

PRELIMINARY MEMORANDUM
MAY 2026

Reparations for Syria for Injuries Suffered in Consequence of Illegal Armed Actions by Iran, 2011-2024

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Cover: Projectiles believed to be Iranian missiles above Damascus, Syria, on Oct. 1, 2024. (Ammar Safarjalani / Xinhua via Getty Images)

Introduction

There is no doubt, on the facts, that Syria and its people in the period 2011 to 2024 were subject to some of the worst violations of international humanitarian law (IHL) ever witnessed in the modern era of international law. The Government of Syria today is right to ask whether international law and international legal procedures provide an avenue for Syria to obtain reparations from Iran, a State that was intensively involved in the armed conflict in Syria during that period. International law has long been clear that “the breach of an [international legal obligation] involves an obligation to make reparation in an adequate form.”¹

However, though the facts are clear as to the horrific *results* of the armed conflict, the interplay between the facts and the rules of international legal responsibility – in particular the subset of those rules concerned with the attribution of conduct to a State – introduce complications that today’s Government of Syria must address if a search for reparations is to have a reasonable chance of success.

The Government, moreover, should keep in mind that international law contains no obvious international legal procedure available to Syria that is compulsory on Iran and entails binding judgment against Iran for Iran’s illegal armed actions. International law has no overarching court of general jurisdiction for claims such as those that Syria’s Government might wish to bring.

Syria’s Government and its legal advisers must keep these challenges in view if Syria’s Government today is to reach a realistic appreciation of the arguments it might make and actions it might pursue under international law for reparations from Iran.

This memorandum sets out substantive legal grounds for Syria’s Government to claim reparations from Iran. It contains only a brief introductory sketch of the legal landscape. For Syria’s Government to pursue reparations from Iran, the Government should consider building a legal team to carry out a confidential assessment of the legal challenges and to develop a workable plan available for the Government to put into action. This is a course of action other Governments in other countries have followed in the past to prepare for legal action against foreign adversaries who have injured the State and its people – adversaries whose conduct should be held to account.²

The memorandum anticipates defenses that Iran likely would put forward to frustrate and thwart Syria from obtaining justice for Iran’s wrongdoing. In particular, the defenses include an argument that Iran’s involvement in Syria was a “justifiable” counter-intervention in response to other States’ prior intervention (see Section (1)); an argument that Syria’s Government at the time invited Iran to intervene and, thus (Iran’s argument would say) Syria’s Government today cannot pursue Iran for reparations (see Section (2)); and an argument that Iran, though it supported armed groups in Syria, did not control the armed groups in a manner or to a degree adequate to have identified the groups as agents or instrumentalities of Iran itself (see Section (4)(i)). Iran’s lawyers likely would make this third argument as a defense because, if the armed groups in Syria really did remain independent entities outside the control of Iran, then violations of IHL committed by those groups are not violations attributable to Iran for purposes of international legal responsibility. This third possible Iranian defense requires careful consideration beyond the scope of this introductory memorandum; Section 4(i) below will set out the basic points.

The memorandum also considers the legal consequences of the identification

1 *Case concerning the Factory at Chorzów (Germany v. Poland)*, Jurisdiction, PCIJ Ser. A No. 9, 26 July 1927 at p. 21.

2 E.g., the Socialist Republic of Viet Nam engaged such a legal team from 2010 to 2019, of which the author of this memorandum was a member. To give another example, the Kingdom of Bahrain, in formulating its plan for an Independent Commission of Inquiry to investigate the events of 2011 in the Kingdom, reportedly took advice from outside counsel.

of the war in Syria as a non-international armed conflict (NIAC), which include the application of IHL to the participants in that conflict (see Section (3)(i)) and – possibly – the illegality *per se* of Iran’s intervention (see Section (3)(ii)).

After addressing Iranian defenses, which Syria’s Government should anticipate and prepare to rebut, the memorandum will conclude with the strongest argument available to Syria today – namely, that Iran itself was a party to the armed conflict through Iran’s own military organs (see Section 4(ii)). This argument would require the careful presentation of factual evidence, but it appears that convincing factual evidence is readily available to support it. As a matter of international law, it is the most difficult argument for Iran to defend against because even if the principle of collective self-defense or a putative invitation by Syria’s former Government gave some legal basis to Iran for intervening in the armed conflict, Iran still will have been subject to the obligations of IHL and will now be legally responsible for violations of IHL that its conduct entailed. No principle or invitation suspends the operation of IHL.

(1) First anticipated Iranian defense: antecedent armed intervention justified a “counter-intervention” by Iran

Iran will say that Syria was subject to attack – i.e., armed intervention – by a number of countries, and so Iran’s involvement in Syria was an exercise of collective self-defense. Good arguments are available to today’s Syrian Government to rebut this anticipated Iranian defense.

Under international law, a dissensus exists as to the definition of “intervention,” and even the expression “armed attack” occasions some dispute. Led by the USSR, a number of States in the 1970s and 1980s took the view that, in addition to overt armed attack, a variety of lesser acts can constitute unlawful intervention.³ This view – which we might refer to as the “enlarged” view of “intervention” – has a significant effect on the legal evaluation of a putative act of collective self-defense. Iran’s involvement in Syria might have been justified under the enlarged view because, while third States had not invaded Syria in the full conventional sense of invasion, they arguably had “intervened” under the enlarged view of intervention.

There are good reasons, however, to reject the enlarged view of intervention.

First, western States and many others reject it. A substantial State practice thus supports an understanding that limits the scope of the term “intervention” to conventional armed acts in the sense of an invasion.

Second, the consequences of the enlarged definition are highly problematic. If any number of acts – for example, communications and propaganda – constitute “intervention,” then the circumstances in which a “counter-intervention” is justified are many. It is not sustainable to have a definition of “intervention” that opens the door so wide to the use of force across State borders.⁴ The interests of international public order require legal limits on the use of force, and the legality of an intervention must depend on readily testable facts. The enlarged view of “intervention,” with its open-ended terms, all but removes the limits and, moreover, makes the legality of intervention turn on factual assertions that are difficult or impossible to test.⁵

There is also the question of whether the then-Government of Syria sought

3 See the articulation of the view that intervention has “its more subtle forms,” which in the Soviet and East Bloc view equally justified counter-intervention, in the General Assembly First Committee: Constantin Flitan (Romania), 3 Dec. 1981, A/C.1/36/PV.50, p. 11.

4 The Russian Federation, for example, as early as 2013 – i.e., the year before the initial invasion of Ukraine and the forced seizure of Ukraine’s Crimea territory – stated that “interventions” by western States justified counter-interventions by Russia: See *Concept of the Foreign Policy of the Russian Federation*, 12 Feb. 2013, paras. 15, 31(b). See also Address of the President of the Russian Federation, 18 Mar. 2014: <http://eng.kremlin.ru/transcripts/6889>

5 For an early critique of the enlarged definition, see Stephen M. Schwebel, “Aggression, intervention and self-defence in modern international law,” (1972) 136 *Hag. Rec.* 411, 453.

“The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken”

Article 39, UN Charter

any collective action through the ordinary channels that modern international law supplies. There is a long-running and extensive Security Council practice relevant to multiple dimensions of Syria’s international security.⁶ The limits of this preliminary memorandum do not allow an examination of the Security Council practice. However, that practice is likely to be relevant to Iran’s attempted defenses – and will be important to Syria’s rebuttal of Iran’s defenses. Constituting the central mechanism for collective action under modern international law, Articles 39 and 51 of the United Nations Charter provide as follows:

Article 39

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

[...]

Article 51

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

While Iran no doubt has an inherent right to engage in its own self-defense, and to participate in collective self-defense (e.g., in and on behalf of Syria), the inherent right is not without limitations. The limitations include (1) the superior authority of the Security Council, under which a State may exercise the inherent right to self-defense only “until the Security Council has taken measures necessary to maintain international peace and security;” (2) the requirement that the State exercising the inherent right shall immediately report to the Security Council measures taken in that exercise; and (3) the requirement that such measures “shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary to maintain or restore international peace and security.” Any deficiency in Iran’s practice under these headings undermines the credibility of Iran’s argument that its intervention in Syria was an exercise of a lawful right of collective self-defense. It would be advisable for the Government of Syria today, as it develops its legal strategy, to study in detail Iran’s statements and correspondence at the United Nations under the rubric of collective self-defense.

It also undermines the credibility of Iran’s argument if the putative antecedent intervention that Iran invokes as justification for its own intervention was not well-documented and recognized. Syria’s legal advisers’ study of the matter should include an examination of U.N. practice addressing foreign States’ interventions in Syria, if any, that in timing and material substance might have lent credibility to Iran’s defense of collective self-defense.

On balance, in view of these considerations, Syria today, with adequate preparation, could convincingly argue that Syria from 2011 to 2024 was not

⁶ See Repertoire of Practice of the U.N. Security Council: <https://main.un.org/securitycouncil/en/content/repertoire/middle-east>

subject to any antecedent intervention by another country or countries that justified Iran's long-term and heavy-handed intervention.

(2) Second anticipated Iranian defense: invitation by Syria's prior Government absolves Iran of international legal responsibility for its conduct

Presented with claims for reparation, Iran likely would argue that its intervention in Syria was justified because Syria's Government at the time invited it. However, Syria's Government today has grounds to argue that the invitation by Syria's Government between 2011 and 2024 did not supply a legal basis for Iran to intervene. Moreover, the invitation does not suspend the application of IHL. Thus, even if an invitation did supply Iran a legal basis for entering the armed conflict in Syria, Iran remains legally responsible for violations of IHL committed by Iran's forces.

(i) Rebutting Iran's "invitation" defense: no legal effect from putative invitation

A State shall not invite another State to perform acts that violate a fundamental rule of international law (*jus cogens*). And an invitation must be consistent with the inviting State's identity as a sovereign actor: an invitation is void if it purports to surrender the State's fundamental sovereign rights.

Taking the first of these two points, Iran does not get very far invoking the invitation of the prior Syrian Government if Iran's conduct amounted to violation of a *jus cogens* rule of international law. The factual evidence suggests that the prior Government of Syria committed such violations and, thus, by extension, that Government's invitation to Iran to aid and assist in the violations had no legal effect.

To take the second point, distinguished international law publicists have expressed doubt whether a State may invite another State on such terms as to render the former completely dependent on the latter. Alain Pellet, one of the world's leading international law academics and most prolific advocates in cases at the ICJ and other international dispute settlement organs, says that an invitation by a Government to a foreign State to intervene would be illegal or void if the intervention had the effect of alienating the independence of the inviting Government's State.⁷ Intervention by "consent" of the target State also has received criticism in the U.N. International Law Commission (ILC).⁸ The catastrophic results in Congo after that State "consented" to a (limited) entry into its territory by forces of Uganda are well-documented.⁹ Syria's Government today could argue that the effect of the prior Government's invitation to Iran was to alienate the independence of Syria. This argument would require detailed analysis of the factual record – and it would by no means be full proof. However, it would be a respectable argument, available to Syria to rebut Iran's invocation of the former Government's invitation.

7 Alain Pellet, Ngyuen Quoc Dinh, Patrick Daillier, Mathias Forteau, *Droit International Public*, 8th edn. (Paris: Librairie générale de droit et de jurisprudence, 2009), p. 1,051.

8 See, e.g., Report of the ILC on the work of its fortieth session, Draft Code of Crimes against the Peace and Security of Mankind, ILC Ybk 1988 vol. II, Part 2, p. 61, para. 242.

9 *Armed Activities on the Territory of the Congo (DRC v. Uganda)*, Judgment, 19 Dec. 2005, ICJ Rep. 2005 p. 168, 198-9, paras. 49-54. NB: The author of this memorandum served (in 2019) on the legal team preparing Congo's reparations claims in the final phase of the *Armed Activities* case.

These points, if sustained by good legal argument and convincing factual evidence, would be a complete answer to Iran's "invitation" defense. That is to say, they would defeat that defense in its entirety.

(ii) Limits of Iran's "invitation" defense

Even if Iran's "invitation" defense were found to have merit, it would be a defense that only goes so far. As suggested immediately above, an invitation is arguably void *per se* if it purports to approve the invited State committing violations of *jus cogens* rules. But even rules falling short of *jus cogens* character are not displaced or deactivated by an invitation to violate them, however well-formed the invitation might otherwise have been. On grounds addressed in the next section of this memorandum (Section 3(ii)), IHL applied to the conduct of all parties to the fighting in Syria from 2011 to 2024. Even a valid invitation by the then-Government of Syria to Iran could not have suspended the operation of IHL in respect of Iran's conduct.

It would be prudent for Syria, if it has not already done so, to document in detail the terms, if any were recorded, by which the prior Government invited Iran, including specifications as to the limits of the invitation. To this end, it will be helpful to compare the (putative) invitation to well-documented practice, such as Mali's invitation in 2013 to France.¹⁰

(3) War in Syria as a non-international armed conflict (NIAC): illegality of intervention and application of IHL

There is no doubt that Syria's government in the relevant time was under intense pressure, to the point that it almost collapsed (and eventually did). The pressure came not from sporadic riots, banditry, or other loosely organized armed acts but instead, from organized resistance that exercised control over significant parts of the country.

Sporadic riots, banditry, or other loosely organized armed acts – without more – do not constitute a NIAC.

The International Committee of the Red Cross (ICRC) has articulated two conditions that must be met to categorize a conflict as a NIAC. In an *Opinion Paper* on the definition of "armed conflict" published in 2024, the ICRC said as follows:

[I]t is widely accepted today that two key conditions must be met for a situation of violence to be considered a NIAC [...]: the non-state party/ parties must be organized, and the violence between the parties must be sufficiently intense.¹¹

The ICRC indicated the conflict in Syria as an example of a NIAC.¹² The ICRC was not alone in that assessment. The U.N. report of the Independent International Commission of Inquiry on the Syrian Arab Republic concluded that a NIAC had been taking place in Syria.¹³

The high degree of organization of the non-state armed groups (NSAGs) in Syria, and the extreme intensity of the violence between them and the then-Government of Syria, identify the fighting in Syria to have constituted a NIAC.

10 See Letter dated 18 September 2012 from the interim President and the Prime Minister of Mali addressed to the Secretary-General; S/2012/727, Annex; and identical letters dated 11 January 2013 from the Permanent Representative of France to the United Nations addressed to the Secretary-General and the President of the Security Council, 14 January 2013, S/2013/17. Note, too, Security Council action on the matter: SC res. 2100 (2013), 25 Apr. 2013.

11 *How is the Term "Armed Conflict" Defined in International Humanitarian Law?* International Committee of the Red Cross Opinion Paper 2024: https://www.icrc.org/sites/default/files/document_new/file_list/armed_conflict_defined_in_ihl.pdf, p. 12.

12 *Internal conflicts or other situations of violence – what is the difference for victims?* International Committee of the Red Cross, 12 December 2012. <https://www.icrc.org/en/article/internal-conflicts-other-situations-violence-victims>

13 A/HRC/21/50, 1 August 2012 – *Summary* p. 1, p. 6 para. 12.

The existence of a NIAC in Syria has at least two legal consequences relevant for the question of reparations.

First, the existence of a NIAC identifies the armed conflict in Syria as one to which IHL applied – even if one ignores the international dimension of the conflict.¹⁴

And, second, it establishes that Iran’s intervention, on a widespread understanding of intervention, was unlawful *per se*.

The first consequence – the application of IHL to the conflict in Syria – in turn, has an important consequence of its own. Even if Iran’s intervention was not unlawful *per se*, to the extent Iran’s forces and proxies violated IHL Iran’s intervention arguably attracts international legal responsibility to Iran. The evidence is extensive and convincing that Iran’s forces and proxies committed egregious violations of IHL in Syria. The egregiousness of the violations is in no doubt at all. However, a difficulty exists for the Government of Syria today in making a legal case against Iran for violations committed by proxies because doubt does exist as to whether such violations are attributable to a State in Iran’s position for purposes of international legal responsibility. Section 4(i) below will explain that in order to attribute the illegal conduct of proxies to Iran, Syria would have to prove that Iran exercised control over these, in the relevant legal sense of “control.”

As Section 2 above has addressed, it is open to Syria’s Government today to argue that an invitation to Iran from Syria’s Government at the time was *per se* ineffective to supply any legal basis for Iran’s intervention (Section 2(i)). To the extent that the then-Government’s invitation *did* supply a legal basis for Iran’s intervention, that basis was for an intervention conducted lawfully under IHL (Section 2(ii)). An invitation – whether or not it provides a *per se* basis for an intervention – does not suspend the application of IHL to the intervener.

Moreover, if Iran argues that Syria’s then-Government invited Iran, then Iran exposes itself to a double-edged sword. On the one side, Iran *might* succeed in proving that a legal basis existed, *per se*, for Iran to participate in the armed conflict in Syria – but, on the other side, on those very terms Iran would be conceding that Iran participated in the armed conflict. Such a concession would greatly strengthen Syria’s argument today that Iran holds direct legal responsibility for the IHL violations committed from 2011 to 2024. Section 4 of this memorandum addresses this argument, which is the strongest available to Syria on the law and on the facts.

Before turning to Iran’s direct legal responsibility, a few more words are in order about the application of IHL to Iran’s conduct during the intervention (i); and the unlawfulness *per se* of Iran’s intervention in the NIAC in Syria (ii).

(i) Violations of IHL during the NIAC

This point may be addressed briefly for present purposes.

Even if a legal basis for Iran’s intervention had existed – e.g., by reference to an invitation by Syria’s then-government, a matter this memorandum has addressed in Section 2 above – the existence of an armed conflict in Syria triggered the application of IHL to the conduct of all organized combatants. Assuming Syria today can prove Iran was directly involved in the armed conflict in the relevant sense for purposes of attribution of international legal responsibility, Iran’s conduct constituted serial, sustained, and egregious violations of IHL attributable to Iran.

This point is separate from that concerning the unlawfulness of Iran’s intervention as such. As noted, IHL applies to the conduct of the intervener,

¹⁴ See Geneva Conventions 1949 Common Article 3.

“Syria’s Government today must keep in mind that international lawyers and States differ as to whether international law permits a third State to intervene in a civil war.”

whether the intervention itself had a legal basis or not.

(ii) *Unlawfulness per se of Iran’s intervention in the NIAC*

It is open to Syria’s Government to argue that Iran’s intervention in the armed conflict from 2011 to 2014 was *per se* illegal. That is to say, grounds exist to argue that Iran’s intervention, independently of the egregious violations of IHL involved, was a breach of international law for which Syria today may seek reparations.

When the *Institut de Droit International* considered intervention in 1975, it drew a number of conclusions that international lawyers in the decade or so that followed largely came to accept. According to Article 2 paragraph 1 of *Le principe de non-intervention dans les guerres civiles*:

“Third States shall refrain from giving assistance to parties to a civil war which is being fought in the territory of another State.”¹⁵

The *Institut* further stipulated that:

“Third States shall use all means to prevent inhabitants of their territories, whether natives or aliens, from raising contingents and collecting equipment, from crossing the border or from embarking from their territories with a view to fomenting or causing a civil war.”¹⁶

The further stipulation is one of a number which the *Institut* formulated. The third State also is to refrain, *inter alia*, from sending armed forces or military volunteers, instructors or technicians to a civil war (Art. 2(a)); from drawing up or training irregular forces (Art. 2(b)); from supplying weapons (Art. 2(c)); or from allowing their territory to be employed as bases for any party to a civil war (Art. 2(e)).

In a 1985 article still widely cited,¹⁷ Louise Doswald-Beck (now the Deputy Head of the ICRC Legal Division), largely concurred with the *Institut*’s position that third-State intervention is in general not available as an aid against insurrection.¹⁸

In relying on this position, however, Syria’s Government today must keep in mind that international lawyers and States differ as to whether international law permits a third State to intervene in a civil war. Writers, considering the practice, have questioned the categorical exclusion as the *Institut* expressed it. For example, Claus Kreß, one of the world’s leading experts on international criminal law, has asked whether a prohibition against intervention has in truth crystallized to that extent.¹⁹ Pellet *et al* identify limits within which an intervention might be legal, the clear case of a breach being that where the State, by accepting the invitation, would “*aliène... son indépendance*” (give up its independence).²⁰

15 Dietrich Schindler, Rapporteur, 8th Comm. (Wiesbaden), *Le principe de non-intervention dans les guerres civiles*, Art. 2 (*Institut de droit international*: 1975).

16 Ibid, Art. 3(a).

17 See, e.g., Gregory H. Fox, “Intervention by Invitation” in Marc Weller (ed.), *Oxford Handbook of the Use of Force in International Law* (Oxford: Oxford University Press, 2015), 816, 823 n. 28; Sikander Ahmed Shah, *International Law and Drone Strikes in Pakistan. The legal and socio-political aspects* (London: Routledge, 2015) 76 n. 33; Kolb, Robert, “Article 103 de la Charte des Nations Unies,” (2013) 367 *Hag. Rec.* 9, 142; May Ellen O’Connell, “Dangerous Departures,” (2013) 107 *AJIL* 380, 384 n. 22; Gray, 3rd edn (2008), p. 99 n. 162.

18 Louise Doswald-Beck, “The Legal Validity of Military Intervention by Invitation of the Government,” (1985) 56 *BYIL* 189, 242-252.

19 Claus Kreß, “Major Post-Westphalian Shifts and Some Important Neo-Westphalian Hesitations in the State Practice on the International Law on the Use of Force,” (2014) 1 *J. on the Use of Force and Int’l L.* 11, 18.

20 Alain Pellet, Ngyuen Quoc Dinh, Patrick Daillier, Mathias Forteau, *Droit International Public*, 8th edn. (Paris: Librairie générale de droit et de jurisprudence, 2009) 1051.

The *Institut* returned to the question of intervention in 2011. The *Institut* addressed “military assistance on request” in particular.²¹ It indicated that a “request,” for purposes of establishing a legal basis for armed assistance, is a “request reflecting the free expression of will of the requesting State and its consent to the terms and modalities of the military assistance.”²² The requirement of a “free expression of will” is of central significance here.

The *Institut*'s 2011 resolution, however, contains narrow limits as to the factual situations in which the rule it postulates would apply. The 2011 resolution indicates that the rule applies to “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, including acts of terrorism, *below the threshold of non-international armed conflict in the sense of Article 1 of Protocol II Additional to the Geneva Conventions relating to the Protection of Victims of Non-International Armed Conflicts of 1977.*”²³ To this extent, the 1975 and 2011 resolutions speak past one another. The earlier resolution concerned “civil wars” – i.e., NIACs; the later resolution was focused on situations “below the threshold.” Writers, e.g. Dapo Akande (currently a member of the ILC and nominee for election as Judge of the ICJ) and Zachary Vermeer (an Australian diplomat),²⁴ identify this distinction as significant. In short, the two *Institut* resolutions are reconcilable; the earlier addressing full-fledged civil wars (NIACs), the other addressing situations of lower-intensity violence than a NIAC.

In light of the above, it is open to Syria's Government today to argue that Iran's intervention in Syria from 2011 to 2024 was *per se* illegal.

(4) Iran's international legal responsibility for conduct in an international armed conflict (IAC)

It is also open to today's Syrian government to argue that Iran holds international legal responsibility for conduct in an IAC. Syria may argue that Iran's responsibility arises *either or both* from Iran's support and control of NSAGs in Syria during the conflict; *and* from Iran's own forces having been engaged directly in the fighting.

(i) Iran's responsibility arising from Iran's support and control of NSAGs and third anticipated Iranian defense: lack of relevant “control”

In its 2024 *Opinion Paper* on the definition of “Armed Conflict” for purposes of international law, the ICRC said the following about control of NSAGs:

[S]ufficiently intense violence taking place between non-state armed groups (NSAGs) and states is classified as a NIAC. However, when one state exercises overall control over an NSAG fighting against another state, the conflict is classified as an IAC between the two states. An NSAG is under the overall control of a state when that state is “not only... equipping and financing the group, but also ... coordinating or helping in the general planning of its military activity.” An NSAG under the overall control of a state is subordinated to that

21 Tenth Commission, Present Problems of the Use of Force in International Law, Gerhard Hafner, Special Rapporteur, Resolution, 8 September 2011.

22 Resolution, 8 September 2011, Art. 1(b). [La ‘demande’ s’entend d’une demande reflétant la libre expression de volonté de l’état requérant ainsi que son consentement quant aux conditions et aux modalités de l’assistance militaire.]

23 Art. 2, para. 1 (emphasis added).

24 Dapo Akande & 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: <http://www.ejiltalk.org/the-airstrikes-against-islamic-state-in-iraq-and-the-alleged-prohibition-on-military-assistance-to-governments-in-civil-wars/>

state as its de facto organ, and members of the group become the equivalent of agents of the state. As a result, fighting between the group and an opposing state does not give rise to an NIAC. Rather, the situation is classified as an IAC between the state exercising overall control over the NSAG and the state fighting that NSAG.²⁵

As noted above in this memorandum, the ICRC has characterized the armed conflict in Syria as an NIAC. However, characterizing the conflict as a NIAC does not exclude that the conflict also involved an IAC. Given the complex and multilateral character of the fighting in Syria from 2011 to 2024, Syria's Government today could respectably argue, on the facts, that Iran's intervention was direct and also by proxy – that is, that Iran intervened *both* directly (i.e., by using its own forces) and indirectly (i.e., by exercising control over NSAGs). The existence of Iranian control over NSAGs would establish Iran's international legal responsibility for the violations of international law committed by those whom Iran controlled.

Let us start by considering the argument, available to Syria's Government today: that Iran participated in the war in Syria through proxies which Iran controlled.

On the law, this argument has considerable merit, because there is no doubt under modern international law that a State controlling an NSAG is responsible for the NSAG's conduct. And, on the facts, there is no doubt that the NSAGs supported by Iran committed egregious atrocities in Syria.

The argument is not, however, without difficulty for Syria. Some doubt exists as to what it means under international law for a State to "control" an NSAG. Two divergent definitions of control have emerged in the jurisprudence.

Under the *Nicaragua* definition, formulated in 1986 by the International Court of Justice (ICJ), the definition imposes a strict standard. Nicaragua had asked the ICJ to conclude that the United States was legally responsible for the conduct of the *Contra* opposition group fighting Nicaragua's Government. The ICJ concluded that Nicaragua had not adduced evidence adequate to support that conclusion. According to the ICJ,

United States 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, is still insufficient in itself, on the basis of the evidence in the possession of the Court, for the purpose of attributing to the United States the acts committed by the *contras* [i.e., the anti-Government forces in Nicaragua] in the course of their military or paramilitary operations in Nicaragua. All the forms of United States participation mentioned above, and even the general control by the respondent State over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State. Such acts could well be committed by members of the *contras* without the control of the United States. For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.²⁶

25 ICRC, *How is the Term "Armed Conflict" Defined in International Humanitarian Law?* at p. 12, quoting International Criminal Tribunal for Yugoslavia (ICTY), Appeals Chamber, Prosecutor v. Dusko Tadic, judgment, case No. IT-94-1-A, 15 July 1999, para. 131.

26 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, ICJ Rep. 1986 p. 14 at pp. 64-65 (para. 115) (27 June).

“In order to attribute the acts of a military or paramilitary group to a State, it must be proved that the State wields overall control over the group, not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity.”

ICTY Appeals Chamber

The test that emerged from *Nicaragua* – a test of “effective control” (versus “overall control” detailed above) – is onerous.²⁷ It tends to localize responsibility on the non-State group rather than allowing attribution of responsibility to an external State sponsor.

By contrast, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) in the *Tadić* case articulated a less exacting definition of “control.” Under the *Tadić* definition, a looser degree and quality of control than that which the ICJ required in *Nicaragua* will suffice to establish the control of the sponsoring State for purposes of attribution and international legal responsibility. According to the ICTY Appeals Chamber,

In order to attribute the acts of a military or paramilitary group to a State, it must be proved that the State wields overall control over the group, not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity. Only then can the State be held internationally accountable for any misconduct of the group. However, it is not necessary that, in addition, the State should also issue, either to the head or to members of the group, instructions for the commission of specific acts contrary to international law.²⁸

The Appeals Chamber also said as follows:

[C]ontrol by a State over subordinate armed forces or militias or paramilitary units may be of an overall character (and must comprise more than the mere provision of financial assistance or military equipment or training). This requirement, however, does not go so far as to include the issuing of specific orders by the State, or its direction of each individual operation. Under international law it is by no means necessary that the controlling authorities should plan all the operations of the units dependent on them, choose their targets, or give specific instructions concerning the conduct of military operations and any alleged violations of international humanitarian law. The control required by international law may be deemed to exist when a State (or, in the context of an armed conflict, the Party to the conflict) has a role in organising, coordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group.²⁹

Syria could plausibly argue that Iran controlled the relevant NSAGs under *either* the *Nicaragua* or the *Tadić* definition, though, obviously, the legal bar is lower (and thus easier for Syria’s Government to meet) under the *Tadić* definition.

Even if a decision-maker (such as a court or tribunal)³⁰ concluded that Iran’s influence over NSAGs in Syria was too tenuous and small to constitute “control” in *either* the *Nicaragua* or the *Tadić* sense, there is still the abundant evidence of major Iranian support to NSAGs in Syria. In *Nicaragua*, the ICJ concluded that United States support to the *contras* sufficed to establish international legal responsibility on the United States.³¹

And there were also acts that the ICJ said were directly attributable to the United States – that is to say, acts performed by United States organs and instrumentalities, not by others.³² This leads to a final point.

27 It is also subject to differing interpretations, a point which Judge Shahabuddeen emphasized in his separate opinion in *Tadić: Prosecutor v. Dusko Tadić*, Judgment, 15 July 1999, ICTY (Appeals Chamber), Sep. Op. Judge Shahabuddeen, para. 7.

28 *Prosecutor v. Duško Tadić*, ICTY Appeals Chamber, Judgment, 15 July 1999, para. 131).

29 *Id.* para. 137.

30 But note: It is difficult to see what court or tribunal would have an obvious jurisdictional basis for hearing a claim in this matter.

31 See ICJ Rep. 1986 at p. 146 (para. 292(3)) and p. 148 (para. 293(9)).

32 *Id.* at pp. 146-147 (para. 292(4)); p. 147 (para. 292(6)).

(ii) Iran's responsibility arising from the conduct of Iran's own forces

It is open, on the fact evidence, for Syria to argue that Iran was engaged *directly* in the fighting in Syria – i.e., not through proxies only but also using Iran's own forces. Significant international institutional statements exist that indicate that Iran's own forces engaged in fighting in Syria. For purposes of this introductory memorandum, representative examples suffice. For example, the U.N. General Assembly in GA Resolution 72/191, 19 Dec. 2017 at paragraph 28 '[s]trongly condemn[ed]', *inter alia*, the Iranian Islamic Revolutionary Guard Corps (IRGC) 'fighting in support of the Syrian authorities.' GA Resolution 76/228, 10 January 2022, at paragraph 35, '[s]trongly condemn[ed] the intervention [*inter alia*] of all those foreign organizations and foreign forces fighting on behalf of the Syrian regime.' The General Assembly spoke in similar terms in GAR 79/185, 19 December 2024, at paragraph 26. The *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic* noted the role of Iranian forces supporting the then-Government of Syria.³³ These are highly respectable factual findings, and it is open to Syria's Government today to rely upon them to demonstrate Iran's role in the fighting.

This would be the most direct, and the most powerful, argument under international law for imposing international legal responsibility on Iran for injuries caused during the war in Syria. There is no doubt that a State is responsible for its own conduct – i.e., the conduct of its own organs and entities. Injuries to Syria and its people caused by formal institutions of Iran – such as the IRGC – are injuries for which Iran may be held legally responsible.

Iran would attempt to rebut Syria's argument that direct Iranian conduct is the basis of Iran's international legal responsibility, but, as suggested in this memorandum, Syria would have respectable answers to Iran's attempted rebuttals.³⁴

(5) Conclusion

(i) Matters to investigate

This memorandum has identified a number of matters that the Government of Syria and its legal advisers should investigate in order to develop a full legal strategy for pursuing Iran for reparations. These matters include, but are not necessarily limited to, the following:

- Iran's statements and correspondence at the United Nations under the rubric of collective self-defense in respect of Syria
- U.N. practice addressing other foreign States' interventions in Syria
- Statements, if any, by the prior Government of Syria indicating an armed intervention against Syria antecedent to Iran's intervention
- The terms, if any were recorded, by which the prior Government of Syria invited Iran, including specifications as to the limits of the invitation
- Intelligence data relevant to Iran's support for and control of NSAGs in Syria from 2011 to 2024
- Registry of injuries caused by Iran, including injuries to the State of Syria, to Syrian business enterprises, and to Syrian individuals
- Registry of injuries caused by Iran's proxies (NSAGs), including injuries to the State of Syria, to Syrian business enterprises, and to Syrian individuals.

³³ A/HRC/57/86, 12 August 2024, p. 2 n. 5.

³⁴ See above Section (1) (collective self-defense); Section (2) (invitation); Section (4)(i) (putative absence of relevant "control").

(ii) Disclaimer and limitations of this memorandum

As indicated above, this is a preliminary memorandum addressing possible legal arguments that Syria's Government today might make, in pursuit of reparations from Iran for the egregious violations of international law committed during the war in Syria, from 2011 to 2024. Because it is preliminary only, the memorandum does not necessarily address *all* potential arguments that Syria might make – and it does not necessarily address *all* potential defenses available to Iran. The memorandum does not address possible measures under national law, such as United States federal anti-terrorism legislation. As suggested above, a full ventilation of the possibilities, national and international, is necessary, if Syria's Government wishes to develop an effective legal strategy maximizing the possibility of achieving full reparation for the injuries that Syria and its people have suffered.

AUTHOR



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