<sup>130</sup> ‘Chemical weapons a ‘red line’ in Syria – Macron’ (*RTE*, 30 May 2017) <<https://www.rte.ie/news/world/2017/0529/878773-macron-putin/>> accessed 26 April 2018.

<sup>131</sup> Jen Kirby, ‘Read Trump’s statement on Syria strike: “They are crimes of a monster”’ (*Vox*, 13 April 2018) <<https://www.vox.com/2018/4/13/17236862/syria-strike-donald-trump-chemical-attack-statement>> accessed 20 April 2018; ‘Statements by Theresa May and Emmanuel Macron on the Syria Strike’ *The New York Times* (13 April 2018) <<https://www.nytimes.com/2018/04/13/world/europe/theresa-mays-statement-on-the-syria-strike.html>> accessed 20 April 2018.

<sup>132</sup> ‘Policy paper: Syria action – UK government legal position’ (14 April 2018) <<https://www.gov.uk/government/publications/syria-action-uk-government-legal-position/syria-action-uk-government-legal-position>> accessed 20 April 2018.

whereas Iraq indicated they could have ‘dangerous consequences’.<sup>133</sup> However, numerous other states supported or condoned the strikes.<sup>134</sup>

It is difficult to establish a valid legal basis for the April 2017 and April 2018 strikes or indeed for Obama and Macron’s threats to use force in response to the use of chemical weapons in Syria. Notably, in the *Nuclear Weapons* Advisory Opinion, the ICJ held that ‘If the envisaged use of force is itself unlawful, the stated readiness to use it would be a threat prohibited under Article 2, paragraph 4’.<sup>135</sup> Syria is legally obliged to refrain from using chemical weapons.<sup>136</sup> However, no *sui generis* rule currently exists under international law allowing third states to threaten or use force to sanction or deter the use of chemical weapons or coerce a state into complying with its obligation not to use them.<sup>137</sup> The April 2017 strikes and the international reaction thereto did not change CIL in this regard.<sup>138</sup>

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<sup>133</sup> Hannah Ellis-Petersen and Peter Beaumont, ‘World reacts to overnight strikes on Syria by US, UK and French forces’ *The Guardian* (14 April 2018) <<https://www.theguardian.com/world/2018/apr/14/airstrikes-syria-world-reacts-bombing-us-uk-french-forces>> accessed 20 April 2018.

<sup>134</sup> *ibid*; Hakimi (127).

<sup>135</sup> *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226 [47].

<sup>136</sup> Prior to the Ghouta attack, Syria was a party to the Geneva Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare (adopted 17 June 1925, entered into force 08 February 1928) 94 LNTS 65. Syria was also prohibited from using chemical weapons under customary IHL. Henckaerts and Doswald-Beck, *Rules* (n12) Rule 74. After the attack, Syria also ratified the Chemical Weapons Convention.

<sup>137</sup> In support of this position, see Stahn, ‘Syria and the Semantics of Intervention’ (n108); Schmitt (n91) 147. See also Dapo Akande, ‘Does Use of Chemical Weapons Justify Intervention in Syria?’ (*EJIL: Talk!*, 27 April 2013) <<https://www.ejiltalk.org/does-use-of-chemical-weapons-justify-intervention-in-syria/>> accessed 20 October 2017; Professor von Heinegg’s observations in ‘Viewpoints: Is there legal basis for military intervention in Syria?’ (*BBC*, 29 August 2013) <<http://www.bbc.com/news/world-23847169>> accessed 24 October 2017.

<sup>138</sup> Milanovic suggested that the *opinio juris* element in particular was lacking as the US failed to provide an official justification under international law for its April 2017 strikes. Marko Milanovic, ‘The Syria Strikes: Still Clearly Illegal’ (*EJIL: Talk!*, 15 April 2018) <<https://www.ejiltalk.org/the-syria-strikes-still-clearly-illegal/>> accessed 20 April 2018. See also Jack Goldsmith and Oona Hathaway, ‘Bad Legal Arguments for the Syria Strikes’ (*Just Security*, 14 April 2018) <<https://www.justsecurity.org/54925/bad-legal-arguments-syria-strikes/>> accessed 20 April 2018; Anders Henriksen, ‘The Legality of Using Force to Deter Chemical Warfare’ (*Just Security*, 17 April 2018) <<https://www.justsecurity.org/55005/legality-international-law-force-deter-chemical-warfare/>> accessed 20 April 2018.

Furthermore, the strikes could not be justified as legitimate countermeasures. Countermeasures must be aimed at bringing about compliance with international law rather than punishing states and holding them accountable for past violations.<sup>139</sup> The US, France and the UK did not appear to suffer any individual material harm as a result of Syria's use of chemical weapons and it is questionable whether Syria's use of chemical weapons amounted to a breach of an *erga omnes* obligation. Even if it did, the law is still unsettled regarding whether or not third states are entitled to implement countermeasures in these circumstances. Finally, and most importantly, countermeasures involving the use of force are considered illegal armed reprisals.<sup>140</sup> Any relaxation of the prohibition on armed reprisals would be unwelcome given the potential for abuse.<sup>141</sup>

In addition, the strikes could not be justified as a legitimate act of individual or collective self-defence. Neither the US, the UK nor France were subjected to an actual or imminent armed attack by Syria.<sup>142</sup> Furthermore, none of their regional allies were subjected to an armed attack by Syria involving the use of chemical weapons. A tenuous argument could be made that the effects of the regime's use of chemical weapons could drift across the border impacting neighbouring states, including Turkey and Jordan.<sup>143</sup> However, such a scenario would depend on atmospheric factors and the geographic proximity of the site of chemical weapons use to the border.<sup>144</sup> Furthermore it is uncertain whether, absent intent, the effects of chemical weapons drifting across the border can amount to an armed attack.<sup>145</sup> Even if

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<sup>139</sup> Stahn, 'Syria and the Semantics of Intervention' (n108) 968–970.

<sup>140</sup> See generally *ibid*; Darcy (n108); Aldo Zammit Borda, 'The Precedent Set by the US Reprisal Against the Use of Chemical Weapons in Syria' (*EJIL: Talk!*, 2 June 2017) <<https://www.ejiltalk.org/the-precedent-set-by-the-us-reprisal-against-the-use-of-chemical-weapons-in-syria/>> accessed 23 October 2017. However, see also *Oil Platforms (Islamic Republic of Iran v United States of America)* (Judgment) [2003] ICJ Rep 161, Separate Opinion of Simma J, [12]–[13].

<sup>141</sup> Stahn, 'Syria and the Semantics of Intervention' (n108) 956–960 and 977; Darcy (n108).  
<sup>142</sup> Obama himself acknowledged 'the absence of a direct or imminent threat to our security'. See President's Remarks on Syria' 10 September 2013 (n122).

<sup>143</sup> Ashley Deeks, 'Syria, Chemical Weapons, and Possible U.S. Military Action' (*Lawfare*, 10 December 2012) <<https://www.lawfareblog.com/syria-chemical-weapons-and-possible-us-military-action>> accessed 14 February 2018.

<sup>144</sup> *ibid*.

<sup>145</sup> Akande, 'Does Use of Chemical Weapons Justify Intervention' (n137).

it did, in the absence of an actual or imminent armed attack of this nature, no right of self-defence would arise and neither Turkey nor Jordan requested any assistance to avert an imminent armed attack. Nor did any of the striking states indicate that they were exercising the collective right of self-defence.

Finally, the striking states could not rely on a unilateral right of humanitarian intervention to justify the strikes because no such right currently exists under international law. Even proponents of such a right generally assert that certain criteria must be satisfied before it can be exercised. It is unlikely that these criteria were fulfilled in 2017<sup>146</sup> or 2018<sup>147</sup> as will be discussed below. Accordingly, both the April 2017<sup>148</sup> and the April 2018

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<sup>146</sup> See Michael Schmitt and Chris Ford, 'The Use of Force in Response to Syrian Chemical Attacks: Emergence of a New Norm?' (*Just Security*, 8 April 2017) <<https://www.justsecurity.org/39805/force-response-syrian-chemical-attacks-emergence-norm/>> accessed 20 October 2017; Kevin Jon Heller, 'Why Unilateral Humanitarian Intervention is Illegal and Potentially Criminal' (*Opinio Juris*, 20 April 2017) <<http://opiniojuris.org/2017/04/20/against-unilateral-humanitarian-intervention-and-why-it-can-be-criminal/>> accessed 20 October 2017; Ben Saul, 'US Missile Strikes Expose the Untenable Status Quo in International Law' (*Chatham House Expert Comment*, 26 April 2017) <<https://www.chathamhouse.org/expert/comment/us-missile-strikes-expose-untenable-status-quo-international-law>> accessed 20 October 2017.

<sup>147</sup> See Milanovic, 'The Syria Strikes' (n138); Dapo Akande, 'The Legality of the UK's Air Strikes on the Assad Government in Syria' (16 April 2018) <[https://d3n8a8pro7vnm.cloudfront.net/campaigncountdown/pages/2243/attachments/original/1523875290/Akande\\_Opinion\\_UK\\_Government's\\_Legal\\_Position\\_on\\_Syria\\_Strike\\_April\\_2018.pdf?1523875290](https://d3n8a8pro7vnm.cloudfront.net/campaigncountdown/pages/2243/attachments/original/1523875290/Akande_Opinion_UK_Government's_Legal_Position_on_Syria_Strike_April_2018.pdf?1523875290)> accessed 23 April 2018; Ray Murphy, 'What can be achieved by missile strikes on Syria?' (*RTE Brainstorm*, 16 April 2018) <<https://www.rte.ie/eile/brainstorm/2018/0416/954780-what-can-be-achieved-by-missile-strikes-on-syria/>> accessed 23 April 2018; Henriksen (n138); Harold Hongju Koh, 'The Real "Red Line" Behind Trump's April 2018 Syria Strikes' (*Just Security*, 16 April 2018) <<https://www.justsecurity.org/54952/real-red-line-behind-trumps-april-2018-syria-strikes/>> accessed 20 April 2018.

<sup>148</sup> In support of this conclusion, see Marty Lederman, 'Why the strikes against Syria probably violate the U.N. Charter and (therefore) the U.S. Constitution' (*Just Security*, 6 April 2017) <<https://www.justsecurity.org/39674/syrian-strikes-violate-u-n-charter-constitution/>> accessed 20 October 2017; Ashley Deeks, 'How Does the Syria Situation Stack up to the "Factors" that Justified Intervention in Kosovo?' (*Lawfare*, 7 April 2017) <<https://www.lawfareblog.com/how-does-syria-situation-stack-the-factors-justified-intervention-kosovo>> accessed 20 October 2017; Ryan Goodman, 'What Do Top Legal Experts Say About the Syria Strikes?' (*Just Security*, 7 April 2017) <<https://www.justsecurity.org/39712/top-legal-experts-syria-strikes/>> accessed 20 October 2017; Schmitt and Ford (n146); Heller, 'Why Unilateral Humanitarian Intervention is Illegal' (n146); Nancy Simons, 'The Legality Surrounding the US Strikes in Syria' (*Opinio Juris*, 25 April 2017) <<http://opiniojuris.org/2017/04/25/the-legality-surrounding-the-us-strikes-in-syria/>> accessed 20 October 2017; Zammit Borda (n140); Milanovic, 'The Syria Strikes' (n138). Alternatively, for a defence of the strike as a legitimate humanitarian intervention in response to the use of chemical weapons, see Harold Hongju Koh, 'Not Illegal: But Now The Hard Part Begins' (*Just Security*, 7 April 2017) <<https://www.justsecurity.org/39695/illegal-hard-part-begins/>> accessed 20 October 2017.



strikes would appear to amount to unlawful armed reprisals. William Schabas inferred that they could theoretically amount to the crime of aggression.<sup>149</sup> Some international law experts suggested that the 2017 and 2018 strikes coupled with the failure of the US and France to provide an official legal justification therefor and the muted international reaction thereto threatened to undermine the non-use of force principle with detrimental ramifications for international peace and security.<sup>150</sup>

#### 7.4.iii Unilateral Humanitarian Intervention

Some commentators have argued that a right of humanitarian intervention exists under international law, which allows states acting individually or collectively to forcibly intervene in another state for the purposes of protecting individuals in that state from actual or imminent major harm in circumstances where the territorial state is unable and/or unwilling to protect them.<sup>151</sup> Advocates of such a right assert that it should be subject to certain criteria, including just cause (gravity), right intention, last resort (necessity), proportionality and reasonable prospects of success (do no harm).<sup>152</sup>

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<sup>149</sup> Schabas originally made this argument in relation to the Obama Administration's proposed strikes in 2013. However, the same legal rationale is applicable. WA Schabas, 'Attacking Syria? This is the Crime of Aggression' (*PhD studies in human rights*, 30 August 2013) <<http://humanrightsdoctorate.blogspot.ie/2013/08/attacking-syria-this-is-crime-of.html>> accessed 20 October 2017.

<sup>150</sup> Goodman, 'What Do Top Legal Experts Say' (n148); Anthea Roberts, 'Syrian Strikes: A Singular Exception or a Pattern and a Precedent?' (*EJIL: Talk!*, 10 April 2017) <<https://www.ejiltalk.org/the-precedent-set-by-the-us-reprisal-against-the-use-of-chemical-weapons-in-syria/>> accessed 23 October 2017; Ingrid Wuerth, 'Using International Law to Prevent Interstate War: How Syrian Airstrikes Make the World Less Safe' (*Lawfare*, 12 April 2017) <<https://www.lawfareblog.com/using-international-law-prevent-interstate-war-how-syrian-airstrikes-make-world-less-safe>> accessed 20 October 2017; Koh, 'The Real "Red Line"' (n147).

<sup>151</sup> ICISS, *Report of the International Commission on Intervention and State Sovereignty* (International Development Research Centre 2001) vii and 16. See also SD Murphy, *Humanitarian Intervention: The United Nations an Evolving World Order* (University of Pennsylvania Press 1996) 11–12.

<sup>152</sup> ICISS Report (n151) 32–37; Paul R Williams, J Trevor Ulbrick and Jonathan Worboyst, 'Preventing Mass Atrocity Crimes: the Responsibility to Protect and the Syria Crisis' (2012) 45 Case WResJInt'l L 473, 479; 'Chemical Weapon Use by Syrian Regime: UK Government Legal Position' (29 August 2013) para 4, <<https://www.gov.uk/government/publications/chemical-weapon-use-by-syrian-regime-uk-government-legal-position/chemical-weapon-use-by-syrian-regime-uk-government-legal-position-html-version>> accessed 27 February 2018; Ramesh Thakur, 'R2P after Libya and Syria: Engaging Emerging Powers' (2013) 36 TWQ 61, 66; Thomas G Weiss, 'Military Humanitarianism: Syria hasn't killed it' (2014) 37 TWQ 7, 10–11; Ford, 'Syria' (n91) 202; Schmitt (n91) 151–152; Saul, 'US Missile Strikes' (n146).

A right of humanitarian intervention is difficult to reconcile with the non-use of force and non-intervention principles both under CIL and Articles 2 (4) and 2 (7) of the UN Charter.<sup>153</sup> States intervening on behalf of oppressed individuals against their government cannot claim to be exercising the right of collective self-defence as states, not individuals, enjoy a right of self-defence under international law.<sup>154</sup> The UNSC has confirmed that the incidence of gross human rights violations within individual states can constitute a threat to international peace and security and has authorised interventions under Chapter VII in response thereto even in the absence of consent from the territorial state.<sup>155</sup> However, it does not necessarily follow that states enjoy a right of *unilateral* humanitarian intervention in the absence of UNSC approval.

Article 2 (4) of the UN Charter requires states to refrain from threatening or using force ‘against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations’. Article 55 confirms that those Purposes include ‘promoting universal respect for, and observance of, human rights and fundamental freedoms’. Article 56 requires member states to ‘pledge themselves to take joint and separate action in cooperation with the’ UN to achieve those Purposes. A combined reading of these articles led some scholars to conclude that the drafters intended to authorise an ‘implicit’ exception to the prohibition on the use of force allowing interventions that seek to further respect for universal human rights and do not seek to deprive the target state of its territory and/or its independence.<sup>156</sup> However, the

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<sup>153</sup> See also Friendly Relations Declaration; A/RES/29/3314; UNGA Res 60/1 ‘World Summit Outcome’ (24 October 2005) UN Doc A/RES/60/1 (World Summit Outcome), para 5.

<sup>154</sup> Heller, ‘Why Unilateral Humanitarian Intervention is Illegal’ (n146).

<sup>155</sup> See eg UNSC Res 1973 (17 March 2011) UN Doc S/RES/1973 (S/RES/1973). See also Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277 (Genocide Convention) art 8; *Prosecutor v Dusko Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) ICTY IT-94-1 (2 October 1995) [30].

<sup>156</sup> See eg Christian Henderson, ‘The UK Government’s Legal Opinion on Forcible Measures in response to the use of Chemical Weapons by the Syrian Government’ (2015) 64 ICLQ 179, 184–187.

drafting history of the Charter does not appear to support this interpretation.<sup>157</sup>

An argument could be made that a rule authorising unilateral humanitarian interventions has crystallised under CIL since the adoption of the UN Charter. However, strong evidence of state practice and *opinio juris* would need to be advanced, particularly as Article 103 of the Charter stipulates that the obligations of member states under the UN Charter shall prevail over their obligations under any other international agreement in the case of conflict. It would need to be shown that the Charter prohibition on the use of force has fallen into desuetude and is no longer binding.<sup>158</sup> The repeated reiteration of the importance of the prohibition under Article 2 (4) in diplomatic circles would appear to negate any such suggestion. Furthermore, the ICJ has indicated that the prohibition on the use of force under Article 2 (4) enjoys peremptory status.<sup>159</sup> According to Article 53 of the Vienna Convention, a peremptory norm ‘can be modified only by a subsequent norm of general international law having the same character’.<sup>160</sup> Consequently, it would need to be shown that the right of unilateral humanitarian intervention enjoys peremptory status.<sup>161</sup>

Advocates of a right of humanitarian intervention have adduced several arguments. As evidence of state practice, they identified several incidents where states intervened unilaterally, without a UNSC authorisation,

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<sup>157</sup> Furthermore, the aspirational wording used in the Preamble and art 56 contrasts with the absolute prohibition on the use of force in art 2 (4). See Henderson, ‘The UK Government’s Legal Opinion’ (n156) 184–186. See also Carsten Stahn, ‘Between Law-breaking and Law-making: Syria, Humanitarian Intervention and ‘What the Law Ought to Be’ (2013) 19 *JC&SL* 25, 32; Dapo Akande, ‘The Legality of Military Action in Syria: Humanitarian Intervention and Responsibility to Protect’ (*EJIL: Talk!*, 28 August 2013) <<https://www.ejiltalk.org/humanitarian-intervention-responsibility-to-protect-and-the-legality-of-military-action-in-syria/>> accessed 20 October 2017; Heller, ‘Why Unilateral Humanitarian Intervention is Illegal’ (n146).

<sup>158</sup> Akande, ‘The Legality of Military Action in Syria’ (n157).

<sup>159</sup> The ICJ referred to the ILC’s determination as to the peremptory status of the norm. See *Nicaragua v USA* (n28) [190].

<sup>160</sup> Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art 53. Syria acceded to the Vienna Convention on 2 October 1970.

<sup>161</sup> Akande, ‘The Legality of Military Action in Syria’ (n157). See also Heller, ‘Why Unilateral Humanitarian Intervention is Illegal’ (n146).

in response to gross human rights violations.<sup>162</sup> They argued that the selective character of past humanitarian interventions does not negate the existence of the right given that it is a right not a duty.<sup>163</sup> They also observed that the UNSC has occasionally provided ex post facto approval of unilateral humanitarian interventions.<sup>164</sup> Furthermore, they highlighted incidents where states have been criticised for failing to intervene to halt actual or imminent humanitarian catastrophes, including Rwanda in 1994, Darfur in 2003 and Syria since 2011, despite the absence of explicit UNSC authorisation.<sup>165</sup> Finally, they observed that the Constitutive Act of the African Union recognises ‘the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity’.<sup>166</sup>

Deniers have refuted these arguments. They pointed to the selective nature of humanitarian intervention and argued that state practice is insufficiently widespread or systematic to give rise to such a right. They observed that in the *Nicaragua Merits* judgment, the ICJ effectively rejected the existence of a right of humanitarian intervention indicating that ‘the use of force could not be the appropriate method to monitor or ensure’ respect for human rights in a third state.<sup>167</sup> They also asserted that insufficient *opinio juris* exists as only a handful of states, most notably the UK, have sought to justify the use of force by reference to a right of humanitarian intervention.<sup>168</sup> States who participated in unilateral interventions for ostensibly humanitarian purposes usually sought to justify their actions on self-defence grounds.<sup>169</sup> Alternatively, they argued that they were acting out of ‘humanitarian necessity’ and therefore their actions were legitimate, if not necessarily

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<sup>162</sup> Examples include: India’s 1971 intervention in East Pakistan, Vietnam’s 1978-1979 intervention in Cambodia, Tanzania’s 1979 intervention in Uganda, and NATO’s 1999 intervention in the Federal Republic of Yugoslavia.

<sup>163</sup> Williams, Ulbrick and Worboyst (n152) 480.

<sup>164</sup> Schmitt and Ford (n146).

<sup>165</sup> *ibid.*

<sup>166</sup> Constitutive Act of the African Union (adopted 7 November 2000, entered into force 26 May 2001) 2158 UNTS 3, art 4.

<sup>167</sup> *Nicaragua v USA* (n28) [268].

<sup>168</sup> Henderson, ‘The UK Government’s Legal Opinion’ (n156) 183.

<sup>169</sup> *ibid* 190–191; Stahn, ‘Between Law-breaking and Law-making’ (n157) 41–45.

lawful, deviations from the general rule and consequently of limited precedential value.<sup>170</sup>

Deniers observed that past unilateral humanitarian interventions have generally attracted widespread condemnation for violating the UN Charter. The 1999 NATO intervention in Kosovo prompted the G77 to explicitly reject the existence of a right of humanitarian intervention.<sup>171</sup> Several actual and emerging powers, including Russia, China, India and Brazil, have also rejected any right of unilateral humanitarian intervention arguing that it is incompatible with the UN Charter.<sup>172</sup> The deniers also noted that a US proposal to exclude unilateral humanitarian interventions from the definition of the crime of aggression was defeated during the Kampala Review Conference in 2010.<sup>173</sup> Finally, they asserted that the inclusion of a right of humanitarian intervention in the Constitutive Act of the African Union did not alter the prohibition of the use of force under the UN Charter or CIL.<sup>174</sup>

On balance, the above analysis suggests that insufficient state practice and even more so, *opinio juris*, currently exists in support of a right of humanitarian intervention under CIL.<sup>175</sup> Nevertheless, some elements of the international community may consider these actions legitimate and/or justifiable, if not necessarily lawful, thereby precluding international

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<sup>170</sup> Henderson, 'The UK Government's Legal Opinion' (n156) 190–191; Stahn, 'Between Law-breaking and Law-making' (n157) 41–45. See also Independent Commission on Kosovo, *The Kosovo Report: Conflict, International Response, Lessons Learned* (OUP 2000) 4.

<sup>171</sup> G77, 'Declaration of the South Summit' (10–14 April 2000) para 54, <[http://www.g77.org/summit/Declaration\\_G77Summit.htm](http://www.g77.org/summit/Declaration_G77Summit.htm)> accessed 21 February 2018. The Non-Aligned Movement has also rejected the existence of such a right. See Stahn, 'Between Law-breaking and Law-making' (n157) 36.

<sup>172</sup> Alex J Bellamy, 'Realizing the Responsibility to Protect' (2009) 10 *International Studies Perspectives* 111, 112; Stephen Kirwan, 'The challenge of humanitarian intervention: towards a consistent doctrine of responsibility to protect in international law?' (2013) 16 *TCLR* 37, 40.

<sup>173</sup> Stahn, 'Between Law-breaking and Law-making' (n157) 39–40; Heller, 'Why Unilateral Humanitarian Intervention is Illegal' (n146).

<sup>174</sup> Henderson, 'The UK Government's Legal Opinion' (n156) 187.

<sup>175</sup> This conclusion is supported by: *ibid* 189; Stahn, 'Between Law-breaking and Law-making' (n157) 26; Akande, 'The Legality of Military Action in Syria' (n157); Schmitt (n91) 149–151; Ruys (n28) 33; Saul, 'US Missile Strikes' (n146).

wrongfulness. This is a slippery slope. Political and moral arguments are inescapably subjective and susceptible to abuse and mistake.<sup>176</sup>

Before the UK Parliament vetoed military action against Syria in response to the regime's alleged use of chemical weapons in August 2013, the UK government indicated that its legal justification for the use of force was humanitarian intervention.<sup>177</sup> It stipulated that, even in the absence of UNSC authorisation due to deadlock, it was still 'permitted under international law to take exceptional measures in order to alleviate the scale of the overwhelming humanitarian catastrophe in Syria by deterring and disrupting the further use of chemical weapons by the Syrian regime.'<sup>178</sup> However, this position does not appear to accord with the law *lex lata*. Christian Henderson suggested that the very publication of the legal position may have amounted to an unlawful threat of the use of force.<sup>179</sup> No state explicitly endorsed the UK's legal position and several states publicly rejected it.<sup>180</sup> The UK government's own position was not entirely unambiguous. It referred to a 'doctrine' as opposed to a 'right' of humanitarian intervention and indicated that its use of force would be 'legally justifiable' as opposed to 'lawful'.<sup>181</sup> Hence, the publication of the legal position did not substantially alter the status of the right of humanitarian intervention under international law.<sup>182</sup>

The UK government again sought to rely on the doctrine of humanitarian intervention to justify its April 2018 strikes in response to the Douma chemical weapons attack.<sup>183</sup> However, even if it were conceded that

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<sup>176</sup> Stahn, 'Between Law-breaking and Law-making' (n157) 44. See also Shane Reeves, 'The Problem of Morally Justifying the United States Strike in Syria' (*Lawfare*, 11 April 2017) <<https://www.lawfareblog.com/problem-morally-justifying-united-states-strike-syria>> accessed 20 October 2017; Simons (n148); Saul, 'US Missile Strikes' (n146).

<sup>177</sup> 'Chemical Weapon Use: UK Government Legal Position' (n152) paras 2 and 5 (iii). This position contrasted with the UK's conclusion in 1986 that 'the best case that can be made in support of humanitarian intervention is that it cannot be said to be unambiguously illegal'. See Henderson, 'The UK Government's Legal Opinion' (n156) 183.

<sup>178</sup> 'Chemical Weapon Use: UK Government Legal Position' (n152) para 4.

<sup>179</sup> Henderson, 'The UK Government's Legal Opinion' (n156) 194.

<sup>180</sup> *ibid* 195.

<sup>181</sup> *ibid* 182.

<sup>182</sup> *ibid* 192–195.

<sup>183</sup> 'UK Policy paper: Syria action' (n132).

a right of unilateral humanitarian exists, the preconditions for the exercise of that right (gravity, right intention, last resort, do no harm) were not satisfied in this instance. The UK's 2018 position is ambiguous regarding whether the UK was intervening in response to the totality of the humanitarian catastrophe in Syria, in which case the gravity threshold was clearly satisfied, or whether it was intervening solely in response to the humanitarian suffering caused by the use of chemical weapons, in which case the threshold probably was not satisfied.<sup>184</sup> It is also unclear whether the UK's primary intention was to 'relieve humanitarian suffering' or to enforce the prohibition on the use of chemical weapons.<sup>185</sup> If its intention genuinely was to relieve humanitarian suffering it is unclear how degrading and deterring the future use of chemical weapons would achieve that goal given that the Assad regime and the armed opposition would remain free to inflict devastating humanitarian suffering through the use of conventional weapons. At the same time, the intervention could potentially violate the do no harm principle.

#### 7.4.iii.a Theoretical Analysis of Humanitarian Intervention

Humanitarian intervention poses a conundrum for liberals.<sup>186</sup> On the one hand, it arguably contravenes the right of peoples to determine freely their political status. Furthermore, governments established as a result of humanitarian intervention may struggle to retain power without resorting to repression or accepting external support.<sup>187</sup> On the other hand, if unilateral humanitarian interventions were not allowed in situations of UNSC deadlock, respect for universal human rights would be undermined.

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<sup>184</sup> Milanovic, 'The Syria Strikes' (n138). See also regarding proposed 2013 strikes: Stahn, 'Between Law-breaking and Law-making' (n157) 29; Henderson, 'The UK Government's Legal Opinion' (n156) 181–182.

<sup>185</sup> Henriksen (n138). See also regarding the proposed 2013 strikes: Stahn, 'Between Law-breaking and Law-making' (n157) 30–31; Schmitt (n91) 151–152; Henderson, 'The UK Government's Legal Opinion' (n156) 181–182.

<sup>186</sup> See Michael W Doyle, 'International Ethics and the Responsibility to Protect' (2011) 13 *Int'l Stud Rev* 72, 76; Stahn, 'Between Law-breaking and Law-making' (n157) 33; Jens David Ohlin, 'Two Visions of the UN Charter' (*Opinio Juris*, 13 April 2017) <<http://opiniojuris.org/2017/04/13/two-visions-of-the-un-charter/>> accessed 20 October 2017.

<sup>187</sup> Doyle, 'International Ethics' (n185) 76.

Realists assert that states are unlikely to intervene militarily in third states for solely humanitarian reasons given the considerable costs involved.<sup>188</sup> They argue that states will only intervene when they deem it to be in their own interests. In such circumstances, they may seek to exploit humanitarian arguments to ‘legitimise’ unilateral interventions that contravene international law. State practice supports this argument. Even Russia, which has traditionally been a vocal opponent of unilateral humanitarian intervention, somewhat hypocritically relied in part on humanitarian arguments to justify interventions in South Ossetia in 2008 and Crimea in 2014, which were aimed at protecting Russia’s perceived sphere of influence from Western encroachment.<sup>189</sup>

The debate surrounding humanitarian intervention reflects the internal divergence in the English School between pluralists and solidarists. Solidarists argue that international citizens should intervene in response to a ‘supreme humanitarian emergency’ even if the intervention constitutes a prima facie violation of international law.<sup>190</sup> However, pluralists counter that unilateral humanitarian interventions are likely to do more harm than good and highlight the risks that they pose to the global balance of power and international peace.<sup>191</sup>

Instrumental approaches would appear to condone unilateral humanitarian interventions provided that they are conducted in furtherance of community values. However, from a TWAIL and post-colonial perspective, humanitarian intervention poses considerable dangers.<sup>192</sup> Some critical scholars and developing states view humanitarian intervention as a

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<sup>188</sup> Amy E Eckert, ‘The Responsibility to Protect in the Anarchical Society: Power, Interest, and The Protection Of Civilians in Libya and Syria’ (2012) 41 *DenvJInt’l L& Pol’y* 87, 91.

<sup>189</sup> Thakur (n152) 68; Derek Averre and Lance Davies, ‘Russia, humanitarian intervention and the Responsibility to Protect: the case of Syria’ (2015) 91 *International Affairs* 813, 817-818, 827, 831–833; Isaac Kfir, ‘NATO and Putin’s Russia: Seeking to balance divergence and convergence’ (2016) 35 *Comparative Strategy* 447, 449; Reeves (n276).

<sup>190</sup> Andrew Linklater, ‘The English School’ in Scott Burchill and others (eds), *Theories of International Relations* (3rd edn, Palgrave MacMillan 2005) 96. See also James Crawford, ‘Sovereignty as a Legal Value’ in James Crawford and Martti Koskenniemi (eds), *The Cambridge Companion to International Law* (CUP 2012) 130–131.

<sup>191</sup> Linklater (n190) 96.

<sup>192</sup> See eg Edward Said, *Orientalism* (Penguin 2003 edn) Preface.



contemporary manifestation of the civilising mission.<sup>193</sup> Similarly, a structuralist perspective perceives humanitarian intervention as an instrument for reinforcing the prevailing neoliberal global economic order.<sup>194</sup> Humanitarian interventions also raise questions regarding agency as third states claim authority to intervene on behalf of ‘others’ often without obtaining their consent.<sup>195</sup> The denial of agency in this scenario is significant as humanitarian interventions, regardless of intentions, often cause more harm than good.<sup>196</sup>

#### 7.4.iv Responsibility to Protect (R2P)

At this juncture, it is worth considering the Syrian crisis through the R2P lens. Paragraphs 138 and 139 of the 2005 World Summit Outcome endorsed the notion that states have a responsibility to protect their populations from atrocity crimes.<sup>197</sup> Paragraph 139 provided that states:

... are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.<sup>198</sup>

The World Summit Outcome is not legally binding; however, it was negotiated by the leaders of over 150 states and unanimously adopted by the UNGA. Furthermore, paragraphs 138 and 139 were unanimously affirmed by

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<sup>193</sup> Martti Koskenniemi, ‘What is International Law for’ in *The Politics of International Law* (Hart Publishing 2009) 252.

<sup>194</sup> Jonathan Graubart, ‘R2P and Pragmatic Liberal Interventionism: Values in the Service of Interests’ (2013) 35 *HumRtsQ* 69, 81–90.

<sup>195</sup> Stahn, ‘Between Law-breaking and Law-making’ (n157) 37–38.

<sup>196</sup> Thakur (n152) 65–67.

<sup>197</sup> Where atrocity crimes encompass: genocide, war crimes, ethnic cleansing and crimes against humanity. See World Summit Outcome, paras 138–139. See also UNGA, ‘A more secure world: Our shared responsibility – Report of the High-level Panel on Threats, Challenges and Change’ (2 December 2004) UN Doc A/59/565 (A/59/565), para 203; UNGA, ‘Report of the UNSG – In Larger Freedom: Towards Security, Development and Human Rights for All’ (21 March 2005) UN Doc A/59/2005, para 132 and Annex, para 7(b).

<sup>198</sup> World Summit Outcome, para 139.

the UNSC.<sup>199</sup> Accordingly, these paragraphs constitute considerable evidence of *opinio juris*. The R2P concept is comprised of three pillars which reflect two distinct, albeit complementary, norms: (i) the primary responsibility of individual states to protect their population from atrocity crimes (pillar 1); and (ii) the residual responsibility of the international community to assist and encourage individual states to discharge their primary responsibility (pillar 2) and to take timely and decisive collective action should individual states manifestly fail to do so (pillar 3).<sup>200</sup> The first ‘internal’ R2P norm (pillar 1) is reflected in numerous existing international instruments<sup>201</sup> and generally accepted by states as representing existing international law.<sup>202</sup> However, the second ‘external’ R2P norm (pillars 2 and 3) does not yet appear to have crystallised into a legally binding obligation.<sup>203</sup>

Scholarly opinion is mixed regarding whether the international community is legally obliged to encourage and assist states to discharge their responsibility to protect (pillar 2).<sup>204</sup> Furthermore, according to Luke Glanville, neither the wording of paragraphs 138 and 139 nor the negotiations underlying them support the contention that the international community,

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<sup>199</sup> UNSC Res 1674 (28 April 2006) UN Doc S/RES/1674, paras 4 and 26.

<sup>200</sup> Luke Glanville, ‘The Responsibility to Protect beyond borders’ (2012) 12 HRLRev 1, 3–4; Alex Bellamy, *The Responsibility to Protect* (OUP 2015) 72; Luke Glanville, ‘Does R2P matter? Interpreting the impact of a norm’ (2016) 51 Coop & Conflict 184, 186; Aidan Hehir, ‘Assessing the influence of the Responsibility to Protect on the UN Security Council during the Arab Spring’ (2016) 51 Coop & Conflict 166, 177. In a 2009 report, former UNSG Ban Ki Mon indicated that there were three pillars to the responsibility to protect. The first norm reflects the first pillar, whereas the second norm reflects the second and third pillars. See UNGA, ‘Report of the Secretary-General: Implementing the responsibility to protect’ (12 January 2009) UN Doc A/63/677, para 11.

<sup>201</sup> For example, Genocide Convention, arts 1, 5 and 6; ICCPR, arts 2 and 9; Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 222 (as amended) (ECHR) arts 1, 2 and 5.

<sup>202</sup> Glanville, ‘The Responsibility to Protect’ (n200) 3; Ved P Nanda, ‘44th Annual Sutton Colloquium: The Arab Spring and its Unfinished Business. The Arab Spring, the Responsibility to Protect, and U.S. Foreign Policy - Some Preliminary Thoughts’ (2012) 41 DenvJInt’l L & Pol’y 7, 28; Hehir, ‘Assessing the influence of the Responsibility to Protect’ (n200) 172–173 and 177.

<sup>203</sup> In support of this conclusion, see Nanda (n202) 28–29; Kirwan (n172), 62–63; Justin Morris, ‘Libya and Syria: R2P and the spectre of the swinging pendulum’ (2013) 89 International Affairs 1265, 1280; Hehir, ‘Assessing the influence of the Responsibility to Protect’ (n200) 167–169 and 177–178. For a counterargument, see Glanville, ‘Does R2P matter?’ (n200) 195–197.

<sup>204</sup> Glanville and Nanda suggested that such an obligation does not exist under international law. See Glanville, ‘The Responsibility to Protect’ (n200) 27–28 and 31–32; Nanda (n202) 28. However, see also Hehir, ‘Assessing the influence of the Responsibility to Protect’ (n200) 170–171 and 177.

acting through the UNSC, has an automatic legal obligation to take timely and decisive action to protect populations in third states from atrocity crimes in cases of manifest failure (pillar 3).<sup>205</sup> The Outcome itself does not include any criteria for determining when the international community is obliged to use force to protect vulnerable populations abroad instead indicating that decisions should be made entirely on a case-by-case basis.<sup>206</sup> It also emphasises that only the UNSC may authorise measures involving the use of force for civilian protection purposes.<sup>207</sup>

States have generally avoided inferences that they have a legal, as opposed to purely moral, obligation to protect populations in third states from atrocity crimes.<sup>208</sup> Since the adoption of the World Summit Outcome, the UNGA and UNSC have referred to the responsibility to protect in multiple resolutions.<sup>209</sup> Nevertheless, these references generally related to the primary responsibility of the territorial state to protect as opposed to any collective responsibility of the international community.<sup>210</sup> Due in part to the opposition of Russia and China, the UNSC has generally been reluctant to authorise military interventions under Chapter VII to protect civilians from actual or imminent atrocity crimes without the consent of the territorial state. Its authorisation of the 2011 intervention in Libya was a notable exception and led some R2P scholars to tout it as an example of timely and decisive collective action under pillar 3.<sup>211</sup>

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<sup>205</sup> Glanville, 'The Responsibility to Protect' (n200) 11, 13 and 15; Glanville, 'Does R2P matter?' (n200) 189.

<sup>206</sup> World Summit Outcome, para 139.

<sup>207</sup> *ibid.*

<sup>208</sup> Glanville, 'The Responsibility to Protect' (n200) 13.

<sup>209</sup> For a list, see *ibid* 1–2 and 13. See also Alex J Bellamy and Paul D Williams, 'The new politics of protection? Côte d'Ivoire, Libya and the responsibility to protect' (2011) 87 *International Affairs* 825, 847; Aidan Hehir, 'The Permanence of Inconsistency: Libya, the Security Council, and the Responsibility to Protect' (2013) 38 *International Security* 137, 148–149.

<sup>210</sup> Hehir, 'Assessing the influence of the Responsibility to Protect' (n200) 173.

<sup>211</sup> See eg Bellamy and Williams, 'The new politics of protection?' (n209) 844; Williams, Ulbrick and Worboyst (n152) 487–488; Spencer Zifcak, 'The responsibility to protect after Libya and Syria' (2012) 13 *MelbJInt'l L* 1, 2 and 6; Thakur (n152) 69; Glanville, 'Does R2P matter?' (n200) 193–194.

In UNSC Resolution 1970, the UNSC recalled the Libyan authorities' responsibility to protect its population and suggested that crimes against humanity may be taking place in Libya.<sup>212</sup> It referred the situation in Libya to the ICC, imposed an arms embargo and implemented targeted sanctions against several individuals associated with the Gaddafi government.<sup>213</sup> When the Gaddafi government failed to comply with the terms of Resolution 1970, the UNSC adopted Resolution 1973 in which it expressed '*its determination to ensure the protection of civilians and civilian populated areas*',<sup>214</sup> authorised UN member states to take all necessary measures 'to protect civilians and civilian populated areas under threat of attack'<sup>215</sup> and decided to establish a no-fly zone over Libya.<sup>216</sup>

Glanville argued that, given America's lack of core interests in Libya and having regard to the costs involved, Obama's decision to support the intervention can only be rationalised by reference to 'the felt imperative to protect Libyan civilians'.<sup>217</sup> However, several other commentators challenged this contention observing that neither the US nor indeed the UK or France sought to justify the Libyan intervention by reference to any ostensible collective responsibility to protect.<sup>218</sup> Furthermore, it has been suggested that China and Russia's decision to abstain was driven by a confluence of unique factors that accorded with their respective national interests.<sup>219</sup> Justin Morris and Aidan Hehir observed that states rarely referred to the R2P in the UNSC debates preceding and following the intervention and whenever they did, it was usually in reference to the Libyan authorities' responsibility to protect.<sup>220</sup> They also observed that neither Resolution 1970

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<sup>212</sup> UNSC Res 1970 (26 February 2011) UN Doc S/RES/1970 (S/RES/1970), Preamble.

<sup>213</sup> *ibid* paras 4–25.

<sup>214</sup> S/RES/1973, Preamble (emphasis in original).

<sup>215</sup> *ibid* para 4.

<sup>216</sup> *ibid* paras 6–8.

<sup>217</sup> Glanville, 'Does R2P matter?' (n200) 193.

<sup>218</sup> Kirwan (n172) 48; Morris, 'Libya and Syria' (n203) 1274; Hehir, 'The Permanence of Inconsistency' (n209) 147–149 and 155–156; Hehir, 'Assessing the influence of the Responsibility to Protect' (n200) 175; Phillips (n74) 93.

<sup>219</sup> Hehir, 'The Permanence of Inconsistency' (n209) 153.

<sup>220</sup> *ibid* 147–149; Morris, 'Libya and Syria' (n203) 1274.

nor Resolution 1973 refer to the collective responsibility of the international community to protect.<sup>221</sup>

The military intervention in Libya had profound consequences for Syria. The NATO-led coalition was accused of using disproportionate force, exceeding the limits of its civilian protection mandate, abandoning neutrality and using R2P as a vehicle for achieving regime change.<sup>222</sup> When the Gaddafi regime's resistance proved stronger than anticipated, the coalition seemingly determined that the protection of civilians could not be achieved without overthrowing the regime.<sup>223</sup> However, as Spencer Zifcak observed, 'this was to stretch the terms of *Resolution 1973* to their absolute limit'.<sup>224</sup> Even some traditional advocates of R2P queried whether the protection of civilians could not have been achieved without effectively taking sides in a civil war.<sup>225</sup> However, some other commentators suggested that circumstances on the ground may have dictated that regime change was the only means of securing civilian protection.<sup>226</sup> Roy Allison inferred that Russia would even have foreseen that regime change was a possible consequence of a civilian protection mandate.<sup>227</sup>

The controversy over Libya, which overlapped with a similar controversy surrounding the implementation of a UNSC-authorized civilian protection mandate in Côte d'Ivoire<sup>228</sup>, may have contributed to the UNSC's limited response to the Syrian crisis.<sup>229</sup> Notably, India, Brazil and South

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<sup>221</sup> Morris, 'Libya and Syria' (n203) 1272; Hehir, 'The Permanence of Inconsistency' (n209) 147 and 149. See also Kirwan (n172) 52–53.

<sup>222</sup> See S/PV.6528, 7–10; UNSC Verbatim Record (27 June 2011) UN Doc S/PV.6566, 4; Bellamy and Williams, 'The new politics of protection?' (n209) 845–848; Zifcak (n211) 11–13; Thakur (n152) 69–70; Samuel Charap, 'Russia, Syria and the Doctrine of Intervention' (2013) 55 *Survival* 35, 36–39; Roy Allison, 'Russia and Syria: explaining alignment with a regime in crisis' (2013) 89 *International Affairs* 795, 797–798.

<sup>223</sup> Zifcak (n211) 7–8.

<sup>224</sup> *ibid* 8 (emphasis in original).

<sup>225</sup> *ibid* 13. See also Charap (n222) 38–39.

<sup>226</sup> Bellamy and Williams, 'The new politics of protection?' (n209) 848; Zifcak (n211) 12; Thakur (n152) 70; Allison (n222) 797; Weiss (n152) 11.

<sup>227</sup> Allison (n222) 797.

<sup>228</sup> See UNSC Res 1975 (30 March 2011) UN Doc S/RES/1975. For a discussion, see Bellamy and Williams, 'The new politics of protection?' (n209) 829–838.

<sup>229</sup> See Zifcak (n211) 14 and 30; Kirwan (n172) 52; Stahn, 'Syria and the Semantics of Intervention' (n108) 961; Thakur (n152) 61 and 71; Morris, 'Libya and Syria' (n203) 1266 and 1274; Emile Hokayem, *Syria's Uprising and the Fracturing of the Levant* (Routledge

Africa abstained from a draft UNSC resolution in October 2011, which, inter alia, condemned the Assad regime's use of force against civilians, due in part to concerns that the draft resolution 'not be part of a hidden agenda aimed at once again instituting regime change'.<sup>230</sup> Russia and China vetoed the resolution and subsequent draft resolutions referring the situation in Syria to the ICC and imposing sanctions under Chapter VII. They indicated that they would not authorise any measure that could set in motion a Libya-style chain of events culminating in a military intervention to secure regime change.<sup>231</sup> Their argument was not entirely unfounded given that several Western and Arab states declared relatively early on in the Syrian crisis that Bashar should step aside.<sup>232</sup> On the other hand, the Libya precedent may have simply offered them a cloak behind which to hide decisions adopted purely on the basis of self-interest.

#### 7.4.iv.a Appraisal of the Syria Crisis through the R2P Lens

In a 2009 report, former UNSG Ban Ki-moon identified several 'risk' factors that render states more vulnerable to atrocity crimes.<sup>233</sup> All of these factors were present in Syria prior to the Arab Spring and the regime repeatedly failed to implement promised structural reforms to address them. The recommendations emanating from treaty monitoring bodies, NGOs and UN special procedures would have alerted the international community to this fact. In response to the March 2011 protests, the regime pretended to implement some long-promised structural reforms. However, in reality these

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2013) ch5, lcn2748; Alan J Kuperman, 'Obama's Libya Debacle: How a Well-Meaning Intervention Ended in Failure' (2015) 94 *Foreign Affairs* 66, 67 and 74–75; Hehir, 'Assessing the influence of the Responsibility to Protect' (n200) 172. See also Radwan Ziadeh and others, 'Conference: Crisis in Syria, what are the U.S Options?' (2012) 19 *Middle EPol'y* 1, 8 (comments by Mark Katz).

<sup>230</sup> See statement of South African representative in UNSC Verbatim Record (4 October 2011) UN Doc S/PV.6627 (S/PV.6627), 11.

<sup>231</sup> S/PV.6627, 4–5; UNSC Verbatim Record (30 August 2012) UN Doc S/PV.6826, 24–25 and 32–33; Thakur (n152) 71; Morris, 'Libya and Syria' (n203) 1275–1276.

<sup>232</sup> Samuel Charap (n222) 39.

<sup>233</sup> These include discrimination against a particular community, the presence of armed groups or militia capable of committing atrocity crimes, authoritarian rule, the denial of civil and political rights, a culture of impunity, the commission of acts that could amount to elements of atrocity crimes and unrest in neighbouring countries. See UNGA/UNSC, 'Report of the Secretary-General on Responsibility to protect: State responsibility and prevention' (9 July 2013) UN Doc A/67/929–S/2013/399, paras 15–28. See also World Bank Group, *The Toll of War: the Economic and Social Consequences of the Conflict in Syria* (World Bank Group 2017) 9.

changes were hollow. Instead of acting to halt imminent and actual crimes and ensure accountability, it guaranteed immunity for regime-aligned perpetrators.<sup>234</sup> Accordingly, it manifestly failed to discharge its pillar 1 responsibility. Furthermore, as a pillar 2 response would have been patently inadequate, a timely and decisive response was required under pillar 3 to protect Syrians from atrocity crimes.

In implementing a pillar 3 response, the international community should promptly employ the tools for the pacific settlement of disputes contained under Chapters VI and VIII of the UN Charter. Non-forcible pillar three actions include the imposition of sanctions and provision of humanitarian aid. As previously discussed, the UNSC's response to the Syrian crisis was severely undermined by internal divisions. Most notably, it declined to even impose an arms embargo due to Russian and Chinese opposition. Some notable actions were undertaken by the UNGA, including its appointment of a joint UN/Arab League Special Envoy,<sup>235</sup> whereas the UNHRC established a Fact Finding Mission and the UNCOI.<sup>236</sup> Several states along with the Arab League and the EU imposed diplomatic and economic sanctions against Syria. States and international and regional organisations also pledged humanitarian assistance and afforded asylum to Syrian refugees. However, the international response to the humanitarian crisis inside Syria and the refugee crisis triggered by the conflict has generally been considered inadequate.

Notably, in contrast to its response to the Libyan crisis, the UNSC declined to authorise a military intervention in Syria for civilian protection purposes. The majority of the P5 concluded that this was not in their respective interests.<sup>237</sup> However, there were also significant differences

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<sup>234</sup> See eg UNHRC, 'Preliminary report of the High Commissioner on the situation of human rights in the Syrian Arab Republic' (14 June 2011) UN Doc A/HRC/17/CRP.1, para 4; UNHRC, 'Report of the independent international commission of inquiry on the Syrian Arab Republic' (23 November 2011) UN Doc A/HRC/S-17/2/Add.1, paras 22, 28 and 85.

<sup>235</sup> UNGA Res 66/253 (21 February 2012) UN Doc A/RES/66/253.

<sup>236</sup> UNHRC Res S-16/1 (29 April 2011) UN Doc A/HRC/RES/S-16/1; UNHRC Res S-17/1 (22 August 2011) UN Doc A/HRC/S-17/1 (A/HRC/S-17/1).

<sup>237</sup> Zifcak (n211) 32–33; Hehir, 'The Permanence of Inconsistency' (n209) 153; Hehir, 'Assessing the influence of the Responsibility to Protect' (n200) 175–176; Phillips (n74) 93.

between the two situations and good reasons to conclude that a military intervention in Syria might do more harm than good.<sup>238</sup> Libya's leader, Muammar Gaddafi, had used language reminiscent to that used by Rwanda's rulers prior to the 1994 genocide leading many international actors to conclude that there was an imminent risk of his regime perpetrating crimes against humanity.<sup>239</sup> Bashar had issued no such threats and had instead made several conciliatory gestures leading many external actors to hope that he would live up to his reformer image.<sup>240</sup> The military balance of power also favoured the Assad regime. In contrast to Libya, Syria had a well-trained and equipped armed forces, which stayed largely intact. Furthermore, no unified and representative opposition movement emerged that was capable of gaining control of strategic areas.<sup>241</sup> Consequently, even a limited military intervention in Syria to secure a no-fly zone was likely to be considerably costlier for contributing states than the intervention in Libya had been.<sup>242</sup>

In addition, in contrast to their proactive response to the Libyan crisis, regional organisations declined to condemn the Assad regime during the initial months of its crackdown or request an intervention.<sup>243</sup> Furthermore, as a result of Syria's geopolitical significance and diverse ethno-sectarian balance, a military intervention could undermine regional stability to the detriment of Israel.<sup>244</sup> Unlike the Gaddafi regime, the Assad regime had powerful external allies who were willing to go to extreme lengths to save it.

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<sup>238</sup> Zifcak (n211) 13 and 31; David W Lesch, *The Fall of the House of Assad* (Updated edn, Yale UP 2013) 220–221; Weiss (n152) 14 and 16; Jeffrey Goldberg, 'The Obama Doctrine' *The Atlantic* (April 2016) <<https://www.theatlantic.com/magazine/archive/2016/04/the-obama-doctrine/471525/>> accessed 2 October 2017; Phillips (n74) 170.

<sup>239</sup> Zifcak (n211) 2 and 26; Kirwan (n172) 52. Some commentators have since challenged this narrative. See eg Alan J Kuperman, 'A Model Humanitarian Intervention?: Reassessing NATO's Libya Campaign' (2013) 38 *International Security* 105.

<sup>240</sup> Zifcak (n211) 26 and 31; Kirwan (n172) 52.

<sup>241</sup> Zifcak (n211) 27; Kirwan (n172) 51; Weiss (n152) 13–14.

<sup>242</sup> Eckert (n188) 97–98; Weiss (n152) 13–14 and 17. See also Daniel Byman, 'Six Bad Options for Syria' (2016) 38 *TWQ* 171, 180–182.

<sup>243</sup> See Bellamy and Williams, 'The new politics of protection?' (n209) 825, 839–843; Zifcak (n211) 5–6, 10, 27–28; Hehir, 'The Permanence of Inconsistency' (n209) 138 and 153–154; Kirwan (n172) 51–52; Hehir, 'Assessing the influence of the Responsibility to Protect' (n200) 175; Morris, 'Libya and Syria' (n203) 1272.

<sup>244</sup> Zifcak (n211) 27 and 31–33; Kirwan (n172) 51; Thakur (n152) 70; Weiss (n152) 14.



Finally, the post-intervention situation in Libya revealed the risks associated with humanitarian interventions.<sup>245</sup>

#### **7.4.iv.b Theoretical Analysis of R2P**

Some commentators, whom Jonathan Graubart collectively refers to as pragmatic liberal interventionists,<sup>246</sup> argue that legitimate authorities, such as regional organisations and/or the UNGA acting under the Uniting for Peace mechanism, should be allowed to authorise limited military interventions for protection purposes in circumstances of UNSC deadlock provided that the preconditions are satisfied concerning right intention, last resort, do no harm etc.<sup>247</sup> They assert that otherwise the protection of civilians will remain hostage to the interests of the P5. However, realists criticise this argument as utopian as it infers that the national interest can be subordinated to moral imperatives.<sup>248</sup> For realists, the selective application of the R2P concept derives from the decentralised character of the international system.<sup>249</sup> Realists reiterate that states will only intervene militarily in third states when they deem it to be in their interests.<sup>250</sup> They observe that states declined to include normative criteria governing the use of force for protection purposes in the World Summit Outcome because they wished to maintain the prerogative to intervene on a case-by-case basis.<sup>251</sup>

Glanville, Morris and Hehir have assessed R2P from a constructivist perspective. Glanville argued that the international community's response to the crises in Libya and Syria suggests that states have internalised a residual responsibility to react which 'imposes upon states a collective responsibility

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<sup>245</sup> Kuperman's analysis of the Libya intervention demonstrated the importance of the 'do no harm' principle and of securing reliable information when deciding whether or not to intervene. Kuperman, 'A Model Humanitarian Intervention?' (n239); Kuperman, 'Obama's Libya Debacle' (n229).

<sup>246</sup> Graubart (n194).

<sup>247</sup> ICISS Report (n151) 32–37 and 49–54. See also 474–475, 489–491 and 498–502; Kirwan (n172) 64; Weiss (n152) 15.

<sup>248</sup> Graubart (n194) 85.

<sup>249</sup> Eckert (n188) 96–99. See also Glanville, 'The Responsibility to Protect' (n200) 32.

<sup>250</sup> Eckert (n188) 91.

<sup>251</sup> *ibid* 96; Hehir, 'The Permanence of Inconsistency' (n209) 157–158; Morris, 'Libya and Syria' (n203) 207.

to *do what they can* to protect populations from mass atrocities'.<sup>252</sup> He asserted that America's support for the Libya intervention and Russia and China's abstentions demonstrate the constitutive effect of R2P on state behaviour.<sup>253</sup> On the contrary, Hehir argued that the Arab Spring experience suggests that the primary responsibility of states to protect their populations from atrocity crimes has been internalised by states; however, the residual responsibility of the international community to assist and react has not.<sup>254</sup> Morris and Stephen Kirwan reached a similar conclusion.<sup>255</sup>

From a post-structuralist perspective, the residual responsibility of the international community to react poses dangers. As Özlem Demirtas-Bagdonas observed, it 'constructs hierarchies of power and morality vis-à-vis the one in need of protection, as well as the other actors in the conflict'.<sup>256</sup>

Finally, proponents of moral hazard theory have argued that the R2P and humanitarian intervention concepts may in some circumstances actually cause atrocity crimes by providing disenfranchised groups with an incentive – the promise of external intervention – to provoke atrocity crimes and/or engage in excessively risky behaviour.<sup>257</sup> Alan Kuperman argued that humanitarian intervention encourages disenfranchised groups to rebel and/or defer negotiated settlements as they anticipate that an external intervention will help them to achieve a decisive military victory and/or a more favourable peace deal.<sup>258</sup> Kuperman doesn't advocate eliminating humanitarian

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<sup>252</sup> Glanville, 'Does R2P matter?' (n200) 191 (emphasis in original). Similarly, Weiss inferred that the R2P norm was emergent. See Weiss (n152) 11–12.

<sup>253</sup> Glanville, 'Does R2P matter?' (n200) 187–190 and 193–196.

<sup>254</sup> Hehir, 'The Permanence of Inconsistency' (n209) 149–151; Hehir, 'Assessing the influence of the Responsibility to Protect' (n200) 167–172 and 178.

<sup>255</sup> Kirwan (n172) 56–57 and 62–63; Morris, 'Libya and Syria' (n203) 1280.

<sup>256</sup> Özlem Demirtas-Bagdonas, 'Reading Turkey's Foreign Policy on Syria: The AKP's Construction of a Great Power Identity and the Politics of Grandeur' (2014) 15 *Turkish Studies* 139, 144

<sup>257</sup> Moral hazard theory is imported from the insurance industry where it refers to a phenomenon whereby 'the expected payout for a loss unintentionally encourages excessively risky or fraudulent behavior'. See Alan J Kuperman, 'Mitigating the Moral Hazard of Humanitarian Intervention: Lessons from Economics' (2008) 14 *Global Governance* 219, 219, 221–222 and 227; Kuperman, 'A Model Humanitarian Intervention?' (n239) 106–107 and 134.

<sup>258</sup> Alex J Bellamy and Paul D Williams, 'On the limits of moral hazard: The 'responsibility to protect', armed conflict and mass atrocities' (2012) 18 *EJIR* 539, 540 and 543. Russia appears to support this argument. See Allison (n222) 797. This concern was voiced by

intervention altogether as he opines that it may reduce the likelihood of states engaging in atrocity crimes in the first place.<sup>259</sup> However, he suggests that the concept be reformed using strategies for reducing moral hazard imported from the insurance industry.<sup>260</sup>

There are problems with Kuperman's analysis. It overlooks a range of other possible causal factors for both atrocity crimes and rebellion and veers toward victim-blaming.<sup>261</sup> Nevertheless, recent experience in Libya and Syria arguably lends support to some of his arguments. Kuperman argued that the intervention in Libya indirectly escalated the conflict in Syria by provoking Syrian opposition actors to arm themselves in the hope that they too would benefit from an external intervention.<sup>262</sup> He also inferred that early calls by Western leaders for Bashar to step aside undermined the peace process by giving the opposition and their regional backers grounds to hope for a Western-backed military intervention and by convincing the Assad regime that it was in a zero sum battle for survival.<sup>263</sup> Several commentators advanced similar arguments.<sup>264</sup> Nevertheless, the escalation of the armed conflict after the non-strike in September 2013 demonstrates that the possibility of humanitarian intervention may serve a social function as Kuperman suggested.<sup>265</sup> After Obama clarified that he had no intention of intervening militarily in Syria, the Assad regime and its core allies were further emboldened to do whatever it took, regardless of the humanitarian cost, to stay in power.

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participants from developing countries in the consultations that preceded the 2001 ICISS Report. See Thakur (n152) 65–66

<sup>259</sup> Kuperman, 'Mitigating the Moral Hazard' (n257) 220 and 226–227.

<sup>260</sup> *ibid* 220–221.

<sup>261</sup> Bellamy and Williams, 'On the limits of moral hazard' (n258) 557.

<sup>262</sup> Kuperman, 'A Model Humanitarian Intervention?' (n239) 131–132 and 134; Kuperman, 'Obama's Libya Debacle' (n229) 67 and 74–75.

<sup>263</sup> Kuperman, 'A Model Humanitarian Intervention?' (n239) 135–136.

<sup>264</sup> Amos N Guiorat, 'Intervention in Libya, Yes; Intervention in Syria, No: Deciphering the Obama Administration' (2011) 44 *Case WResJInt'l L* 251, 252–253; Charap (n222) 39; Raymond Hinnebusch, 'Globalization, democratization, and the Arab uprising: the international factor in MENA's failed democratization' (2015) 22 *Democratization* 335, 349; Phillips (n74) 143, 145, 169–172, 184, 186–187 and 232; Nikolaos van Dam, *Destroying a Nation: the Civil War in Syria* (Kindle edn, IB Tauris 2017) ch4, lcn1977–2633.

<sup>265</sup> Kuperman, 'Mitigating the Moral Hazard' (n257) 220 and 226–227. See also Phillips (n74) 232.

#### 7.4.v Self-defence

Article 51 of the UN Charter requires states to inform the UNSC immediately upon the implementation of self-defence measures. The following participants in the US-led coalition against ISIS informed the UNSC of military actions undertaken in Syria in the collective self-defence of Iraq: Australia, Germany, Denmark, Belgium, Norway, France, the US, the UK and Canada.<sup>266</sup> The latter three states<sup>267</sup> along with Turkey,<sup>268</sup> Israel<sup>269</sup> and arguably France<sup>270</sup> also indicated that they had undertaken military actions in Syria in individual self-defence. Arab states who participated in the US-led coalition strikes in Syria declined to inform the UNSC of their actions. The

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<sup>266</sup> UNSC, 'Letter dated 23 September 2014 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General' (23 September 2014) UN Doc S/2014/695 (S/2014/695); UNSC, 'Identical letters dated 25 November 2014 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the Secretary-General and the President of the Security Council' (26 November 2014) UN Doc S/2014/851 (S/2014/851); UNSC, 'Letter dated 31 March 2015 from the Chargé d'affaires a.i. of the Permanent Mission of Canada to the United Nations addressed to the President of the Security Council' (31 March 2015) UN Doc S/2015/221 (S/2015/221); UNSC, 'Letter dated 9 September 2015 from the Permanent Representative of Australia to the United Nations addressed to the President of the Security Council' (9 September 2015) UN Doc S/2015/693 (S/2015/693); UNSC, 'Letter dated 10 December 2015 from the Chargé d'affaires a.i. of the Permanent Mission of Germany to the United Nations addressed to the President of the Security Council' (10 December 2015) UN Doc S/2015/946 (S/2015/946); UNSC, 'Letter dated 11 January 2016 from the Permanent Representative of Denmark to the United Nations addressed to the President of the Security Council' (13 January 2016) UN Doc S/2016/34 (S/2016/34); UNSC, 'Letter dated 7 June 2016 from the Permanent Representative of Belgium to the United Nations addressed to the President of the Security Council' (9 June 2016) UN Doc S/2016/523 (S/2016/523); UNSC, 'Letter dated 3 June 2016 from the Permanent Representative of Norway to the United Nations addressed to the President of the Security Council' (3 June 2016) UN Doc S/2016/513 (S/2016/513).

<sup>267</sup> S/2014/695; S/2015/221; UNSC, 'Letter dated 7 September 2015 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council' (8 September 2015) UN Doc S/2015/688 (S/2015/688).

<sup>268</sup> Turkey suggested that it was taking military actions in individual and collective self-defence, including in coordination with members of the US-led Coalition against ISIS. See UNSC, 'Letter dated 24 July 2015 from the Chargé d'affaires a.i. of the Permanent Mission of Turkey to the United Nations addressed to the President of the Security Council' (24 July 2015) UN Doc S/2015/563.

<sup>269</sup> UNSC, 'Identical letters dated 16 July 2013 from the Permanent Representative of Israel to the United Nations addressed to the Secretary-General and the President of the Security Council' (17 July 2013) UN Doc S/2013/425; UNSC, 'Identical letters dated 28 January 2015 from the Permanent Representative of Israel to the United Nations addressed to the Secretary-General and the President of the Security Council' (28 January 2015) UN Doc S/2015/65.

<sup>270</sup> France's letter was slightly ambiguous as to whether or not it was acting in the exercise of individual and/or collective self-defence. See UNSC, 'Identical letters dated 8 September 2015 from the Permanent Representative of France to the United Nations addressed to the Secretary-General and the President of the Security Council' (9 September 2015) UN Doc S/2015/745 (S/2015/745).

ICJ has indicated that ‘the absence of a report may be one of the factors indicating whether the State in question was itself convinced that it was acting in self-defence’.<sup>271</sup> This section examines whether members of the US-led coalition were entitled to exercise the right of collective self-defence of Iraq under international law. It also examines the lawfulness of military measures ostensibly taken in the collective self-defence of Iraq in Syria and the lawfulness of military actions undertaken in Syria in the exercise of the individual right of self-defence.

#### **7.4.v.a Collective Self-defence of Iraq**

In order for the right of collective self-defence to arise it needs to be shown that a state has been the victim of an actual or imminent armed attack; that the victim state has declared itself the victim of the actual or imminent armed attack and requested the assistance of the state(s) asserting the right of collective self-defence; that the measures taken by the assisting state(s) have not exceeded the boundaries of the consent provided by the victim state; and that the requirements of proportionality, necessity and immediacy have been satisfied.<sup>272</sup>

##### *Declaration and consent of victim state*

In a letter to the UNSC dated 25 June 2014, the Iraqi government declared that Iraq was the victim of continuing armed attacks by ISIS and requested urgent assistance from the international community to address the threat these attacks posed to Iraq and to international order.<sup>273</sup> In a subsequent letter, dated 20 September 2014, the Iraqi government indicated that it had requested the US ‘to lead international efforts to strike ISIL sites and military strongholds, with our express consent.’<sup>274</sup> Several intervening states explicitly referred to the fact that Iraq had explicitly requested assistance in their letters to the

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<sup>271</sup> *Nicaragua v USA* (n28) [200].

<sup>272</sup> *ibid* [176], [195] and [199]; Ford, ‘Syria’ (n91) 193 and 204–205.

<sup>273</sup> UNSC, ‘Letter dated 25 June 2014 from the Permanent Representative of Iraq to the United Nations addressed to the Secretary-General’ (25 June 2014) UN Doc S/2014/440, Annex.

<sup>274</sup> UNSC, ‘Letter dated 20 September 2014 from the Permanent Representative of Iraq to the United Nations addressed to the President of the Security Council’ (22 September 2014) UN Doc S/2014/691, Annex.

UNSC.<sup>275</sup> Accordingly, actions undertaken by members of the US-led coalition in the collective defence of Iraq would appear to be *prima facie* lawful provided that Iraq had been subjected to an armed attack and that the measures undertaken did not exceed the boundaries of Iraq's consent. Iraq protested to the UNSC in 2015 that Turkey had contravened its sovereignty by intervening militarily in Iraq, ostensibly in order to counter terrorism, without obtaining its prior consent.<sup>276</sup> The absence of any such protests in response to the actions of other participants in the US-led coalition against ISIS suggest that they have not exceeded the boundaries of the consent provided by Iraq.<sup>277</sup>

### *Armed Attack*

UNGA Resolution 3314 (XXIX) of 14 December 1974 offered a non-exhaustive list of acts which, in the absence of other circumstances justifying their commission including the fact that they or their consequences are not of sufficient gravity, constitute an armed attack.<sup>278</sup> In the *Nicaragua Merits* judgment, the ICJ differentiated between armed attacks which have 'scale and effects' and other 'less grave forms' of the use of force, such as 'frontier incidents'.<sup>279</sup> The exact gravity threshold is unsettled<sup>280</sup> and some commentators<sup>281</sup> and states<sup>282</sup> challenge its existence altogether. Yoram

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<sup>275</sup> S/2014/695; S/2014/851; S/2015/221; S/2015/693; S/2016/513; S/2016/34; S/2016/523.

<sup>276</sup> UNSC, 'Note verbale dated 16 September 2015 from the Permanent Mission of Iraq to the United Nations addressed to the Secretary-General' (25 September 2015) UN Doc S/2015/723; UNSC, 'Letter dated 11 December 2015 from the Permanent Representative of Iraq to the United Nations addressed to the President of the Security Council' (14 December 2015) UN Doc S/2015/963. See Bannelier-Christakis (n25) 752–754.

<sup>277</sup> Furthermore, even if one accepts the operation of the negative equality principle the US-led intervention on the side of the Iraqi government could arguably be justified as a legitimate intervention by invitation for the specific purpose of fighting terrorism. See generally Bannelier-Christakis (n25); Ruys and Ferr (n29) 91–92. Van Steenberghe has also suggested that, given its transnational effects, the armed conflict in Iraq between the Iraqi government and ISIS is not an exclusively internal political strife. See Van Steenberghe (n39).

<sup>278</sup> A/RES/29/3314.

<sup>279</sup> *Nicaragua v USA* (n28) [191] and [195].

<sup>280</sup> Noam Lubell, *Extraterritorial Use of Force Against Non-State Actors* (OUP 2010) 50; Nico Schrijver and Larissa van den Herik, (2010) 'Leiden Policy Recommendations on Counter-terrorism and International Law', April 2010, para 39 <<http://www.uni-koeln.de/jur-fak/kress/Materialien/Leiden%20Policy%20Recommendations%201%20April%202010.pdf>> accessed 19 March 2018.

<sup>281</sup> See eg Elizabeth Wilmschurst, 'The Chatham House Principles of International Law on the Use of Force in Self-Defence' (2006) 55 ICLQ 963, 967.

<sup>282</sup> For example, the US. See Schmitt (n91) 142–143.

Dinstein suggested that the force must produce or be liable to produce ‘serious consequences, epitomized by territorial intrusions, human casualties or considerable destruction of property’.<sup>283</sup> In practice, states have invoked the right to self-defence in response to acts of questionable gravity, including the protection of military personnel, nationals and installations abroad.<sup>284</sup> Regardless of the gravity threshold one applies, the armed attacks perpetrated by ISIS against Iraq would appear to satisfy it.

Some controversy exists regarding whether or not armed attacks perpetrated by NSAs such as ISIS, which are not sent by or acting on behalf of a state, can trigger the right of self-defence.<sup>285</sup> The ICJ in the *Nicaragua Merits* judgment, referring to Article 3 (g) of UNGA Resolution 3314 (XXIX), indicated that armed attacks included:

... “the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to” (*inter alia*) an actual armed attack conducted by regular forces, “or its substantial involvement therein”.<sup>286</sup>

In its 2004 *Wall Advisory Opinion*, the ICJ inferred that Article 51 of the UN Charter only recognises an inherent right of self-defence in response to an armed attack perpetrated by, or imputable to, a state.<sup>287</sup> In the 2005 *Armed Activities* case, after determining that the armed attacks in question were not attributable to the DRC, the ICJ indicated that it was not required to consider ‘whether and under what conditions contemporary international law provides for a right of self-defence against large-scale attacks by irregular forces’.<sup>288</sup>

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<sup>283</sup> Yoram Dinstein, *War, Aggression, and Self-Defence* (5th edn, CUP 2011) 208. See also Cassese, *International Law* (n16) 355.

<sup>284</sup> Marian Nash Leich, ‘Contemporary practice of the United States relating to international law’ (1990) 84 AJIL 536, 548; Cassese, *International Law* (n16) 356.

<sup>285</sup> A conspiracy theory has been advanced which suggests collusion between ISIS and the Assad regime, although it would appear to have been largely disproven. See discussion in fn284 in ch6.

<sup>286</sup> *Nicaragua v USA* (n28) [195].

<sup>287</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136 [139]. Although some commentators have challenged this interpretation of the judgment. See eg Chatham House Principles (n281) 969.

<sup>288</sup> *DRC v Uganda* (n86) [146]–[147].

Noam Lubell opined that the ICJ's 'lack of will to determine the question of self-defence against non-state actors indicates that the Court, perhaps slightly backtracking on itself, deemed this to be a question still open for debate'.<sup>289</sup> However, other commentators argued that the court simply declined to address the question because it was not pertinent to the case at hand.<sup>290</sup>

Arguably, the core issue is not so much whether or not NSAs can perpetrate armed attacks but whether victim states are entitled to implement forcible self-defence measures in third states from which the NSAs are operating without the territorial state's *consent*. The academic world is divided in this regard between so-called 'expansionists' and 'restrictivists' as will be discussed further below.<sup>291</sup>

#### *Immediacy, Necessity and Proportionality*

The immediacy criterion requires that there 'not be an undue time-lag between the armed attack and the exercise of self-defence'.<sup>292</sup> The immediacy criteria would appear to have been satisfied in the present case as ISIS was still engaged in hostilities with the Iraqi authorities when the various states referred to above asserted the right of collective self-defence of Iraq. The necessity criterion requires that forcible measures only be used where peaceful measures have been exhausted or are unlikely to be effective in ending an actual, or averting an imminent, armed attack.<sup>293</sup> It limits the nature, intensity and duration of the forcible response to what is required to

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<sup>289</sup> Lubell (n280) 33. Sean Murphy reportedly expressed a similar view in private correspondence to Jackson. See Aaron L Jackson, 'Hunting down terrorists "wherever they exist": ISIL in Syria and the legal argument for United States military operations within the territory of a non-consenting nation-state' (2015) 74 *AFLRev* 133, 176. See also Jochen Abr Frowein, 'Article 51 and the Realities of the Present Day World' in Anne Peters and Christian Marxsen (eds), 'Self-Defence Against Non-State Actors: Impulses from the Max Planck Dialogues on the Law of Peace and War' (2017) *MPIL Research Paper Series No 2017-07*, 42 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2941640](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2941640)> accessed 19 March 2018.

<sup>290</sup> See eg Shin Kawagishi, 'Clearing Uncertainties of the Jurisprudence of the ICJ on Self-Defence Against Non-State Actors' in Peters and Marxsen (eds) (n289) 26.

<sup>291</sup> See generally Peters and Marxsen (eds) (n289).

<sup>292</sup> Dinstein, *War* (n283) 227–233.

<sup>293</sup> Chatham House Principles (n281) 966–967; Christian Henderson, 'The 2010 United States National Security Strategy and the Obama Doctrine of "Necessary Force"' (2010) 15 *JC&SL* 403, 418.



end or avert the armed attack.<sup>294</sup> The necessity criterion would appear to have been satisfied at the outset given that ISIS rejects the prevailing international order and consequently was unlikely to accept a diplomatic settlement.

Eric Cannizaro asserted that ‘the use of force must necessarily be commensurate with the concrete need to repel the current attack, and not with the need to produce the level of security sought by the attacked state’.<sup>295</sup> Accordingly, forcible measures should do no more than what is needed to end the threat posed by an actual or imminent armed attack. The proportionality requirement is difficult to implement in practice given the inherent uncertainty surrounding the measurement of the ‘threat’ posed by an actual or imminent armed attack.<sup>296</sup> Judith Gardam indicated that the following factors should be taken into account when measuring proportionality: state practice, temporal and geographical scope of the response, likely incidental harm to civilians and civilian objects, means and methods of warfare, target selection and impact on third states.<sup>297</sup> Robert Ago argued that a state, which has suffered a series of successive attacks, may ‘undertake a single armed action on a much larger scale in order to put an end to this escalating succession of attacks’.<sup>298</sup> However, the legal status of this so-called ‘accumulation doctrine’ is uncertain.<sup>299</sup>

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<sup>294</sup> Chatham House Principles (n281) 966–967.

<sup>295</sup> Eric Cannizaro, ‘Contextualizing Proportionality: Jus Ad Bellum and Jus In Bello in the Lebanese War’ (2006) 88 *International Review of the Red Cross* 779, 781. For a similar opinion, see Judith Gardam, *Necessity, Proportionality and the Use of Force by States* (CUP 2004) 158. For a contrary view, see International Institute of Humanitarian Law, ‘San Remo Manual on International Law Applicable to Armed Conflicts at Sea adopted June 1994’ (1995) 35 *International Review of the Red Cross* 595, 595–637.

<sup>296</sup> Lubell (n280) 65–66.

<sup>297</sup> Gardam (n295) 162.

<sup>298</sup> Robert Ago, ‘Addendum - Eighth Report on State Responsibility by Mr. Robert Ago, Special Rapporteur – the internationally wrongful act of the State, source of international responsibility (part 1)’ (1980) 2 *UNYBILC* 3, para 121.

<sup>299</sup> Tams suggested in a 2009 article that this argument had generally been rejected, including by the UNSC. See Christian J Tams, ‘The Use of Force against terrorists’ (2009) 20 *EJIL* 359, 370. However, several proponents of the expansionist approach to self-defence have proffered implicit support for the doctrine. For example, Scharf asserted that ‘the individual or aggregate actions of the non-state actors must amount to the equivalent of an armed attack to trigger the right to use force in self-defence’. See Michael P Scharf, ‘How the War Against ISIS Changed International Law’ (2016) 48 *Case WResJInt’l L* 1, 53–54. Furthermore, the Leiden Policy Recommendations asserted that when assessing the scale of an armed attack by an NSA ‘account may be taken of a series of attacks emanating from the same territory and the same terrorist group’. See Leiden Policy Recommendations on Counter-terrorism (n280) para 39.

The necessity and proportionality requirements impose a continuing constraint on states asserting a right of self-defence. Consequently, any measures employed in the collective self-defence of Iraq would need to be adjusted and/or terminated if and when the threat posed to Iraq by an actual or imminent armed attack by ISIS and other internationally recognised terrorist organisations was reduced/eradicated.

#### **7.4.v.b Measures against ISIS in Syria in Collective Self-defence of Iraq**

States acting in the collective self-defence of Iraq would still need to provide a legal justification for any forcible measures they have taken against ISIS in Syria. Potential arguments include passive consent, the ‘unable or unwilling’ doctrine, loss of effective control of territory and implementation of UNSC resolutions.

##### *Passive Consent of Syrian Government*

The US-led coalition’s intervention in Syria against ISIS cannot be justified as an intervention by invitation as the Assad regime did not issue a prior invitation to the coalition to intervene<sup>300</sup> nor did the coalition request the regime’s consent for its operations or seek to rely upon the intervention by invitation argument.<sup>301</sup> Indeed the US indicated that it would not be coordinating with the Syrian armed forces as it considered the Assad government to have forfeited its legitimacy.<sup>302</sup> Nevertheless, a very tentative argument has been made that the Assad government passively consented to the coalition’s intervention, at least up until 17 September 2015.<sup>303</sup> The ILC’s 2001 Draft Articles stipulate that:

Valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the

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<sup>300</sup> UNSC, ‘Identical letters dated 17 September 2015 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council’ (21 September 2015) UN Doc S/2015/719.

<sup>301</sup> Bannelier-Christakis (n25) 767 and 774.

<sup>302</sup> *ibid* 767.

<sup>303</sup> *ibid* 767–774; Jackson (n289) 162–163; Ford, ‘Syria’ (n91) 198–200. Regarding the interpretation of silence and passivity, see Paulina Starski, ‘A Call for a Turn to the Meta-Level of International Law: Silence, the “Interregnum”, and the Conundrum of Ius Cogens’ in Peters and Marxsen (eds) (n289).

limits of that consent.<sup>304</sup>

Notably, a valid consent may be informal and need not necessarily be explicit or written.<sup>305</sup> States may have political reasons for declining to publicly consent or admit that they are cooperating to combat a shared threat.<sup>306</sup>

Prior to the US-led coalition's initiation of airstrikes against ISIS, a Syrian minister indicated that 'any action of any kind without the consent of the Syrian government would be an attack on Syria'.<sup>307</sup> The Assad regime's core international allies, Russia and Iran, made similar statements.<sup>308</sup> Nevertheless, after the coalition commenced its airstrikes the Syrian government declined to undertake any significant action in response. Its failure to take military action can be rationalised by the coalition's military superiority.<sup>309</sup> However, its omission to publicly condemn the coalition's actions is less easy to explain. It led some commentators to suggest that the Syrian government passively consented to the coalition's actions thereby precluding their unlawfulness. However, this argument could not be sustained after 17 September 2015 as on that date the Assad government submitted the first of several letters to the UNSC condemning the coalition's actions as contrary to international law.<sup>310</sup>

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<sup>304</sup> ILC 2001 Draft Articles, 72–74 (art 20). See also discussion of legitimate authorities in s7.3 above.

<sup>305</sup> *ibid* 72–74 (art 20). See also *DRC v Uganda* (n86) [45]–[46].

<sup>306</sup> Although Bannelier–Christakis argued that, in contrast to the so-called Pakistani precedent, the practical barriers to cooperation were potentially insurmountable in the Syrian case as the US and several of its coalition allies had publicly called for Bashar to step down and provided various forms of support to his opponents. Bannelier–Christakis (n25) 769–770 and 774.

<sup>307</sup> 'Isis air strikes: Obama's plan condemned by Syria, Russia and Iran' *The Guardian* (12 September 2014) <<https://www.theguardian.com/world/2014/sep/11/assad-moscow-tehran-condemn-obama-isis-air-strike-plan>> accessed 24 March 2018.

<sup>308</sup> *ibid*.

<sup>309</sup> Jackson (n289) 157–158.

<sup>310</sup> S/2015/719; UNSC, 'Identical letters dated 21 September 2015 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council' (22 September 2015) UN Doc A/70/385–S/2015/727 (Doc A/70/385–S/2015/727); UNSC, 'Identical letters dated 9 November 2015 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council' UN Doc S/2015/851; UNSC, 'Identical letters dated 18 January 2016 from the Charge' d'affaires of the Permanent Mission of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council' (22 January 2016) UN Doc S/2016/46. In support of this argument, see Tristan Ferraro and Lindsey Cameron, 'Article

### *Loss of Control of Territory*

In their letters to the UNSC, Germany and Belgium inferred that the consent of the Syrian government was not required for defensive measures against ISIS in parts of Syria occupied by ISIS as the central authorities no longer exercised effective control over this territory.<sup>311</sup> This argument is difficult to sustain because for as long as the Assad regime is recognised as the de jure government of Syria its consent to any forcible measures on Syrian territory would appear to be required.<sup>312</sup> Furthermore, this argument could have the undesirable effect of conferring international legitimacy on ISIS.<sup>313</sup>

### *UNSC Resolution 2249*

In their letters to the UNSC, Germany, Denmark, Belgium and Norway indicated that they had taken military action against ISIS in Syria pursuant to UNSC Resolution 2249.<sup>314</sup> In the resolution's operative part, the UNSC calls upon UN member states with the capacity to do so to take all necessary measures, in compliance with international law in particular the UN Charter, on the territory under the control of ISIS in Syria and Iraq to prevent and suppress terrorist acts committed by ISIS, JAN and other al Qaeda affiliates and to eradicate the safe haven they have established in parts of Iraq and Syria.<sup>315</sup>

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2: Application of the Convention' in Knut Dörmann and others (eds), *ICRC Commentary on the First Geneva Convention, 2016* (ICRC 2016) para 263 <[https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=B E2D518CF5DE54EAC1257F7D0036B518#96\\_B](https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=B E2D518CF5DE54EAC1257F7D0036B518#96_B)> accessed 27 March 2018; Bannelier-Christakis (n25) 769–774; Ali Fuat Bahcavan, 'Legal aspects of using force against the Islamic State in Syria after Russian intervention' (2016) 224 *MillRev* 639, 656. See also Marc Weller, 'Islamic State crisis: What force does international law allow?' (*BBC News* 23 September 2014) <<http://www.bbc.com/news/world-middle-east-29283286>> accessed 23 September 2014.

<sup>311</sup> S/2015/946; S/2016/523.

<sup>312</sup> See eg Priya Urs, 'Effective Territorial Control by Non-State Armed Groups and the Right of Self-Defence' in Peters and Marxsen (eds) (n289) 29; Britta Sjöstedt, 'Applying the Unable/Unwilling State Doctrine – Can a State Be Unable to Take Action?' in Peters and Marxsen (eds) (n289) 37.

<sup>313</sup> Jackson (n289) 165; Urs (n312) 29.

<sup>314</sup> S/2015/946; S/2016/34; S/2016/513; S/2016/523. Former Prime Minister Cameron also relied upon the resolution to justify the UK's participation in the strikes in a statement before Parliament. See Dapo Akande and Marko Milanovic, 'The Constructive Ambiguity of the Security Council's ISIS Resolution' (*EJIL: Talk!*, 21 November 2015) <<https://www.ejiltalk.org/the-constructive-ambiguity-of-the-security-councils-isis-resolution>> accessed 14 March 2018.

<sup>315</sup> UNSC Res 2249 (20 November 2015) UN Doc S/RES/2249 (S/RES/2249), para 5.

Marc Weller asserted that Resolution 2249 effectively ‘granted a universal licence’ to states to implement military measures against ISIS in Syria in the exercise of the right of ‘pre-emptive’ self-defence.<sup>316</sup> In support of this argument, he observed that the resolution determined that ISIS ‘constitutes a global and unprecedented threat to international peace and security’<sup>317</sup> in the preamble and noted in operative paragraph 1 that ISIS ‘has the capability and intention to carry out further attacks’.<sup>318</sup> However, numerous other legal commentators insisted that the resolution does not implicitly endorse self-defence as a legal basis for military intervention against ISIS in Syria.<sup>319</sup> Akande and Marko Milanovic observed that, in contrast to UNSC Resolutions 1368 and 1373, which were adopted in the immediate aftermath of the 9/11 attacks, Resolution 2249 does not include any reference to the inherent right of self-defence.<sup>320</sup> In fact, it doesn’t actually authorise UN member states to take any measures against ISIS other than the measures that they are already entitled to implement under existing international law.<sup>321</sup> As Akande and Milanovic observed, the resolution was not adopted under Chapter VII of the UN Charter, ‘calls upon’ instead of ‘authorises’ states to take all necessary measures, and includes the caveat ‘in compliance with international law, in particular the United Nations Charter’.<sup>322</sup>

Akande, Milanovic and Christian Marxsen suggested that Resolution 2249 is deliberately ambiguous and flexible.<sup>323</sup> On the one hand, it seemingly

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<sup>316</sup> Marc Weller, ‘Permanent Imminence of Armed Attacks: Resolution 2249 (2015) and the Right to Self Defence Against Designated Terrorist Groups’ (*EJIL: Talk!*, 22 November 2015) <<https://www.ejiltalk.org/permanent-imminence-of-armed-attacks-resolution-2249-2015-and-the-right-to-self-defence-against-designated-terrorist-groups/>> accessed 14 March 2018.

<sup>317</sup> S/RES/2249, Preamble.

<sup>318</sup> *ibid.*, para 1.

<sup>319</sup> Akande and Milanovic (n314). See also Olivier Corten, ‘The ‘Unwilling or Unable’ Test: Has it Been, and Could it be, Accepted?’ (2016) 29 *LJIL* 777, 790; Urs (n312) 30.

<sup>320</sup> Akande and Milanovic (n314).

<sup>321</sup> *ibid.*; Weller, ‘Permanent Imminence’ (n316); Scharf (n299) 51; Urs (n312) 30; Monica Hakimi and Jacob Katz Cogan, ‘A Role for the Security Council on Defensive Force?’ (*EJIL: Talk!*, 21 October 2018) <<https://www.ejiltalk.org/author/mhakimiandjcogan/>> accessed 16 March 2018.

<sup>322</sup> Akande and Milanovic (n314).

<sup>323</sup> *ibid.*; Christian Marxsen, ‘A Note on Indeterminacy of the Law on Self- Defence Against Non-State Actors’ in Peters and Marxsen (eds) (n289) 79.

endorses military action against ISIS in Syria and Iraq thereby providing intervening states with an apparent legal justification for their actions, which they can sell to both domestic and international audiences.<sup>324</sup> On the other hand, it is ambiguous enough to allow states to interpret it in a manner that is compatible with their own interests and subjective positions regarding the legality of the various external military interventions in Syria and Iraq.<sup>325</sup>

#### *Unwilling or Unable Doctrine*

At least four states relied upon the ‘unwilling or unable’ doctrine to justify their defensive military measures against ISIS in Syria. They argued that the Syrian government had shown itself to be ‘unwilling or unable’ to prevent ISIS from using its territory as a safe haven from which to launch armed attacks against other states.<sup>326</sup> The ‘unwilling or unable’ doctrine posits that a state is entitled under international law to implement forcible defensive measures in response to an actual or imminent armed attack by an NSA on the territory of a third state from which the NSA is operating, even without the consent of the territorial state and irrespective of whether or not the attack is attributable to it, in circumstances where the territorial state has shown itself to be unwilling or unable to address the threat posed by the NSA to the victim state. This doctrine reflects the expansionist approach to the right of self-defence. It has been challenged by restrictivists.

Restrictivists argue that a state may only implement forcible self-defence measures in response to an armed attack by an NSA on the territory of a third state without the latter’s consent if the attack can be attributed to the territorial state or the territorial state has a ‘substantial involvement’ in the NSA’s actions.<sup>327</sup> The appropriate test for attribution is whether the state ‘had effective control of the military or paramilitary operations in the course

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<sup>324</sup> Akande and Milanovic (n314); Marxsen, ‘A Note on Indeterminacy’ (n323) 79. See also Leiden Policy Recommendations on Counter-terrorism (n280) para 36.

<sup>325</sup> Akande and Milanovic (n314); Marxsen, ‘A Note on Indeterminacy’ (n323) 79.

<sup>326</sup> See S/2014/695; S/2015/221; S/2015/563; S/2015/693.

<sup>327</sup> Olivier Corten, ‘A plea against the abusive invocation of self-defence as a response to terrorism’ (*EJIL: Talk!*, 14 July 2016) <<http://cdi.ulb.ac.be/wp-content/uploads/2016/06/A-plea-against-the-abusive-invocation-of-self-defence.pdf>> accessed 16 March 2018.

of which the alleged violations were committed'.<sup>328</sup> The 'substantial involvement' criterion requires that a 'direct link' be shown to exist between the territorial state and the NSA in question.<sup>329</sup>

Restrictivists argue that the 'unwilling or unable' principle attempts to transform the due diligence obligation on states not to participate in, or acquiesce to, organised activities on their territory that are directed towards the commission of acts of civil strife or terrorism in other states<sup>330</sup> into an obligation of result as opposed to conduct.<sup>331</sup> They assert that their position reflects UNGA Resolution 3314 (XXIX),<sup>332</sup> the definition of the crime of aggression adopted by the States parties to the Rome Statute,<sup>333</sup> the case law of the ICJ<sup>334</sup> and CIL. They argue that Article 51 of the UN Charter, which reiterates the right of self-defence, must be read together with Article 2 (4), which requires states to refrain from the use of force in their international relations.<sup>335</sup>

Olivier Corten, a prominent restrictivist, conceded that there are some examples of state practice, which support a broader interpretation of self-defence than that advanced by restrictivists. However, he asserted that these examples are too 'erratic and ambiguous' to give rise to a change in the status of the *jus ad bellum* rules.<sup>336</sup> He argued that existing *opinio juris* supports the

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<sup>328</sup> *Nicaragua v USA* (n28) [115] and [195]; ILC 2001 Draft Articles, 47–48 (art 8).

<sup>329</sup> Corten, 'A plea' (n327).

<sup>330</sup> Friendly Relations Declaration, Principle 1.

<sup>331</sup> Corten, 'The 'Unwilling or Unable' Test' (n319) 792–793; Theodore Christakis, 'Challenging the "Unwilling or Unable" Test' in Peters and Marxsen (eds) (n289) 18; Antonello Tancredi, 'Doctrinal Alternatives to Self-Defence Against Non-State Actors' in Peters and Marxsen (eds) (n289) 60.

<sup>332</sup> A/RES/29/3314, para 3 (g).

<sup>333</sup> RES RC/RES.6 of the Review Conference of the Rome Statute, 'The crime of aggression' (11 June 2010) Resolution RC/Res.6, Annex 1.

<sup>334</sup> See *Nicaragua v USA* (n28) [191] and [195]; *Wall Advisory Opinion* (n287) [139]. *DRC v Uganda* (n86) [301] and [303].

<sup>335</sup> See eg Letizia Lo Giacco, 'Reconsidering the Legal Basis for Military Actions Against Non-State Actors' in Peters and Marxsen (eds) 33. See also Sjöstedt (n312) 36.

<sup>336</sup> Olivier Corten, 'Has Practice Led to an "Agreement Between the Parties" Regarding the Interpretation of Article 51 of the UN Charter?' in Peters and Marxsen (eds) (n289) 14–16. For a similar view, see Kevin Jon Heller, 'The Absence of Practice Supporting the "Unwilling or Unable" Test' (*Opinio Juris*, 17 February 2015) <<http://opiniojuris.org/2015/02/17/unable-unwilling-test-unstoppable-scholarly-imagination/>> accessed 16 March 2018.

restrictivist position.<sup>337</sup> For example, the Non-Aligned Movement, which has 120 member states, has made several statements that support it.<sup>338</sup> Michael Scharf posited that the use of force against al Qaeda and its affiliates after the 9/11 attacks triggered the emergence of a new customary rule in support of the ‘unwilling or unable’ doctrine, which effectively crystallised following the use of defensive military measures against ISIS in Syria and the international response thereto.<sup>339</sup> Corten rejected this argument observing that only four states explicitly relied upon the unwilling or unable argument to justify their defensive measures in Syria in letters to the UNSC.<sup>340</sup> He argued that this demonstrated that little *opinio juris* exists in support of the doctrine even amongst the coalition members themselves.<sup>341</sup> He further argued that the doctrine is not accepted by the international community as a whole as evident from the fact that several states, including Syria, Russia, Cuba and Ecuador, challenged the lawfulness of the coalition’s airstrikes in Syria and/or reiterated the importance of ensuring respect for Syria’s sovereignty.<sup>342</sup>

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<sup>337</sup> Corten, ‘Has Practice Led to an “Agreement Between the Parties”’ (n336) 14–16.

<sup>338</sup> UNSC Verbatim Record (15 February 2016) UN Doc S/PV.7621, 33–34. See also NAM, Final Document of the 16th Summit of Heads of State or Government (August 2012) NAM 2012/Doc.1/Rev.2, para 28.2; NAM, ‘Final Document of the 17th Summit of Heads of State or Government’ (September 2016) NAM 2016/CoB/DOC.1. Corr.1, para 25.2; UNGA/UNSC, ‘Annex to the Letter dated 8 July 2016 from the representatives of China and the Russian Federation to the United Nations addressed to the Secretary-General: The Declaration of the Russian Federation and the People’s Republic of China on the Promotion of International Law’ (12 July 2016) UN Doc A/70/982–S/2016/600, paras 2–4 and 7. Notably, the Organization of American States condemned a Colombian military intervention against FARC rebels in Ecuador in 2008 as a violation of Ecuador’s sovereignty. See Elena Chachko and Ashley Deeks, ‘Who is on Board with “Unwilling or Unable”?’ (*Lawfare*, 10 October 2016) <<https://www.lawfareblog.com/who-board-unwilling-or-unable#>> accessed 16 March 2018.

<sup>339</sup> Scharf (n299) 21 and 50–53.

<sup>340</sup> S/2014/695; S/2015/693; S/2015/221; S/2015/563.

<sup>341</sup> Corten, ‘The ‘Unwilling or Unable’ Test’ (n319) 780–785. See also Christakis (n331) 19. However, Chachko and Deeks asserted that the UK, Germany, the Netherlands and the Czech Republic also explicitly relied upon the ‘unwilling or unable’ argument in various official statements; that Belgium implicitly relied upon it; and that France, Denmark, Norway, Egypt, Iraq, Jordan and Lebanon may also have relied on it although it was not entirely clear. See Chachko and Deeks (n338). However, some of the evidence that Chachko and Deeks adduced in support of their argument has been challenged. See eg Corten, ‘The ‘Unwilling or Unable’ Test’ (n319) 780; Sjöstedt (n312) 37–38; Hakimi and Cogan (n321). Ford asserted that France also implicitly relied upon the ‘unable or unwilling’ doctrine to justify its intervention in Syria. See Ford, ‘Syria’ (n91) 196.

<sup>342</sup> Corten, ‘The ‘Unwilling or Unable’ Test’ (n319) 786–791.



Expansionists observe that Article 51 does not explicitly stipulate that an armed attack must have been perpetrated by a state to trigger the right of self-defence and assert that the phrase must be interpreted in light of state practice.<sup>343</sup> They argue that state practice, particularly since the 9/11 attacks, supports the expansionist position.<sup>344</sup> UNSC Resolutions 1368 and 1373 recognised in their respective Preambles the inherent right of individual or collective self-defence in accordance with the UN Charter and asserted that acts of international terrorism constitute a threat to international peace and security.<sup>345</sup> Furthermore, Resolution 1373, which was adopted under Chapter VII, outlined several measures that states were required to implement to prevent and suppress terrorism.<sup>346</sup> Expansionists interpret Resolutions 1368 and 1373 and the international response to the 9/11 attacks as an acknowledgement that armed attacks by NSAs can trigger the right to self-defence.<sup>347</sup> Judges Kooijmans and Simma reached a similar conclusion in

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<sup>343</sup> C Greenwood, 'International Law and the "War Against Terrorism"' (2002) 78 *International Affairs* 301, 307; Thomas M Franck, 'Editorial Comments: Terrorism and the Right of Self-Defense' (2001) 95 *AJIL* 839, 840; Jordan J Paust, 'Use of Force Against Terrorists in Afghanistan, Iraq and Beyond' (2002) 35 *Cornell Int'l LJ* 533, 534; Chatham House Principles (n281) 969–970; Lubell (n280) 31–32; Henderson, 'The 2010 United States National Security Strategy' (n293) 422; Frowein (n289) 42; Michael Wood 'Self-Defence Against Non-State Actors – A Practitioner's View' in Peters and Marxsen (eds) (n289) 65–66. See also *Wall* Advisory Opinion (n287), Separate Opinion by Higgins J [33], Separate Opinion by Kooijmans J [35] and Declaration of Burgenthal J [6].

<sup>344</sup> For a review of state practice in support of this argument both before and after the 9/11 attacks, see Chatham House Principles (n281) 969–970; Lubell (n280) 29–31, 34–35 and 39–42; Dinstein, *War* (n283) 272–274; Chachko and Deeks (n338); Christian J Tams, 'Embracing the Uncertainty of Old: Armed Attacks by Non-State Actors Prior to 9/11' in Peters and Marxsen (eds) (n289) 53–55. See also in support of this position Cassese, *International Law* (n16) 355; Tams, 'The Use of Force' (n299) 381; Kreß (n65); Jackson (n289) 177–179; Bahcavan (n310) 655; Ford, 'Syria' (n91) 194–195.

<sup>345</sup> UNSC Res 1368 (12 September 2001) UN Doc S/RES/1368, Preamble and para 1; UNSC Res 1373 (28 September 2001) UN Doc S/RES/1373 (S/RES/1373) Preamble.

<sup>346</sup> S/RES/1373 paras 1–3.

<sup>347</sup> See eg Franck, 'Editorial Comments' (n343) 840; Paust (n343) 535; Christopher Greenwood, 'International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaida, and Iraq' (2003) 4 *San Diego Int'l LJ* 7, 17; Lubell (n280) 34; Jackson (n289) 177; Bahcavan (n310) 652; Scharf (n299) 27–29. However, some other commentators suggested that the resolutions were intentionally ambiguous in this regard. See eg Eric PJ Myjer and Nigel D White, 'The Twin Towers Attack: An Unlimited Right to Self-Defence?' (2002) 7 *JC&SL* 5, 7; Tom Ruys and Sten Verhoeven, 'Attacks by Private Actors and the Right of Self-Defence' (2005) 10 *JC&SL* 289, 310, 312.

their respective separate opinions in the *Wall Advisory Opinion*<sup>348</sup> and the *Armed Activities* case.<sup>349</sup>

The ‘unwilling or unable’ doctrine derives inspiration from the laws of neutrality, which required neutral states to prevent belligerents from conducting hostile operations within their territory.<sup>350</sup> Expansionists assert that states are required under CIL to take all reasonable measures to ensure that NSAs do not use their territory as a safe haven from which to launch armed attacks against other states.<sup>351</sup> Irène Couzigou inferred that this duty of due diligence may encompass an obligation to seek and/or accept assistance from other states in circumstances where the territorial state is unable to adequately address the threat posed by the NSA.<sup>352</sup>

States asserting the right of self-defence in response to an armed attack by an NSA would need to ensure that the requirements of gravity, necessity, proportionality, immediacy and imminence (in respect of threatened armed attacks) were satisfied. Some expansionists suggested that the gravity threshold may be higher in respect of armed attacks perpetrated solely by NSAs.<sup>353</sup> However, some expansionists also seemed to voice support for Ago’s accumulation doctrine.<sup>354</sup> Expansionists assert that when assessing the necessity of defensive measures, states should have regard to the gravity and nature of the threat posed by the NSA and the attitude of the territorial state toward it.<sup>355</sup> It must be shown that law-enforcement measures

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<sup>348</sup> *Wall Advisory Opinion* (n287), Separate opinion by Kooijmans J [35] and see also Declaration of Burgenthal J [6].

<sup>349</sup> *DRC v Uganda* (n86), Separate Opinion by Kooijmans J [28] and Separate Opinion by Simma J [11].

<sup>350</sup> Bahcavan (n310) 654–655; Scharf (n299) 30–32.

<sup>351</sup> Chatham House Principles (n281) 970; Dinstein, *War* (n283) 269; Ford, ‘Syria’ (n91) 197. See *Corfu Channel Case (UK v Albania)* (Merits) [1949] ICJ Rep 4, 22.

<sup>352</sup> Irène Couzigou, ‘The Right to Self-Defence Against Non-State Actors – Criteria of the “Unwilling or Unable” Test’ in Peters and Marxsen (eds) (n289) 47.

<sup>353</sup> Chatham House Principles (n281) 969 and 971; Leiden Policy Recommendations on Counter-terrorism (n280) para 39.

<sup>354</sup> Leiden Policy Recommendations on Counter-terrorism (n280) para 39. See also Dinstein, *War* (n283) 276; Daniel Bethlehem, ‘Self-Defense against an Imminent or Actual Armed Attack by Nonstate Actors’ (2012) 106 AJIL 770, 775.

<sup>355</sup> Leiden Policy Recommendations on Counter-terrorism (n280) para 42.

would clearly be ineffective.<sup>356</sup> Ideally the territorial state should first be afforded an opportunity to address the threat itself and its prior consent to any forcible measures against the NSA on its territory should be sought.<sup>357</sup> Nevertheless, expansionists assert that non-consensual forcible measures may be implemented against NSAs where the territorial state has shown itself to be unwilling or unable to address the threat that they pose to the victim state.<sup>358</sup>

Expansionists accept that the proportionality requirement prevents states from taking forcible defensive measures against the territorial state itself unless the actions of the NSA are attributable to it.<sup>359</sup> Notably, several participants in the US-led coalition against ISIS stressed that their defensive measures against ISIS in Syria were not directed against Syria or the Syrian people.<sup>360</sup> Expansionists have suggested that the territorial state may even be legally obliged not to interfere with the victim state's defensive operations against the NSA and consequently, if the territorial state engages the victim state militarily, the latter would be entitled to defend itself.<sup>361</sup> Notably, when the US shot down a Syrian fighter jet in June 2016 it claimed to be acting in defence of 'Coalition and partner forces in Syria conducting legitimate counter-ISIS operations' and in response to 'The demonstrated hostile intent and actions of pro-regime forces toward' them.<sup>362</sup> Nevertheless, Adil Ahmad

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<sup>356</sup> Chatham House Principles (n281) 971; Leiden Policy Recommendations on Counter-terrorism (n280) paras 41–42.

<sup>357</sup> Ashley S Deeks, '“Unwilling or Unable”: Toward a Normative Framework for Extraterritorial Self-Defense' (2012) 52 *VaJInt'l L* 483, 490; Elizabeth Wilmshurst and Michael Wood, 'Self-Defense against Nonstate Actors: Reflections on the Bethlehem Principles' (2013) 107 *AJIL* 390, 394–395.

<sup>358</sup> For the expansionist position, see Chatham House Principles (n281) 969–970; Lubell (n280) 29–31 and 34–35; Leiden Policy Recommendations on Counter-terrorism (n280) paras 32, 42, 51–52; Dinstein, *War* (n283) 269–270; Bethlehem (n354) 774 and 776; Couzigou (n352) 47.

<sup>359</sup> Chatham House Principles (n281) 969; Leiden Policy Recommendations on Counter-terrorism (n280) para 43; Dinstein, *War* (n283) 270 and 276–277; Jackson (n289) 164–165; Scharf (n299) 32. See also Henderson, 'The 2010 United States National Security Strategy' (n293) 424–427.

<sup>360</sup> See eg S/2015/693; S/2015/946; S/2016/513.

<sup>361</sup> Lubell (n280) 40–41; Dinstein, *War* (n283) 277; Adil Ahmad Haque, 'On the Precipice: The U.S. and Russia in Syria' (*Just Security*, 19 June 2017) <<https://www.justsecurity.org/42297/precipice-u-s-russia-syria>> accessed 1 November 2017.

<sup>362</sup> Haque, 'On the Precipice' (n361).

Haque indicated that the lawfulness of America's defensive actions may have been compromised by 'the mixed motives' of the coalition and its partner, the YPG-dominated SDF.<sup>363</sup> The YPG has helped establish an autonomous region in northern Syria, whereas the US and most of its coalition partners have indirectly supported regime change by calling for Bashar to step down.

Finally, expansionists accept that states have a right to implement forcible measures in anticipatory self-defence where they are necessary to avert an imminent armed attack in accordance with the *Caroline* standard,<sup>364</sup> namely, where the necessity for self-defence was 'instant, overwhelming, and leaving no choice of means, and no moment for deliberation'.<sup>365</sup> Nevertheless, both the Leiden Policy Recommendations on Counter-terrorism and the Chatham House Principles on the Use of Force in Self-Defence determined that the use of preventative/pre-emptive forcible measures in response to potential or developing threats, which have yet to crystallise, are *per se* unlawful unless authorised by the UNSC.<sup>366</sup>

Expansionists suggest that the 'unwilling or unable' doctrine seeks to reconcile the competing principles of sovereign equality, non-use of force and non-intervention on the one hand and self-defence on the other. They concur with Judge Kooijmans that it 'would be unreasonable to deny the attacked State the right to self-defence merely because there is no attacker State, and the Charter does not so require'.<sup>367</sup> In Guy Keinan's opinion, it would arbitrarily prefer the population of the territorial state over the population of the victim state.<sup>368</sup>

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<sup>363</sup> *ibid.* The YPG wishes to create an autonomous region in northern Syria.

<sup>364</sup> Chatham House Principles (n281) 966–968; Leiden Policy Recommendations on Counter-terrorism (n280) paras 45–48.

<sup>365</sup> 'Letter dated 6 August 1842 from Mr. Webster to Lord Ashburton, Department of State, Washington' <[http://avalon.law.yale.edu/19th\\_century/br-1842d.asp#web1](http://avalon.law.yale.edu/19th_century/br-1842d.asp#web1)> accessed 14 October 2014.

<sup>366</sup> They both reflect the expansionist position. See Chatham House Principles (n281) 968; Leiden Policy Recommendations on Counter-terrorism (n280) para 45. See also Lubell (n280) 55–63.

<sup>367</sup> *DRC v Uganda* (n86), Separate Opinion by Kooijmans J [30]. See Dinstein, *War* (n283) 269–272; Jackson (n289) 163.

<sup>368</sup> Guy Keinan, 'Humanising the Right of Self-Defence' in Peters and Marxsen (eds) (n289) 51.

However, restrictivists argue that the expansionist approach is incompatible with the existing *jus ad bellum* requirements of armed attack, necessity, imminence and proportionality.<sup>369</sup> They highlight the risks of abuse inherent in the expansionist approach, which infers that states may unilaterally determine if a territorial state is unable or unwilling to address the threat posed by an NSA operating from the territorial state's territory. They argue that it provides powerful states with an excuse to contravene the non-intervention and non-use of force principles whenever they deem it to be in their subjective interests.<sup>370</sup> They further argue that it could undermine the collective security system and allow the return of the unrestrained unilateralism and volatility that characterised the pre-Charter era.<sup>371</sup>

Both restrictivists and expansionists have been accused of examining and interpreting state practice selectively to suit their respective viewpoints.<sup>372</sup> As Marxsen observed, 'This is not surprising, since the practice of states and international organs virtually is intended to be ambiguous, not ruling out one or the other interpretation of the rule on self-defence'.<sup>373</sup> Marxsen inferred that positivist arguments cannot conclusively determine the correct interpretation of the right of self-defence under international law as long as state practice remains unsettled and the applicable international legal rules remain indeterminate.<sup>374</sup> He suggested that these positivist arguments are in fact driven by the extra-legal subjective political beliefs of their authors, which themselves deserve further consideration to truly appreciate the core issues involved.<sup>375</sup>

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<sup>369</sup> Corten, 'The 'Unwilling or Unable' Test' (n319) 797–798; Inger Österdahl, 'Scarcely Reconcilable with the UN Charter' in Peters and Marxsen (eds) (n289) 22.

<sup>370</sup> Matthias Hartwig, 'Which State's Territory May Be Used for Self-Defence Against Non-State Actors?' in Peters and Marxsen (eds) (n289) 41.

<sup>371</sup> Corten, 'The 'Unwilling or Unable' Test' (n319) 779 and 797–798; Heller, 'The Absence of Practice' (n336); Christakis (n331) 19; Österdahl (n369) 22–23; Giacco (n335) 34.

<sup>372</sup> Carl-Philipp Sassenrath, 'Diverging Interpretations of Individual State Practice on Self-Defence Against Non-State Actors – Considerations for a Methodological Approach' Peters and Marxsen (eds) (n289) 71–74; Starski (n303) 75–78; Marxsen, 'A Note on Indeterminacy' (n323) 79–81.

<sup>373</sup> Marxsen, 'A Note on Indeterminacy' (n323) 79.

<sup>374</sup> *ibid* 79–81. See also Ian Hurd, 'The permissive power of the ban on war' (2016) 2 EJIS 1, 14.

<sup>375</sup> Marxsen, 'A Note on Indeterminacy' (n323) 80–81.

*Application of Unable or Unwilling Test in Syria*

If the restrictivist position is adopted, non-consensual third state military interventions against ISIS in Syria contravened international law given that ISIS' actions could not be attributed to Syria.<sup>376</sup> Even if one accepts the unwilling or unable doctrine, one would need to examine if the criteria governing its application were satisfied in Syria. It would be difficult to decisively prove that the Syrian government was unwilling to address the threat posed by ISIS, particularly after the summer of 2014 when ISIS and the Syrian armed forces began to engage each other in hostilities.<sup>377</sup> A more promising argument suggests that the government was *unable* to effectively combat the threat posed by ISIS as evident from its withdrawal from non-strategic areas in Eastern Syria where ISIS established a base.<sup>378</sup> Nevertheless, Britta Sjöstedt asserted that the 'unable' argument was difficult to sustain after Russia's intervention by invitation in September 2015.<sup>379</sup> However, Ali Bahcavan countered that the 'unable' argument was unaffected by Russia's intervention as, initially at least, Russia focussed its airstrikes primarily on FSA-affiliated armed groups.<sup>380</sup>

Notably, the US-led coalition declined to request the Syria government's consent or cooperation even though the Syrian government indicated its willingness to cooperate with any state in the fight against ISIS.<sup>381</sup> However, an argument could be made that coordination with the Assad regime was practically and politically unfeasible for coalition members as many of them had already called for Bashar to step down and/or provided support to the political and armed opposition and also because of the regime's implication in gross human rights violations.<sup>382</sup>

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<sup>376</sup> See discussion in fn284 in ch6.

<sup>377</sup> Michael Weiss and Hassan Hassan, *ISIS: Inside the Army of Terror* (Regan Arts 2015) 197–198 and 218.

<sup>378</sup> See eg Jackson (n289) 165–166 and 180; Kreß (n65); Ford, 'Syria' (n91) 197.

<sup>379</sup> Sjöstedt (n312) 37–38.

<sup>380</sup> Bahcavan (n310) 660–664.

<sup>381</sup> A/70/385-S/2015/727; 'Syria Will Help US Fight Terrorism, Says Walid Muallem' (*BBC News*, 25 August 2014) <<http://www.bbc.com/news/world-middle-east-28927246>> accessed 25 March 2018.

<sup>382</sup> Bahcavan (n310) 660–661; Corten, 'The 'Unwilling or Unable' Test' (n319) 779; Kreß (n65). See also Colum Lynch, 'Obama Hints at legal rationale for airstrikes on Syria' (*The Cable*, 28 August 2014)

#### 7.4.v.c Individual Self-defence

Some coalition members along with Israel and Turkey explicitly or implicitly relied upon the right of individual self-defence to justify military measures taken against ISIS in Syria. Setting aside the question of whether states are entitled to implement defensive measures against NSAs without the consent of the territorial state, it is questionable whether the *jus ad bellum* criteria of armed attack, necessity, proportionality and immediacy were satisfied.

##### *Coalition Members*

As discussed in chapter five, the doctrine of pre-emptive/preventative self-defence was largely rejected by the international community after the 2003 intervention in Iraq as incompatible with existing international law. Nevertheless, the Obama Administration relied upon pre-emptive/preventative inspired arguments to justify the extraterritorial use of force against alleged associated forces of al Qaeda in Syria.<sup>383</sup> Both the Bush and Obama Administrations argued that al Qaeda and its associated forces, affiliates and adherents<sup>384</sup> pose a ‘continuing’ or ‘always’ imminent threat to the US due to al Qaeda’s capabilities, resources, methods, past armed attacks against the US and publicly pronounced intention to perpetrate future armed attacks against the US and its allies.<sup>385</sup> Accordingly, the US has suggested that it does not need to demonstrate that each and every associated force,

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<[http://thecable.foreignpolicy.com/posts/2014/08/28/us\\_airstrikes\\_in\\_syria\\_would\\_raise\\_legal\\_questions](http://thecable.foreignpolicy.com/posts/2014/08/28/us_airstrikes_in_syria_would_raise_legal_questions)> accessed 24 September 2014.

<sup>383</sup> Aiden Warren and Ingvild Bode, ‘Altering the Playing Field: The U.S. Redefinition of the Use-of-force’ (2015) 36 *ContempSecPol’y* 174, 175–176, 185–187 and 192; Scharf (n299) 32–34; Curtis A Bradley and Jack L Goldsmith, ‘Obama’s AUMF Legacy’ (2016) 110 *AJIL* 628, 643–644. See also generally Henderson, ‘The 2010 United States National Security Strategy’ (n293) 403.

<sup>384</sup> Associated forces have been defined as ‘cobelligerents of al-Qa’ida or the Taliban.’ Affiliates is a broader category, which includes not only associated forces but all ‘Groups that have aligned with al-Qa’ida’. Adherents are defined as ‘Individuals who have formed collaborative relationships with, act on behalf of, or are otherwise inspired to take action in furtherance of the goals of al-Qa’ida—the organization and the ideology—including by engaging in violence regardless of whether such violence is targeted at the United States, its citizens, or its interests’. See ‘National Strategy for Counterterrorism’ (28 June 2011) 3 <[https://obamawhitehouse.archives.gov/sites/default/files/counterterrorism\\_strategy.pdf](https://obamawhitehouse.archives.gov/sites/default/files/counterterrorism_strategy.pdf)> accessed 26 March 2018.

<sup>385</sup> Warren and Bode (n383) 175–176 and 186; Scharf (n299) 32–34; Bradley and Goldsmith (n383) 643–644. In support of this argument, see eg Jackson (n289) 197; Charles J Dunlap Jr, ‘On Israeli Airstrikes in Syria—Lawful and No Need for Transparency’ (*Just Security*, 8 May 2017) <<https://www.justsecurity.org/40612/israeli-airstrikes-syria-lawful-transparency/>> accessed 1 November 2017.

affiliate or adherent of al Qaeda poses an imminent threat to the US before taking forcible defensive measures against them.<sup>386</sup> The US has also often declined to adduce proof that the *jus ad bellum* requirements of necessity and proportionality have been satisfied when it has used force against associated forces, affiliates or adherents of al Qaeda.<sup>387</sup>

In September 2014, the US indicated that it was taking measures against ISIS, the Khorasan Group and other al Qaeda affiliates in Syria in the exercise of the right of individual self-defence.<sup>388</sup> Obama indicated that ISIS posed a threat not only to American personnel and facilities in the Middle East but also, through returning foreign fighters, to the American homeland.<sup>389</sup> However, at this point neither ISIS, the Khorasan Group nor JAN had used force against the US of sufficient gravity to amount to an armed attack. Furthermore, these entities did not appear to pose an imminent threat to the US.<sup>390</sup> Nevertheless, the Obama Administration suggested that they were associated forces of al Qaeda and therefore were legitimate targets in America's on-going armed conflict against al Qaeda and its adherents and affiliates.<sup>391</sup> It argued that it was not required to secure the consent of the Syrian government as the latter had shown itself to be 'unwilling or unable' to address the threat posed by these entities to the US.<sup>392</sup>

UNSC Resolutions 1368 and 1373, which were adopted in the immediate aftermath of the 9/11 attacks, implicitly endorsed America's right to take forcible self-defence measures against al Qaeda, the Taliban and their

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<sup>386</sup> Warren and Bode (n383) 175.

<sup>387</sup> *ibid* 187.

<sup>388</sup> S/2014/695. See also 'Statement by the President on ISIL' (White House Press Release, 10 September 2014) <<https://obamawhitehouse.archives.gov/the-press-office/2014/09/10/statement-president-isil-1>> accessed 13 March 2018; 'Statement by the President on Airstrikes in Syria' (White House Press Release, 23 September 2014) <<https://obamawhitehouse.archives.gov/the-press-office/2014/09/23/statement-president-airstrikes-syria>> accessed 13 March 2018.

<sup>389</sup> President's Statement on ISIL 10 September 2014 (n388).

<sup>390</sup> Colum Lynch (n392).

<sup>391</sup> 2011 Counterterrorism Strategy (n384); 'The National Security Strategy of the United States of America' (May 2010) 19–20 <<http://nssarchive.us/NSSR/2010.pdf>> accessed 16 February 2018.

<sup>392</sup> Warren and Bode (n383) 185–187.



associates in response to the 9/11 attacks.<sup>393</sup> UNSC Resolutions 2133 and 2178, which were adopted in 2014 and aimed at combating the threat posed by terrorist groups, including ISIS and JAN, reaffirmed Resolution 1373.<sup>394</sup> Aaron L. Jackson interpreted this reaffirmation as an implicit confirmation that the US was still entitled to use forcible defensive measures against al Qaeda and its affiliates in Syria.<sup>395</sup> However, his interpretation is not necessarily widely shared.

Significantly, the Obama Administration relied upon the 2001 Authorization for Use of Military Force (2001 AMUF) to justify America's military intervention against ISIS in Syria under domestic law. The 2001 AMUF authorised the President:

... to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.<sup>396</sup>

The Obama Administration interpreted this past tense language extremely broadly to enable it to target individuals and organisations that did not exist on 11 September 2001 but have since been classified as 'associated forces' of al Qaeda.<sup>397</sup> The classification of ISIS as an associated force is problematic given that al Qaeda officially denounced ISIS in February 2014 and JAN, al Qaeda's official affiliate in Syria from February 2014 until mid-2016, has

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<sup>393</sup> Jackson (n289) 188–189.

<sup>394</sup> UNSC Res 2133 (27 January 2014) UN Doc S/RES/2133; UNSC Res 2178 (24 September 2014) UN Doc S/RES/2178.

<sup>395</sup> Jackson (n289) 188–190.

<sup>396</sup> US Congress, 'Joint Resolution to Authorize the Use of United States Armed Forces against Those Responsible for the Recent Attacks Launched against the United States' Public Law 107–40 (US Government Printing Office, 18 September 2001) s2a. He also relied upon the Authorization for the Use of Military Force Against Iraq Resolution of 2002 (2002 AMUF).

<sup>397</sup> Jackson (n289) 183–184; Bradley and Goldsmith (n383) 628–629 and 635. See also Amanda Taub, 'Experts: Obama's legal justification for the war on ISIS is "a stretch"' (*Vox*, 12 September 2014) <<https://www.vox.com/iraq-crisis/2014/9/12/6134159/is-obamas-new-isis-strategy-legal>> accessed 24 October 2017.

engaged in numerous clashes with ISIS. Furthermore, in mid-2016 JAN evolved into JFS and its leader, al-Jawlani, declared that the new organisation no longer had any affiliation to ‘any external or foreign entity’.<sup>398</sup> JFS subsequently formed an umbrella organisation called HTS. According to Charles Lister, al Qaeda core does not consider HTS to be an official al Qaeda affiliate.<sup>399</sup> Nevertheless, the UNSC indicated that ISIS and JAN were associates of al Qaeda in numerous resolutions adopted after al Qaeda officially denounced ISIS in February 2014.<sup>400</sup> The US argued that ISIS could be considered an associated force because it: (i) originated out of AQI - a group that incidentally did not itself exist on 11 September 2001 but subsequently evolved into an official affiliate of al Qaeda core, (ii) had links to al Qaeda fighters, (iii) used similar tactics to al Qaeda, and (iv) was the ‘true inheritor of Osama bin Laden’s legacy’.<sup>401</sup> However, several legal commentators have rejected this argument.<sup>402</sup>

Both the Bush and Obama Administrations have been criticised for attempting to justify a unilateral right of individual self-defence of potentially

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<sup>398</sup> Van Dam, *Destroying a Nation* (n264) ch3, lcn1569.

<sup>399</sup> Charles Lister, ‘Al-Qaeda’s Turning Against its Syrian Affiliate’ (*Middle East Institute Countering Terrorism Project*, 18 May 2017) <<http://www.mei.edu/content/article/al-qaeda-s-turning-against-its-syrian-affiliate?print=>> accessed 6 November 2017. See also Charles Lister, ‘Turkey’s Idlib incursion and the HTS question: understanding the long game in Syria’ (*War on the Rocks*, 31 October 2017) <<https://warontherocks.com/2017/10/turkeys-idlib-incursion-and-the-hts-question-understanding-the-long-game-in-syria/>> accessed 6 November 2017; Jamie Dettmer, ‘Turkey Deploys More Forces in Northern Syria’ (*VOA News*, Middle East, 3 November 2017) <<https://www.voanews.com/a/turkey-deploys-forces-northern-syria/4098874.html>> accessed 6 November 2017.

<sup>400</sup> See eg UNSC Res 2170 (15 August 2014) UN Doc S/RES/2170 (S/RES/2170); Jackson (n289) 183–184 and 191–192.

<sup>401</sup> Ankit Panda, ‘A Bad Idea: Using the 2001 AUMF as Legal Rationale for Striking ISIS’ *The Diplomat* (11 September 2014) <<https://thediplomat.com/2014/09/a-bad-idea-using-the-2001-aumf-as-legal-rationale-for-striking-isis/>> accessed 24 October 2017; Bradley and Goldsmith (n383) 637; Matthew C Weed, ‘A New Authorization for Use of Military Force Against the Islamic State: Issues and Current Proposals’ (*Congressional Research Centre*, 21 February 2017) 2–4 <<https://fas.org/sgp/crs/natsec/R43760.pdf>> accessed 30 July 2018. Presumably, a similar argument would be utilised to justify attacks against HTS since 2017.

<sup>402</sup> Panda (n401); David Nakamura and Sari Horwitz, ‘White House’s legal rationale for airstrikes in Syria comes under scrutiny’ *The Washington Post* (11 September 2014) <[http://www.washingtonpost.com/world/national-security/2014/09/11/e64774b2-39e0-11e4-8601-97ba88884ffd\\_story.html](http://www.washingtonpost.com/world/national-security/2014/09/11/e64774b2-39e0-11e4-8601-97ba88884ffd_story.html)> accessed 25 October 2017; Taub (n397). In February 2015, the Obama Administration presented a new draft AMUF to Congress specifically authorising the use of force against ISIS and associated persons or forces, namely, ‘individuals and organizations fighting for, on behalf of, or alongside ISIL or any closely related successor entity in hostilities against the United States or its coalition partners’, see Weed (n401) 9.

indefinite geographical, temporal and material scope.<sup>403</sup> According to Aiden Warren and Ingvild Bode, both Administrations demonstrated a ‘belief in American exceptionalism that translates into distinct privileges the USA as the sole superpower and the custodian of the international liberal order may claim for itself’.<sup>404</sup> Significantly in its 2010 National Security Strategy the Obama Administration reserved ‘the right to act unilaterally if necessary to defend our nation and our interests’.<sup>405</sup> The Trump Administration’s omission to even offer a justification under international law for its 2017 and 2018 strikes could be considered an extension of this US exceptionalism.

Some states that previously rejected the Bush Doctrine and War on Terror paradigm utilised pre-emptive/preventative-inspired self-defence arguments to justify their use of force against ISIS in Syria.<sup>406</sup> Prior to ISIS’ armed attacks in Paris in November 2015, France inferred that ISIS posed a direct and extraordinary threat to its security and indicated that it was taking measures in accordance with Article 51 of the UN Charter without explicitly clarifying if it was acting in individual and/or collective self-defence.<sup>407</sup> Weller suggested that statements made by the then French President, François Hollande, suggested that France was acting in individual self-defence in response to several Islamist terrorism-related attacks in France, although at this point ISIS itself had yet to subject France to an armed attack.<sup>408</sup> Canada asserted in its letter to the UNSC that ISIS posed a threat to Canada and Canadians and indicated that it was acting in the exercise of the individual and collective right of self-defence.<sup>409</sup> The UK informed the UNSC in September and December 2015 of measures it was taking in the exercise of

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<sup>403</sup> See Christine Gray, ‘President Obama’s 2010 United States National Security Strategy and International Law on the Use of Force’ (2011) 10 *Chinese JIL* 35, 43–46; and generally, Warren and Bode (n383); Bradley and Goldsmith (n383). See also Weller, ‘Islamic State crisis’ (n310).

<sup>404</sup> Warren and Bode (n383) 192.

<sup>405</sup> For a discussion, see *ibid*; Bradley and Goldsmith (n383). See also Weller, ‘Islamic State crisis’ (n310).

<sup>406</sup> Nehal Bhuta, ‘On Preventive Killing’ (*EJIL: Talk!*, 17 September 2015) <<https://www.ejiltalk.org/on-preventive-killing/#more-13651>> accessed 14 March 2018; Weller, ‘Permanent Imminence’ (n316).

<sup>407</sup> S/2015/745.

<sup>408</sup> Weller, ‘Permanent Imminence’ (n316).

<sup>409</sup> S/2015/221.

the right of individual self-defence against ISIS members engaged in planning and directing armed attacks against the UK.<sup>410</sup>

### *Israel*

Israel has executed strikes against Syrian armed forces and Syrian installations in Syria, including the Golan Heights, since 2011: in response to cross-border attacks; in order to thwart the transfer of advanced weaponry to Hezbollah; and in violation of, and in response to violations of, the 1974 Separation of Forces Agreement between Syria and Israel.<sup>411</sup> Israel reportedly sought to defend strikes aimed at thwarting the transfer of advanced weaponry to Hezbollah as legitimate exercises of the right of individual preventative/pre-emptive self-defence.<sup>412</sup>

### *Turkey*

In a letter to the UNSC dated 24 July 2015, Turkey indicated that it was taking forcible measures against ISIS in Syria in the exercise of the right of individual self-defence.<sup>413</sup> It stated that it was ‘under a clear and imminent threat of continuing attack from Daesh’ and that the Syrian regime was ‘neither capable of nor willing to prevent these threats emanating from its territory’.<sup>414</sup> Notably, in early July 2015 Turkey was subjected to attacks by ISIS, which resulted in the deaths of approximately thirty two Turkish citizens and one Turkish soldier.<sup>415</sup>

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<sup>410</sup> S/2015/688; UNSC, ‘Letter dated 3 December 2015 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council’ (3 December 2015) UN Doc S/2015/928.

<sup>411</sup> For a list and discussion of these incidents, see ‘Syria’ (*RULAC*, 14 February 2018) <<http://www.rulac.org/browse/countries/syria#collapse1accord>> accessed 27 March 2018; ‘International armed conflicts in Syria’ (*RULAC*, 22 March 2018) <<http://www.rulac.org/browse/conflicts/international-armed-conflict-in-syria#collapse5acco>> accessed 27 March 2018; Asaf Lubin, ‘Israeli Airstrikes in Syria: The International Law Analysis You Won’t Find’ (*Just Security*, 3 May 2017) <<https://www.justsecurity.org/40475/israeli-airstrikes-syria-international-law-analysis-wont-find/>> accessed 20 October 2017.

<sup>412</sup> For example, the Minister of Intelligence, Yisrael Katz, reportedly asserted that one such strike ‘completely conforms to Israel’s policy, to act so as to prevent the smuggling of advanced weapons from Syria to Hezbollah in Lebanon by Iran’. See Lubin (n412). In support of the Israeli position, see Dunlap Jr (n385).

<sup>413</sup> S/2015/563.

<sup>414</sup> *ibid.*

<sup>415</sup> *Ibid.*; S/2015/563. Ruys queried whether these incidents satisfied the criteria for an armed attack, including the gravity threshold. ‘Interview with Professor Tom Ruys: “Operation

Turkey subsequently relied on the right of individual self-defence against the threat posed by Syrian-based terrorist organisations, including ISIS and the YPG/PYD, to justify military operations in Syria, including Operation Euphrates Shield<sup>416</sup> and Operation Olive Branch.<sup>417</sup> Turkey's operations against the YPG/PYD were especially controversial as these organisations have not been classified as terrorist organisations by the UNSC and the YPG is the US-led coalition's main partner on the ground in Syria in the fight against ISIS. In justifying Operation Olive Branch, Turkey claimed to have been subjected to 'rocket attacks and harassment fire' originating from the then YPG/PYD-controlled Afrin region in northern Syria.<sup>418</sup> However, Anne Peters queried the veracity of this claim and suggested that the gravity, necessity and proportionality criteria had not been satisfied.<sup>419</sup> In contrast, Lokman Çetinkaya, subscribing to Ago's contested accumulation doctrine, implied that the gravity threshold would have been satisfied if Turkey had been subjected to a series of trans-border armed attacks which could cumulatively be categorised as a composite armed attack.<sup>420</sup> He further asserted that, even if Turkey could not produce evidence of rocket fire from Afrin prior to the initiation of Operation Olive Branch, its actions could still be justified by reference to the anticipatory self-defence doctrine which he

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Euphrates Shield: The Legality of Turkey's Recent Military Intervention in Syria and The Use of Force in Self-Defence against Non-State Actors' (*Research Turkey*, December 2012) <<http://researchturkey.org/?p=13099>> accessed 27 October 2017.

<sup>416</sup> UNSC, 'Letter dated 24 August 2016 from the Permanent Representative of Turkey to the United Nations addressed to the President of the Security Council' (25 August 2016) UN Doc S/2016/739. See also 'Statement of the Spokesman of the Ministry of Foreign Affairs, Tanju Bilgiç, Responding to a Question in Relation to Public Remarks by US Secretary of Defense, Defense Department Spokesperson, White House Press Secretary and Special Presidential Envoy for the Global Coalition to Counter DAESH, Regarding Operation Euphrates Shield' (*Turkish MFA*, 30 August 2016) <[http://www.mfa.gov.tr/qa\\_31\\_-30-august-2016\\_-statement-of-the-spokesman-of-the-ministry-of-foreign-affairs\\_-tanju-bilgiç\\_-responding-to-a-question.en.mfa](http://www.mfa.gov.tr/qa_31_-30-august-2016_-statement-of-the-spokesman-of-the-ministry-of-foreign-affairs_-tanju-bilgiç_-responding-to-a-question.en.mfa)> accessed 12 December 2017; Sinan Ülgen and Can Kasapoğlu, 'Operation Euphrates Shield: Aims and Gains' (*Carnegie Endowment for International Peace*, 19 January 2017) <<http://carnegieeurope.eu/2017/01/19/operation-euphrates-shield-aims-and-gains-pub-67754>> accessed 4 October 2017).

<sup>417</sup> UNSC 'Identical letters dated 20 January 2018 from the Chargé d'affaires a.i. of the Permanent Mission of Turkey to the United Nations addressed to the Secretary-General and the President of the Security Council' (22 January 2018) UN Doc S/2018/53.

<sup>418</sup> *ibid.*

<sup>419</sup> Anne Peters, 'The Turkish Operation in Afrin (Syria) and the Silence of the Lambs' (*EJIL: Talk!*, 30 January 2018) <<https://www.ejiltalk.org/the-turkish-operation-in-afrin-syria-and-the-silence-of-the-lambs/>> accessed 29 March 2018.

<sup>420</sup> Lokman B Çetinkaya, 'Turkey's Military Operations in Syria' (*EJIL: Talk!*, 20 February 2018) <<https://www.ejiltalk.org/turkeys-military-operations-in-syria/>> accessed 29 March 2018.

seemingly unilaterally interpreted to include a right of preventative/pre-emptive self-defence.<sup>421</sup>

Finally, in its letters to the UNSC Turkey also sought to rely upon UNSC Resolutions 1373 (2001), 1624 (2005), 2170 (2014) and 2178 (2014) to justify its military operations in Syria. Whilst these resolutions call upon UN member states to take actions to combat terrorism, they do not explicitly authorise the use of force against terrorist organisations in third states without their consent and, accordingly, do not constitute a legitimate justification for Turkey's actions.

## 7.5 Conflict Classification, Legal Framework and Violations

This thesis generally refers to the armed conflict in Syria. However, in strict legal terms multiple armed conflicts, both brief and prolonged, have arisen in Syria since March 2011. The categorisation of an armed conflict is significant from an international law perspective as different legal frameworks will apply depending on whether a situation is classified as a non-international armed conflict or an international armed conflict.<sup>422</sup>

### 7.5.i Non-international Armed Conflicts (NIACs)

In the *Tadić* decision on jurisdiction, the ICTY determined that an NIAC exists whenever there is 'protracted armed violence between governmental authorities and organized armed groups or between such groups within a State'.<sup>423</sup> The *Tadić* formula is usually used to determine whether an NIAC exists for the purpose of triggering the application of Common Article 3 to

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<sup>421</sup> *ibid.*

<sup>422</sup> Perhaps most significantly, the rules governing combatant immunity and the grave breaches regime only apply during international armed conflicts. For a discussion of the differences, see Ferraro and Cameron (n310) para 239; Adil Ahmad Haque, 'Whose Armed Conflict? Which Law of Armed Conflict?' (*Just Security*, 4 October 2016) <<https://www.justsecurity.org/33362/armed-conflict-law-armed-conflict/>> accessed 27 March 2018; Dapo Akande, 'When Does the Use of Force Against a Non-State Armed Group trigger an International Armed Conflict and Why does this Matter?' (*EJIL: Talk!*, 18 October 2016) <<https://www.ejiltalk.org/when-does-the-use-of-force-against-a-non-state-armed-group-trigger-an-international-armed-conflict-and-why-does-this-matter/>> accessed 27 March 2018; 'Classification of armed conflicts' (*RULAC*, 21 April 2017) <<http://www.rulac.org/classification#collapse3accord>> accessed 27 March 2018.

<sup>423</sup> *Prosecutor v Dusko Tadić* (Interlocutory Appeal) (n155) [70].

the Geneva Conventions.<sup>424</sup> In determining if armed groups are ‘organised’ account is usually taken of whether they have a command structure, disciplinary rules, control of territory, a headquarters, a unified military strategy, military tactics, the capacity to negotiate agreements as a unified actor, and the ability to access military personnel, equipment and training.<sup>425</sup> In order for armed violence to be classified as ‘protracted’ it will need to reach a degree of intensity that exceeds internal disturbances or tensions. In measuring intensity, account may be taken of the volume, duration and intensity of individual confrontations; the nature of the military equipment used, and the number of fighters and types of forces involved; and any displacement, casualties, material damage or UNSC involvement.<sup>426</sup>

The ICRC has confirmed that an NIAC has existed in Syria between the Syrian government and its allies<sup>427</sup> on the one hand and the FSA on the other since at least 17 July 2012.<sup>428</sup> Since July 2012, additional NIACs may also have emerged between the Syrian government and their allies on the one hand and other armed opposition groups, including Ahrar al-Sham, JAN (HTS) and ISIS on the other.<sup>429</sup> These armed groups and the YPG/YPJ also

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<sup>424</sup> Cullen suggested that this is also the appropriate threshold for determining the existence of an armed conflict not of an international character for the purposes of art 8 (2) (c) and art 8 (2) (e) of the Rome Statute. Anthony Cullen, ‘The Definition of Non-International Armed Conflict in the Rome Statute of the International Criminal Court: An Analysis of the Threshold of Application Contained in Article 8(2)(f)’ (2008) 12 *JC&SL* 419.

<sup>425</sup> *Prosecutor v Haradinaj* (Judgment) ICTY IT-04-84-T (3 April 2008) [60].

<sup>426</sup> *ibid* [49]. For a discussion of the judgment and of the ‘protracted’ and ‘organised’ criteria, see Anthony Cullen and Marko Divac Öberg, ‘Prosecutor v. Ramush Haradinaj et al.: The International Criminal Tribunal for the Former Yugoslavia and the Threshold of Non-International Armed Conflict in International Humanitarian Law (2008) 12 (7) *ASIL Insights* <<https://www.asil.org/insights/volume/12/issue/7/prosecutor-v-ramush-haradinaj-et-al-international-criminal-tribunal>> accessed 6 August 2018. Regarding the application of these criteria to the Syria crisis, see Ford, ‘Syria’ (n91) 211–215.

<sup>427</sup> These ‘allies’ encompass regime-aligned militias and external allies who have directly participated in hostilities rendering them a party to the NIAC, including Hezbollah since at least May 2013 and Russia since approximately September 2015. Iran has denied any direct participation in hostilities. However, evidence has been adduced which suggests otherwise. See s6.3.ii.a and s6.3.ii.b in ch6.

<sup>428</sup> ICRC, ‘Syria’ (n72). The UNCOI concluded in mid-February 2012 that the violence in Syria exceeded the intensity threshold. However, it did not consider the FSA to be sufficiently organised. Nevertheless, it subsequently confirmed that an NIAC existed in its August 2012 report. See A/HRC/21/50, Annex II, paras 2–3. However, Ford has queried whether the FSA has indeed satisfied the organised criterion. Ford, ‘Syria’ (n91) 214.

<sup>429</sup> These conflicts have not been classified as one single NIAC as the armed opposition does not form a unitary bloc. See ‘Non-international armed conflicts in Syria’ (*RULAC*, 22 March 2018) <<http://www.rulac.org/browse/conflicts/non-international-armed-conflicts-in-syria#collapse5accord>> accessed 28 March 2018.

arguably satisfy the ‘organised’ criterion.<sup>430</sup> Furthermore, various armed opposition groups have fought against each other giving rise to distinctive NIACs between these armed groups.

An NIAC has also existed since September 2014 between ISIS and the US-led coalition against ISIS and their Syrian partners, most notably the SDF. Whilst the US refers to ISIS and JAN collectively as associated forces of al Qaeda these groups have frequently clashed militarily since late 2013. Accordingly, one might also conclude that the US-led coalition and their Syrian allies are engaged in a distinct NIAC with JAN (HTS). Finally, Turkey supported by Turkish-aligned armed opposition groups has been engaged in an NIAC with ISIS since approximately July 2015<sup>431</sup> and an NIAC with the YPG since approximately August 2016.<sup>432</sup>

#### **7.5.ii International Armed Conflicts (IACs)**

Article 2 (1) of the First Geneva Convention provides that the Convention shall apply to any ‘armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them’.<sup>433</sup> Any determination as to whether or not an IAC exists must be based solely on the facts notwithstanding the subjective views of the parties.<sup>434</sup> It has generally been accepted that an IAC exists ‘whenever there

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<sup>430</sup> *ibid*; David Wallace, Amy McCarthy and Shane R Reeves, ‘Trying to make sense of the senseless: classifying the Syrian war under the Law of Armed Conflict’ (2017) 25 *MichStInt’l LRev* 555, 587–589; Ford, ‘Syria’ (n91) 215.

<sup>431</sup> S/2015/563; ‘Interview with Professor Tom Ruys’ (n415).

<sup>432</sup> Turkey conducted Operation Euphrates Shield in Syria from August 2016 to March 2017. Turkish troops were subsequently deployed in Idlib in October 2017, ostensibly to monitor the implementation of de-escalation agreements, but with the ancillary aim of containing the YPG/YPJ. See Lister, ‘Turkey’s Idlib incursion’ (n399); Dettmer (n399); Abdulrahman al-Masri, ‘Lessons From Iraq: Syria’s Kurds and the United States’ (*Syria Deeply*, 2 November 2017) <<https://www.newsdeeply.com/syria/articles/2017/11/02/lessons-from-iraq-syrias-kurds-and-the-united-states>> accessed 6 November 2017. Turkey initiated Operation Olive Branch in January 2018 ostensibly in order to counter the threat to Turkish security posed by terrorist groups operating from Syria, including ISIS and the PYD/YPG.

<sup>433</sup> Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31 (Geneva I), art 2 (1).

<sup>434</sup> Ferraro and Cameron (n310) paras 210–213. See also ‘Classification of armed conflicts’ *RULAC* (n422).



is a resort to armed force between States'.<sup>435</sup> It is largely, though not universally, accepted that no intensity threshold has to be satisfied.<sup>436</sup> Furthermore, the perceived lawfulness of a resort to force under the *jus ad bellum* rules has no bearing on the determination as to the existence of an armed conflict.<sup>437</sup>

In contrast to the 1958 ICRC Commentary on the Fourth Geneva Convention, the 2016 ICRC Commentary on the First Geneva Convention (the 2016 ICRC Commentary) posited that the unilateral use of force by one state against another without the latter's consent is sufficient to give rise to an armed conflict under Article 2 even if the territorial state fails to respond militarily.<sup>438</sup> Traditional methods of warfare, such as the deployment of troops, will give rise to an IAC as may the use of force by de facto organs of state.<sup>439</sup> The use of force need not be directed against the territorial state's armed forces; rather any 'unconsented-to armed intrusion into the territorial State's sphere of sovereignty' is sufficient to trigger an IAC between the intervening and territorial states.<sup>440</sup> This would include the targeting of an NSA in a third state from which the NSA is operating.<sup>441</sup> If the intervening state is already engaged in an NIAC with the NSA, this NIAC will continue to exist in parallel with the IAC triggered by the intervening's state non-consensual intervention.<sup>442</sup>

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<sup>435</sup> *Prosecutor v Dusko Tadić* (Interlocutory Appeal) (n155) [70]; Ferraro and Cameron (n310) para 218.

<sup>436</sup> Ferraro and Cameron (n310) paras 236–243. See also Ford, 'Syria' (n91) 209; Wallace, McCarthy and Reeves (n430) 578; 'International armed conflicts in Syria' *RULAC* (n411).

<sup>437</sup> Ferraro and Cameron (n310) para 215; Akande, 'When Does the Use of Force' (n422).

<sup>438</sup> Ferraro and Cameron (n310) paras 222–223. In support of this position, see Akande, 'When Does the Use of Force' (n422); Wallace, McCarthy and Reeves (n430) 579; 'International armed conflicts in Syria' *RULAC* (n411).

<sup>439</sup> Ferraro and Cameron (n310) paras 223, 225, 229–230 and 241.

<sup>440</sup> *ibid* paras 224 and 261. In support of this view, see eg Akande, 'When Does the Use of Force' (n422); Ford, 'Syria' (n91) 210; Adil Ahmad Haque, 'Between the Law of Force and the Law of Armed Conflict' (*Just Security*, 13 October 2016) <<https://www.justsecurity.org/33515/law-force-law-armed-conflict/>> accessed 27 March 2018; 'Contemporary challenges for classification' (*RULAC*, 3 July 2017) <<http://www.rulac.org/classification/contemporary-challenges-for-classification#collapse6accord>> accessed 27 March 2018.

<sup>441</sup> Ferraro and Cameron (n310) paras 257 and 259–263. In support of this view, see 'Contemporary challenges' *RULAC* (n440).

<sup>442</sup> Ferraro and Cameron (n310) para 261. In support of this position, see *Nicaragua v USA* (n28) [219]. However, some commentators have suggested that the NIAC is transformed into an IAC as a result of the intervention. See 'Contemporary challenges' *RULAC* (n440).

Advocates of this position argue that it is in accordance with the object and purpose of the Geneva Conventions as the use of force against the NSA risks harm to the territorial state's civilian population and infrastructure.<sup>443</sup> However, opponents argue that no IAC is triggered in such circumstances whilst the intervening state will remain engaged in an NIAC with the NSA. Terry Gill and Kenneth Watkin suggested that the consent of the territorial state is only relevant for determining the lawfulness of the intervention from a *jus ad bellum* perspective and has no impact on the determination as to whether or not an IAC exists.<sup>444</sup> Gill opined that an IAC is only triggered where the intervening state occupies the territorial state's territory or where it attacks the territorial state's armed forces or national assets under the territorial state's control.<sup>445</sup> Watkin asserted that the 2016 ICRC Commentary prioritises form over substance and pays insufficient heed to the relationship between the supposed parties to the conflict.<sup>446</sup>

If the 2016 ICRC Commentary's position is accepted, participants in US-led airstrikes against ISIS in Syria have been engaged in an IAC with Syria since September 2014.<sup>447</sup> Furthermore, Turkey has also been involved in an IAC with Syria since approximately July 2015 when it first informed the UNSC of its military measures against ISIS in Syria.<sup>448</sup> Since then, Turkey, assisted by certain FSA-affiliated armed groups, has initiated air and

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<sup>443</sup> Ferraro and Cameron (n310) paras 223–224 and 262; Adil Ahmad Haque, 'The United States is at War with Syria (according to the ICRC's New Geneva Convention Commentary)' (*EJIL: Talk!*, 8 April 2016) <<https://www.ejiltalk.org/the-united-states-is-at-war-with-syria-according-to-the-icrcs-new-geneva-convention-commentary/>> accessed 27 March 2018; Ford, 'Syria' (n91) 210.

<sup>444</sup> Terry Gill, 'Letter to the Editor from Professor Terry Gill on Classification of International Armed Conflict' (*Just Security*, 14 October 2016) <<https://www.justsecurity.org/33569/letter-editor-prof-terry-gill-classification-international-armed-conflict/>> accessed 27 March 2018; Kenneth Watkin, 'The ICRC Updated Commentaries: Reconciling Form and Substance, Part II' (*Just Security*, 30 August 2016) <<https://www.justsecurity.org/32608/icrc-updated-commentaries-reconciling-form-substance-part-ii/>> accessed 28 March 2018.

<sup>445</sup> Gill, 'Letter to the Editor' (n444). See also Watkin (n444). However, see also Haque, 'Between the Law of Force' (n440).

<sup>446</sup> Watkin (n444). See also Sean Watts, 'The Updated First Geneva Convention Commentary, DOD's Law of War Manual, and a More Perfect Law of War, Part II' (*Just Security*, 5 July 2016) <<https://www.justsecurity.org/31749/updated-geneva-convention-commentary-dods-law-of-war/>> accessed 28 March 2018.

<sup>447</sup> In support of this view, see eg Haque, 'The United States is at War with Syria' (n443); 'International armed conflicts in Syria' *RULAC* (n411).

<sup>448</sup> S/2015/563; 'Syria' *RULAC* (n411).

ground offensives against both ISIS and the YPG inside Syria without the consent of the Syrian government.<sup>449</sup>

Regardless of the 2016 ICRC Commentary, US airstrikes against Syrian installations in response to alleged chemical weapons attacks by the Assad regime in April 2017 arguably gave rise to a short and distinct IAC between the US and Syria.<sup>450</sup> The same argument may be made in respect of airstrikes launched by the US, the UK and France against Syria in response to alleged chemical weapons attacks in April 2018. It has also been argued that US airstrikes against the Syrian armed forces in 2016 and 2017, ostensibly in the defence of coalition and partner forces and their area of operations, gave rise to distinct IACs between the US and Syria.<sup>451</sup> Furthermore, Syria's shooting down of a Turkish fighter jet in June 2012 also arguably gave rise to a short-lived IAC between Turkey and Syria.<sup>452</sup> Similarly, Turkey's shooting down of a Russian military jet in November 2015 arguably gave rise to a brief IAC between Turkey and Russia.<sup>453</sup> Finally, Israel's strikes against Syria's territory and armed forces since 2011 arguably gave rise to several short-lived IACs between Syria and Israel.<sup>454</sup>

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<sup>449</sup> Regarding the lack of consent, see UNSC, 'Identical letters dated 18 January 2016 from the Chargé d'affaires a.i. of the Permanent Mission of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council' (22 January 2016 ) UN Doc S/2016/45.

<sup>450</sup> In support of this view, see eg Wallace, McCarthy and Reeves (n430) 591; 'International armed conflicts in Syria' *RULAC* (n411).

<sup>451</sup> 'International armed conflicts in Syria' *RULAC* (n411). In support of this argument, see eg Ryan Goodman, 'Is the United States Already in an "International Armed Conflict" with Syria?' (*Just Security*, 11 October 2016) <<https://www.justsecurity.org/33477/united-states-international-armed-conflict-syria/>> accessed 27 March 2018. In opposition, see eg Deborah Pearlstein, 'A Syrian IAC?' (*Opinio Juris*, 14 October 2016) <<http://opiniojuris.org/2016/10/14/a-syrian-iac/>> accessed 27 March 2018.

<sup>452</sup> The Syrian government alleged that the jet had entered Syrian airspace. However, Turkey claimed that the incident took place in international airspace. See Thilo Marauhn, 'Sailing close to the wind: Human Rights Council fact-finding in cases of armed conflict – the case of Syria' (2012) 43 *CalWIntL* 401, 411–412.

<sup>453</sup> Ford, 'Syria' (n91) 210; Kubo Mačák, 'Was the Downing of the Russian Jet by Turkey Illegal?' (*EJIL: Talk!*, 26 November 2015) <<https://www.ejiltalk.org/was-the-downing-of-the-russian-jet-by-turkey-illegal/>> accessed 27 October 2017.

<sup>454</sup> For a discussion of these incidents, see Lubin (n412); 'Syria' *RULAC* (n411); 'International armed conflicts in Syria' *RULAC* (n411).

### 7.5.iii Military Occupation

In accordance with Article 2 (2) of the First Geneva Convention, a foreign occupation may trigger the application of the Geneva Conventions even in the absence of any armed resistance.<sup>455</sup> Any determination as to the existence of a military occupation should be based entirely on the facts.<sup>456</sup> It must be shown that the occupying state is in effective control of all or part of the territory in question, namely, its armed forces must: (i) be physically present in the territorial state without the consent of the effective local government that was in situ at the time of the invasion; (ii) have rendered the effective local government substantially or entirely incapable of exerting its power; and (iii) have the capacity to exercise authority over all or parts of the territory concerned in place of the effective local government.<sup>457</sup> Israel has been in military occupation of the Golan Heights since 1967.<sup>458</sup> It has been argued that Turkey has been in military occupation of parts of northern Syria since August 2016.<sup>459</sup>

### 7.5.iv Internationalisation of an NIAC

Third states sometimes intervene in NIACs on the side of the de jure authorities or the armed opposition. In the former situation, the classification of the conflict under international law remains unaltered. However, the latter situation may give rise to a parallel IAC between the intervening state and the territorial state if the former uses military force against the territorial state in its territory.<sup>460</sup> Furthermore, an NIAC may be transformed into an IAC where the control exerted by an intervening state over an armed opposition group is

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<sup>455</sup> Ferraro and Cameron (n310) paras 193 and 286–289.

<sup>456</sup> *ibid* para 300. See also Shane Reeves and David Wallace, ‘Has Turkey Occupied Northern Syria?’ (*Lawfare*, 22 September 2016) <<https://www.lawfareblog.com/has-turkey-occupied-northern-syria>> accessed 4 October 2017.

<sup>457</sup> Ferraro and Cameron (n310) para 304.

<sup>458</sup> ‘Military occupation of Syria by Israel’ (*RULAC*, 14 February 2018) <<http://www.rulac.org/browse/conflicts/military-occupaton-of-syria-by-israel#collapse5accord>> accessed 27 March 2018.

<sup>459</sup> *RULAC* suggested that the military occupation continued after Turkey’s official withdrawal in March 2017. Turkey subsequently launched a second intervention in Syria in January 2018. See ‘Military occupation of Syria’ *RULAC* (n458); Reeves and Wallace (n456); Ryan Goodman, ‘Turkey’s US-Backed Operation in Syria has created an International Armed Conflict’ (*Lawfare*, 17 October 2016) <<https://www.justsecurity.org/33643/us-backed-turkey-operation-syria-creates-international-armed-conflict/>> accessed 27 October 2017.

<sup>460</sup> Ferraro and Cameron (n310) para 264.

such that the acts of the latter may be attributed to the former.<sup>461</sup> It appears that the ‘overall control’ test is the appropriate test for determining whether a state exerted sufficient control over an armed group for conflict classification purposes.<sup>462</sup> According to the ICTY Appeals Chamber, the provision of military equipment, finance and/or military training to an armed opposition group is not sufficient to prove overall control; rather it must also be shown that the state was involved in ‘coordinating or helping in the general planning of its military activity’.<sup>463</sup> However, it is not necessary for the state to ‘plan all the operations of the units dependent on them, choose their targets, or give specific instructions concerning the conduct of military operations’.<sup>464</sup> State practice suggests that particularly compelling evidence of control would need to be adduced in order for the overall control test to be satisfied.<sup>465</sup> The support provided by the various external states to Syrian armed opposition groups would not appear to satisfy this test.<sup>466</sup>

### 7.5.v Legal Framework

As Syria is not a party to Additional Protocol II to the Geneva Conventions, any NIACs that have taken place in Syria since 2011 are governed by Common Article 3 to the Geneva Conventions and the rules of customary IHL applicable to NIACs.<sup>467</sup> Any IACs are governed by the 1949 Geneva Conventions, customary IHL applicable to IACs and, for States parties,

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<sup>461</sup> *ibid* para 265–267; *Prosecutor v Duško Tadić* (Appeals Chamber Judgment) ICTY IT-94-1-A (15 July 1999). [84].

<sup>462</sup> Whilst the ICJ does not endorse the ‘overall control’ test as a means of attributing conduct to a state for the purpose of determining state responsibility, it does appear to accept it as the appropriate test for the purpose of classifying an armed conflict. See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 43 [404]. The ICTY, ICC and ICRC (in its 2016 Commentary) have also endorsed the overall control test for this purpose. See *Prosecutor v Tadić* (Appeals Chamber Judgment) (n461); *The Prosecutor v Thomas Lubanga Dyilo* (Pre-Trial Chamber Decision on the Confirmation of Charges) ICC-01/04-01/06-803 (29 January 2007) [211]; *The Prosecutor v Thomas Lubanga Dyilo* (Trial Chamber Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06-2842 (14 March 2012) [541]; Ferraro and Cameron (n310) paras 268–273.

<sup>463</sup> *Prosecutor v Tadić* (Appeals Chamber Judgment) (n461) [131] and [137].

<sup>464</sup> *ibid* [137].

<sup>465</sup> Wallace, McCarthy and Reeves (n430) 592.

<sup>466</sup> In support of this position, see Ford, ‘Syria’ (n91) 211; Schmitt (n91) 157–158; Wallace, McCarthy and Reeves (n430) 593.

<sup>467</sup> Henckaerts and Doswald-Beck, *Rules* (n12).

Additional Protocol I to the Geneva Conventions (API).<sup>468</sup> Parties to NIACs and IACs are required under CIL to ensure respect for IHL by their own armed forces ‘and other persons or groups acting in fact on its instructions, or under its direction or control’.<sup>469</sup> Third states are required under CIL not to encourage violations of IHL and ‘to exert their influence, to the degree possible, to stop’ them.<sup>470</sup> The laws governing military occupation apply in Occupied Territories within Syria.<sup>471</sup> IHRL continues to apply during situations of armed conflict subject to the operation of the *lex specialis derogate generali* rule. This means that in the case of conflict between an IHL rule and an IHRL rule, the former will take precedence.<sup>472</sup> Accordingly, the Syrian government remains bound by its obligations under IHRL, whereas armed opposition groups are required to ‘respect the fundamental human rights of persons forming customary international law (CIL), in areas where such actors exercise *de facto* control’.<sup>473</sup>

#### 7.5.vi Violations of IHL/IHRL

Since March 2011, members of Syria’s armed forces, security and intelligence agencies and regime-aligned militias have been accused of committing egregious human rights violations in Syria, some of which have amounted to crimes against humanity,<sup>474</sup> and, since July 2012, of committing war crimes.<sup>475</sup> Russia, often categorised under the umbrella of pro-government forces in UNCOI reports, has been implicated in the perpetration

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<sup>468</sup> Syria is a state party to the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 (API). Of the US-led coalition member states, Australia, Belgium, France, Germany, Jordan, the Netherlands, Saudi Arabia, the UAE and the UK are States parties. Neither Israel, the US nor Turkey are States parties.

<sup>469</sup> Henckaerts and Doswald-Beck, *Rules* (n12) Rule 139.

<sup>470</sup> *ibid* Rule 144.

<sup>471</sup> These include customary IHL, relevant provisions of the 1949 Geneva Conventions, the 1907 Hague Regulations and API. See Ferraro and Cameron (n310) para 322; Reeves and Wallace (n456).

<sup>472</sup> *Wall* Advisory Opinion (n287) [105]–[106]; *Nuclear Weapons* Advisory Opinion (n135) [25].

<sup>473</sup> A/HRC/21/50, Annex II, para 10.

<sup>474</sup> For example, murder, torture, rape and enforced disappearance.

<sup>475</sup> For example, murder, hostage-taking, torture, rape and sexual violence, recruiting and using children in hostilities, using prohibited weapons, targeting civilians, bombarding civilian areas, the starvation of civilians as a method of warfare, the impeding of humanitarian access, and forcible displacement.

of war crimes, human rights violations and crimes against humanity.<sup>476</sup> Iran has also been implicated through the actions of the IRGC's Quds Force.<sup>477</sup>

By early 2012, the UNCOI had documented some human rights abuses by armed opposition groups albeit 'not comparable in scale and organization with those carried out by the State'.<sup>478</sup> In August 2012, the UNCOI observed that human rights abuses perpetrated by armed opposition groups 'may be prosecutable as war crimes'.<sup>479</sup> As late as 15 May 2013 the UNCOI observed that 'The violations and abuses committed by anti-Government armed groups did not, however, reach the intensity and scale of those committed by Government forces and affiliated militia'.<sup>480</sup> Nevertheless, from 2014 onwards the abuses perpetrated by armed opposition groups escalated dramatically in concurrence with the proliferation of jihadism in Syria. ISIS has been accused of committing war crimes, genocide and crimes against humanity.<sup>481</sup> JAN has also been accused of perpetrating acts that may amount to war crimes.<sup>482</sup> The YPG has been accused of perpetrating human rights abuses, including inhuman or degrading treatment or punishment of detainees, murder, the disproportionate use of force, arbitrary arrest, abductions, recruitment and use of children in hostilities, destruction of civilian property, and failure to provide displaced persons with

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<sup>476</sup> See eg A/HRC/31/68; UNHRC, 'Report of the independent international commission of inquiry on the Syrian Arab Republic' (2 February 2017) UN Doc A/HRC/34/64 (A/HRC/34/64); A/HRC/36/55.

<sup>477</sup> See eg A/HRC/34/64, para 23.

<sup>478</sup> UNHRC, 'Report of the independent international commission of inquiry on the Syrian Arab Republic' (22 February 2012) UN Doc A/HRC/19/69, para 126 and see also paras 50, 69, 83 and 87.

<sup>479</sup> A/HRC/21/50, para 89.

<sup>480</sup> A/HRC/23/58, Summary (covers the period from 15 January to 15 May 2013).

<sup>481</sup> A/HRC/25/65, para 61. See generally UNHRC, 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, Rule of Terror: Living under ISIS in Syria' (19 November 2014) UN Doc A/HRC/27/CRP.3; UNHRC, "'They came to destroy": ISIS Crimes Against the Yazidis' (15 June 2016) UN Doc A/HRC/23/CRP.2.

<sup>482</sup> UNHRC, 'Report of the independent international commission of inquiry on the Syrian Arab Republic' (5 February 2015) UN Doc A/HRC/28/69 (A/HRC/28/69), para 30; UNHRC, 'Report of the independent international commission of inquiry on the Syrian Arab Republic' (13 August 2015) UN Doc A/HRC/30/48 (A/HRC/30/48), paras 129–131, 157 and 164; A/HRC/31/68, paras 107–108; UNHRC, 'Report of the independent international commission of inquiry on the Syrian Arab Republic' (11 August 2016) UN Doc A/HRC/33/35 (A/HRC/33/35), paras 71–72, 82 and 101; A/HRC/34/64, para 67; A/HRC/34/CRP.3, paras 73–74.

adequate humanitarian assistance.<sup>483</sup> SDF forces have been accused of forcible conscription – including of children, intimidation of journalists, looting, internment and failure to provide adequate humanitarian assistance to evacuated civilians.<sup>484</sup>

Finally, participants in the US-led coalition against ISIS in Syria have also been accused of violating IHL, particularly during the 2018 Raqqa offensive.<sup>485</sup> The UNCOI has accused the coalition of violating the requirement to take all feasible precautions to avoid or minimise incidental harm to civilians and civilian objects.<sup>486</sup> Coalition forces have also been suspected of violating the IHL rules concerning distinction<sup>487</sup> and proportionality,<sup>488</sup> and of failing to provide victims of human rights violations with an adequate, prompt and effective remedy.<sup>489</sup>

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<sup>483</sup> A/HRC/25/65, para 81; UNHRC, ‘Report of the independent international commission of inquiry on the Syrian Arab Republic’ (13 August 2014) UN Doc A/HRC/27/60 (A/HRC/27/60), paras 97 and 130; A/HRC/28/69, paras 42, 57 and 71, and Annex II, paras 214–216; A/HRC/34/CRP.3, paras 88–95; A/HRC/36/55, para 51.

<sup>484</sup> UNHRC, ‘Report of the Independent International Commission of Inquiry on the Syrian Arab Republic’ (1 February 2018) UN Doc A/HRC/37/72 (A/HRC/37/72), paras 42–44; A/HRC/34/CRP.3, paras 89 and 91. The failure to provide adequate humanitarian assistance contravenes Principles 17 to 19 of the Guiding Principles on Internal Displacement. See ECOSOC, ‘Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission resolution 1997/39, Addendum: Guiding Principles on Internal Displacement’ (11 February 1998) E/CN.4/1998/53/Add.2.

<sup>485</sup> See eg AI, ‘*War of Annihilation*’: *Devastating Toll on Civilians, Raqqa – Syria* (AI 2018).

<sup>486</sup> Henckaerts and Doswald-Beck, *Rules* (n12) Rules 15–21. Regarding the violation, see A/HRC/36/55, para 61; A/HRC/37/72, paras 38–41 and 83. For an alternative view, see Shane Reeves and Ward Narramore, ‘The UNHRC Commission of Inquiry on Syria Misapplies the Law of Armed Conflict’ (*Lawfare*, 15 September 2017) <<https://www.lawfareblog.com/unhrc-commission-inquiry-syria-misapplies-law-armed-conflict>> accessed 31 October 2017. For a critique of that alternative view, see Adil Ahmad Haque, ‘A Careless Attack on the UN’s Commission of Inquiry on Syria’ (*Just Security*, 21 September 2017) <<https://www.justsecurity.org/45213/syria-commission-inquiry/>> accessed 1 November 2017. For other alleged violations of this rule, see A/HRC/30/48, para 38; A/HRC/33/35, para 31; A/HRC/34/CRP.3, paras 96–98 and 112. See also Cristina Roca, ‘How the Syrian War Changed How War Crimes Are Documented’ (*Syria Deeply*, 1 June 2017) <<https://www.newsdeeply.com/syria/articles/2017/06/01/long-read-how-the-syrian-war-changed-how-war-crimes-are-documented>> accessed 21 September 2017; Jonathan Horowitz, ‘Legal Questions About the Airstrike Against the ISIS “Happy Journeys” Convoy’ (*Just Security*, 2 September 2017) <<https://www.justsecurity.org/44666/legal-questions-airstrike-isis-happy-journeys-convoy/>> accessed 1 November 2017.

<sup>487</sup> Henckaerts and Doswald-Beck, *Rules* (n12) Rules 1–10.

<sup>488</sup> *ibid* Rule 14.

<sup>489</sup> Sarah Knuckey, ‘Pentagon Admits Major Investigation Flaw: They Rarely Talk to Air Strike Witnesses or Victims’ (*Just Security*, 29 June 2017) <<https://www.justsecurity.org/42675/pentagon-admits-rarely-talks-air-strike-witnesses-victims/>> accessed 1 November 2017; Nadim Houry, ‘Acknowledging the Harm Done to Civilians by the U.S.-Led Coalition in Syria’ (*Just Security*, 4 October 2017)



## 7.6 Accountability

Individual victims of gross human rights violations, war crimes and crimes against humanity committed in Syria since 2011 have a right to an accessible and effective remedy under IHRL, which includes bringing the perpetrators to justice.<sup>490</sup> This section discusses the feasibility of holding states accountable for internationally wrongful acts perpetrated in Syria since March 2011 before international and regional courts and via the individual complaints mechanisms of international human rights treaties. It also discusses potential avenues for securing individual criminal responsibility for international crimes perpetrated in Syria since 2011 before international, national and/or ad hoc courts.

### 7.6.i State Responsibility for Internationally Wrongful Acts

States incur international responsibility for internationally wrongful acts, namely, conduct consisting of an act or omission that is attributable to a state and which amounts to a breach of an international obligation under international law.<sup>491</sup> Conduct is attributable to a state if it is committed by: (i) a state organ acting in an official capacity, (ii) an individual or entity acting in an official capacity who is empowered under national law to exercise a governmental function, (iii) an individual or group where the state acknowledges and adopts the said conduct as its own, or (iv) a de facto state organ, including individuals or entities acting on the state's instructions or under its direction or control.<sup>492</sup>

In the case of de facto state organs, the exact level of control required for the purpose of establishing state responsibility 'is a matter for appreciation

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<<https://www.justsecurity.org/45598/acknowledging-harm-civilians-u-s-led-coalition-syria/>>accessed 1 November 2017.

<sup>490</sup> The right is outlined in numerous human rights instruments eg ICCPR, art 2. See also CCPR, 'General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (29 March 2004) UN Doc CCPR/C/21/Rev.1/Add.13 (CCPR/C/21/Rev.1/Add.13), paras 15–19; Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UNGA Res 60/147 (16 December 2005) UN Doc A/RES/60/147, Annex; Henckaerts and Doswald-Beck, *Rules* (n12) Rule 158.

<sup>491</sup> ILC 2001 Draft Articles, 4–57 (arts 1–2).

<sup>492</sup> *ibid* 40–54 (arts 4–11). See also Henckaerts and Doswald-Beck, *Rules* (n12) Rules 139 and 149.

in each case', although it appears likely that the ICJ's 'effective control' test would need to be satisfied.<sup>493</sup> Accordingly, it would need to be proven that the state 'had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.'<sup>494</sup> The ICJ has suggested that 'participation, even if preponderant or decisive, in the financing, organizing, training, supplying and equipping of the *contras*, the selection of its military or paramilitary targets, and the planning of the whole of its operation'<sup>495</sup> may of itself be insufficient.

Since March 2011, members of Syria's armed forces, intelligence and security agencies and regime-aligned militias have allegedly perpetrated gross violations of human rights, war crimes and crimes against humanity in Syria in breach of Syria's international obligations under international human rights treaties to which it is a party, Common Article 3 to the Geneva Conventions and CIL. These internationally wrongful acts are attributable to the Syrian authorities, including those perpetrated by regime-aligned militias where it can be proven that the Syrian authorities exercised effective control over the paramilitary operations during which the acts were committed.<sup>496</sup> Accordingly, Syria incurs international responsibility for these breaches.<sup>497</sup>

The ILC's 2001 Draft Articles suggested that where a breach involves a gross or systematic failure to uphold an obligation arising under a peremptory norm, it may have legal consequences for the international community as a whole.<sup>498</sup> In such circumstances, all states, regardless of whether or not they have been individually injured by the breach, may have a positive duty 'to cooperate to bring the breach to an end, not to recognize as lawful the situation created by the breach and not to render aid or assistance to the responsible State in maintaining the situation so created'.<sup>499</sup> During the

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<sup>493</sup> ILC 2001 Draft Articles, 47–48 (art 8).

<sup>494</sup> *Nicaragua v USA* (n28) [115].

<sup>495</sup> *ibid.*

<sup>496</sup> Ford is confident that acts committed by the *shabiha* are attributable to the Syrian government. See Ford, 'Syria' (n91) 223–224.

<sup>497</sup> In support of this argument, see A/HRC/21/50, Annex II, paras 25–26.

<sup>498</sup> ILC 2001 Draft Articles, 110–116 (arts 40–41).

<sup>499</sup> Although the ILC conceded that this duty may not reflect settled international law. See *ibid* 113–114 (art 41). The responsibility arising from breaches of peremptory norms has

Syrian crisis, there has been a gross and systematic failure by the Syrian authorities to uphold their obligations: not to engage in torture,<sup>500</sup> not to commit crimes against humanity,<sup>501</sup> and to comply with Common Article 3 to the Geneva Conventions.<sup>502</sup> All states may thus have a positive duty to cooperate by lawful means to bring these breaches to an end.

It could also be argued that Syria has breached obligations owed *erga omnes* to the international community as a whole under CIL. In the *Barcelona Traction* case, the ICJ held that every state has a ‘legal interest’ in the protection of obligations owed to the international community as a whole.<sup>503</sup> The ILC’s 2001 Draft Articles determined that any state other than an injured state is entitled to invoke state responsibility and demand that the responsible state cease the objectionable conduct where the obligation breached is owed to the international community as a whole.<sup>504</sup> There is no exhaustive list of obligations owed to the international community as a whole. However, the ILC inferred that these obligations overlap with peremptory norms, certain of which Syria has allegedly breached, as discussed above.<sup>505</sup>

Russia and Iran may incur international responsibility for war crimes, human rights violations and crimes against humanity, which are directly attributable to actual and de facto organs of state that have participated in Syria’s armed conflict on the side of the Assad regime. These include members of Russia’s air force and members of Iran’s IRGC. Russia and Iran may also incur international responsibility for aiding and assisting the Syrian

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been referred to as ‘aggravated responsibility’. See Cassese, *International Law* (n16) 15–17 and 262–277; Villalpando (n5) 405–406.

<sup>500</sup> A/HRC/23/58, para 87. The peremptory status of the prohibition against torture has been recognised by the ICJ. See *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* (Judgment) [2012] ICJ Rep 422 [99].

<sup>501</sup> The UNCOI suggested that the prohibition of crimes against humanity may constitute a peremptory norm. See A/HRC/21/50, Annex II, para 26.

<sup>502</sup> The ILC suggested that the requirement to uphold the basic rules of IHL, including those contained within Common Article 3, may enjoy peremptory status. See ILC 2001 Draft Articles, 113, relying upon the finding of the ICJ that these norms were ‘intransgressible’ in its *Nuclear Weapons* Advisory Opinion (n135) [79].

<sup>503</sup> *Barcelona Traction, Light and Power Company (Belgium v Spain)* [1970] ICJ Rep 3 [33].

<sup>504</sup> ILC 2001 Draft Articles, 33, 116 and 126–128 (art 48); Cassese, *International Law* (n16) 15–17 and 262–263; Villalpando (n5) 401.

<sup>505</sup> ILC 2001 Draft Articles, 111–112 and 127. See also Villalpando (n5) 402–405 and 408–410.

authorities to perpetrate grave violations of human rights, war crimes and crimes against humanity. A state that aids or assists another state in the commission of an internationally wrongful act will incur international responsibility where it provides such aid and assistance with knowledge of the circumstances of the internationally wrongful act and that act would be internationally wrongful if perpetrated by the assisting state.<sup>506</sup> Both Russia and Iran voluntarily provided aid and assistance, which was in fact used by the Assad regime for the purpose of committing internationally wrongful acts and made a significant contribution in that regard.<sup>507</sup> Nevertheless, it may be difficult to prove that they provided that aid and assistance with the knowledge and intent that it would be used to perpetrate internationally wrongful acts.<sup>508</sup>

The UNCOI has indicated that weapons provided by external actors to armed opposition groups in Syria have been used to perpetrate war crimes, crimes against humanity and gross human rights abuses.<sup>509</sup> Accordingly, states providing support to those groups could theoretically incur responsibility for those internationally wrongful acts if they were committed during operations over which the providing state exercised ‘effective control’. However, the support provided by external states to Syrian armed opposition groups would not appear to satisfy this test.<sup>510</sup>

Nevertheless, there are some potential avenues through which Syria, Russia and Iran could be held responsible for internationally wrongful acts committed in Syria since March 2011. Syria and Russia are both States parties to CAT. The Syrian government has failed to effectively investigate, prosecute and punish alleged acts of torture committed in Syria since March

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<sup>506</sup> ILC 2001 Draft Articles, 65–66 (art 16).

<sup>507</sup> *ibid* 66 (art 16).

<sup>508</sup> Regarding the criteria, see *ibid* 65 (art 16). Regarding the difficulty of proving intent, see Ruys (n28) 23–26.

<sup>509</sup> A/HRC/27/60, para 139.

<sup>510</sup> Indeed, it may not even satisfy the lower ‘overall control’ threshold. See Schmitt (n91) 146 and 157–158; Ruys (n28) 22 fn38; Ford, ‘Syria’ (n91) 204–207, 211 and 223. See also Weizmann (n114); Wallace, McCarthy and Reeves (n430) 593.

2011 contrary to its obligations under CAT.<sup>511</sup> Other States parties to CAT that are capable of exercising jurisdiction over these alleged crimes may request Syria to either prosecute or extradite the suspected perpetrators.<sup>512</sup> If Syria failed to accede to their request, the state(s) seeking extradition could initiate proceedings against Syria before the ICJ. The ICJ may only exercise jurisdiction in contentious proceedings where they have received the consent of both parties. Syria has not accepted the ICJ's compulsory jurisdiction<sup>513</sup> and is unlikely to voluntarily consent to these proceedings. However, Article 30 (1) of CAT allows a State party to submit a dispute with another State party concerning the interpretation or application of the Convention to the ICJ for settlement in circumstances where arbitration and negotiation have failed.<sup>514</sup> The Syrian authorities have not submitted a declaration opting out of this provision. A similar argument could be made in respect of Russia, which withdrew a declaration opting out of the provision in 1989 and has also been accused of violating the prohibition of torture as a result of its aerial bombardment of civilian areas in Syria.

Beth Van Schack suggested that the UNGA could seek an Advisory Opinion from the ICJ<sup>515</sup> regarding Syria's responsibility for internationally wrongful acts committed in Syria since March 2011.<sup>516</sup> This option may not be open with regard to Russia and Iran as proceedings before the ICJ could potentially be rendered inadmissible by virtue of the Monetary Gold principle. The Monetary Gold principle precludes a determination on the international responsibility of a state where that determination would also require a determination on the lawfulness of another state's conduct – in this case Syria – in the second state's absence and without their consent.<sup>517</sup>

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<sup>511</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1977, entered into force 26 June 1987) 1465 UNTS 85 (CAT), arts 5 and 7.

<sup>512</sup> *ibid* art 5.

<sup>513</sup> Statute of the International Court of Justice (adopted 24 June 1945, entered into force 24 October 1945) 3 Bevens 1153 (ICJ Statute), art 36.

<sup>514</sup> CAT, art 30 (1).

<sup>515</sup> ICJ Statute, arts 65–68.

<sup>516</sup> Beth Van Schaack, 'Syria, J'Accuse! Syrian State Responsibility for War Crimes' (*Just Security*, 13 July 2016) <<https://www.justsecurity.org/32009/syria-jaccuse-syrian-state-responsibility-war-crimes/>> accessed 1 November 2017.

<sup>517</sup> ILC 2001 Draft Articles, 67.

Individuals may seek state responsibility for violations of their rights under international human rights treaties. Treaties with individual communications mechanisms allow individuals to submit complaints to treaty monitoring bodies regarding alleged violations of their rights. The process is slow and cumbersome and, unlike courts, treaty monitoring bodies have no powers of enforcement. Furthermore, as individual communications mechanisms are optional, states may opt out of them as Syria has done.<sup>518</sup> Nevertheless, they present a potential avenue for holding Russia accountable. Russia has ratified ICCPR and CAT and accepted their respective individual communications mechanisms.<sup>519</sup>

Notably, the Human Rights Committee (CCPR) interpreted the jurisdictional clause contained in Article 2 (1) of ICCPR to require States parties to ‘respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party’.<sup>520</sup> According to the CCPR, the State party’s obligations are owed ‘regardless of the circumstances in which such power or effective control was obtained’<sup>521</sup> be it with or without the consent or acquiescence of the territorial state,<sup>522</sup> regardless of whether or not the territorial state is also a State party to ICCPR,<sup>523</sup> and regardless of the nationality or other status of the individual who finds themselves within the jurisdiction of the State party.<sup>524</sup> The ICJ has largely endorsed the CCPR’s view and also indicated that ICESCR and CAT may apply extraterritorially.<sup>525</sup>

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<sup>518</sup> Syria only opted into the individual communications mechanism for the Convention on the Rights of Persons with Disabilities.

<sup>519</sup> This section focuses on CAT and ICCPR as they are arguably of most relevance to the discussion. Iran has ratified ICCPR but not CAT. However, it has not accepted ICCPR’s individual complaints mechanism.

<sup>520</sup> CCPR/C/21/Rev.1/Add.13, para 10. See also *Sergio Euben Lopez Burgos v Uruguay*, Communication No 52/1979, CCPR Decision of 29 July 1981, para 12.3, reproduced in ‘Human Rights Committee: Selected Decisions Under The Optional Protocol (Second To Sixteenth Sessions)’ (UN 1985) UN Doc CCPR/C/OP/1, 88–92.

<sup>521</sup> CCPR/C/21/Rev.1/Add.13, para 10.

<sup>522</sup> *Burgos v Uruguay* (n520) paras 12.1–12.3; Karen da Costa, *Extraterritorial Application of Selected Human Rights Treaties* (Martinus Nijhoff 2013) 51–52 and 89.

<sup>523</sup> Da Costa (n522) 89–90.

<sup>524</sup> CCPR/C/21/Rev.1/Add.13, para 10.

<sup>525</sup> *Wall Advisory Opinion* (n287) [109]–[111]; *DRC v Uganda* (n86) [216] and [220].

The Committee Against Torture has similarly indicated that States parties to CAT owe obligations to individuals abroad who are subject to their de jure or de facto effective control regardless of whether or not those individuals are citizens and regardless of whether or not the territorial state is a party to CAT.<sup>526</sup> The CCPR indicated that it would be ‘unconscionable’ to allow a State party to commit violations of the ICCPR on the territory of a third state that it was not permitted to commit on its own territory.<sup>527</sup> The ICJ in turn indicated that it would be contrary to the object and purpose of the Covenant.<sup>528</sup>

Some Syrians could have an arguable case that Russia violated their rights under ICCPR and CAT since its military intervention in September 2015.<sup>529</sup> However, in order to trigger Russia’s extraterritorial jurisdiction, they would first have to demonstrate that they were subjected to Russia’s power or effective control. When determining whether or not an individual is within the power or effective control of a third state, the CCPR has tended to look at the factual, as opposed to legal, relationship between the individual and the third state.<sup>530</sup> The CCPR has indicated that states may potentially exert power or effective control over individuals abroad in situations of military occupation or as a result of the actions of their armed forces, security officials, police officers and diplomatic or consular agents.<sup>531</sup>

Russia is also a party to the European Convention on Human Rights (ECHR). Article 1 thereof requires States parties to ‘secure to everyone within their jurisdiction the rights and freedoms’ under the ECHR. The European Court of Human Rights (ECtHR) has interpreted this clause in

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<sup>526</sup> CAT, ‘General Comment No 2: Implementation of article 2 by States parties’ (24 January 2008) UN Doc CAT/GC/2; da Costa (n522) ch3.

<sup>527</sup> *Burgos v Uruguay* (n520) para 12.3.

<sup>528</sup> *Wall Advisory Opinion* (n287) [109].

<sup>529</sup> A Syrian doctor from Aleppo has already accused Russia of violating his rights to life and to freedom from torture under the ECHR as a result of its aerial bombardment of Aleppo. See ‘Briefing Note on case brought against Russia by Aleppo doctor in the European Court of Human Rights’ <[https://www.middleeastmonitor.com/wp-content/uploads/2016/10/20161012\\_Syria-case-1.pdf](https://www.middleeastmonitor.com/wp-content/uploads/2016/10/20161012_Syria-case-1.pdf)> accessed 26 January 2018.

<sup>530</sup> Da Costa (n522) 56 and 89.

<sup>531</sup> *ibid* 64–66, 77 and 81.

primarily territorial terms, although it has indicated that in exceptional cases the ‘acts of the Contracting States performed, or producing effects, outside their territories can constitute an exercise of jurisdiction by them within the meaning of Article 1’.<sup>532</sup> The ECtHR has tended to examine whether extraterritorial jurisdiction exists based on the facts and regardless of the legality of the acts that purportedly gave rise to the exercise of extraterritorial jurisdiction.<sup>533</sup> The ECtHR has recognised extraterritorial jurisdiction on two main grounds: spatial jurisdiction and personal jurisdiction. Spatial jurisdiction arises where:

... as a consequence of military action - whether lawful or unlawful – it [a state party] exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration.<sup>534</sup>

Effective control may be exercised directly, for example, through the threat or use of force including in circumstances of military occupation,<sup>535</sup> or indirectly via a subordinate local administration.<sup>536</sup> When determining if effective control exists, the ECtHR has paid particular attention to the ‘strength of the State’s military presence in the area’<sup>537</sup> taking into account not only the volume of troops but also the temporal length and geographic extent of their deployment.<sup>538</sup> The court may also consider whether a State party’s economic, military, financial and political support enables the survival of a local subordinate administration and provides the State party with decisive influence over the area in question.<sup>539</sup>

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<sup>532</sup> *Banković and others v Belgium and others* ECHR 2001–XII 333 [67].

<sup>533</sup> See *da Costa* (n522) 122–124, 139–141, 161–163, 184 and 248.

<sup>534</sup> *Loizidou v Turkey* (1995) (Preliminary Objections) Series A no 310 [62]. See also *Banković v Belgium* (n532) [69]; *Al-Skeini and Others v the United Kingdom* [2011] ECHR 1093 [138].

<sup>535</sup> See eg *Loizidou v Turkey* (n534) [62]; *Banković v Belgium* (n532) [71].

<sup>536</sup> See eg *Ilaşcu and Others v Moldova and Russia* ECHR 2004-VII 179, [314].

<sup>537</sup> *Al-Skeini v United Kingdom* (n534) [139].

<sup>538</sup> *Issa and Others v Turkey* [2004] ECHR 629 [75]–[76].

<sup>539</sup> *Ilaşcu v Moldova and Russia* (n539) [382]–[394]. See also *Al-Skeini v United Kingdom* (n534) [138]–[139]; *Mozer v the Republic of Moldova and Russia* App no 11138/10 (ECtHR, 23 February 2016) [110]; *Chiragov and Others v Armenia* App no 13216/05 (ECtHR, 16



Personal jurisdiction arises where a State party exercises ‘authority and control’ over an individual abroad,<sup>540</sup> including ‘through its agents operating – whether lawfully or unlawfully’<sup>541</sup> in another state. Personal jurisdiction has arisen in circumstances where a State party, by virtue of the consent, invitation or acquiescence of the territorial government, has exercised all or some of the public powers normally exercised by that government, including executive, judicial and security-related functions.<sup>542</sup> In such circumstances, the State party exercising those public powers will be responsible for any breaches of the ECHR that occur as a result provided that they are attributable to that State party and not the territorial state.<sup>543</sup> Personal jurisdiction has also been triggered by the actions of diplomatic and consular agents present on foreign territory in accordance with international law or aboard vessels or aircrafts flying the flag or registered in the name of a third state.<sup>544</sup>

Personal jurisdiction has also been found to exist in a limited number of situations where state agents have used force abroad, including where state agents have arrested individuals abroad and/or taken them into custody,<sup>545</sup> and where state agents have exercised authority and control over individuals passing through checkpoints.<sup>546</sup> However, the ECtHR’s jurisprudence is somewhat unclear regarding whether or not the simple fact of being a victim of the use of instantaneous lethal force in the form of gunfire or airstrikes is capable of triggering extraterritorial jurisdiction.

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June 2015) [180]–[186]. For a critique of *Chiragov*, see Marko Milanovic, ‘The Nagorno-Karabakh Cases’ (*EJIL: Talk*, 23 June 2015) <[https://www.printfriendly.com/print?customCSSURL=&disableClickTo...7E\\_PcSJJmrwvyGnyxmBEt\\_%7E\\_PcSGur-AntBEAB-xnEnonxu-pnFrF\\_%7E\\_PcS](https://www.printfriendly.com/print?customCSSURL=&disableClickTo...7E_PcSJJmrwvyGnyxmBEt_%7E_PcSGur-AntBEAB-xnEnonxu-pnFrF_%7E_PcS)> accessed 25 January 2018.

<sup>540</sup> *Öcalan v Turkey* ECHR 2005-IV 131 [91].

<sup>541</sup> *Issa v Turkey* (n538) [71].

<sup>542</sup> *Banković v Belgium* (n532) [71]; *Al-Skeini v United Kingdom* (n534) [135].

<sup>543</sup> *Al-Skeini v United Kingdom* (n534) [135].

<sup>544</sup> *ibid* [134] and [149]–[150]; *Banković v Belgium* (n532) [73]; *Medvedyev and Others v France* [2010] ECHR 384 [65].

<sup>545</sup> *Öcalan v Turkey* (N540) [91]; *Al-Saadoon and Mufdhi v the United Kingdom* App no 61498/08 (ECtHR, 21 March 2010) [140]; *Al-Skeini v United Kingdom* (n534) [136]; *Hassan v the United Kingdom* App no 29750/09 (ECtHR, 16 September 2014) [76]–[80].

<sup>546</sup> *Jaloud v the Netherlands* App no 47708/08 (ECtHR, 20 November 2014) [152]. See also *Pisari v the Republic of Moldova and Russia* App no 42139/12 (ECtHR, 21 April 2015).

In 2001, the Grand Chamber rejected a ‘cause-and-effects’ notion of extraterritorial jurisdiction in the *Banković* decision. The applicants in the case were the relatives of individuals killed as a result of a NATO airstrike on a radio station in the Federal Republic of Yugoslavia in 1999. The applicants argued that they were brought within the effective control and hence extraterritorial jurisdiction of the respondent states by the strike.<sup>547</sup> They asserted that the respondent states were not obliged to secure all of the Convention rights but were required to secure those rights, which were ‘within their control in the situation in question’.<sup>548</sup> In other words ‘the extent of the positive obligation under Article 1 of the Convention to secure Convention rights would be proportionate to the level of control in fact exercised’.<sup>549</sup> The Grand Chamber unanimously rejected the applicants’ arguments.<sup>550</sup> It asserted that the wording of Article 1 did not suggest that the rights and freedoms contained in the Convention ‘can be divided and tailored in accordance with the particular circumstances of the extra-territorial act in question’.<sup>551</sup> It appeared to be influenced by the fact that the strike took place outside Council of Europe territory. It stressed that the ECHR operates in ‘an essentially regional context and notably in the legal space (*espace juridique*) of the Contracting States’.<sup>552</sup>

Nevertheless, Karen da Costa observed that a number of post-*Banković* cases implicitly supported a ‘cause-and-effects’ notion of extraterritorial jurisdiction, albeit arguably only within Council of Europe territory.<sup>553</sup> For example, in *Andreou v Turkey* a victim located on the Greek side of Cyprus, who sustained fatal injuries as a result of indiscriminate gunfire by Turkish forces from Turkish controlled territory, was considered to fall within the authority and control of Turkey. The court found that:

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<sup>547</sup> *Banković v Belgium* (n532) [46]–[47].

<sup>548</sup> *ibid* [47].

<sup>549</sup> *ibid* [46].

<sup>550</sup> *ibid* [82].

<sup>551</sup> *ibid* [75].

<sup>552</sup> *ibid* [80].

<sup>553</sup> Da Costa (n522) 205–210, 243–246 and 251–252. See eg *Andreou v Turkey* App no 45653/99 (ECtHR, 27 October 2009) [25]; *Solomou and Others v Turkey* App no 36832/97 (ECtHR, 24 June 2008) [25] and [51].

... even though the applicant had sustained her injuries in territory over which Turkey exercised no control, the opening of fire on the crowd from close range, which was the direct and immediate cause of those injuries, had been such that the applicant should be regarded as “within [the] jurisdiction” of Turkey within the meaning of Article 1 of the Convention.<sup>554</sup>

In *Al Skeini*, the Grand Chamber held *contra Banković* that the ECHR could be divided and tailored in situations where state agents exercised authority and control over an individual. It indicated that in such circumstances the state was required under Article 1 ‘to secure to that individual the rights and freedoms under Section 1 of the Convention that are relevant to the situation of that individual’.<sup>555</sup> It also indicated that the fact that the impugned act took place outside of Council of Europe territory was not an automatic bar to jurisdiction.<sup>556</sup> On the other hand, in *Medvedyev* the Grand Chamber explicitly excluded *Banković*-type situations where ‘what was at issue was an instantaneous extraterritorial act, as the provisions of Article 1 did not admit of a “cause-and-effect” notion of “jurisdiction’.<sup>557</sup> Furthermore, in *Jaloud* the Grand Chamber declined to outright reject the respondent’s argument that the use of gunfire alone was incapable of triggering jurisdiction under Article 1.<sup>558</sup>

Overall, the case law to date tends to suggest that the use of lethal force alone by state agents is not sufficient to trigger extraterritorial jurisdiction, particularly if the state in which the impugned act occurs is not a Council of Europe member state.<sup>559</sup> On the other hand, this is not to definitively say that the ECtHR will not adopt a different approach in the

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<sup>554</sup> *Andreou v Turkey* (n553) [25].

<sup>555</sup> *Al-Skeini v United Kingdom* (n534) [137]. See also *Jaloud v the Netherlands* (n546) [154].

<sup>556</sup> See eg *Al-Skeini v United Kingdom* (n534) [141]–[142]; *Issa v Turkey* (n538) [74].

<sup>557</sup> *Medvedyev v France* (n544) [64].

<sup>558</sup> Aurel Sari, ‘Jaloud v Netherlands: New Directions in Extra-Territorial Military Operations’ (*EJIL: Talk!*, 24 November 2014) <<https://www.ejiltalk.org/jaloud-v-netherlands-new-directions-in-extra-territorial-military-operations/>> accessed 25 January 2018.

<sup>559</sup> See eg da Costa (n522) 245; Sari (n558); Cedric de Koker, ‘Extra-territorial Jurisdiction & Flexible Human Rights Obligations: The Case of Jaloud v. the Netherlands’ (*Strasbourg Observer*, 8 December 2014) <<https://strasbourgobservers.com/2014/12/08/extra-territorial-jurisdiction-flexible-human-rights-obligations-the-case-of-jaloud-v-the-netherlands/>> accessed 25 January 2018.

future. In recent years the ECtHR has adopted a more protective approach to jurisdiction increasing the range of acts that trigger extraterritorial jurisdiction on an incremental case-by-case basis.<sup>560</sup> As the Chamber observed in *Issa*: ‘Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory’.<sup>561</sup>

The ECtHR will soon have an opportunity to revisit the matter. Moawyah Al-Awad, a doctor based in Aleppo, has lodged a complaint with the ECtHR alleging that Russia had violated his rights to life, freedom from torture and inhuman or degrading treatment or punishment, and respect for private and family life under the ECHR.<sup>562</sup> With regard to jurisdiction, a preliminary briefing note on his case suggests that he will seek to demonstrate that the hospital in which he works has been repeatedly subjected to deliberate airstrikes by Russian armed forces and that these attacks have brought him within the practical control and effective authority of Russia.<sup>563</sup> The note also inferred that his life and fate was determined entirely by Russia and the Assad regime as a result of the combined effects of the siege on Aleppo and Russia’s aerial bombardment.<sup>564</sup>

### 7.6.ii Individual Criminal Responsibility

Syrians and nationals of third states may incur individual criminal responsibility under international law for war crimes and crimes against humanity perpetrated in Syria since March 2011, which they committed individually or jointly, ordered, solicited, induced, aided, abetted, assisted, participated in, or contributed to.<sup>565</sup> Russia and Iran have been directly implicated in the perpetration of war crimes and crimes against humanity in Syria. Officials in other external states could feasibly be accused of aiding

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<sup>560</sup> Da Costa (n522) 155. See also de Koker (n559).

<sup>561</sup> *Issa v Turkey* (n538) [71].

<sup>562</sup> ‘Briefing Note on case brought against Russia by Aleppo doctor in the European Court of Human Rights’ <[https://www.middleeastmonitor.com/wp-content/uploads/2016/10/20161012\\_Syria-case-1.pdf](https://www.middleeastmonitor.com/wp-content/uploads/2016/10/20161012_Syria-case-1.pdf)> accessed 26 January 2018.

<sup>563</sup> *ibid.*

<sup>564</sup> *ibid.*

<sup>565</sup> Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90 (Rome Statute), art 25 (3).

and abetting the commission of war crimes and crimes against humanity by providing arms and other forms of support to the Syrian government and armed opposition groups that are known to commit war crimes and crimes against humanity. However, the actus reus of ‘aiding and abetting’ liability, as presently defined by the ICTY, requires that the aid be ‘specifically directed’ toward the commission of the crimes in question, a very onerous standard of proof to satisfy.<sup>566</sup>

#### 7.6.ii.a Documenting the Evidence

Several mechanisms have been established to help collect the evidence needed to support the prosecution of international crimes committed in Syria since March 2011. The UNHRC established the UNCOI in August 2011 to:

... investigate all alleged violations of international human rights law since March 2011 in the Syrian Arab Republic, to establish the facts and circumstances that may amount to such violations and of the crimes perpetrated and, where possible, to identify those responsible with a view to ensuring that perpetrators of violations, including those that may constitute crimes against humanity, are held accountable.<sup>567</sup>

The UNCOI’s mandate was expanded in September 2012 to enable it:

... to conduct an international, transparent, independent and prompt investigation into abuses and violations of international law, with a view to hold to account those responsible for violations and abuses, including those that may amount to crimes against humanity and war crimes.<sup>568</sup>

The UNCOI’s competence to apply IHL has been questioned and it has been suggested that the evidence it has collected, which uses the ‘reasonable grounds to believe’ threshold, may not satisfy the standard of proof required

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<sup>566</sup> Marko Milanovic, ‘The Limits of Aiding and Abetting Liability: The ICTY Appeals Chamber Acquits Momcilo Perisic’ (*EJIL: Talk!*, 11 March 2013) <<https://www.ejiltalk.org/the-limits-of-aiding-and-abetting-liability-the-icty-appeals-chamber-acquits-momcilo-perisic/>> accessed 25 October 2017; Ruys (n28) 20-2.

<sup>567</sup> A/HRC/S-17/1, para 13.

<sup>568</sup> UNHRC Res 21/26 (28 September 2012) UN Doc A/HRC/RES/21/26, para 10.

for criminal investigations.<sup>569</sup> In addition, the UNCOI was not always able to share relevant information with domestic prosecutors due to issues surrounding consent and protection of sources.<sup>570</sup> In order to overcome the UNCOI's shortcomings, in December 2016 the UNGA established the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Those Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011 (the 'Mechanism'). Its mandate is:

... to closely cooperate with the Independent International Commission of Inquiry on the Syrian Arab Republic to collect, consolidate, preserve and analyse evidence of violations of international humanitarian law and human rights violations and abuses and to prepare files in order to facilitate and expedite fair and independent criminal proceedings, in accordance with international law standards, in national, regional or international courts or tribunals that have or may in the future have jurisdiction over these crimes, in accordance with international law<sup>571</sup>

The Mechanism is not a prosecutorial body; rather its role is to collect, analyse and preserve evidence that could be used in future criminal proceedings.<sup>572</sup> Consequently, it does not have the power to compel states to cooperate with it.<sup>573</sup>

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<sup>569</sup> Marauhn (n452) 447 and 459. See also HRW, *These are the crimes we are fleeing: Justice for Syria in Swedish and German Courts* (HRW 2017) 58–59. However, the UNCOI's evidence collection capabilities have arguably been significantly improved since Marauhn's article. See Roca (n486).

<sup>570</sup> HRW, *These are the crimes* (n569) 58–59.

<sup>571</sup> UNGA Res 71/L.48 (21 December 2016) UN Doc A/RES/71/L.48, para 4. The resolution establishing the Mechanism had considerable support. 59 states encompassing every UN regional group co-sponsored it. 105 countries voted in favour, 52 countries abstained and 15 voting against it. See UNGA Official Record (21 December 2016) UN Doc A/71/PV.66.

<sup>572</sup> Christian Wenaweser and James Cockayne, 'Justice for Syria?: The International, Impartial and Independent Mechanism and the Emergence of the UN General Assembly in the Realm of International Criminal Justice' (2017) 15 JICJ 211, 224; Alex Whiting, 'An Investigation Mechanism for Syria: The General Assembly Steps into the Breach' (2017) 15 JICJ 231, 232. Regarding the Mechanism's terms of reference and working methods, see UNGA, 'Report of the Secretary General on the Implementation of the resolution establishing the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011' (19 January 2017) UN Doc A/71/755.

<sup>573</sup> Wenaweser and Cockayne (n572) 214–215.

In August 2015, the UNSC established the OPCW/UN Joint Investigative Mechanism (JIM) ‘to identify to the greatest extent feasible individuals, entities, groups, or governments who were perpetrators, organisers, sponsors or otherwise involved in the use of chemicals as weapons’ in Syria.<sup>574</sup> In its reports, the JIM has attributed responsibility to both the Syrian authorities and ISIS for chemical weapons attacks.<sup>575</sup> In October 2017, Russia used its veto to prevent the UNSC from renewing JIM’s mandate. However, in June 2018 the States parties to the Chemical Weapons Convention adopted a resolution deciding ‘that the Secretariat shall put in place arrangements to identify the perpetrators of the use of chemical weapons’ in Syria.<sup>576</sup>

Several NGOs and Syrian activists have also been involved in documenting alleged international crimes in Syria.<sup>577</sup> However, the evidentiary value of their findings has been questioned.<sup>578</sup> EU member states involved in the investigation and prosecution of international crimes and terrorism-related offences in Syria have shared information through mechanisms such as the EU Genocide Network and Europol.<sup>579</sup>

### 7.6.ii.b Domestic Prosecutions

Domestic courts may exercise jurisdiction over international crimes on the basis of territoriality, active nationality, passive nationality or universal

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<sup>574</sup> UNSC Res 2235 (7 August 2015) UN Doc S/RES/2235, para 5.

<sup>575</sup> UNSC, ‘Seventh report of the Organisation for the Prohibition of Chemical Weapons-United Nations Joint Investigative Mechanism (26 October 2017) UN Doc S/2017/904, paras 36 and 46.

<sup>576</sup> OPCW, ‘Addressing the threat from Chemical Weapons Use’ (27 June 2018) C-SS-4/DEC.3, para 10.

<sup>577</sup> For example, the Syrian Commission on International Justice and Accountability and the Commission for International Justice and Accountability. See Beth Van Schaack, ‘Options for Accountability in Syria’ (*Just Security*, 22 May 2014) <<https://www.justsecurity.org/10736/options-accountability-syria/>> accessed 1 November 2017; Roca (n486).

<sup>578</sup> HRW, *These are the crimes* (n569) 58.

<sup>579</sup> *ibid* 54–56. A bill was put before the US Congress in 2017. If passed, the Syrian War Crimes Accountability Act would require the US State Department to assist entities involved in the identification and investigation of suspected perpetrators of war crimes, crimes against humanity and genocide in Syria. See eg Beth Van Schaack, ‘Important New Bipartisan Bill To Advance Accountability for International Crimes in Syria’ (*Just Security*, 10 April 2017) <<https://www.justsecurity.org/39839/important-bipartisan-bill-advance-accountability-international-crimes-syria/>> accessed 1 November 2017.

jurisdiction.<sup>580</sup> The Syrian government has failed to make a credible effort to investigate, prosecute and punish international crimes committed in Syria since 2011<sup>581</sup> contrary to its obligations under international law.<sup>582</sup> Hence, the territoriality principle has thus far proven largely impotent. The passive personality principle allows states to exercise jurisdiction over crimes committed against their nationals abroad. Criminal proceedings have been initiated in the US and France against the Syrian government on this basis.<sup>583</sup> The active nationality principle allows states to exercise jurisdiction over crimes committed by their nationals abroad. Third states have prosecuted their own nationals for international crimes and terrorism-related offences they committed in Syria.<sup>584</sup> In August 2014, the UNSC explicitly called upon states to take domestic measures to bring ‘foreign terrorist fighters’ to justice in accordance with applicable international law.<sup>585</sup> This includes an obligation to prosecute and punish ‘any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts’.<sup>586</sup>

Finally, under CIL states are entitled to exercise universal jurisdiction over war crimes, crimes against humanity, genocide and torture, even if the traditional grounds for exercising jurisdiction are absent.<sup>587</sup> The underlying

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<sup>580</sup> Van Schaack asserted that neighbouring states may also be entitled to exercise jurisdiction on the basis of the ‘effects’ doctrine and the protective principle. See Beth Van Schaack, ‘Alternative Jurisdictional Bases for a Hybrid Tribunal for Syria’ (*Just Security*, 29 May 2014) <<https://www.justsecurity.org/10968/alternative-jurisdictional-bases-hybrid-tribunal-syria/>> accessed 31 October 2017.

<sup>581</sup> UNHRC, ‘Report of the independent international commission of inquiry on the Syrian Arab Republic’ (5 February 2013) UN Doc A/HRC/22/59 (A/HRC/22/59), Annex XIV, 124.

<sup>582</sup> A/RES/60/147, Annex Basic Principles on the Right to a Remedy; Henckaerts and Doswald-Beck, *Rules* (n12) Rule 158

<sup>583</sup> Van Schaack, ‘Syria, J’Accuse!’ (n516); ‘When “Public Interest Litigation” Isn’t in the Public’s Interest: Universal Jurisdiction and the Case against Assad’ (*Syria Justice & Accountability Centre*, 2 March 2017) <<https://syriaaccountability.org/updates/2017/03/02/when-public-interest-litigation-isnt-in-the-publics-interest-universal-jurisdiction-and-the-case-against-assad/>> accessed 31 July 2018.

<sup>584</sup> See eg with regard to Germany, Patrick Kroker and Alexandra Lily Kather, ‘Justice for Syria? Opportunities and Limitations of Universal Jurisdiction Trials in Germany’ (*EJIL: Talk!*, 12 August 2016) <<https://www.ejiltalk.org/justice-for-syria-opportunities-and-limitations-of-universal-jurisdiction-trials-in-germany/>> accessed 31 October 2017.

<sup>585</sup> S/RES/2170, paras 5 and 8.

<sup>586</sup> S/RES/2178, para 6; S/RES/1373, para 2(e).

<sup>587</sup> The principle is reflected in CAT, art 5; Convention on the Safety of United Nations and Associated Personnel (adopted 9 December 1994, entered into force 15 January 1999) 2051



rationale posits that some crimes are ‘of such gravity and magnitude that they warrant universal prosecution and repression’<sup>588</sup> because they pose a threat to international order itself.<sup>589</sup> In practice, many states assert a ‘conditional’ form of universal jurisdiction rather than the ‘pure’ form described above. Accordingly, they add additional criteria that must be satisfied before universal jurisdiction can be asserted, such as requiring that the accused be a resident or present on the prosecuting state’s territory or that the victim be a resident and national. Even in countries that assert a ‘pure’ form of universal jurisdiction, prosecutors often enjoy considerable discretion when determining whether or not to initiate proceedings *in absentia* having regard to the practical difficulties involved.<sup>590</sup>

Turkey, Lebanon and Jordan host the most Syrian refugees, but they lack the legislative framework to prosecute international crimes on the basis of universal jurisdiction.<sup>591</sup> Investigations based on universal jurisdiction have been initiated in several European states, including France, Spain, Norway, Sweden, Switzerland, the Netherlands and Germany. In states that exercise a conditional form of universal jurisdiction, attaining custody of the accused<sup>592</sup> and/or identifying a victim who is also a resident and a national<sup>593</sup>

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UNTS 363 art 10; Inter-American Convention on Forced Disappearances (adopted 9 June 1994, entered into force 28 March 1996) 33 ILM 1429, art 4; Second Protocol to the Hague Convention for the Protection of Cultural Property (adopted 26 March 1999, entered into force 9 March 2004) 2253 UNTS 172, art 16 (1); Geneva I, art 49; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 85, art 50; Geneva Convention relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135, art 129; Geneva IV, art 146. See also Henckaerts and Doswald-Beck, *Rules* (n12) Rule 158.

<sup>588</sup> Cassese, *International Law* (n16) 452.

<sup>589</sup> Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (OUP 1994) 56–63.

<sup>590</sup> HRW, *These are the crimes* (n569) 16 and 24–25.

<sup>591</sup> *ibid* 57.

<sup>592</sup> For example, France. See Amira Mikhail, ‘Ahead of the Game: Prosecuting Syrian Crimes in French Courts’ (*Lawfare*, 13 October 2015) <<https://www.lawfareblog.com/ahead-game-prosecuting-syrian-crimes-french-courts#>> accessed 31 October 2017; Kroker and Kather (n584).

<sup>593</sup> Regarding the situation in Spain, see Cristina Roca, ‘Spanish Prosecutor Appeals Decision to Allow Trial of Syrian Officials’ (*Syria Deeply*, 31 March 2017) <<https://www.newsdeeply.com/syria/articles/2017/03/31/spanish-prosecutor-appeals-decision-to-allow-trial-of-syrian-officials>> accessed 21 September 2017; Roca (n486); ‘Spanish Court Case Tests the Challenges of Universal Jurisdiction on Syrians’ (*Syria Untold*, 2 October 2017). <<http://www.syriauntold.com/en/2017/10/spanish-court-case-tests-the-challenges-of-universal-jurisdiction-on-syrians/>> accessed 1 November 2017;

has proven difficult. Sweden and Germany are arguably the best-equipped of the European states to prosecute on the basis of universal jurisdiction because they: (i) exercise a pure form of universal jurisdiction; (ii) have war crimes units and experience prosecuting international crimes; and (iii) have the most Syrian asylum seekers and Syrian refugees in Europe and, accordingly, the most access to potential witnesses, victims, suspects and evidence.<sup>594</sup> However, even these states have found it difficult to build prosecutorial cases due to challenges associated with verifying evidence and engaging Syrians in the proceedings.<sup>595</sup>

It has proven especially difficult to prosecute mid to high-ranking members of the Assad regime given the reluctance of most European states to exercise universal jurisdiction *in absentia* and their adherence to the legal principle of sovereign immunity.<sup>596</sup> Consequently, the vast majority of domestic prosecutions have been against low-grade members of ISIS, JAN and other armed opposition groups.<sup>597</sup> Furthermore, suspected perpetrators of both international crimes and domestic terrorism-related offences have often only been prosecuted for the latter as they have less stringent evidentiary requirements.<sup>598</sup> However, terrorism-related offences may attract shorter prison sentences and do not adequately reflect the magnitude and nature of the atrocities committed in Syria.<sup>599</sup> Finally, unlike the Assad regime, Russia and Iran haven't been ostracised by the international community at large. Accordingly, third states may be less likely to initiate prosecutions against their nationals based upon universal jurisdiction for political reasons.

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Anne Barnard, 'Syrian Soldier Is Guilty of War Crime, a First in the 6-Year Conflict' *The New York Times* (Beirut, 3 October 2017) <<https://www.nytimes.com/2017/10/03/world/middleeast/syria-war-crime.html>> accessed 1 November 2017.

<sup>594</sup> HRW, *These are the crimes* (n569) 2 and 23.

<sup>595</sup> *ibid* 2–4 and 43–53; Kroker and Kather (n584).

<sup>596</sup> HRW, *These are the crimes* (n569) 36–37 and 42–43.

<sup>597</sup> *ibid* 37.

<sup>598</sup> *ibid* 3.

<sup>599</sup> *ibid* 3 and 37–39.

It has been argued that domestic prosecutions are worthwhile even if they don't result in the conviction of those most responsible for international crimes committed in Syria since 2011 as they: deter the commission of future international crimes, limit the freedom of movement of perpetrators, discredit the Assad regime and collect evidence that could be used in future prosecutions.<sup>600</sup> On the other hand, the difficulties associated with securing domestic prosecutions have not been adequately explained to Syrian refugees leading to a disconnect between victims' expectations and results and a loss of faith in the ability of domestic prosecutions to achieve justice.<sup>601</sup> Accordingly, the first conviction of an actual affiliate of the Assad regime for an international crime in October 2017 was significant. Whilst the perpetrator was only a low-rank soldier and the sentence was relatively short, the conviction had important symbolic value as it demonstrated that European states were not only interested in prosecuting Islamist terrorists for domestic security purposes.<sup>602</sup>

The discussion outlined above suggests that domestic prosecutions by third states will only achieve accountability in a limited and supplementary fashion.<sup>603</sup> Accordingly, the UNCOI has also advocated prosecution by an international or ad hoc tribunal, preferably the ICC.<sup>604</sup>

### **7.6.ii.c The International Criminal Court (ICC)**

The ICC is arguably the most suitable forum for prosecuting international crimes committed in Syria since March 2011. The alleged crimes committed are within the court's jurisdiction.<sup>605</sup> The gravity threshold and complementarity<sup>606</sup> principle have been satisfied. The Syrian authorities have shown themselves to be not only unwilling but also genuinely unable as a result of the armed conflict to bring perpetrators to justice.<sup>607</sup> However, as

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<sup>600</sup> Mikhail (n592); Barnard (n593).

<sup>601</sup> HRW, *These are the crimes* (n569) 3, 37–39 and 54; Syria Justice and Accountability Centre, 'When "Public Interest Litigation" Isn't in the Public's Interest' (n583).

<sup>602</sup> Barnard (n593).

<sup>603</sup> A/HRC/22/59, Annex XIV, 125.

<sup>604</sup> *ibid* Annex XIV, 126. See also HRW, *These are the crimes* (n569) 5.

<sup>605</sup> Rome Statute, art 5.

<sup>606</sup> *ibid* art 17.

<sup>607</sup> A/HRC/22/59, Annex XIV, 124.

Syria is not a State party to the Rome Statute, the ICC can only exercise jurisdiction if the Syrian authorities voluntarily accept the ad hoc jurisdiction of the court<sup>608</sup> or if the UNSC refers the situation to the ICC.<sup>609</sup> The former scenario is highly unlikely given the alleged implication of many regime elites in the international crimes committed.

During the early years of the Syrian crisis, calls for ICC referral emanated from various corners, including the UNHCHR,<sup>610</sup> the UN special procedures,<sup>611</sup> the UNCOI,<sup>612</sup> the European Parliament,<sup>613</sup> the London 11<sup>614</sup> and over 100 civil society organisations.<sup>615</sup> On 22 May 2014, France tabled a draft UNSC resolution deciding to refer the situation in Syria since March 2011 to the ICC.<sup>616</sup> Significantly, the resolution was co-sponsored by 65 states representing all five UN regional groups. 13 UNSC members voted in favour, but the resolution was ultimately vetoed by Russia and China.<sup>617</sup> The Russian representative, Vitaly Churkin, inferred that a referral would jeopardise the peace process, escalate the hostilities and pave the way for an

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<sup>608</sup> Rome Statute, art 12 (3).

<sup>609</sup> *ibid* art 13 (b). The ICC can also exercise jurisdiction over nationals of States parties for crimes perpetrated in Syria on the basis of active personality. However, this would only achieve a very selective form of justice. The UK and France are States parties to the Rome Statute but Syria, Russia, Iran, the US, Saudi Arabia, Qatar, Turkey and the UAE are not. Accordingly, their nationals would be barred from prosecution on the basis of active personality.

<sup>610</sup> See eg UNHRC, ‘Statement by Ms. Navi Pillay, UN High Commissioner for Human Rights to the Human Rights Council 17th Special Session on “Situation of human rights in the Syrian Arab Republic” in Geneva’ (22 August 2011) <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=11321&LangID=E>> accessed 23 July 2014.

<sup>611</sup> UNHRC, ‘Statement delivered on behalf of all Special Procedures mandate-holders of the United Nations Human Rights Council at the Eighteenth Special Session of the Human Rights Council on the situation of human rights in the Syrian Arab Republic’ (2 December 2011)

<[http://www.ohchr.org/Documents/HRBodies/HRCouncil/SpecialSession/Session18/SpecialProcedures\\_MsFaridaShaheed.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/SpecialSession/Session18/SpecialProcedures_MsFaridaShaheed.pdf)> accessed 23 July 2014.

<sup>612</sup> A/HRC/22/59, para 180 (b).

<sup>613</sup> EU Parliament, ‘Resolution on the Situation in Syria’ (12 September 2013) (2013/2819(RSP)), para 6.

<sup>614</sup> Friends of Syria Core Group (London 11) Communiqué (15 May 2014) <<https://www.gov.uk/government/news/london-11-friends-of-syria-core-group-ministerial-communication>> accessed 24 July 2014. The London 11 is comprised of Egypt, France, Germany, Italy, Jordan, Qatar, Saudi Arabia, Turkey, the UAE, the UK and the US.

<sup>615</sup> FIDH, ‘Syria: Groups Call for ICC Referral - Statement by Civil Society Organizations on Need for Justice (New York 15 May 2014) <<http://www.fidh.org/en/north-africa-middle-east/syria/15321-syria-groups-call-for-icc-referral>> accessed 23 July 2014.

<sup>616</sup> UNSC Draft Res 2014/348 (22 May 2014) UN Doc S/2014/348 (S/2014/348).

<sup>617</sup> UNSC Verbatim Record (22 May 2014) UN Doc S/PV.7180 (S/PV.7180).

external military intervention.<sup>618</sup> The Chinese representative, Wang Min, implied that a referral would jeopardise the peace process, infringe the ICC's complementarity principle and contravene Syria's judicial sovereignty.<sup>619</sup>

Russia and China were condemned by human rights groups for enabling impunity.<sup>620</sup> However, other P5 members have also stood alone in order to protect their allies and national interests. The US has vetoed multiple UNSC resolutions deemed detrimental to Israeli interests, including resolutions seeking to address gross human rights violations. The P3 – the US, UK and France – also condemned Russia and China.<sup>621</sup> However, the primary target of their outrage was arguably their own domestic constituencies<sup>622</sup> as they allegedly knew in advance that China and Russia would veto a UNSC referral.<sup>623</sup> However, they still pushed ahead. The foreseeable defeat of the referral arguably afforded the Assad regime a green light to continue repressing with impunity.

After the veto, France suggested the introduction of a UNSC code of conduct, which would effectively require P5 members to refrain from vetoing resolutions addressing alleged atrocity crimes.<sup>624</sup> However, by stipulating

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<sup>618</sup> *ibid* 12–13.

<sup>619</sup> *ibid* 13–14.

<sup>620</sup> HRW, 'UN Security Council: Vetoes Betray Syrian Victims' (22 May 2014) <<http://www.hrw.org/news/2014/05/22/un-security-council-vetoes-betray-syrian-victims>> accessed 28 July 2014; AI, 'UN: Russian and Chinese Vetoes of Syria ICC Resolution Callous' (22 May 2014) <<http://www.amnesty.ie/news/un-russian-and-chinese-vetoes-syria-icc-resolution-'callous'>> accessed 28 July 2014; No Peace Without Justice, 'UNSC/Syria: Russia and China's vetoes block overwhelming consensus to ensure justice and accountability' (22 May 2014) <<http://www.npwj.org/ICC/UNSCSyria-Russia-and-China's-vetoes-block-overwhelming-consensus-ensure-justice-and-accountability>> accessed 30 July 2014; FIDH, 'China-Russia disgraceful Veto in the Security Council blocks ICC Referral of the Syrian Situation (22 May 2014)' <<http://www.fidh.org/en/north-africa-middle-east/syria/15365-china-russia-disgraceful-veto-in-the-security-council-blocks-icc-referral>> accessed 31 July 2014.

<sup>621</sup> See generally S/PV.7180.

<sup>622</sup> Dov Jacobs, 'Why a Syria UNSC Referral to the ICC is not necessarily a good idea (and why we should be allowed to say that)' (*Spreading the Jam*, 24 May 2014) <<https://dovjacobs.com/2014/05/22/why-a-syria-uns-c-referral-to-the-icc-is-not-necessarily-a-good-idea-and-why-we-should-be-allowed-to-say-that>> accessed 6 November 2017; van Dam, *Destroying a Nation* (n264) ch4, lcn1837.

<sup>623</sup> S/PV.7180, 12–14 (see Russian and Chinese interventions).

<sup>624</sup> The idea of a UNSC code of conduct was first introduced in 2001. For a discussion of the French proposal and a broader code of conduct proposed by the Global Centre for R2P, see Hehir, 'Assessing the influence of the Responsibility to Protect' (n200) 174-177. See also A/59/565, para 256; Van Schaack, 'Options for Accountability' (n577).

that the code would be voluntary and that P5 members would be entitled to ignore it if their vital interests were engaged, the proposal ultimately subordinated the achievement of justice and prevention of atrocities to the reality of national interests. Nonetheless, a not insignificant volume of cross-regional support was voiced for the proposal.<sup>625</sup> During the siege of Aleppo in 2016, the UNHCHR, Zeid Ra'ad al Hussein, reignited the call for a UNSC code of conduct.<sup>626</sup>

The Syrian example reflects the politicised and selective nature of the ICC referral process. Only situations in which no P5 member has a vital interest have been referred. Even these referrals have arguably reflected a capitulation to external pressure rather than a genuine commitment to international justice as the UNSC has been reluctant to provide the ICC with the assistance it needs to discharge its mandate following referrals.<sup>627</sup> Furthermore, UNSC referrals have been specifically tailored to facilitate what Michael Ignatieff refers to as 'US exemptionalism', namely, the practice whereby 'America supports multilateral agreements and regimes, but only if they permit exemptions for US nationals'.<sup>628</sup> The US has insisted upon the inclusion of limitation clauses in ICC referrals exempting states that are not parties to the Rome Statute from any obligation to cooperate with the ICC,<sup>629</sup> excluding their nationals from the ICC's jurisdiction,<sup>630</sup> and ensuring that they are not responsible for any of the costs of ICC investigations and prosecutions resulting from UNSC referrals.<sup>631</sup>

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<sup>625</sup> S/PV.7180 (see statements by representatives of Rwanda, Jordan, Luxembourg, Chile and Australia).

<sup>626</sup> Mai El-Sadany, 'Deadlock at the Security Council on Syria: A Legal Perspective' (*Lawfare*, 14 October 2016) <<https://www.lawfareblog.com/deadlock-security-council-syria-legal-perspective>> accessed 31 October 2017.

<sup>627</sup> For example, China, which has significant economic and political interests in Sudan, reportedly prevented the UNSC from using its powers of enforcement to compel states into cooperating with the ICC's investigations in the Darfur case. Rosa Aloisi, 'A Tale of Two Institutions: The United Nations Security Council and the International Criminal Court' (2013) 13 *IntCLR* 147, 151–159, 161 and 167–168.

<sup>628</sup> Michael Ignatieff, *American Exceptionalism and Human Rights* (Princeton UP 2005) 4.

<sup>629</sup> UNSC Res 1593 (31 March 2005) UN Doc S/RES/1593 (S/RES/1593), para 2; S/RES/1970, para 5; S/2014/348, para 3.

<sup>630</sup> S/RES/1593, para 6; S/RES/1970, para 6; S/2014/348, para 7.

<sup>631</sup> S/RES/1593, para 7; S/RES/1970, para 8; S/2014/348, para 8. For a critique of these limitations clauses, see Aloisi (n627) 160–161.

The inclusion of these limitation clauses in the draft resolution referring Syria to the ICC undermined support for the resolution. For example, Argentina and Chad, whilst ultimately voting in favour of the resolution, declined to cosponsor it because of these clauses.<sup>632</sup> Limitation clauses have been criticised by UNSC members, including Brazil, the Philippines, Greece, Tanzania, Benin and France.<sup>633</sup> They have also caused Brazil, Mexico, Germany and France to abstain from voting on UNSC resolutions in the past.<sup>634</sup> Despite Russia's allegations of American double standards,<sup>635</sup> both Russia and China implicitly support limitation clauses as they have also declined to ratify the Rome Statute.<sup>636</sup> If at any stage the situation in Syria were actually referred to the ICC, the limitation clauses could prove crucial in exempting Russian nationals from prosecution.

The purpose of the referral mechanism is to secure the universality of international justice. However, the blatantly selective and politicised manner in which the UNSC has utilised it has arguably rendered this goal obsolete. Even more worryingly, the referral mechanism has undermined the independence and legitimacy of the ICC leading some commentators to suggest that the administration of international justice in an impartial and non-political manner would be better served without it.<sup>637</sup>

#### 7.6.ii.d Ad Hoc Tribunal

Some commentators have recommended the establishment of an ad hoc tribunal to prosecute international crimes committed in Syria since March 2011.<sup>638</sup> It would most likely take the form of a hybrid tribunal empowered

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<sup>632</sup> S/PV.7180.

<sup>633</sup> See UNSC Verbatim Record (31 March 2005) UN Doc S/PV.5158.

<sup>634</sup> UNSC Verbatim Record (26 February 2011) UN Doc S/PV.6491; UNSC Verbatim Record (1 August 2003) UN Doc S/PV.4803.

<sup>635</sup> S/PV.7180, 13 (see Churkin's intervention).

<sup>636</sup> Andrea Birdsall, 'The Responsibility to Prosecute and the ICC: a Problematic Relationship?' (2015) 26 *CrimLF* 51, 58.

<sup>637</sup> See Aloisi (n627) 160–161, 164 and 167–168; Mark Kersten, 'Calls to Prosecute War Crimes in Syria are Growing. Is international justice possible?' (*Justice in Conflict*, 17 October 2016) <<https://justiceinconflict.org/2016/10/17/calls-to-prosecute-war-crimes-in-syria-are-growing-is-international-justice-possible/>> accessed 6 November 2017; Birdsall (n636) 55 and 58.

<sup>638</sup> See Stahn, 'Syria, Security Resolution 2118' (n638); Van Schaack, 'Options for Accountability' (n577); Beth Van Schaack, 'A Mixed Chamber for Syria: An Idea Whose

to utilise a mixture of international and domestic law, and with a mixture of domestic and international judges and prosecutors. Examples include the Extraordinary Chambers in the Courts of Cambodia and the Special Tribunal for Lebanon.<sup>639</sup> However, considerable hurdles would have to be overcome surrounding costs, venue, impartiality, independence and legitimacy.

Any tribunal established within Syria would have to overcome considerable security-related challenges. It could also encounter difficulties proving its legitimacy. Ad hoc tribunals have traditionally been established with the consent of the subject state or, where that consent is unforthcoming, following a UNSC resolution.<sup>640</sup> The Syrian government is unlikely to consent to a genuinely impartial and independent tribunal and the opposition, given its fragmented nature, is unable to provide the necessary consent.<sup>641</sup> As the war winds down in the regime's favour, the risk is that any mechanism established within Syria with the regime's consent would only prosecute members of the opposition.

Having regard to the previous discussion surrounding the attempted ICC referral, the UNSC is unlikely to authorise an ad hoc tribunal. A tribunal could possibly be authorised by the UNGA, but its legality would likely be challenged given the UNSC's primary responsibility for international peace and security.<sup>642</sup> A coalition of neighbouring states impacted by the refugee crisis could potentially support the establishment of a tribunal that could exercise jurisdiction on the basis of universal jurisdiction, passive personality

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Time Has Come?' (*Just Security*, 28 May 2014) <<https://www.justsecurity.org/10928/mixed-chamber-syria-idea-time-come/>> accessed 1 November 2017; Beth Van Schaack 'Alternative Jurisdictional Bases for a Hybrid Tribunal for Syria' (*Just Security*, 29 May 2014) <<https://www.justsecurity.org/10968/alternative-jurisdictional-bases-hybrid-tribunal-syria/>> accessed 31 October 2017; Kersten (n637); Ben Saul, 'Standing Up for Justice in War' (2016) Chatham House Research Paper, November 2016 <<https://www.chathamhouse.org/expert/comment/standing-justice-war>> accessed 31 October 2017.

<sup>639</sup> Another option would be to establish a specialised domestic court within Syria akin to the Iraqi High Criminal Court.

<sup>640</sup> Van Schaack, 'A Mixed Chamber for Syria' (n638).

<sup>641</sup> *ibid.*

<sup>642</sup> Van Schaack, 'Options for Accountability' (n577).



and active personality.<sup>643</sup> The tribunal could be established in a willing host state preferably a border state given the advantages of proximity.<sup>644</sup> However, no regional state is likely to offer to host such a tribunal given the potential impact it could have on that state's domestic politics and relationship with the resurgent Assad regime. Furthermore, any tribunal established without the consent of the Syrian authorities or a UNSC mandate would face considerable operational difficulties. Also, as the majority of funding for such an ad hoc tribunal would most likely come from Western states, it could face allegations of bias.<sup>645</sup>

#### **7.6.ii.e Peace versus Justice**

The controversy surrounding the attempted ICC referral reignited the peace versus justice debate. Carsten Stahn observed that UNSC Resolution 2118, which endorsed the US-Russian Framework for the destruction of Syria's chemical weapons, reflected the 'peace before justice' position.<sup>646</sup> Whilst stressing that those responsible for the use of chemical weapons should be held accountable, the resolution made no mention of the actual mechanisms through which individual criminal responsibility could be achieved.<sup>647</sup> Notably, the Assad regime's continuing cooperation with the chemical weapons destruction programme could have been jeopardised by the actual or threatened initiation of criminal proceedings.<sup>648</sup>

On the one hand, it was suggested that the pursuit of accountability should be postponed until a political solution had been reached and/or disarmament had been completed. Advocates of this position asserted that referring the situation to the ICC whilst armed conflict was on-going would merely escalate the hostilities and jeopardise peace negotiations by providing the parties with a disincentive to compromise.<sup>649</sup> Russia alleged that this is

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<sup>643</sup> *ibid*; Van Schaack, 'A Mixed Chamber for Syria' (n638); Saul 'Standing Up for Justice' (n638).

<sup>644</sup> Van Schaack 'Alternative Jurisdictional Bases' (n638).

<sup>645</sup> Kersten (n637).

<sup>646</sup> Stahn, 'Syria, Security Resolution 2118' (n638).

<sup>647</sup> *ibid*.

<sup>648</sup> *ibid*. See also Birdsall (n636) 69–70.

<sup>649</sup> S/PV.7180, 12–13; Aloisi (n627) 148, 159, 162, 166–167; Birdsall (n636) 65–66.

what happened in Libya.<sup>650</sup> Van Dam suggested that Western demands for accountability caused the Assad regime to view the conflict in zero sum terms and consequently incentivised rather than deterred the violence.<sup>651</sup> Noha Aboueldahab inferred that even if a referral had been secured the chances of effective investigations and prosecutions being carried out were slim given the ICC's limited enforcement powers and the UNSC's demonstrated reluctance to support the court in this regard.<sup>652</sup>

On the other hand, it was argued that accountability would reduce the violence in Syria by deterring would-be perpetrators.<sup>653</sup> Advocates of this position asserted that the UNSC's power to defer prosecutions<sup>654</sup> would operate as a safeguard against prosecutions jeopardising any nascent peace process. Accordingly, a referral resolution could include language effectively postponing the initiation of investigations pending the conclusion of a political agreement.<sup>655</sup> Abdulhay Sayed asserted that the UNSC's failure to tackle impunity sent a message to the belligerents that 'escalating violence improves your chances of securing a seat at the negotiating table'.<sup>656</sup> He inferred that as the situation deteriorated and sectarianism increased, impunity for violence against the 'other' became socially accepted as both sides justified their crimes by reference to their own respective values as opposed to the language of international law.<sup>657</sup> He suggested that a sustainable political solution is unlikely to be reached in Syria without accountability for past crimes, as impunity constitutes the foundation upon which further violence is constructed.<sup>658</sup> To this end, he observed that the legal immunity enjoyed by Syria's notoriously brutal *Mukhabarat* agents was

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<sup>650</sup> S/PV.7180, 13 (see Russia's intervention).

<sup>651</sup> Van Dam, *Destroying a Nation* (n264) ch4, lcn1834. See also Jacobs (n622).

<sup>652</sup> Noha Aboueldahab, 'The Perils of Impulsive Promises for Justice in Syria' (*Lawfare*, 26 April 2017) <<https://www.lawfareblog.com/perils-impulsive-promises-justice-syria>> accessed 31 October 2017.

<sup>653</sup> See eg S/PV.7180, 8 (Luxembourg's intervention).

<sup>654</sup> Rome Statute, art 16.

<sup>655</sup> Stahn, 'Syria, Security Resolution 2118' (n638).

<sup>656</sup> Abdulhay Sayed, 'Syria the Land of Impunity' (*EJIL: Talk!*, 24 November 2015) <<https://www.ejiltalk.org/syria-as-a-land-of-impunity/>> accessed 31 October 2017.

<sup>657</sup> *ibid.*

<sup>658</sup> *ibid.*

one of the core triggers for the initial protests.<sup>659</sup> A further argument in favour of accountability is that Syrians themselves appear to support it.<sup>660</sup>

### 7.7 Theoretical Appraisal and Conclusion

The chapter lent support to several realist arguments. First, it reinforced the realist argument that international law will not constrain states if their vital interests are perceived to be at stake.<sup>661</sup> This was evident from the willingness of Syria, Russia and Iran to blatantly contravene IHL and IHRL to secure regime survival. Democratic states belonging to the US-led coalition against ISIS were also accused of committing violations of IHL, particularly during the 2018 offensive against ISIS in Raqqa, albeit not to the same extent as the Assad regime and its allies. This suggests that the political ordering principle of a state may slightly impact, albeit not dictate, its adherence to *jus in bello* rules. Moreover, America's retention of a right to act unilaterally to defend its interests<sup>662</sup> and reliance upon controversial pre-emptive/preventative self-defence arguments suggests that democracies are not immune to viewing their *jus ad bellum* obligations through a realist prism.

The Syrian experience also reinforced the realist contention that states will only intervene militarily in third states when they consider it to be in their interests.<sup>663</sup> The UK's reliance on a right of unilateral humanitarian intervention in dubious circumstances to justify its April 2018 strikes buttressed the realist argument that states merely instrumentalise humanitarian arguments to justify actions undertaken primarily for self-

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<sup>659</sup> *ibid.*

<sup>660</sup> Although admittedly this finding is based on qualitative studies involving a limited number of Syrian respondents. See Craig Charney and Christine Quirk, "He who did wrong should be accountable": Syrian Perspectives on Transitional Justice' (2014) Syria Justice and Accountability Centre, January 2014, 1–2 and 5–7 <[http://syriaaccountability.org/wp-content/uploads/SJAC\\_Syrian\\_Perceptions\\_2014\\_EN.pdf](http://syriaaccountability.org/wp-content/uploads/SJAC_Syrian_Perceptions_2014_EN.pdf)> accessed 22 January 2018; Craig Charney, "Maybe We Can Reach a Solution": Syrian Perspectives on the Conflict and Local Initiatives for Peace, Justice and Reconciliation' (2015) Syria Justice and Accountability Centre, February 2015, 84 <<http://www.charneyresearch.com/wp-content/uploads/2015/02/Report-Syrian-Perceptions-of-the-Conflict-and-Local-Initiatives-20151.pdf>> accessed 22 January 2018; HRW, *These are the crimes* (n569) 17 and 20–21.

<sup>661</sup> Hans Morgenthau, *Politics among Nations: The Struggle for Power and Peace* (6th edn, McGraw Hill 1985) 298; Christian Reus-Smit, 'The Politics of International Law' in Christian Reus-Smit (ed), *The Politics of International Law* (CUP 2004) 16.

<sup>662</sup> 2010 National Security Strategy (n391).

<sup>663</sup> Eckert (n188) 91.

interested reasons. Furthermore, the discussion surrounding the ICC referral reinforced the realist contention that the enforcement of international law is dependent upon the connivance of powerful states. It also resurrected the ‘peace versus justice’ argument and suggested that international justice may only be achieved in the current international system in a partial and selective manner. Finally, the Syrian protests and the response thereto supported the critique of international law’s inability to respond to demands for distributive justice made by realists, English School theorists and TWAIL scholars.<sup>664</sup>

From an English School perspective, the international response to the Syrian crisis reinforced the pluralist conception of international society. The reluctance of states to accept a collective legal responsibility to take timely and decisive collective action to protect populations abroad from atrocity crimes suggests that they are not yet willing to prioritise the interests of international society over their respective national interests. In this manner, the Syrian crisis reignited the ‘order versus justice’ debate within the English School and again questioned whether individual and cosmopolitan justice can be achieved in the current state-centric international system.

The chapter tested the assumption, arguably implicit in international legal positivism, liberal internationalism and some constructivist writing, that international law offers a sufficiently determinate benchmark against which the lawfulness of international behaviour may be objectively measured. The UNCOI’s reports suggest that many of the IHRL and IHL rules are sufficiently determinate to operate as a yardstick against which the lawfulness of the behaviour of the parties to the various armed conflicts that have arisen in Syria since 2011 may be examined. Nevertheless, the analysis revealed that there is some ambiguity surrounding the actual classification of these armed conflicts, most notably regarding whether or not a distinct IAC has arisen between Syria and the participants in the US-led coalitions strikes against

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<sup>664</sup> See eg Edward H Carr, *The Twenty Years’ Crisis 1919–1939: An Introduction to the Study of International Relations* (2nd edn, Macmillan and Co Ltd 1946) 191; Linklater (n190) 101; Frédéric Mégret, ‘International Law as law’ in Crawford and Koskeniemi (eds) (n190) 88.

ISIS in Syria. Furthermore, it also revealed that several, albeit not all, of the *jus ad bellum* rules are indeterminate and subject to competing interpretations as apparent from the debates surrounding the lawfulness of third party countermeasures, the negative equality principle, the capacity of an NSA to launch an armed attack, the gravity and proportionality criteria for self-defence purposes, the unable and unwilling doctrine, and the asserted right of pre-emptive/preventative self-defence. In this regard, the chapter supported Koskenniemi's suggestion that political actors engage in a hegemonic struggle to have their own subjective and partial definition of international legal rules accepted as the universal and correct interpretation.<sup>665</sup> Like constructivists, Koskenniemi observed that international law offers a language and framework through which these subjective claims can be made and evaluated.<sup>666</sup> Despite the indeterminacy of international law, Koskenniemi advocates the retention of a culture of formalism as instrumental approaches risk transforming international law into a tool for furthering the interests of dominant international actors. In this light, the failure of the US and France to provide any official justification under international law for their airstrikes in response to the Assad regime's alleged use of chemical weapons arguably threatens international law's distinctive normative character, which according to constructivists is socially constructed through the use of legal reasoning in state practice.<sup>667</sup>

The chapter lent support to Koskenniemi's argument that the indeterminacy of international law derives from its genesis in liberal political theory, which attempts to reconcile cosmopolitanism and individualism.<sup>668</sup> On the one hand, the Syrian protests suggested that cosmopolitan human rights law may be utilised as an instrument for combating injustice and

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<sup>665</sup> Martti Koskenniemi, *The Politics of International Law* (Hart Publishing 2009) 222. For a similar view, see Marxsen, 'A Note on Indeterminacy' (n323) 80–81.

<sup>666</sup> Christian Reus-Smit, 'Introduction' in Christian Reus-Smit (ed) (n661) 5. See also Martti Koskenniemi, 'International Law in the World of Ideas' in Crawford and Koskenniemi (eds) (n190) 59–61.

<sup>667</sup> Arend (n1) 141.

<sup>668</sup> Martti Koskenniemi, *From Apology to Utopia: the Structure of International Legal Argument* (Reissue, CUP 2005) 74–89. See also Christian Reus-Smit, 'The Politics of International Law' in Christian Reus-Smit (ed), *The Politics of International Law* (CUP 2004) 32–35.

affecting change. On the other hand, the reliance of the Assad regime and its external allies upon the individualist sovereign equality and non-intervention principles demonstrated how international law can be utilised to perpetuate injustice and maintain the status quo. Liberal interventionists argued that in such circumstances a cosmopolitan humanitarian intervention doctrine is necessary to protect foreign populations against the abuse of individualist rights. However, realists and TWAIL scholars cautioned that states will merely exploit cosmopolitan doctrines to justify unilateral interventions initiated for purely self-interested reasons whilst declining to intervene to relieve genuine humanitarian catastrophes if their interests are not impacted. The Syrian experience tends to reinforce this argument.

## **Chapter Eight: Conclusion**

### **8.1 Research Aims and Process**

The thesis sought to investigate the relationship between international law, international politics and the state using Syria as a case study. In so doing, it endeavoured to discover whether existing theoretical approaches to international law and international relations accurately capture this relationship. It also sought to address recurrent themes in the existing research, including the relationship between the domestic and international domains and between the theory and practice of international relations and international law; the challenges posed by non-state actors and processes to the ‘state-centric’ character of international law and the international system; the perceived ineffectiveness of international law as a result of its inherent indeterminacy and dearth of mandatory and centralised enforcement mechanisms; and the tension between international law’s role in maintaining international order and its role in promoting justice both for states and individuals. Finally, the thesis sought to investigate whether international law could be effectively utilised to achieve normative goals.

The thesis initially examined the most prominent theoretical approaches to international relations and international law focussing on their treatment of the relationship between international law, international politics and the state. It then tested their respective assertions against Syria’s actual experience from the late Ottoman period to mid-2018. In so doing, it sought to reveal the role that international law and international politics have played in phenomena including state formation, authoritarian regime resilience, recurring armed conflict and social inequality in Syria and the wider region. Finally, the thesis examined whether international law is sufficiently determinate to act as a benchmark against which the lawfulness of international behaviour can be objectively measured. It did this by utilising the traditional doctrinal approach to assess compliance with the international legal rules concerning the use of force and conduct of hostilities in Syria since March 2011.

## **8.2 Limitations and Potential Areas of Future Research**

As this thesis utilises Syria as a case study, its findings reflect Syria's particular history, political ordering type, geopolitical position, ethno-sectarian demographics and socio-economic characteristics. Consequently, its findings may not be readily generalisable. Indeed, the utilisation of comparative case studies offers a potential area of future research. Furthermore, as the situation in Syria is constantly evolving, this research may need to be updated to take account of future developments, including in Idlib, the remaining stronghold of jihadists and opposition actors, and in the PYD-controlled Democratic Federation of Northern Syria.

A critical appraisal of the international response to the refugee crisis triggered by the Syrian armed conflict was beyond the scope of this study. However, it presents a fascinating area for future analysis, particularly given that host states may soon be seeking to return refugees to Syria as the war winds down. The return of refugees will need to be monitored against the obligation of host states to ensure non-refoulement under international law.<sup>1</sup> Poststructuralism could also offer an interesting prism through which to examine the refugee crisis.

During the early stages of Syria's unrest, many external actors declared that the Assad regime had forfeited its legitimacy as a result of its violations of international law. However, as the regime's survival, in the short to medium term at least, now appears assured, it will be interesting to see how these actors interact with the regime in the future. It will be difficult for liberal states to fully accept Syria back into international society. However, the regime's core allies – Russia, China and Iran – will ensure that it is not totally relegated to pariah status. They have already undertaken to provide the Assad regime with aid to reconstruct Syria. Reconstruction aid is necessary to ensure

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<sup>1</sup> The rule requires states to refrain from expelling or returning refugees 'in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion', Convention relating to the Status of Refugees (adopted 22 April 1954, entered into force 28 July 1951) 189 UNTS 137, art 3 (1).



Syria's future. However, it is also likely to become a new form of rent that the regime utilises to reconsolidate its domestic support base.<sup>2</sup>

### 8.3 Findings

The thesis revealed that no one theoretical approach has captured the precise contours of the relationship between international law, international politics and the state. Some of their assertions have been confirmed by Syria's experience, whereas others have been disproven or at least thrown into question.

The thesis challenged essentialist theories, which presuppose the Middle East's unique disposition to instability, its inherent incompatibility with democratic government, and the supposed immutable identity of its inhabitants. It demonstrated the extent to which external actors have contributed to authoritarian resilience, recurring armed conflict, the salience of sub- and supra-state identities, and the proliferation of extremism and sectarianism in the region. At various intervals in Syria's history, its population demonstrated an autogenous preference for democratic rule, for example, following World War I, in the post-independence era and during the Arab Spring protests. A democratic society could potentially have been established had embryonic Syria not become central to regional and international struggles for power during the 1950s, which in turn compelled it to renounce its sovereignty and join the UAR. Significantly, it was during

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<sup>2</sup> For a discussion of the gargantuan challenge posed by post-conflict recovery in Syria and the political dynamics of reconstruction aid, see David Butter, 'Syria's Economy Picking up the Pieces' (2015) Chatham House Research Paper, June 2015, 2–5, 13, 16–25 <[https://www.chathamhouse.org/sites/files/chathamhouse/field/field\\_document/20150623SyriaEconomyButter.pdf](https://www.chathamhouse.org/sites/files/chathamhouse/field/field_document/20150623SyriaEconomyButter.pdf)> accessed 2 October 2017; World Bank Group, *The Toll of War: the Economic and Social Consequences of the Conflict in Syria* (World Bank Group 2017) 83–86 and 90–102. See also John R Allen and Michael E O'Hanlon, 'Economics could be the key to ending the Syrian civil war' (*The Brookings Institution*, 9 August 2017) <<https://www.brookings.edu/blog/markaz/2017/08/09/economics-could-be-the-key-to-ending-the-syrian-civil-war/>> accessed 9 October 2017; Steven Heydemann, 'Rules for reconstruction in Syria' (*Markaz*, 24 August 2017) <<https://www.brookings.edu/blog/markaz/2017/08/24/rules-for-reconstruction-in-syria/>> accessed 9 October 2017; Mina al-Oraibi, 'Economic leverage could be the new mechanism to get Syrians to negotiating table: But once there, will they be making the decisions?' *The National* (23 September 2017) <<https://www.thenational.ae/world/economic-leverage-could-be-the-new-mechanism-to-get-syrians-to-negotiating-table-1.661030>> accessed 24 September 2017.

the UAR era that Syria's future authoritarian rulers, including Hafez al-Assad, learnt their craft.

The thesis revealed the extent to which international and regional actors exploited ideational factors to achieve their strategic objectives in the Middle East. Sub-state identities were nurtured during the Ottoman era as a result of the Ottomans' decentralised form of rule and the European powers' exploitation of religious identity to justify their interference in the Empire's internal affairs. European interference in turn exacerbated sectarian tensions and contributed to a counter-interest in the supra-state ideologies of pan-Arabism and pan-Islam. Sub- and supra-state identities continued to influence domestic and regional politics after WWI due to the arbitrary imperial division of Greater Syria, the denial of Kurdish and Palestinian statehood, and the mandatory powers' divide and rule policies. Like their colonial forebears, post-independence elites also manipulated ideational factors and ethno-sectarian differences to consolidate their rule. Nevertheless, they frequently contradicted their ideological rhetoric, for example, by forming strategic alliances with their ideological opposites. Perhaps more so than any other factor, Israel's unlawful occupation of Arab territories fuelled support for anti-imperialism, Arab nationalism and Islamist extremism in the region. As post-structuralists would expect, pan-Arab and Zionist identities were constructed in opposing and mutually dependent terms.

During the 21<sup>st</sup> century, the Bush Administration exploited the fear of the 'Islamist other' following the 9/11 attacks to generate domestic support for its 2003 intervention in Iraq. The intervention dramatically increased sectarianism and support for Islamist extremism in the MENA region. Various regional actors, including the Assad regime, Iran and AQI, manipulated ideational factors to generate a sectarian war in Iraq and thereby increase the costs of the occupation for the Occupying Forces. After the overthrow of Hussein's regime, the policies implemented by the CPA and the Maliki regime also exacerbated sectarian tensions. The intervention altered the regional balance of power in Iran's favour and polarised the Middle East along apparently sectarian lines. Indeed, the Syrian crisis has often been

depicted as a microcosm of a regional sectarian conflict, which pits the Sunni-dominated Gulf monarchies against the Shia crescent of Iran, Iraq, Syria and Hezbollah. However, as this thesis demonstrated, this representation is overly simplistic. It doesn't reflect the extent to which regional actors have exploited sectarian differences to mobilise support for strategic objectives. In so doing, they contributed to the radicalisation of a conflict in Syria that originated out of initially peaceful and inclusive protests. Once sectarian tensions and the fear of the 'other' were aroused, they created their own realities.

The thesis demonstrated the contribution of external actors to the emergence and resilience of authoritarian rule in the Middle East. Imperial powers failed to prepare indigenous populations for independent rule, engineered the installation of allied authoritarian monarchs in newly-independent states, and provided inspiration for the ideologies that radical autocrats relied upon for domestic legitimacy. During the Cold War era, the superpowers propped up their respective authoritarian allies by providing them with material and diplomatic support. Western states prioritised economic over genuine political reform and afforded a veneer of legitimacy to repressive regimes that practiced 'cosmetic democracy'. Some observers even suggested that Western actors needed authoritarian regimes to protect their regional interests.<sup>3</sup> Nevertheless, after 9/11 the Bush Administration began to view continuing authoritarian rule in the region as a threat to its national security and consequently sought to forcibly export democracy to the Middle East. However, when democratisation threatened to bring Islamists to power, it performed yet another U-turn and began to view authoritarian rulers, even traditional foes such as the Assads, as bulwarks against Islamist extremism.

Despite highlighting the dangers of differentiating between liberal and non-liberal states under international law, the thesis suggested that

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<sup>3</sup> See eg Raymond Hinnebusch, 'Europe and the Middle East: From Imperialism to Liberal Peace?' (2012) 4 *Review of European Studies* 18, 23–24; Raymond Hinnebusch, 'Globalization, democratization, and the Arab uprising: the international factor in MENA's failed democratization' (2015) 22 *Democratization* 335, 343.

authoritarian regimes have peculiar characteristics that may enhance both their vulnerability and their resilience to internal unrest. It traced the causes of Syria's various internal uprisings since 1970 in large part to the Assad regime's authoritarian character. In this regard, it tended to reinforce the liberal argument that autocracies are more susceptible to internal armed conflict than democracies. Nevertheless, it also demonstrated the resilience of the Assad regime, a variable that was significantly under-estimated by the regime's regional and international opponents in the initial stages of the Arab Spring. It also suggested that authoritarian regimes prioritise the regime interest over the national interest as omnibalancing theory presupposes.<sup>4</sup> The Assad regime repeatedly demonstrated its willingness to do whatever it took to secure its own survival regardless of the costs to Syria's population and regardless of its own obligations under international law.

The thesis suggested that the 'cosmetic democracy' model is not conducive to long-term stability, particularly when accompanied by increasing inequality as a result of economic liberalisation. The economic liberalisation measures advocated by the IMF and the EMP contributed to inequality, poverty and corruption in Arab states. These grievances were amongst the key triggers of the Arab Spring protests. Accordingly, the protests challenge the assumption implicit in neoliberal institutionalism that international regimes contribute to international order. Instead, they support Bull's contention that the absence of justice in the international system, in this case distributive justice, may jeopardise international order.<sup>5</sup>

The thesis confirmed many of realism's central tenets. As a result of its geopolitical and ideological significance, Syria repeatedly found itself at the heart of regional and international struggles for power. The response of external actors to the Arab Spring protests was dictated by their respective strategic interests as realists would predict. The thesis also reinforced the realist argument that ideational factors tend to be exploited by political actors

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<sup>4</sup> Stephen R David, 'Explaining Third World Alignment' (1991) 43 *WldPol* 233, 236–237.

<sup>5</sup> Andrew Linklater, 'The English School' in Scott Burchill and others (eds), *Theories of International Relations* (3rd edn, Palgrave MacMillan 2005) 101.

to further their strategic objectives. However, it also revealed, as constructivists have argued, that ideational factors are not mere instruments as, once consolidated, they can exert an independent influence on foreign policy formation. For example, Arab nationalism prevented most Arab states from concluding bilateral peace deals with Israel until the Palestinians had first negotiated the Oslo Accord. In this regard, the thesis demonstrated the limits of neorealism as it overlooks the impact of domestic and transnational factors on inter-state relations.

The thesis also supported the realist and TWAIL argument that powerful international actors instrumentalise international law to justify actions taken for purely self-interested reasons. From the Ottoman period up until the Arab Spring, external powers utilised international law, including in the form of capitulation treaties, wartime agreements, mandates, collective security pacts and the right of 'pre-emptive/preventative' self-defence, to further their regional interests. They sought to exploit international law to generate indigenous support for their regional objectives and justify their neo-imperial adventures. For example, Britain utilised the promise of self-determination to convince the Arabs to revolt against the Turks during WWI. During the mandate era, France sought to instrumentalise the emergent concept of minority rights to guarantee itself a right of intervention in post-independence Syria and Lebanon. Furthermore, the Bush Administration exploited the language of human rights to justify its 2003 intervention in Iraq. These latter two incidents revealed the risks of abuse inherent in democratic peace theory and the liberal R2P and humanitarian intervention concepts.

The thesis also demonstrated the limited capacity of international law to restrain state behaviour, particularly in areas of 'high politics' as realists have long argued. States regularly deployed material power to secure their strategic objectives and have their preferences reflected in post-conflict legal agreements. For example, Israel and the US used their respective military and economic power to secure the bilateral Egyptian-Israeli peace treaty. The Assad regime utilised asymmetric warfare to secure international acquiescence to its continuing presence in Lebanon as reflected in the 1989

Ta'if Agreement. In the post Arab Spring environment, the Assad regime, Iran and Russia deployed unlawful siege warfare to secure local agreements, which effectively enabled the regime to increase the territory under its control and push the rebellion into Idlib province.

The thesis challenged the assumptions, implicit in liberal internationalism, that international law is amenable to collective enforcement and capable of achieving international justice. Instead, it reinforced realism's contention that the enforcement of international law and the achievement of international justice, both for states and individuals, is dependent upon the connivance of powerful states. Emir Faisal proved unable to enforce Britain's wartime pledges after WWI as no Great Power was willing to enforce the right to self-determination of the Syrian people. The US intervened to restore Kuwaiti sovereignty in 1991 as Iraq's invasion of Kuwait jeopardised its regional interests. However, it helped frustrate the Palestinians' right to self-determination by adopting a biased position toward its ally, Israel, in the Arab-Israeli peace process.

The thesis supported Hathaway's argument that authoritarian regimes ratify international human rights treaties with weak internal and external enforcement mechanisms solely in order to attain the reputational benefits associated with ratification with no intention of actually complying with their obligations thereunder.<sup>6</sup> Overall, Western democracies declined to underpin their rhetorical support for human rights and democratisation in the region with concrete action in order to avoid jeopardising their own interests. In the post-Arab Spring environment, Western leaders seeking to position themselves on the 'right side of history' voiced rhetorical support for pro-democracy activists. However, they were disinclined to intervene militarily to support the opposition or relieve the humanitarian crisis as an intervention was not considered necessary to protect their vital interests. In contrast,

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<sup>6</sup> Oona Hathaway, 'Do Human Rights Treaties Make a Difference?' (2002) 111 Yale LJ 1935, 2011–2012.

Russia, Iran and Hezbollah intervened in support of the Assad regime as, for them, the regime's survival was a strategic imperative.

The Syrian crisis reignited the 'peace versus justice' debate and demonstrated the dangers of rhetorical demands for accountability in circumstances where the impugned actor is aligned with a powerful state. On the one hand, it was argued that demands for accountability in Syria served a deterrent function and that a sustainable political solution could not be achieved without accountability for past crimes as impunity constitutes the foundation upon which future violence is constructed. On the other hand, it was argued that premature declarations that Bashar had lost his legitimacy and the inclusion of references to accountability in peace initiatives rendered the conflict more intractable by raising expectations of a Western-led intervention and convincing the regime that it was in a zero sum battle for survival. China and Russia were condemned by the P3 (US, UK and France) for vetoing the attempted referral of the situation in Syria to the ICC. However, their vetoes were hardly surprising as the P5 have consistently vetoed initiatives deemed contrary to their interests. Indeed, from the P3's perspective the attempted referral was arguably motivated more by the desire to alleviate pressure to do something in response to the Syrian crisis than the desire to achieve international justice. Indeed, the foreseeable defeat of the referral may have escalated the conflict by signalling to the Assad regime that it would not be held accountable for its crimes so long as it won the war.

The thesis demonstrated that international law conditions states to articulate their interests in terms that are compatible therewith as constructivists have argued. This was apparent, for example, from the breadth of legal arguments used to both justify and condemn the 2003 intervention in Iraq and the US-led coalition's intervention against ISIS in Syria. Nevertheless, the thesis did not indicate that participation in the international legal regime necessarily socialises states to comply with international law. Part of the problem is the lack of centralised and compulsory enforcement mechanisms. Another is the inherently indeterminate nature of many international legal rules, which are subject to competing interpretations and

exceptions. This was demonstrated in chapter seven, which revealed the contested nature of many of the *jus ad bellum* rules. In this manner, the thesis reinforced Koskenniemi's immanent critique of international law.

Koskenniemi argued that international law's indeterminate nature derives from its genesis in liberal political theory, which attempts to concurrently guarantee and restrain the freedom of action of states.<sup>7</sup> However, this has proven an impossible task as apparent in the recurrent clash between the cosmopolitan doctrines of 'human rights' and '*erga omnes*' obligations, and the individualist doctrines of sovereign equality and non-intervention.<sup>8</sup> The tension that Koskenniemi identified between cosmopolitanism and individualism reflects a conundrum implicitly and explicitly identified by realists, liberals, constructivists, English School scholars and critical theorists: how does one reconcile international law's purpose in maintaining international order with its purpose in ensuring progressive change, its processual legitimacy with its duty to deliver distributive justice, its internal morality with its external morality, its normativity with its concreteness, and its inclination toward the status quo with its revolutionary potential.

English School pluralists might argue that a reconciliation of international law's cosmopolitan and individualist tendencies is not possible in the current international society and therefore international law should be limited to the individualist rules of co-existence that help maintain international order.<sup>9</sup> From a realist and pluralist perspective, the evolution of Syria's initially peaceful and inclusive protests into a sectarian conflict with global repercussions revealed the dangers inherent in liberal idealism and the solidarist school. On the other hand, solidarists, liberals and even some critical international law scholars have argued that international law should

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<sup>7</sup> Martti Koskenniemi, *From Apology to Utopia: the Structure of International Legal Argument* (Reissue, CUP 2005) 74–89 and 512.

<sup>8</sup> Friedrich V Kratochwil, *Rules, Norms, and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (CUP, 1989) 42; Gerry J Simpson, 'Imagined Consent: Democratic Liberalism in International Legal Theory' (1994) 15 *AustYBIL* 103, 113.

<sup>9</sup> Linklater (n5) 93–94.



still promote principles of justice even whilst attempting to maintain international order. They believe in the possibility of a norm-governed international society emerging if international law could somehow be made to work in favour of the oppressed and if its structural bias toward the status quo could be overcome. From their perspective, the deprivation of justice is the core cause of continuing instability in the Middle East.

However, political cosmopolitans and poststructuralists might argue that the attainment of justice is not possible in the current state-centric international system as it is founded upon exclusion and inequality.<sup>10</sup> Nevertheless, a counter-argument posits that in a world characterised by pluralism and differing perspectives of the ‘good life’ the state is the only way of preventing a hegemon from imposing its views on the whole of mankind under the guise of universalism. Indeed, some TWAIL scholars have even defended ‘formalism’ as the last line of defence against functional legal regimes and purely instrumental approaches that risk completely transforming international law into a tool for furthering the interests of the most powerful international actors.

#### **8.4 Core Themes**

Several core themes emerged in the thesis. The first is the threat that inequality and injustice pose to order at the domestic, international and regional levels. Since the Arab Spring, this threat has manifested itself in the form of protests, armed conflict, mass outflows of refugees and economic migrants, acts of transnational terrorism, and increasing support for radical ideologies, including Islamist extremism and right-wing nationalism. External actors helped perpetuate inequality and injustice in the Middle East, including through their role in the denial of Kurdish statehood, the frustration of Palestinian self-determination, the persistence of authoritarian rule and the promotion of neo-liberal economic reforms. In Syria, the threat that inequality poses to order was exacerbated by the intersection of socio-economic and

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<sup>10</sup> Toni Erskine ‘Normative International Relations Theory’ in Tim Dunne, Mikja Kurki and Steve Smith (eds), *International Relations Theories: Discipline and Diversity* (3rd edn, OUP 2013) 42.

ethno-sectarian differences. During the Ottoman era, external interference inspired the *Tanzimat* reforms, which in turn concentrated land ownership and power in the hands of a small group of predominantly Sunni, urban-dwelling elites. The French mandatory authorities made insufficient efforts to address poverty in rural areas whilst deliberately aggravating ethno-sectarian tensions. Syria's post-independence political scene was riven with factionalism as a result of extreme inequality, the loss of Palestine and excessive interference in Syria's internal affairs. When the radical Ba'ath regime attempted a revolution from above, socioeconomic differences became even more overlaid with sectarian ones due to the radical Ba'athists' predominantly minoritarian background.

During the Hafez era, the Ba'ath party was transformed from an ideological movement committed to social revolution into a privileged elite determined to maintain the status quo. Nevertheless, the regime managed to maintain a significant support base, including amongst low-middle income Sunnis, by ensuring a minimal standard of living for all Syrians. However, Bashar reneged upon this social contract. His liberalising economic policies exacerbated inequality and enhanced the perception of sectarian rule as the most visible beneficiaries of corruption were increasingly Alawis, whereas the majority of disenfranchised Syrians were Sunnis. Significantly, the initial core demands of the Syrian protesters were justice, dignity and freedom, including freedom from regime repression.<sup>11</sup>

A second core theme that emerged in the thesis was the repeated betrayal of Middle Eastern populations by Western actors. After WWI, Britain failed to uphold its wartime promise to guarantee the Arabs' right to self-determination and allowed the creation of a Jewish homeland in Palestine. When Syria was occupied by the Vichy regime during WWII, the Free French undertook to guarantee Syria and Lebanon their independence only to later renege on this promise and attempt to render independence conditional upon their retention of special privileges. The Bush

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<sup>11</sup> Radwan Ziadeh, *Power and Policy in Syria* (revised edn, IB Tauris 2013) xv.

Administration sought to forcibly export democracy to the Middle East, but it rejected the results of democratic elections when they didn't accord with American preferences. After the Hariri assassination, European states encouraged Syrian activists to proactively oppose the Assad regime in an effort to hasten its collapse. However, they subsequently turned a blind eye to the regime crackdown that this activism incited as by this stage a rapprochement with the Assad regime was deemed to be in their interests.<sup>12</sup> In the post-Arab Spring environment, many Syrians again felt betrayed by the West after it failed to intervene militarily in support of the opposition despite having called for Bashar to step aside. The US entered a marriage of convenience with the Syrian Kurds to defeat ISIS but declined to help them to defend Afrin against Turkish incursions. The fact that the PYD/YPG reportedly sought a compromise with the Assad regime in July 2018 reflects its lack of confidence in continuing US support.

A third theme is the sense that, on balance, throughout Syria's history international law has operated as an instrument of the powerful, at the international, transnational and domestic levels, to the detriment of the majority of Syrians. During the Ottoman era, external actors used international law to afford themselves special privileges and justify their interference in the Empire. After WWI, the imperial powers exploited the mandate system to legitimise their neo-colonial ambitions. Syrian nationalists sought to deny French demands for special privileges in post-mandate Syria by demonstrating Syria's sovereignty, including by ratifying the UN Charter. Nevertheless, France was only prevented from achieving its goals by force when its actions jeopardised British and American interests in the region.<sup>13</sup> In the post-independence era, a UNGA resolution was relied upon to justify the imperial reallocation of Palestinian land.<sup>14</sup> Western powers sought to instrumentalise collective security agreements to maintain control of the

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<sup>12</sup> Carsten Wieland, *Syria—A Decade of Lost Chances: Repression and Revolution from Damascus Spring to Arab Spring* (Kindle edn, Cune Press 2012) ch3, lcn1164–1175, ch6, lcn2946–2953 and ch13, lcn7245.

<sup>13</sup> Sami Moubayed, *Syria and the USA: Washington's Relations with Damascus from Wilson to Eisenhower* (IB Tauris 2012) 64 and 66.

<sup>14</sup> UNGA Res 181 (II) 'Future government of Palestine' (29 November 1947) UN Doc A/RES/181 (II).

region during the Cold War ultimately forcing Syria to renounce its sovereignty in order to protect itself against external encroachment. International law failed to prevent Israel from occupying and annexing the Golan Heights after the Six Days War, although it did serve to illustrate the illegitimacy of Israel's actions.<sup>15</sup> In the post-Cold War era, decentralised regimes such as the EMP contributed to increasing inequality and disenfranchisement in the region by promoting liberalising economic reforms, which created new opportunities for rent-seeking and required the dismantling of the socialist subsidies that the poorest societal groups relied upon to survive. The Ba'ath regime's ratification of multiple human rights treaties did not prevent it from committing egregious human rights violations, although IHRL did operate as a benchmark against which NGOs and treaty monitoring bodies could critique the regime's behaviour.

During the Arab Spring, pro-democracy protesters deployed the language of human rights in the mistaken expectation that the promises they held would be fulfilled. Instead, the Assad regime used an iron fist to crush the protests. Despite the Assad regime's lack of democratic legitimacy, the doctrine of effectiveness enabled it to receive support from its allies to help it to repress its opponents. The doctrine also allowed the regime to continue to represent Syria in intergovernmental forums and bind it under international law. Admittedly, the UNCOI was able to utilise IHL and IHRL as a yardstick against which to measure the lawfulness of the behaviour of the various parties to the armed conflicts that emerged in Syria. Nevertheless, the Assad regime and its allies were able to rely upon the right to sovereign equality and non-interference under international law to deflect criticism of the regime's actions. Furthermore, the UNCOI reports revealed that even ostensibly liberal states were capable of violating the IHL rules aimed at the protection of civilians when they deemed it necessary to further their strategic objectives and protect their interests.<sup>16</sup> The absence of centralised enforcement

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<sup>15</sup> See eg UNSC Res 497 (17 December 1981) UN Doc S/RES/497.

<sup>16</sup> See eg UNHRC, 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic' (1 February 2018) UN Doc A/HRC/37/72, paras 42–44. See also AI, *"War of Annihilation": Devastating Toll on Civilians, Raqqa – Syria* (AI 2018).

mechanisms led to an accountability deficit and a loss of faith amongst Syrians in the capacity of international criminal law to achieve justice. The unrest in Syria triggered one of the biggest refugee exoduses in living memory. However, instead of complying with their obligations under international refugee law, most Western states adopted a predominantly securitised response to the crisis.

### **8.5 Final Observations**

The thesis reinforced the solidarist argument that inequality and the absence of justice, both at the national and international level, jeopardise international order, peace and security. Thus, from both an interest-based and a cosmopolitan perspective, a redistribution of societal wealth and power would appear essential at both the national and international levels in order to prevent the combustion of the international system and ensure the continuing well-being of the human race. If one subscribes to the view of some classical realists that international politics is invariably a struggle for power as a result of the inherent and insatiable human desire for power<sup>17</sup>, the possibility of a more egalitarian society emerging at the domestic and international levels appears slim. Nevertheless, the fact that IHRL and IHL already identify certain minimal standards of inter-human behaviour, even if these standards are often not adhered to, and the fact that individuals, if not always governments, have demonstrated considerable empathy for the suffering of the Syrian people suggests that all is not lost.

The analysis of the Syrian crisis resurrected many of the age-old controversies that have historically permeated the international relations and international law disciplines, most notably, the ‘order versus justice’ and ‘realism versus idealism’ dichotomies. Instead of skirting over international law’s imperfections, these controversies need to be subjected to vigorous debate in order to determine whether international law can in fact be utilised for progressive ends or whether it is irredeemably compromised by its

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<sup>17</sup> See eg Hans Morgenthau, *Politics among Nations: The Struggle for Power and Peace* (Alfred A Knopf Inc 1948) 17.

colonial heritage and structural bias towards the world's most powerful actors.

At the same time, the thesis revealed the dangers of purely instrumental theoretical approaches, which completely collapse the distinction between binding international legal rules and non-binding norms. Despite international law's inherent weaknesses, most notably its structural bias towards the most powerful international actors, it does signify that some conduct is clearly illegitimate, for example, the deliberate targeting of civilians during the conduct of hostilities. Accordingly, arguments and theories that attempt to erode international law's distinctive character should be treated with caution.

The thesis demonstrated the importance of in-depth knowledge of the relevant historical, political and socio-economic context when responding to complex crises.<sup>18</sup> This is necessary in order to unravel the causes and complexities of these crises, identify the external actors directly *and* indirectly implicated therein, and challenge victim-blaming narratives. In this regard, the thesis intimated that the most powerful states and international actors cannot keep reaping the rewards of globalisation without taking responsibility for their role in the associated costs.

Finally, the thesis arguably demonstrated the potential value of interdisciplinary academic courses, which incorporate elements of international law, international relations and regional studies, and prepare students to devise more progressive, enlightened *and* practical solutions to global problems in their future roles as activists, academics, international lawyers and diplomats.

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<sup>18</sup> In this regard, it overlapped with Koskenniemi's position. See Koskenniemi, *From Apology to Utopia* (n7) 545.

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