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# International Coalitions and Non-Militarily Contributing Member States: A Perspective from Panama's Practice and the Law of Neutrality

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# **International Coalitions and Non-Militarily Contributing Member States: A Perspective from Panama's Practice and the Law of Neutrality**

Alonso E. Illueca\*

*Abstract: The military actions of an International Coalition and the role of its non-military contributing member States is yet another fundamental example of international practice concerning conflation between jus ad bellum and jus in bello. Although International Law proscribes the use of force in international relations, membership in an International Coalition engaged in military operations does not come without a cost. Non-military contributing member States may be regarded as co-belligerents or neutral States violating the laws of neutrality. This article argues that mere membership in a coalition does not amount to co-belligerency. Nevertheless, it claims that membership could entail a violation of the laws of neutrality, authorizing the use of countermeasures or lawful reprisals. The article analyzes the practice of Panama as part of the allies in World War II, the coalition of willing in Iraq (2003), and the coalition to*

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*counter ISIL in Iraq and Syria (2015). In doing so, it considers the applicable laws and possible conflicts between jus ad bellum and jus in bello.*

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## I. INTRODUCTION

Does a State's mere membership in an international coalition automatically translate into co-belligerency? Can the State become a party to an armed conflict without actually firing a single bullet or even providing material support to one of the belligerents? The laws of neutrality and recent State practice provide useful guidance in asserting that a neutral power's violation of its status does not *ipso facto* mean co-belligerency. While violations of neutrality, such as

openly expressing support for one of the belligerents in an armed conflict, may legitimize the aggrieved State (one of the belligerents) to adopt countermeasures or undertake lawful reprisals, this violation should not be understood as a *carte blanche* for the lawful use of force against the State in question.

This article specifically analyzes the practice of Panama as a case study, which consists of joining several coalitions without actually engaging in armed hostilities. Three cases related to Panama's participation in international coalitions will be analyzed in light of the applicable principles of *jus ad bellum* and *jus in bello*. These include Panama's participation in World War II ("WWII") as a "co-belligerent", its incorporation to the United States of America ("U.S.") led coalitions against Iraq in 2003 and against Islamic State of Iraq and the Levant ("ISIL") in 2015.

The practice of Panama in this regard deserves special consideration as the country lacks a standing army, and it is not or was not actively engaged in hostilities in either of the above-mentioned conflicts. After the 1989 U.S. military intervention, Panama decided to abolish its army.<sup>1</sup> Furthermore, in 1994, Panama established, through a Constitutional reform,<sup>2</sup> the prohibition of the country possessing an army.<sup>3</sup>

After the end of WWII and with the advent of the United Nations ("U.N."), international law was revolutionized with the entry into force of the U.N. Charter and the general prohibition on the threat or the use of force.<sup>4</sup> This prohibition allows only for two general exceptions, as specified in the U.N. Charter, which are individual or

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<sup>1</sup> RENÉ DE LA PEDRAJA, *THE UNITED STATES AND THE ARMED FORCES OF MEXICO, CENTRAL AMERICA AND THE CARIBBEAN, 2000-2014* 211 (2014).

<sup>2</sup> ORLANDO J. PEREZ, *POLITICAL CULTURE IN PANAMA: DEMOCRACY AFTER INVASION 93-94* (2011) (elaborating on the process for abolishing the army and reforming the constitution).

<sup>3</sup> CONST. POL. PAN. [Constitution] art. 310 (1972) am. 1994.

<sup>4</sup> U.N. Charter art. 2 ¶4; *see, e.g.*, *Corfu Channel (Alb. v. U.K.)*, Judgment, 1949 I.C.J. Rep. 4, 35 (April 9); *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. Rep. 14, ¶¶181-95 (June 27); *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. Rep. 226, 244, ¶¶37-38 (July 8); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. Rep. 136, ¶87 (July 9); *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)* 2005 Rep. 168, ¶¶148, 162-65 (December 19).

collective self-defense<sup>5</sup> and collective action sanctioned by the U.N. Security Council (“UNSC”).<sup>6</sup> With this general prohibition in place, contemporary *jus ad bellum* was established, regulating the resort to armed force in inter-state relations.<sup>7</sup> Contemporary *jus ad bellum* renders declarations of war as unnecessary tools for unilaterally advancing the State’s national policy interests and, arguably, as illegal threats to the use of force.<sup>8</sup>

As evidenced by the participation of several States<sup>9</sup> in WWII through non-military contributions, a State could become a co-belligerent in the course of an armed conflict without actually engaging in military hostilities or using force. Did this state of affairs survive the establishment of contemporary *jus ad bellum*? The answer to this question lies in a legal analysis based in the principles of *jus in bello*, i.e., international humanitarian law (“IHL”), and *jus ad bellum*.<sup>10</sup> While *jus in bello* generally regulates conduct beyond the scope of *jus ad bellum* - such as civil wars and protection of civilians during armed conflict - sometimes certain principles of such areas of international law operate concurrently.<sup>11</sup> The present article aims at explaining the legal consequences of a State’s participation in an international military coalition, in the specific circumstance where such State does not resort to the use of armed force (*jus ad bellum*).

This article does not intend to settle questions of State responsibility for military actions or problems associated with differing

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<sup>5</sup> U.N. Charter art. 51; *see also* Oil Platforms (Iran v. U.S.), Judgment, 2003 I.C.J. Rep. 161, ¶51 (November 6).

<sup>6</sup> *See generally* U.N. Charter art. 39-51.

<sup>7</sup> Robert Sloane, *The Cost of Conflation: Preserving the Dualism of Jus ad Bellum and Jus in Bello in the Contemporary Law of War*, 34 YALE J. INT’L L. 47, 49, 64–65 (2008) (explaining the advent of contemporary Jus Ad Bellum).

<sup>8</sup> U.N. Charter art. 2 ¶4; *see also* INTERNATIONAL LAW STUDIES VOL. 73, ANNOTATED SUPPLEMENT TO THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS 365 (A.R. Thomas & James C. Duncan eds., 1999) [Hereinafter THE COMMANDER’S HANDBOOK].

<sup>9</sup> *Allied powers*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/Allied-Powers-international-alliance> (listing as allied powers States such as Uruguay, Nicaragua, Panama, Guatemala, Honduras, Haiti, Bolivia and Ecuador).

<sup>10</sup> Sloane, *supra* note 7, at 67-68 (explaining the jus ad bellum-in bello relationship in the U.N. Charter era).

<sup>11</sup> *But see Id.* at 67-68 (stating that presently jus ad bellum and in bello principles can often operate concurrently).

treaty obligations. The main question is context specific, i.e., an ongoing-armed conflict, and concerns a State not participating in hostilities. It focuses on whether the actions of such State (violations of the laws of neutrality) are grave enough under IHL to drag it into the armed conflict as a co-belligerent.

In order to uniformly address the questions presented, this article is organized in five parts: this brief introduction, three legal argumentation sections and a conclusion. Section I provides an overview of Panama's incorporation to the above-mentioned military coalitions and the reasons provided for such incorporation, it also characterizes the conflicts in which such coalitions were/are engaged as either International Armed Conflict or Non-International Armed Conflict. Section II considers relevant concepts of the law of neutrality in international armed conflicts, such as violations of neutrality and co-belligerent designations. Section III suggests that Panama should be considered as either a co-belligerent state or a state that violated the laws of neutrality in the above mentioned conflicts. It also describes the legal consequences for Panama and the rights of the aggrieved belligerents *vis-à-vis* Panama.

## II. INCORPORATION TO INTERNATIONAL COALITIONS

In the last fifteen years, Panama has joined two international coalitions without contributing military forces to their strategic objectives.<sup>12</sup> In both occasions the President adopted a unilateral decision, without the prior approval of the National Assembly (legislative power).<sup>13</sup> Moreover, it failed to present a concise legal reasoning for such decisions, along with an analysis of its immediate and future consequences.<sup>14</sup> One factor that has been repeatedly ignored is the impact that the applicable rules of IHL may have in elucidating the

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<sup>12</sup> 'Coalition of the Willing', THE WASHINGTON POST, Mar. 27, 2003, [https://www.washingtonpost.com/archive/politics/2003/03/27/coalition-of-the-willing/cdb82022-5b70-4650-9b8b-2f6f544e4cdd/?utm\\_term=.79fe8e974bb3](https://www.washingtonpost.com/archive/politics/2003/03/27/coalition-of-the-willing/cdb82022-5b70-4650-9b8b-2f6f544e4cdd/?utm_term=.79fe8e974bb3); Elisa Vásquez, *Panama Joins Coalition against ISIS Despite Having No Army*, PANAM POST, Feb. 9, 2015, <https://panampost.com/elisa-vasquez/2015/02/09/panama-joins-coalition-against-isis-despite-having-no-army/>.

<sup>13</sup> *Id.* (in both cases Panama's Executive Power only issued an official statement on the decision without prior participation or approval by the legislature).

<sup>14</sup> *Id.* (the official statements can be better framed as mere statements of support due to the absence of any concrete reasoning or analysis).

consequences of Panama's membership in such coalitions, which could affect its status as a neutral State in those conflicts.<sup>15</sup> Particularly, the rules of neutrality have been sidelined and the analysis has been simplified to a mere question of *jus ad bellum*.<sup>16</sup> Nonetheless, it is Panama's own practice during WWII as part of the Allied block and a co-belligerent that best illustrates the special consideration that should be given to *jus in bello*, and, in particular, the laws of neutrality, whenever *jus ad bellum* is not effectively observed and implemented.<sup>17</sup>

Prior to analyzing the consequences of Panama's actions in the last fifteen years, it is necessary to describe and analyze its participation in three military coalitions: the Allies (WWII), the Coalition of the Willing, and the Coalition to counter the ISIL. In doing, special consideration will be provided to the purposes and objectives of these coalitions. Additionally, the role of Panama as a member will be analyzed. Lastly, each of the conflicts in question will be characterized as either international or non-international in light of IHL.

a. *The Allies and WWII*

On December 10, 1941, three days after the Empire of Japan ("Japan") attack on the United States ("U.S.") at Pearl Harbor in Hawaii, the Panamanian Legislature enacted Law 104, which declared war against Japan.<sup>18</sup> In the same legal instrument, the Executive Power was authorized to declare war against any power allied to Japan.<sup>19</sup> Subsequently, on December 12, 1941, the Executive Power enacted two Decrees in which Panama declared war to Germany<sup>20</sup> and Italy<sup>21</sup>.

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<sup>15</sup> See, Paul Seger, *The Law of Neutrality*, in THE OXFORD HANDBOOK OF INTERNATIONAL LAW IN ARMED CONFLICT 248 (Andrew Clapham & Paola Gaeta, eds., 2014) (for an introduction to the law of neutrality).

<sup>16</sup> See, Okimoto Keichiro, *The Relationship between Jus Ad Bellum and Jus in Bello*, in THE OXFORD HANDBOOK OF INTERNATIONAL LAW OF THE USE OF FORCE 1209, 1209-24 (Mark Weller, ed, 2015).

<sup>17</sup> See, Sloane, *supra* note 7, at 64 (as WWII occurred prior to the UN Charter era, *jus in bello* was the only applicable body of law at the time).

<sup>18</sup> Ley no. 104, Dec. 10, 1941, LEG. PAN. (Pan.).

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

<sup>20</sup> Decreto no. 14, Dec. 12, 1941, LEG. PAN. (Pan.).

<sup>21</sup> Decreto no. 15, Dec. 12, 1941, LEG. PAN. (Pan.).

On January 1, 1942, in the midst of WWII hostilities, the Republic of Panama, alongside twenty-five other nations, signed the “Declaration by the United Nations.”<sup>22</sup> Such a declaration would later constitute the basis for and one of the closest antecedents to the United Nations organization.<sup>23</sup> The text provides for a declaration of war by the signatory States against the members of the Tripartite Pact - Germany, Italy and Japan.<sup>24</sup> Additionally, it established a collective state of belligerency for all the signatory states given their “common struggle against savage and brutal forces seeking to subjugate the world,” and the commitment they undertook to cooperate among themselves and not to make any separate armistices or peace agreements with the common enemies.<sup>25</sup>

Panamanian armed forces were never engaged in military hostilities with any of the members of the Tripartite Pact during WWII.<sup>26</sup> The only participation in hostilities, if it can be considered as such, was the military buildup in areas neighboring the Panama Canal after 1941.<sup>27</sup> At that time, Panama’s sovereignty over certain areas of its territory was contested given that Article III of the Hay-Bunau-Varilla Treaty granted rights to the U.S. as “if it were the sovereign” (sovereign rights) of the so-called Panama Canal Zone.<sup>28</sup> Historic records provide that at the time, the U.S. stationed sixty-five thousand soldiers in one-hundred thirty-six defense locations at

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<sup>22</sup> *Declaration by the United Nations* (Jan. 1, 1942), THE AVALON PROJECT, [http://avalon.law.yale.edu/20th\\_century/decade03.asp](http://avalon.law.yale.edu/20th_century/decade03.asp) [hereinafter *Declaration by the United Nations*].

<sup>23</sup> U.N. DEP’T OF PUB. INFO., THE UNITED NATIONS TODAY, at 3, U.N. Sales No. E.08.I.6 (2008).

<sup>24</sup> Mark Reeves, *The Broad, Toiling Masses in all the Continents: Anticolonial Activists and the Atlantic Charter* (2014) (unpublished M.A. thesis, Western Kentucky University) (on file with TopScholar).

<sup>25</sup> *Declaration by the United Nations*, *supra* note 22.

<sup>26</sup> STEWART BREWER, BORDERS AND BRIDGES: A HISTORY OF U.S.-LATIN AMERICAN RELATIONS 109-11 (2006).

<sup>27</sup> STENSON CONN ET AL., GUARDING THE UNITED STATES AND ITS OUTPOSTS 344, 353 (2000).

<sup>28</sup> Convention for the Construction of a Ship Canal to Connect the Waters of the Atlantic and Pacific Oceans art. III, Pan.-U.S. art. III Nov. 18, 1903, 33 Stat. 2234 [hereinafter Hay-Bunau-Varilla Treaty].

the Canal Zone and other parts of Panamanian territory.<sup>29</sup> The Fábrega-Wilson Treaty provided official permission to the U.S. to occupy defensive areas in Panamanian territory, apart from the Canal Zone, which would terminate one year after the signature of the peace treaty ending the war.<sup>30</sup>

Additionally, it has been recognized that Germany intended to attack the Panama Canal due to the tactical advantage that the infrastructure represented to the United States.<sup>31</sup> The attack plan was known as “Operation Pelikan” or “Projekt 14” and was called off in 1943.<sup>32</sup> Similarly, Japan had a plan to attack the Canal with special submarines, I-400 Class, in order to halt the U.S. led offensive in the Pacific.<sup>33</sup> Notwithstanding that the Hay-Bunau-Varilla Treaty provided that “the Canal and its entrances shall be neutral in perpetuity,”<sup>34</sup> German and Japanese forces considered the Canal to be a legitimate military objective during the course of WWII.<sup>35</sup> It could be argued, at the time, that the legitimacy of Germany and Japan’s perspective rested on the fact that they were not parties to the Hay-Bunau-Varilla Treaty and therefore, they did not recognize the neutrality of the waterway. Moreover, it should also be considered that while the U.S. proclaimed the Canal permanently neutral, its practice since 1904 was to exercise belligerent rights when engaged in

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<sup>29</sup> Reymundo Guardián Guerra, *Evolución Histórica de la Presencia Militar Norteamericana en Panamá* [Historical Evolution of the North American Military Presence in Panama], in EL CANAL DE PANAMA [THE PANAMA CANAL] 360, 397-98 (Juan Antonio Tack ed., 1999).

<sup>30</sup> U.S., *Panama Sign Pact on Defense Areas*, THE GAZETTE (New York) 11 (May 19, 1942), <https://news.google.com/newspapers?nid=1917&dat=19420519&id=72YtAAAAIABAJ&sjid=A4kFAAAAIAAJ&pg=1033,2074155&hl=en>.

<sup>31</sup> LADISLAS FARGO, *THE GAME OF FOXES: THE UNTOLD STORY OF GERMAN ESPIONAGE IN THE UNITED STATES AND GREAT BRITAIN DURING WORLD WAR II* 51-54 (1971); RENE J. FRANCILLON, *JAPANESE AIRCRAFT OF THE PACIFIC WAR* 294 (1970).

<sup>32</sup> *Id.*

<sup>33</sup> *See, e.g.*, HENRY SAKAIDA ET AL., *I-400, JAPAN’S SECRET AIRCRAFT CARRYING STRIKE SUBMARINE: OBJECTIVE PANAMA CANAL* (2006); JOHN GOEGHEGAN, *OPERATION STORM: JAPAN’S TOP SECRET SUBMARINES AND ITS PLAN TO CHANGE THE COURSE OF WORLD WAR II* (2014).

<sup>34</sup> Hay-Bunau-Varilla Treaty, *supra* note 28, at art. XVIII.

<sup>35</sup> Guerra, *supra* note 29, at 398.

hostilities.<sup>36</sup> In World War I, the U.S. had initially proclaimed its neutrality, but yielded it with a proclamation of belligerency, which was extended to the Canal.<sup>37</sup> The U.S. even proceeded to exercise belligerent rights in the Canal by seizing six German ships after the issuance of its proclamation.<sup>38</sup> Considering this precedent and the fact that the U.S. effectively closed the Canal to enemy ships once it entered into WWII (1941),<sup>39</sup> the legitimate military objective argument gains significant ground. In this sense, due to the strategic importance of the Canal for the transit of troops from the Pacific to the Atlantic (or vice versa), its destruction or injury would have offered a definite military advantage to the Tripartite Pact.<sup>40</sup>

Ralph Smith provides an interesting rationale for rejecting the neutrality of a waterway in this context, and ergo supporting its status as a legitimate military objective once the State becomes a belligerent in the conflict.<sup>41</sup> He asserts that there is no internationally recognized legal authority establishing “rules for preserving the neutrality of a body of water within the territorial boundaries of a State when the territorial sovereign is not itself neutral.”<sup>42</sup> Smith articulates that there is no concept of neutrality applicable to a canal if the littoral State (or the State in control of the waterway) becomes a belligerent.<sup>43</sup> Consequently, he argues that such “a ‘regime of neutrality’ in a canal cannot be inviolable, but must give way to properly exercised rights of self-defense.”<sup>44</sup>

The Panama Canal Zone and sovereign Panamanian territory were used during WWII to conduct military exercises, defensive

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<sup>36</sup> See, RICHARD BAXTER, VIAS ACUATICAS INTERNACIONALES [THE LAW OF INTERNATIONAL WATERWAYS] 213-216 (Agustin Contin trans., UTHEA, 1967) (describing U.S. belligerent acts in the Panama Canal in WWI and WWII).

<sup>37</sup> Ralph Smith, *Beyond the Treaties: Limitations on Neutrality in the Panama Canal*, 4 YALE J. INT'L L. 1, 18-19 (1978).

<sup>38</sup> *Id.* at 19.

<sup>39</sup> *Id.* at 19-20.

<sup>40</sup> See Yoram Dinstein, *Legitimate Military Objectives under The Current Jus In Bello*, 78 INT'L L. STUDIES, 139, 146-47 (2002); Horace Robertson, *The Principle of the Military Objective in the Law of Armed Conflict*, 8 U.S. AIR FORCE ACADEMY J. OF LEGAL STUDIES 35, 40 (1997).

<sup>41</sup> Smith, *supra* note 37, at 13.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

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

preparations, and for the transit of troops towards Europe or the Pacific.<sup>45</sup> Although such portions of Panama's territory were not under its direct control at the time, it should be noted that Panama voluntarily leased portions of its territory to the U.S. for the duration of the war.<sup>46</sup> This was a sufficient ground to consider Panama a party to the armed conflict. Moreover, and independent from this lease, Panama was already considered a cobelligerent State in WWII because it issued "war declarations"<sup>47</sup> against the Axis powers and joined the "Declaration by the United Nations" as a signatory.<sup>48</sup>

*b. The Coalition of the Willing and the Iraq War of 2003*

On March 27, 2003, the U.S. announced that it had assembled an international coalition, comprised of forty-nine states, with the purpose of dismantling Iraq's weapons of mass destruction programs and bringing that country into compliance with several resolutions of the United Nations Security Council ("UNSC").<sup>49</sup> The Coalition, named by the Bush Administration as the "Coalition of the Willing," was not an operation authorized by the UNSC; rather, it was a multilateral effort beyond the legal scope of any international organization.<sup>50</sup> The press release issued by the White House stated that the members of the coalition would contribute to such enterprise in different capacities, including: direct military participation, logistical and intelligence support, specialized chemical/biological response teams, over-flight rights, humanitarian and reconstruction aid, and political support.<sup>51</sup> Panama was in the initial list of coalition members provided by the White House.<sup>52</sup>

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<sup>45</sup> CONN ET AL., *supra* note 27, at 301-27.

<sup>46</sup> Agreement for the Lease of Defense Sites in the Republic of Panama, Pan.-U.S., May 18, 1942, 57 Stat. 1232 [hereinafter Fabrega-Wilson Treaty].

<sup>47</sup> MICHAEL WALSH, ROUND ONE TO THE BARBARIANS 117-19 (2005) (Panama declared war on Germany and Italy on December 12, 1941 and on Japan on December 8, 1941).

<sup>48</sup> *Declaration by the United Nations*, *supra* note 22.

<sup>49</sup> Press Release, The White House, Operation Iraqi Freedom: Coalition Members (March 27, 2003) [hereinafter Press Release – Coalition Members].

<sup>50</sup> Raymond Hinnebusch, *The Iraq War and International Relations: Implications for Small States*, 19 CAMBRIDGE REV. OF INT'L AFF. 451, 455-57 (2006).

<sup>51</sup> Press Release – Coalition Members, *supra* note 49.

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

i. Panama Joins the Coalition of the Willing

By way of a Joint Presidential Declaration,<sup>53</sup> issued by the heads of State of Panama, El Salvador, Nicaragua and Honduras, these Central-American States offered their support to the ultimatum proffered by the U.S. against Iraq to disarm and comply with relevant UNSC Resolutions, or assume grave consequences.<sup>54</sup> The Declaration expressed particular regret for Iraq's defiance and material breach of UNSC Resolution 1441.<sup>55</sup> The Heads of State indicated their belief "that now is the defining moment for the Iraqi government to disarm and cease its negative and dilatory attitude that encourages the suspicion of the presence of weapons of mass destruction on its territory."<sup>56</sup>

Panama's contributions to the coalition remain disputed to this day.<sup>57</sup> Although neither Panama nor the U.S. ever specified how the former would contribute to the coalition, data compiled by ProCon<sup>58</sup> suggests that such contribution was limited to political support. There is no reliable evidence proving that Panama gave any type of military, logistical or intelligence support, or even humanitarian aid.<sup>59</sup>

The earliest expression of Panama's political support to the Coalition is found in a public statement of March, 2003, in which the then-President Moscoso said to the U.S. government, "my government understands your decision to grant to the Iraqi people the

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<sup>53</sup> *Panamá se suma a aliados en Irak* [*Panama joins allies in Iraq*], EL MERCURIO (Chile), March 24, 2003, <http://www.emol.com/noticias/internacional/2003/03/24/107964/panama-se-suma-a-aliados-en-irak.html>.

<sup>54</sup> *Critican apoyo Centroamericano al ataque a Irak* [*Critics to the Central-American support to the attack against Iraq*], LOS ANDES (Argentina), (March 18, 2003), <http://archivo.losandes.com.ar/notas/2003/3/18/un-292581.asp>.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Accord Id.* (citing reactions from Panamanian political figures).

<sup>58</sup> *Coalition Forces in Iraq*, PROCON.ORG (September 1, 2010), <http://usiraq.procon.org/view.resource.php?resourceID=000677>; ProCon.org, Country Participation in US-led Coalition in Iraq (June 27, 2008), <http://usiraq.procon.org/view.additional-resource.php?resourceID=700>.

<sup>59</sup> David Morrison, *Who's who in the Coalition of the Willing*, LABOUR & TRADE UNION REVIEW (May 2003), <http://www.david-morrison.org.uk/iraq/coalition-of-willing.htm> (all things considered, some member States such as Panama were only "publicly committed" with the goals of the coalition).

chance to enjoy democracy, peace and respect for human rights.”<sup>60</sup> Records suggest that after December 2003, Panama withdrew from the coalition alongside twelve other States.<sup>61</sup>

ii. The 2003 Iraq War as an International Armed Conflict

The Operation “Iraqi Freedom” carried out by the U.S.-led coalition to oust the regime of Saddam Hussein and disarm Iraq of its alleged arsenal of weapons of mass destruction (WMDs) can be considered an International Armed Conflict (“IAC”). According to Common Article 2 of the Geneva Conventions of 1949 (“GCs”), an IAC is 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>62</sup> In the present case, the U.S., the United Kingdom, Australia and other member states of the coalition, which contributed to the offensive phase of the invasion, were parties to the GCs prior to the initiation of hostilities.<sup>63</sup> Moreover, Iraq ratified

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<sup>60</sup> Press Release, The White House, Operation Iraqi Freedom: Statement of Support from Coalition (March 26, 2003) [hereinafter Press Release – Statement of Support].

<sup>61</sup> *Coalition Forces in Iraq*, PROCON.ORG (September 1, 2010), <http://usiraq.procon.org/view.resource.php?resourceID=000677>.

<sup>62</sup> Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 2, Aug. 12, 1949, 75 U.N.T.S. 31 [Hereinafter I Geneva Convention]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, art. 2, Aug. 12, 1949, 75 U.N.T.S. 85 [Hereinafter II Geneva Convention]; Geneva Convention Relative to the Treatment of Prisoners of War, art. 2, Aug. 12, 1949, 75 U.N.T.S. 135 [Hereinafter III Geneva Convention]; Geneva Convention Relative to the Protection of Civilian Person in Time of War Geneva, art. 2, Aug. 12, 1949, 75 U.N.T.S. 287 [Hereinafter IV Geneva Convention].

<sup>63</sup> *State Parties to the Following International Humanitarian Law and Other Related Treaties*, INTERNATIONAL COMMITTEE OF THE RED CROSS, <https://www.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountry.xsp> (last visited Nov. 3, 2017).

the four GCs in February 14, 1956.<sup>64</sup> The exercise of military hostilities between the two contending sides was undeniable.<sup>65</sup> Therefore, the conflict's initial phase (invasion and occupation) constituted an IAC.

After the invasion and occupation of Iraq, the UNSC recognized the United Kingdom and the U.S. as occupying powers through resolution 1483 adopted on May 22, 2003. After the end of the occupation, the newly established Iraqi government invited U.S. forces to remain in Iraq's territory under a Status of Forcers Agreement ("SOFA").<sup>66</sup> After the U.S. forces withdrew from Iraq in 2011, a conflict of sectarian character escalated, mostly between Sunni and Shia groups, spreading to neighboring Syria and radicalizing the Syrian Civil War.<sup>67</sup>

*c. The Global Coalition to Counter ISIL and the Current Situation in Iraq and Syria*

With the resurgence of the Islamic State of Iraq and the Levant ("ISIL" - a former Al-Qaeda affiliate in Iraq) in Iraqi territory and its expansion to neighboring Syria, the situation in the Middle East reached a historical peak in regards to violations of human rights, IHL, and the rule of law.<sup>68</sup> In 2014, ISIL exercised significant control over portions of Syrian and Iraqi territory.<sup>69</sup> The situation in Syria has worsened given the ongoing civil war between Bashar Al-Assad's autocratic regime and the dismembered rebel forces.<sup>70</sup> The

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<sup>64</sup> Treaties, State Parties and Commentaries – Iraq, INTERNATIONAL COMMITTEE OF THE RED CROSS, [https://www.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountrySelected.xsp?xp\\_countrySelected=IQ](https://www.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountrySelected.xsp?xp_countrySelected=IQ) (last visited Nov. 3, 2017).

<sup>65</sup> Knut Dörmann & Laurent Colassis, *International Humanitarian Law in the Iraq Conflict*, 47 GERMAN Y.B. INT'L L. 293, 295 (2004).

<sup>66</sup> M. Cherif Bassiouni, *Legal Status of US Forces in Iraq From 2003-2008*, 11 CHI. J. OF INT'L LAW 1, 1-3 (2010).

<sup>67</sup> CRISTOPHER M. BLANCHARD & CARLA E. HUMUD, CONG. RESEARCH SERV., R43612, THE ISLAMIC STATE AND U.S. POLICY (2016) [hereinafter *The Islamic State and U.S. Policy*].

<sup>68</sup> *See, e.g., Id.*; MICHAEL WEISS & HASSAN HASSAN, *ISIS: INSIDE THE ARMY OF TERROR* 126-59 (2015).

<sup>69</sup> *See Id.* at 3 (territory held by ISIL until January, 2016).

<sup>70</sup> BLANCHARD & HUMUD, *supra* note 67, at 6-7, 33.

presence of Russian and Iranian forces and non-state actors such as Hezbollah further complicates the current situation.<sup>71</sup>

After considering the situation in Iraq and Syria, then-U.S. President Barack Obama announced on September 10, 2014, the formation of a broad international coalition to defeat ISIL, emphasizing: “our objective is clear: We will degrade, and ultimately destroy, ISIL through a comprehensive and sustained counterterrorism strategy.”<sup>72</sup> Later, announcing that the coalition would act in accordance with “five mutually reinforcing lines of effort,” which include: providing military support to partners; impeding the flow of foreign fighters; stopping ISIL’s financing and funding; addressing the humanitarian crisis in the region; and exposing ISIL’s true nature.<sup>73</sup>

The legal argument for this global coalition’s resort to armed force seems unexplained at first glance. Prior to the commencement of the air-strike campaign by the U.S.-led coalition, a letter dated September 23, 2014 from the then-U.S. Permanent Representative to the U.N., Samantha Power to the former U.N. Secretary General, Ban Ki-Moon, provides an interesting legal rationale for the coalition’s activities.<sup>74</sup> According to Ambassador Power, the U.S. and its allies are acting in exercise of the right to collective self-defense in favor of the Iraqi Government and only against ISIL.<sup>75</sup> The letter states that “Iraq has asked the [U.S.] to lead international efforts to strike ISIL sites and military strongholds in Syria in order to end the continuing attacks on Iraq, to protect Iraqi citizens, and ultimately to enable and arm Iraqi forces to perform their task of regaining control of the Iraqi borders.”<sup>76</sup> Furthermore, the letter clarifies that the actions of the U.S. and its allies in Syria are directed only against ISIL and because the Syrian Government is “unwilling or unable to prevent the use of its territory for such attacks.”<sup>77</sup>

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<sup>71</sup> *Id.* at 1, 35.

<sup>72</sup> *The Global Coalition to Counter ISIL*, U.S. DEPARTMENT OF STATE, <http://www.state.gov/s/sect/> (last visited Nov. 3, 2017).

<sup>73</sup> *Id.*

<sup>74</sup> U.N. SCOR, Letter dated 23 Sept. 2014 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General, U.N. Doc. S/2014/695 (Sept. 23, 2014) [hereinafter U.S.-U.N. Letter].

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> See, e.g., *Id.*; Marty Lederman, *The War Powers Resolution and Article 51 Letters Concerning Use of Force in Syria Against ISIL and the Khorasan Group*

i. Panama and the Global Coalition to Counter ISIL

Panama is part of this “Global Coalition” alongside sixty-eight other states and four intergovernmental organizations (the North Atlantic Treaty Organization, the European Union, the Arab League and Interpol).<sup>78</sup> By way of a press release dated February 5, 2015, Panama’s Ministry of Foreign Affairs announced the country’s decision to join the coalition against ISIL.<sup>79</sup> Despite failing to specify the nature of its involvement, Panama stated that it had made such a decision without compromising its principles of being a peace-loving nation that promotes dialogue and peaceful coexistence between peoples.<sup>80</sup> After several months, another press release specified that Panama’s involvement is focused in stopping ISIL’s financing and funding,<sup>81</sup> also asserting that it was not contributing to the coalitions’ military activities and hinted at the possibility of providing humanitarian aid to civilians displaced by the conflict.<sup>82</sup> Nonetheless, as early as 2016, Newsweek listed Panama among the “coalition members providing unspecified support.”<sup>83</sup> Moreover, the coalition’s own website fails to specify the type of support that Panama

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[UPDATED to add statement of the U.N. Secretary-General], JUST SECURITY (Sept. 23, 2014, 3:21 PM), <https://www.justsecurity.org/15436/war-powers-resolution-article-51-letters-force-syria-isil-khorasan-group/>, (explaining the U.S. position in regards to airstrikes in Syria and the implied endorsement of the airstrikes by the U.N. Secretary-General).

<sup>78</sup> 73 Partners, THE GLOBAL COALITION AGAINST DAESH, <http://theglobalcoalition.org/en/partners/>.

<sup>79</sup> Press Release, Ministry of Foreign Affairs of Panama, Panamá se une a coalición de la Comunidad Internacional contra Estado Islámico [Panama joins a coalition of the International Community against the Islamic State] (Feb. 5, 2015) (on file with the Ministry of Foreign Affairs of Panama), <http://mire.gob.pa/noticias/2015/02/05/panama-se-une-coalicion-de-la-comunidad-internacional-contra-estado-islamico>.

<sup>80</sup> *Id.*

<sup>81</sup> Press Release, Ministry of Foreign Affairs of Panama, Panamá apoya esfuerzos para prevenir financiamiento del terrorismo [Panama supports efforts to prevent the financing of terrorism] (Nov. 17, 2015) (on file with the Ministry of Foreign Affairs of Panama), <http://mire.gob.pa/noticias/2015/11/17/panama-apoya-esfuerzos-para-prevenir-financiamiento-del-terrorismo>.

<sup>82</sup> *Id.*

<sup>83</sup> *United We Stand: A Break Down of What Each Member of the International Coalition Allied against ISIS Contributes to the Fight*, NEWSWEEK (SPECIAL EDITION), Feb. 2016, at 72-73 [Hereinafter *United We Stand*].

is providing.<sup>84</sup> While Panama has consistently clarified that its support to the coalition is non-military in character and mostly limited to countering the financing of ISIL, it remains difficult to reconcile this position with the factual reality.

As specified by its own website, the Global Coalition is unique in its membership, scope and commitment.<sup>85</sup> It has objectives that go beyond the military campaign.<sup>86</sup> Nevertheless, it is quite hard to separate these non-military objectives with the military component of the Coalition, when its main objective is both the ideological and military defeat of ISIL. Panama, by joining the Global Coalition, expressed its support for this ultimate end and consequently endorsed, directly or indirectly, the U.S.-led airstrikes in both Iraq and Syria.

It is relevant to note that besides the goal of providing military support to allies, all the other lines of effort can be accomplished by complying with pre-existing international commitments - including binding international instruments.<sup>87</sup> Binding UNSC Resolutions, adopted under Chapter VII of the U.N. Charter, impose on all member-States of the U.N. the obligation to undertake efforts to prevent the flow of foreign fighters to Iraq and Syria, and prevent the financing of terrorist groups, *inter alia* ISIL.<sup>88</sup>

With regard to efforts focused on addressing the humanitarian crisis in the region, it can be argued that all States are authorized to provide humanitarian assistance to civilians and *hors de combat* in armed conflicts. This authorization is derived from the IHL customary rule governing “access for humanitarian relief to civilians in

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<sup>84</sup> *Partners*, THE GLOBAL COALITION AGAINST DAESH, <http://theglobalcoalition.org/en/partners/> (last visited Oct. 27, 2017).

<sup>85</sup> *Mission*, THE GLOBAL COALITION AGAINST DAESH, <http://theglobalcoalition.org/en/mission-en/> (last visited Oct. 27, 2017).

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

<sup>87</sup> See Alonso Illueca, *Panamá y la Lucha Mundial Contra el Terrorismo* [Panama and the Global Struggle Against Terrorism], LA ESTRELLA DE PANAMÁ, Feb. 17, 2015.

<sup>88</sup> See, e.g., S.C. Res. 2170 (Aug. 15, 2014); S.C. Res. 2178 (Sept. 24, 2014); S.C. Res. 2195 (Dec. 19, 2014); S.C. Res. 2199 (Feb. 12, 2015).

need,” which is applicable to both international and non-international armed conflicts.<sup>89</sup> Although humanitarian relief functions are primarily exercised by humanitarian organizations such as the International Committee of the Red Cross (“ICRC”), nothing expressly prohibits States from providing such assistance.<sup>90</sup> In any event, the assisting entity or State would need the consent of the State concerned, and the assistance provided must be both impartial and non-discriminatory.<sup>91</sup> Lastly, this authorization could also find its basis in the duty to ensure respect, protection, and human treatment for individuals no longer or not participating in hostilities derived from common article 3 of the GCs.<sup>92</sup>

Considering that the coalition lacks a founding legal document, it is challenging to ascertain when one of its leading member-States is acting in its personal capacity or on behalf of the broader membership. This point is illustrated by the recent Gulf diplomatic crisis where some States, *inter alia*, Saudi Arabia, the United Arab Emirates and Bahrain (all members of the Coalition) broke diplomatic ties with Qatar (also a member) for supposedly financing terrorism (one of the objectives which the coalition is supposed to counter).<sup>93</sup> Responding to this, the U.S. Air Force’s Central Command spokesperson stressed that the U.S. “and the coalition are grateful to the

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<sup>89</sup> JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 193-94 (Cambridge Univ. Press, 2005).

<sup>90</sup> *Id.* at 196.

<sup>91</sup> *Id.* at 196-97.

<sup>92</sup> *See*, I Geneva Convention, *supra* note 62, at art. 3; II Geneva Convention, *supra* note 62, at art. 3; III Geneva Convention, *supra* note 62, at art. 3; IV Geneva Convention, *supra* note 62, at art. 3, 23, 38, 39; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, art. 18, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter II Additional Protocol]. *Accord*, Ruth A. Stoffels, *Legal regulation of humanitarian assistance in armed conflict: Achievements and gaps*, 86 IRRC 515, 518-20, 537-38 (2004) (discussing the right of third states to provide humanitarian assistance in armed conflicts and what to do when such right is denied by one of the parties to the conflict).

<sup>93</sup> Patrick Wintour, *Gulf plunged into diplomatic crisis as countries cut ties with Qatar*, THE GUARDIAN (June 5, 2017), <https://www.theguardian.com/world/2017/jun/05/saudi-arabia-and-bahrain-break-diplomatic-ties-with-qatar-over-terrorism>.

Qataris for their long-standing support of our presence and their enduring commitment to regional security.”<sup>94</sup> In this sense, it seems difficult to reconcile the ‘apparent’ collective position of the coalition members with actions and reasoning of Saudi Arabia, the United Arab Emirates and Bahrain.

ii. The Coalition’s Conflict with ISIL as a Non-International Armed Conflict

The characterization of the Coalition’s ongoing conflict with ISIL is a complicated affair given the plurality of actors involved (State and non-State).<sup>95</sup> If we rely on Ambassador Power’s rationale,<sup>96</sup> the conflict with ISIL can be categorized as a non-international armed conflict (“NIAC”) with a transnational character. Within the meaning of Common Article 3 to the GCs, which reads that NIACs are “armed conflicts not of an international character occurring in the territory of one of the High Contracting Parties”.<sup>97</sup> This definition explains that if a conflict within the territory of a State party to the GC is not an IAC, i.e. between two or more of the High Contracting Parties of the GCs, it could *prima facie* be considered a NIAC.

In the case at hand, the situation in Syria and Iraq can be qualified separately and *prima facie* as NIACs, as both States are facing a military threat from non-State actors within their own territory (ISIL in the case of Iraq, and ISIL and other non-State actors in Syria).<sup>98</sup> As mentioned before, Iraq is a party to the GCs since 1956,<sup>99</sup> while Syria has been a State party since November 2,

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<sup>94</sup> *Id.*

<sup>95</sup> See, e.g., Julia Zorthian, *Who’s Fighting Who in Syria*, TIME (Oct. 7, 2015); *Islamic State and the crisis in Iraq and Syria in maps*, BBC (Oct. 21, 2017), <http://www.bbc.com/news/world-middle-east-27838034>.

<sup>96</sup> U.S.-U.N. Letter, *supra* note 74.

<sup>97</sup> See, I Geneva Convention, *supra* note 62, at art. 3; II Geneva Convention, *supra* note 62, at art. 3; III Geneva Convention, *supra* note 62, at art. 3; IV Geneva Convention, *supra* note 62, at art. 3.

<sup>98</sup> See, Terry D. Gill, *Classifying the Conflict in Syria*, 92, INT’L STUD. 353, 373-74 (2015); CHRISTINE CHINKIN & MARY KALDOR, INTERNATIONAL LAW AND NEW WARS 246-48 (2017).

<sup>99</sup> *Treaties, State Parties and Commentaries – Iraq*, *supra* note 64.

1953.<sup>100</sup> Therefore, drawing upon GCs' mutually exclusive definitions of IACs and NIACs, both conflicts could be characterized as NIACs.

The International Criminal Tribunal for the Former Yugoslavia ("ICTY") in the jurisdiction phase of *Prosecutor v. Tadic* determined that a NIAC exists "whenever there is . . . protracted armed violence between governmental authorities and organized armed groups or between such groups within a State."<sup>101</sup> In *Tadic*, the ICTY stated that for the purposes of distinguishing between armed conflicts (within the meaning of Common Article 3) and other less serious forms violence (internal disturbances and tensions), the test provided by Article 1 of Additional Protocol II ("AP II") is accepted.<sup>102</sup> This test provides that a conflict can be characterized as a NIAC whenever the following criteria are met: the hostilities must reach a minimum level of intensity and the parties to the conflict must possess organized military forces.<sup>103</sup>

The conflicts in Syria and Iraq also seem to fall beneath the scope of the more restrictive definition of NIAC provided by AP II.<sup>104</sup> AP II introduces, *inter alia*, a requirement of territorial control for the non-state actor party to the conflict, in order to carry out "sustained and concerted military operations."<sup>105</sup> Given that Syria and Iraq are not parties to AP II,<sup>106</sup> its direct application by way of treaty law remains questionable.<sup>107</sup> Nonetheless, most of AP II provisions

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<sup>100</sup> *Treaties, State Parties and Commentaries – Syria*, INTERNATIONAL COMMITTEE OF THE RED CROSS, [https://www.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountrySelected.xsp?xp\\_countrySelected=SY](https://www.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountrySelected.xsp?xp_countrySelected=SY) (last visited Nov. 3, 2017).

<sup>101</sup> *Prosecutor v. Tadic*, Case No. IT-94-1-I, Decision on Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

<sup>102</sup> *Prosecutor v. Tadic*, Case No. IT-94-1-T, Judgment and Opinion, ¶ 561-68 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997).

<sup>103</sup> *Id.*

<sup>104</sup> *See* II Additional Protocol, *supra* note 92, at art. 1.

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

<sup>106</sup> *Treaties, State Parties and Commentaries – Iraq*, *supra* note 64; *Treaties, State Parties and Commentaries – Syria*, *supra* note 100.

<sup>107</sup> Vienna Convention on the Law of Treaties, art. 34, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980).

are considered part of customary international law,<sup>108</sup> or applied as a matter of policy.

As recognized in Ambassador Power's letter, the Iraqi government does not control its borders and it is subject to "continuing" attacks from ISIL.<sup>109</sup> The letter also acknowledges that ISIL possesses several strongholds in Syria.<sup>110</sup> Besides this letter, other sources recognize the control that ISIL exercises over significant parts of Iraqi and Syrian territory.<sup>111</sup> The fact that ISIL exercises control over portions of territory and constantly engages in military hostilities with different forces provides support to the theory that both conflicts have reached the threshold of a NIAC.<sup>112</sup>

### iii. The Coalition's Activities in Syria as an International Armed Conflict

As already stated, an IAC exists whenever one State resorts to any form of armed force against another State. When an international coalition uses force against a non-State armed group within the territory of another State, with the explicit consent of the territorial State, there is no IAC.<sup>113</sup> However, if the consent of the State in question is absent then the conflict might be considered an IAC.<sup>114</sup>

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<sup>108</sup> Jean-Marie Henckaerts, *Study on customary international humanitarian law: A contribution to the understanding and respect for the rule of law in armed conflict*, 87 INT'L REV. OF THE RED CROSS 175, 188 (2005).

<sup>109</sup> U.S.-U.N. Letter, *supra* note 74.

<sup>110</sup> *Id.*

<sup>111</sup> See, e.g., BLANCHARD & HUMUD, *supra* note 67, at 1-6; JESSICA LEWIS MCFATE, THE ISIS DEFENSE IN IRAQ AND SYRIA: COUNTERING AN ADAPTIVE ENEMY 8-12 (2015).

<sup>112</sup> Gill, *supra* note 98, at 373-77.

<sup>113</sup> See, e.g., 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! (Feb. 2, 2015), <https://www.ejiltalk.org/the-airstrikes-against-islamic-state-in-iraq-and-the-alleged-prohibition-on-military-assistance-to-governments-in-civil-wars/>; Laura Visser, *Russia's Intervention in Syria*, EJIL: TALK! (Nov. 25, 2015), <https://www.ejiltalk.org/russias-intervention-in-syria/> (explaining intervention by invitation under international law); HELEN DUFFY, THE 'WAR ON TERROR' AND THE FRAMEWORK OF INTERNATIONAL LAW 308-09 (2d ed. 2015).

<sup>114</sup> J.K. Kleffner, *Scope of Application of International Humanitarian Law*, THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 44 (Dieter Fleck ed., 2013).

Dapo Akande and Marko Milanovic argue that, absent the consent of the territorial State, the active exercise of hostilities between a foreign State and a non-State actor in the territory of another State (the territorial State) would activate the application of laws governing IACs between the foreign State and the non-State actor.<sup>115</sup> Akande in one of his scholarly dispositions explains that this position finds support, *inter alia*, in scholarly writings and the jurisprudence of national and international tribunals,<sup>116</sup> including the International Court of Justice.<sup>117</sup>

Currently, the U.S.-led coalition engages in attacks against ISIL in Syrian territory without the consent of the Syrian government (led by Al-Assad). Recently, the U.S. executed a punitive airstrike against a Syrian air force base.<sup>118</sup> The rationale offered was that the attack on regime troops within Syrian jurisdiction was justified because it intended to punish and deter the future use of chemical weapons in the context of the Syrian civil war.<sup>119</sup> In light of these new facts and the legality of the aforementioned rationale, could the situation between Syria and the U.S. be characterized as an IAC? Notwithstanding the “unwilling or unable” doctrine, if Syria considers that the coalition’s ongoing airstrikes violate its sovereignty, the IAC claim may have a legal basis.

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<sup>115</sup> Marko Milanovic, *What Exactly Internationalizes an Internal Armed Conflict?*, EJIL: TALK! (May 7, 2010), <https://www.ejiltalk.org/what-exactly-internationalizes-an-internal-armed-conflict/>; Dapo Akande, *Are Extraterritorial Armed Conflicts with Non-State Groups International or Non-International?*, EJIL TALK! (Oct. 18, 2011), <https://www.ejiltalk.org/are-extraterritorial-armed-conflicts-with-non-state-groups-international-or-non-international/>.

<sup>116</sup> Dapo Akande, *Classification of Armed Conflicts: Relevant Legal Concepts*, in INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS 32, 70-79 (Elizabeth Wilmshurst ed., 2012).

<sup>117</sup> *Armed Activities on the Territory of the Congo (Dem. Rep. of the Congo v. Uganda)*, Judgment, 2005 I.C.J. Rep. 168, ¶163.

<sup>118</sup> Nadia Khomami & Jamie Grierson, *US military strikes on Syria*, THE GUARDIAN, Apr. 7, 2017, <https://www.theguardian.com/world/2017/apr/07/us-airstrikes-on-syria-donald-trump-what-we-know-so-far>.

<sup>119</sup> *Id.*

### III. THE LAW OF NEUTRALITY IN INTERNATIONAL HUMANITARIAN LAW

Traditionally, the law of neutrality in IHL distinguishes between two types of States: neutral and belligerent.<sup>120</sup> Belligerent States are those engaged in hostilities, while neutral States are those not taking part in hostilities.<sup>121</sup> This part of IHL is governed by customary international law<sup>122</sup> and the following conventions: The Hague Convention (V) on Neutral Powers in case of War on Land (1907)<sup>123</sup> and the Hague Convention (XIII) on Neutral Powers in Naval War (1907).<sup>124</sup>

With the adoption of the U.N. Charter, the law of neutrality underwent significant setbacks.<sup>125</sup> One of the principles of the U.N. Charter requires all member States to provide assistance to the organization at all times and refrain from providing assistance to any State on which the U.N. is taking any type of action (preventive or enforcement).<sup>126</sup> Moreover, Article 25 of the U.N. Charter establishes the binding character of UNSC resolutions on all member states, in particular the resolutions adopted under Chapter VII. If the Council dictates enforcement measures (including the resort to armed force) States are obliged to comply with them, notwithstanding the laws of neutrality, i.e., the concept of neutrality as a “permissive legal status.”<sup>127</sup> Reflecting on this, Maria Gavouneli notes that in the U.N. collective security system the idea of “neutral unilateralism” remains foreign.<sup>128</sup> She also recognizes that in the U.N.

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<sup>120</sup> COMMANDER'S HANDBOOK, *supra* note 8, at 365.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 367.

<sup>123</sup> The Hague Convention (V) on Neutral Powers in case of War on Land arts. 5, 10. Oct. 18, 1907 [Hereinafter The Hague Convention (V)].

<sup>124</sup> The Hague Convention (XIII) on the Rights and Duties of Neutral Powers in Naval War art. 6, Oct. 18, 1907 [Hereinafter The Hague Convention (XIII)].

<sup>125</sup> COMMANDER'S HANDBOOK, *supra* note 8, at 368-69.

<sup>126</sup> U.N. Charter art. 2 ¶5.

<sup>127</sup> *See, e.g.*, THE COMMANDER'S HANDBOOK, *supra* note 8, at 368-69; *Neutrality*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/neutrality>.

<sup>128</sup> Maria Gavouneli, *Neutrality – A Survivor?*, 23 THE EUR. J. OF INT'L L. 267, 270 (2012).

system there will always be room for decentralized action.<sup>129</sup> Gavouneli concludes that in these few cases where “the UN member states fail to respond adequately and sufficiently in terms of both time and substance,”<sup>130</sup> some fragments of the law of neutrality will play an auxiliary role in the law of armed conflict.<sup>131</sup> The latter states that whenever the UNSC has not adopted any type of measure and where there is an armed conflict, the U.N. Member States are free to maintain their status as neutral powers.<sup>132</sup>

A similar argument arises in the case of collective security arrangements, such as the North Atlantic Treaty<sup>133</sup> and the Rio Treaty,<sup>134</sup> which establish that an armed attack against one Member State constitutes an armed attack against all members. In such cases and if the treaty in question is invoked, States’ parties are theoretically obliged to provide assistance and exercise the right to individual or collective self-defense against the aggressor in accordance with the provisions established in the U.N. Charter.<sup>135</sup> If the States concerned acted in accordance with their treaty commitments by exercising individual or collective self-defense, they would compromise their neutral status under IHL.<sup>136</sup> In the absence of collective self-defense arrangements, States are entitled to maintain their neutral status, as long as the UNSC is not seized on the matter and has not determined the existence of an act of aggression and adopted appropriate measures under Chapter VII of the U.N. Charter.<sup>137</sup>

Hence, contemporary *jus ad bellum* directly affects the laws of neutrality. Whenever the UNSC is seized on the matter by either implementing enforcement measures or authorizing the exercise of individual and collective self-defense, the law of neutrality remains inapplicable to all the States concerned.<sup>138</sup> However, if the Council

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<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 273.

<sup>132</sup> *Id.* at 271-72.

<sup>133</sup> North Atlantic Treaty art. 5, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243.

<sup>134</sup> Inter-American Treaty of Reciprocal Assistance art. 3, Sept. 2, 1947, 21 U.N.T.S. 77.

<sup>135</sup> COMMANDER’S HANDBOOK, *supra* note 8, at 370.

<sup>136</sup> Gavouneli, *supra* note 128, at 271-72; Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion 1996 I.C.J. Rep. 226, ¶¶88-89 (July 8).

<sup>137</sup> U.N. Charter art. 39, ¶51.

<sup>138</sup> Gavouneli, *supra* note 128, at 273.

has failed to act, the law of neutrality becomes applicable as a set of auxiliary rules.<sup>139</sup> Additionally, the law of neutrality is only applicable to IACs and certain NIACS (belligerency recognition), as contemporary international law does not recognize insurgent groups as neutral powers.<sup>140</sup>

Recent developments in IHL have raised claims that a new “category” of States has emerged in the context of armed conflicts.<sup>141</sup> The III Geneva Convention (“GC III”) introduces in Article 4(B)(2) the expression “neutral or non-belligerent Power,” which entails the existence of a new category of States in armed conflicts: the non-belligerent State. Yves Sandoz finds no explanation for “this exceptional addition of the expression ‘non-belligerent’ after ‘neutral’ powers.”<sup>142</sup> Moreover, Sandoz also signals that the “non-belligerent Power” concept was not discussed in the 1949 Diplomatic Conference or in the 1948 International Red Cross Conference.<sup>143</sup> According to Sandoz, the origin of this term can be found in the 1947 Conference of Government Experts, where the French Delegate introduced the term ‘non-belligerent’ States, with specific reference to WWII.<sup>144</sup> Finally, Sandoz concludes that the term ‘neutral’ States covers all States not participating in a given armed conflict, while the term “non-belligerent” lacks factual meaning for interpreting GC III.<sup>145</sup>

As already explained, the law of neutrality survived the U.N. Charter and remains applicable in cases where the latter is not implemented. The ICRC has recognized that in cases of collective self-

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<sup>139</sup> *Id.*

<sup>140</sup> See, Kevin Jon Heller, *The Law of Neutrality Does Not Apply to the Conflict with Al-Qaeda, and It's a Good Thing, Too: A Response to Chang*, 47 *TEX. INT'L L. J.* 115, 141 (2011).

<sup>141</sup> Andrea Gioia, *Neutrality and Non-Belligerency*, in *INTERNATIONAL ECONOMIC LAW AND ARMED CONFLICT* 51, 76 (Harry H. G. Post ed., 1994) [hereinafter *Neutrality and Non-Belligerency*] (arguing in favor of a new category of States in the context of an armed conflict: non-belligerents).

<sup>142</sup> Yves Sandoz, *Rights, Powers, and Obligations of Neutral Powers under the Conventions*, in *THE 1949 GENEVA CONVENTIONS: A COMMENTARY* 85, 92 (Andrew Clapham et al. eds., 2015).

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* (The French delegation in their intervention equated the concept of neutral and non-belligerent).

<sup>145</sup> *Id.*

defense and UNSC enforcement actions, the U.N. Charter provisions prevail over the laws of neutrality.<sup>146</sup> Below, we will analyze the categories of States, within the context of the laws of neutrality, which are listed as follows: neutral, non-belligerent, belligerent and co-belligerent States.

*a. Neutral States*

Lassa Oppenheim describes neutrality as “an attitude of impartiality deliberately taken up by a State not implicated in a war; neutrality cannot begin before the outbreak of war.”<sup>147</sup> Oppenheim also states, “the duty of impartiality compromises to-day abstention from any active or passive co-operation with belligerents.”<sup>148</sup> He concludes that “the duties of neutrality are incumbent upon [States] as long as they do not *expressis verbis* or by unmistakable acts declare that they will be parties to the war.”<sup>149</sup>

Before the advent of the U.N., the practice of States was to notify third States of the initiation of the conflict in order to enable them to adopt the necessary attitude of impartiality.<sup>150</sup> However, notifications were never considered legally necessary.<sup>151</sup> In the U.N. era, notifications have been abandoned as the use of force in contravention with the U.N. Charter has been proscribed.<sup>152</sup> The rules governing the neutrality status of States are binding as part of treaty and customary international law.<sup>153</sup>

The ICRC has compiled a glossary that provides for IHL key terms’ definitions in which “neutral State” is defined as a “State that has chosen to be neutral either permanently or only in a particular IAC, or in certain cases in a NIAC.”<sup>154</sup> The glossary also explains

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<sup>146</sup> *Lesson 8: Neutrality*, in THE LAW OF ARMED CONFLICT (International Committee of the Red Cross eds., 2002) [hereinafter *ICRC on Neutrality*].

<sup>147</sup> LASSA OPPENHEIM, INTERNATIONAL LAW: A TREATISE, WAR AND NEUTRALITY 328 (1906).

<sup>148</sup> *Id.* at 337.

<sup>149</sup> *Id.* at 328.

<sup>150</sup> *Id.* at 329.

<sup>151</sup> *Id.*

<sup>152</sup> U.N. Charter art. 2, ¶4.

<sup>153</sup> Tess Bridgeman, *The Law of Neutrality and the Conflict with Al Qaeda*, 85 N.Y.U. L. REV. 1186, 1198 (2010).

<sup>154</sup> Glossary, INTERNATIONAL COMMITTEE OF THE RED CROSS, <https://casebook.icrc.org/glossary/neutral-state> (last visited Nov. 3, 2017)

that neutrality does not imply ideological impartiality; it does not require the State to abstain from showing its preference in regard to another State.<sup>155</sup> However, a neutral state may not openly participate in hostilities.<sup>156</sup> The State should also abstain from lending assistance to belligerents, recruiting troops for belligerents, allowing third parties to do so in its territory, or supply the belligerents with military equipment or with military intelligence.<sup>157</sup>

According to the V Hague Convention, a neutral State must ensure respect for its neutrality and if necessary may resort to force in case of any violations in its territory.<sup>158</sup> The ICRC notes that a neutral State must treat opposing belligerents with impartiality, which creates a prohibition on discrimination.<sup>159</sup> By non-discrimination, the ICRC forbids differential treatment of belligerents in the specific context of armed conflict; it does not affect preexisting commercial relations.<sup>160</sup> Additionally, the XIII Hague Convention provides that “the supply, in any manner, directly or indirectly, by a neutral Power to a belligerent Power, of warships, ammunition, or war material of any kind whatever, is forbidden.”<sup>161</sup>

Andrea Gioia considers that duties of neutral States can be qualified as duties of abstention (from providing military aid to belligerents), prevention (defend its territory’s inviolability), and impartiality (towards belligerents on sensitive diplomatic, commercial and political issues).<sup>162</sup> Gioia asserts that such duties stem from the general principle of impartiality and constitute the core of neutrality.<sup>163</sup>

Robert Kolb and Richard Hyde argue that if the neutral state violates its aforementioned duties, it loses the entitlement to be treated

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<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> The Hague Convention (V), *supra* note 123, at arts. 5, 10..

<sup>159</sup> *ICRC on Neutrality*, *supra* note 146, at 5.

<sup>160</sup> *Id.*

<sup>161</sup> The Hague Convention (XIII), *supra* note 124, at art. 6.

<sup>162</sup> Andrea Gioia, *Neutrality in Air Warfare*, in *THE LAW OF AIR WARFARE: CONTEMPORARY ISSUES* 181, 184 (Natalino Ronzitti & Gabriella Venturini eds., 2006) [hereinafter *Neutrality in Air Warfare*]; ROBERT KOLB & RICHARD HYDE, *AN INTRODUCTION TO THE INTERNATIONAL LAW OF ARMED CONFLICTS* 279 (2008).

<sup>163</sup> *Neutrality in Air Warfare*, *supra* note 162, at 184.

as a neutral.<sup>164</sup> For example, if it violates the duty of prevention, which requires active protection of the inviolability of its territory, “it will expose itself to belligerent action on its territory to safeguard the essential interests and rights of the aggrieved belligerent.”<sup>165</sup> The U.N. General Assembly in its Resolution 3314 (XXIX) on the “Definition of Aggression” mentions among the acts that qualify as acts of aggression, regardless of a declaration of war, “the action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by the other State for perpetrating an act of aggression against a third State.”<sup>166</sup> This list of acts of aggression provided by Resolution 3314 is considered to reflect customary international law.<sup>167</sup> In this sense, the duty of prevention permeates to *jus ad bellum* given that non-compliance under the specific circumstances underlined by Resolution 3314 constitutes *casus belli*.<sup>168</sup>

However, in cases not involving the use of a neutral State’s territory and the exercise of the right of self-defense, the assertion that the aggrieved belligerent can resort to force remains dubious at best. In contemporary international law, a violation of the laws of neutrality gives rise to the legitimate right of the aggrieved State to take reprisals and countermeasures.<sup>169</sup> Nonetheless, this right does not justify any action contrary to the prohibition on the use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations.<sup>170</sup>

Heller explains that the relationship between the law of neutrality and *jus ad bellum* is defined by the different kinds of violations of neutrality.<sup>171</sup> These violations can be classified in two instances: situations where the neutral State affirmatively supports one of the

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<sup>164</sup> KOLB & HYDE, *supra* note 162, at 281.

<sup>165</sup> *Id.*

<sup>166</sup> G.A. Res. 3314 (XXIX), annex, art. 3(f) Special Committee on the Question of Defining Aggression (Dec. 14, 1994).

<sup>167</sup> Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 195 (June 27).

<sup>168</sup> *Casus belli*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/casus-belli>.

<sup>169</sup> *Neutrality and Non-Belligerency*, *supra* note 141, at 66.

<sup>170</sup> *Id.*, at 98-99.

<sup>171</sup> Heller, *supra* note 140 at 136.

belligerents, and where the neutral State is unwilling or unable to prevent a belligerent from using its territory for hostile acts (duty of prevention).<sup>172</sup> With regard to the former, the law of neutrality requires States to refrain from materially supporting one of the belligerents.<sup>173</sup> Nonetheless, providing material support to one of the belligerents does not automatically end the State's neutral status.<sup>174</sup> The affected State may be entitled to reparations or prone to overlook this violation of the law of neutrality.<sup>175</sup> However, the mere violation of the law of neutrality would not authorize the aggrieved belligerent to use of force.<sup>176</sup>

*b. Non-Belligerent States*

Although certain authors reject the existence of non-belligerent States as sub-category of States in the context of armed conflicts,<sup>177</sup> others defend its existence. Particularly, Gioia articulates that non-belligerency is an intermediate position between neutrality and belligerency,<sup>178</sup> and that States may resort to such position without immediately violating international law.<sup>179</sup> Gioia also explains that “non-belligerency” or “qualified neutrality” can be employed for situations where a State does not wish to enter the conflict on the side of one belligerent, but at the same time does not choose to be bound by the traditional laws of neutrality.<sup>180</sup> Additionally, Gioia argues that non-belligerent States, though not bound by neutrality obligations, enjoy some of the rights that neutral states enjoy *vis-à-vis* belligerents. Among such rights is the inviolability of a State's territory, which does not flow from the law of neutrality but from the U.N. Charter.<sup>181</sup>

In regards to actions of non-belligerent States favoring belligerents, the consequences flowing from such actions remain unclear. Gioia asserts that “un-neutral” behavior from neutral States, though

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<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* at 137.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *See Sandoz, supra* note 142, at 92.

<sup>178</sup> *Neutrality and Non-Belligerency, supra* note 141, at 76.

<sup>179</sup> *Id.* at 61.

<sup>180</sup> *Id.* at 76.

<sup>181</sup> *Id.* at 77-79; *see also* U.N. Charter art. 2 ¶4.

themselves not constituting acts of aggression may be seen as amounting to complicity with one of the belligerents.<sup>182</sup> This rationale is applied *mutatis mutandis* to non-belligerent states.<sup>183</sup> Nevertheless, Gioia argues that in those circumstances, the aggrieved belligerent State may not justify its actions by virtue of its right to self-defense nor take lawful reprisals against the non-belligerent State, as the laws of neutrality do not bind the latter.<sup>184</sup> In any event, the law of reprisals does not justify the resort to armed force.<sup>185</sup> The only exception allowing for the use force seems to be the use of a neutral State's territory by one of the belligerents to conduct military operations against another belligerent.<sup>186</sup>

Lastly, it is necessary to emphasize that as a matter of legal principle and in view of relevant State practice, the concept of a "non-belligerent" State lacks factual legal basis.<sup>187</sup> The sub-category of non-belligerent States in armed conflicts was and should still be considered a "euphemism designed to cover violations of international law in the field of neutral obligations."<sup>188</sup>

*c. Belligerent States*

The term 'belligerent State' is defined as a State engaged in an armed conflict, or more simply as a State waging hostilities.<sup>189</sup> Treaty and customary international law govern the conduct of belligerents.<sup>190</sup> It is also agreed that belligerency is defined in contrast

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<sup>182</sup> *Neutrality and Non-Belligerency*, *supra* note 141, at 101-03.

<sup>183</sup> *Id.* at 102-03.

<sup>184</sup> *Id.* at 76-77.

<sup>185</sup> *Id.* at 101.

<sup>186</sup> G.A. Res. 3314, *supra* note 166, annex, art 3(f).

<sup>187</sup> Wolff Heintschel von Heinegg, *Benevolent Third States in International Armed Conflicts: The Myth of the Irrelevance of the Law of Neutrality*, in *INTERNATIONAL LAW AND ARMED CONFLICT: EXPLORING THE FAULTLINES* 543, 555-56 (Michael N. Schmitt & Jelena Pejic eds., 2007).

<sup>188</sup> H.W. Briggs, *Neglected Aspects of the Destroyer Deal*, 34 *AJIL* 569, 569-587 (1940).

<sup>189</sup> Nathalie Weizmann, *Associated Forces and Co-belligerency*, *JUST SECURITY* (Feb. 24, 2015), <https://www.justsecurity.org/20344/isil-aumf-forces-co-belligerency/>.

<sup>190</sup> *See*, YORAM DINSTEN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 4-12 (2004).

with the laws of neutrality, which provides important guidance for determining when a State becomes belligerent or co-belligerent.<sup>191</sup>

Nathalie Weizmann explains that in accordance with the law of neutrality, a State becomes a belligerent in an armed conflict whenever it declares war against another State, participates in hostilities to a significant extent, or engages in systematic or substantial violations of its neutrality duties of impartiality and non-participation.<sup>192</sup> For the purposes of the present study, it seems appropriate to not consider declarations of war as an action that provides for a state of belligerency. After 1945, declarations of war ceased to be instruments for proclaiming *de jure* existence of war.<sup>193</sup> At the present time, for a state of war to exist, one of the parties to the conflict has to make its intentions clear by actually commencing hostilities or making extensive preparations.<sup>194</sup>

*d.. Co-Belligerent States*

Whenever two or more States are engaged in an armed struggle against a common enemy, the doctrine of co-belligerency becomes applicable.<sup>195</sup> The term ‘co-belligerent’ is generally understood as a State fighting with another Power against a common enemy.<sup>196</sup> Basically, the term involves two or more States undertaking joint operations against a rival entity in the context of an armed conflict.<sup>197</sup> Traditionally, the doctrine of co-belligerency has been applied exclusively to IACs.<sup>198</sup> Nonetheless, some of its features have been applied to NIACs. For example, the pooling of military resources in

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<sup>191</sup> Memorandum Opinion from the Office of the Legal Counsel to the President: “Protected Person” Status in Occupied Iraq under the Fourth Geneva Convention (Mar. 18, 2004) (on file with George Washington University) [hereinafter Goldsmith Memorandum].

<sup>192</sup> Weizmann, *supra* note 189.

<sup>193</sup> *Glossary*, INTERNATIONAL COMMITTEE OF THE RED CROSS, <https://casebook.icrc.org/glossary/declaration-war> (last visited Nov. 3, 2017).

<sup>194</sup> *Id.*

<sup>195</sup> MORRIS GREENSPAN, *THE MODERN LAW OF LAND WARFARE* 531 (1959).

<sup>196</sup> *Id.*

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

<sup>198</sup> Jens D. Ohlin, *Targeting Co-Belligerents*, in *TARGETED KILLINGS: LAW AND MORALITY IN AN ASYMMETRICAL WORLD* 60, 71-72 (Claire Finkelstein et al. eds., 2012) [Hereinafter *Targeting Co-Belligerents*].

favor of one of the parties of a NIAC has been regarded as a form of co-belligerency.<sup>199</sup>

Different authors understand the term 'co-belligerent' as synonymous with "ally."<sup>200</sup> The U.S. Manual for Military Commission defines co-belligerent as "any State or armed force joining and directly engaged with the [U.S.] in hostilities or directly supporting hostilities against a common enemy."<sup>201</sup> Other groups of scholars focus on establishing an effective test for co-belligerency. In a 2004 memo, Jack Goldsmith wrote "mere participation in any aspect of the occupation itself will not always suffice to constitute co-belligerency, especially when a State's specific contribution has no direct nexus with belligerent or hostile activities."<sup>202</sup> He then concluded: "the determination whether a State is a 'co-belligerent' by virtue of its participation . . . turns on whether the participation is closely related to 'hostilities.'"<sup>203</sup>

Gioia agrees with Goldsmith by stating, "under the traditional law of neutrality, a violation of neutrality obligations did not automatically make the State concerned a co-belligerent."<sup>204</sup> Morris Greenspan proposes a very narrow test for determining co-belligerency: the State has to be in "fully fledged belligerent fighting in association with one or more belligerent powers."<sup>205</sup> Goldsmith and Curtis Bradley present a co-belligerency threshold for neutral states, which is surpassed whenever they engage in systematic or signifi-

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<sup>199</sup> Tristan Ferraro, *The ICRC's legal position on the notion of armed conflict involving foreign intervention and on determining the IHL applicable to this type of conflict* 97 INT'L R. OF THE RED CROSS 1227, 1231, 1233-34 (2015).

<sup>200</sup> See MICHAEL BOTHE ET AL., NEW RULES FOR VICTIMS OF ARMED CONFLICTS 440, 444 (1982); OSCAR M. UHLER ET AL., COMMENTARY, IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 49 (Jean S. Picet ed., 1958); Bridgeman, *supra* note 153, at 1190.

<sup>201</sup> United States, *Manual for Military Commissions*, published in implementation of Chapter 47a of Title 10, United States Code, as amended by the Military Commissions Act of 2009, 10 U.S.C., §§ 948a, *et seq.*, 18 January 2007, Part II, Rule 103(24), II-4.

<sup>202</sup> Goldsmith Memorandum, *supra* note 191.

<sup>203</sup> *Id.*

<sup>204</sup> *Neutrality and Non-Belligerency*, *supra* note 141, at 104.

<sup>205</sup> GREENSPAN, *supra* note 195, at 531; *see also*, Weizmann, *supra* note 188 (citing Greenspan).

cant violations of their duties under the law of neutrality, i.e., prevention, abstention and impartiality.<sup>206</sup> Greenspan, Bradley, and Goldsmith seem to offer more narrow tests, focused on the participation in hostilities or systematic/significant violations of the law of neutrality.<sup>207</sup> The ICTY's jurisprudence also seems to favor the participation in hostilities approach.<sup>208</sup> In the *Blaskic* case, the Court hinted that joint military operations were the key for establishing the status of co-belligerent.<sup>209</sup>

Christopher Greenwood goes even further in arguing that a State not originally participating in an armed conflict would only commit an act of war and become a party to the conflict by "giving direct support to the military operations of one of the belligerents."<sup>210</sup> He excludes from this type of material assistance the provision of financial, intelligence and political support.<sup>211</sup> Similarly, Michael Bothe and Wolf Heintschel von Heinegg claim that the fact that a neutral State provides "unneutral services," i.e. rendering assistance to one of the belligerents, is not sufficient to justify the use of force against it.<sup>212</sup>

In contrast, the former U.N. Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, offered in one of his reports a contemporary-broad test for co-belligerency.<sup>213</sup> In

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<sup>206</sup> Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARVARD L. REV. 2047, 2112 (May 2005).

<sup>207</sup> *Id.*; GREENSPAN, *supra* note 195, at 531.

<sup>208</sup> *Prosecutor v. Blaskic*, Case No. IT-95-14-T, Judgment, ¶ 137-43 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000).

<sup>209</sup> *Id.*

<sup>210</sup> Christopher Greenwood, *Scope of Application of Humanitarian Law*, in THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 45, 58 (Dieter Fleck ed., 2d ed. 2009).

<sup>211</sup> *Id.*

<sup>212</sup> Michael Bothe, *Neutrality in Naval Warfare: What Is Left of Traditional International Law*, in HUMANITARIAN LAW OF ARMED CONFLICT: CHALLENGES AHEAD 387, 396 (Astrid J.M. Delissen & Gerard J. Tanja et al. eds., 1991); Wolf Heintschel von Heinegg, *Visit, Search, Diversion and Capture in Naval Warfare*, 30 CANADIAN Y.B. INT'L L. 89, 131 (1992).

<sup>213</sup> U.N. Special Rapporteur on extrajudicial, summary or arbitrary executions, Promotion and protection of human rights: human rights questions, including alternative approaches for improving effective enjoyment of human rights and fundamental freedoms, ¶60, U.N. Doc. A/68/382 (Sept. 13, 2013) (citing Oppenheim) [hereinafter Heyns' Report].

2013, Heyns stressed, “co-belligerency is a concept that applies to international armed conflicts and entails a sovereign State becoming a party to a conflict, either through formal or informal processes.<sup>214</sup> A treaty of alliance may be concluded as a formal process, while an informal process could involve providing assistance to or establishing a common cause with belligerent forces.”<sup>215</sup>

Jens Ohlin proposes another interesting test, in which he argues that in accordance with the traditional doctrine of co-belligerency (which stems from the law of neutrality) a belligerent State must give a third State the opportunity to declare its neutrality before declaring it a co-belligerent.<sup>216</sup> If the original state in question refuses to make the declaration, it can be considered a co-belligerent (a party to the conflict) and therefore a lawful subject of an attack.<sup>217</sup> Ohlin and Heyns’ tests constitute the more broadly construed proposals, presumably extending co-belligerent status to States not directly participating in hostilities.<sup>218</sup>

After briefly examining some of the abovementioned positions, Weizmann concludes that the following criterion is the most useful for recognizing co-belligerent States: the State has to provide “systematic or substantial supply of war materials, military troops, or financial support in association, cooperation, assistance or common cause with another belligerent.”<sup>219</sup> This approach seems to take a middle ground between the broad and narrow tests mentioned above.

As showcased by the differing views among legal scholars, the threshold between violations of the law of neutrality and the co-belligerency status is unclear. While some authors rely on the State’s direct involvement in hostilities, others seem to rest on more subjective elements such as refusal to declare its neutrality or the establishment of a common cause. The following section explores

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<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> *Targeting Co-Belligerents*, *supra* note 198, at 70-71 (Ohlin notes that the application of this doctrine can be quite controversial.).

<sup>217</sup> JENS D. OHLIN, *THE ASSAULT ON INTERNATIONAL LAW* 40 (2015); Michael Bothe, *The Law of Neutrality*, in *THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW* 571, 580 (Dieter Fleck ed., 2009).

<sup>218</sup> *Id.*; Heyns’ Report, *supra* note 213, at ¶60.

<sup>219</sup> Weizmann, *supra* note 189.

whether Panama became a co-belligerent state or maintained its status of a neutral power by joining the aforementioned coalitions.

#### IV. PANAMA AS A CO-BELLIGERENT OR NEUTRAL STATE?

The underlying fact that contributes to our analysis is that in each of the military coalitions' subjects of the present study (WWII, the Coalition of the Willing, and the Global Coalition to counter ISIL), Panama did not contribute to military operations. Although Panama failed, at times, to specify the nature of its involvement, it remains difficult to claim that it was directly engaged in hostilities.<sup>220</sup> This fact rules out the possibility of Panama being characterized *ab initio* as a belligerent State. Therefore, the question posed is whether Panama is/was a neutral or co-belligerent state given its presumed violations of the law of neutrality.

By joining the above-mentioned international coalitions, Panama openly expressed its support for one of the warring belligerents.<sup>221</sup> This amounted to a violation of the duty of impartiality. The fact that the coalitions' ultimate goal was the military defeat of a common enemy (the Axis Powers, Saddam Hussein's Iraq, and ISIL, respectively) adds to the gravity of the neutrality law violations. In the case of the Coalition to Counter ISIL, the existence of an asymmetric conflict between the Coalition and ISIL would translate into the inapplicability of the law of neutrality, as ISIL cannot be regarded as a belligerent. However, as noted above, Syria could plausibly argue that the ongoing operations of the Coalition within its territory are part of an ongoing IAC, as that it deems such operations unlawful and in contravention with the U.N. Charter.

Applying the co-belligerence tests specified in the previous sections to Panama's actions under the abovementioned coalitions

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<sup>220</sup> See, BREWER, *supra* note 26, at 109-11; Emma Brookes, *What can Eritrea possibly do to help the US in Iraq*, THE GUARDIAN (Mar. 20, 2003), <https://www.theguardian.com/world/2003/mar/20/iraq.emmabrockes>; Frances Martel, *Panama becomes first Latin American nation to join coalition against ISIS*, BREITBART (Feb. 7, 2015), <http://www.breitbart.com/national-security/2015/02/07/panama-becomes-first-latin-american-nation-to-join-coalition-against-isis/>.

<sup>221</sup> Heyns' Report, *supra* note 213, at ¶60 (establishing common cause with belligerent forces).

could give rise, in some cases, to plausible claims of co-belligerency. Particularly, Panama's involvement in all of these coalitions fits perfectly into Ohlin and Heyns' tests. In joining the coalitions, Panama established a common cause with its members and failed to declare its neutrality. In contrast, Greenspan, Goldsmith, Greenwood, Bothe, Heintschel, and Weizmann's proposals rule out the co-belligerency claim in two of the cases (Coalition of the Willing and against ISIL) because of the fact that Panama is/was not actively involved in the exercise of military hostilities. Moreover, the absence of factual evidence of any type of financial contribution to the war aim adds to the claim against Panama's co-belligerency.

Which of these two schools of thought should prevail? Existing international norms seem to be inclined towards the narrow test of co-belligerency.<sup>222</sup> Specifically, the peremptory norm against the use of force seems to deem Ohlin and Heyns' tests inapplicable. Absent an act of aggression or a UNSC enforcement action, any resort to armed force against a sovereign State would constitute a violation of the prohibition on the use of force, an *erga omnes*<sup>223</sup> and *jus cogens* norm.<sup>224</sup> Violations of the laws of neutrality authorize the aggrieved State to resort to lawful countermeasures and reprisals.<sup>225</sup> However, countermeasures or reprisals that include the use of force against neutral states are considered unlawful.<sup>226</sup> Hence, Ohlin and Heyns' tests should be interpreted in accordance with the *jus cogens* prohibition on the use of force. A State's incorporation to a coalition

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<sup>222</sup> See, U.N. Charter art. 2 ¶4; G.A. Res. 3314, *supra* note 166.

<sup>223</sup> Barcelona Traction (Belg. v. Spain), Judgment, 1970 I.C.J. Rep. 3, ¶33-34 (Feb. 5).

<sup>224</sup> IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 274 (1963); LORI F. DAMROSCH & SEAN D. MURPHY, INTERNATIONAL LAW CASES AND MATERIALS 1100 (6th ed. 2014); Int'l Law Comm'n, Rep. on the Work of the Second Part of Its Seventeenth Session and on Its Eighteenth Session, U.N. Doc. A/6309/Rev.1., at 247 (1966); Military and Paramilitary Activities in and Against Nicaragua (Nicar. V. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 190 (June 27); Armed Activities on the Territory of the Congo (Congo v. Uganda), Judgment, 2005 I.C.J. Rep. 168, ¶ 148.

<sup>225</sup> *Neutrality and Non-Belligerency*, *supra* note 144, at 66.

<sup>226</sup> *Neutrality and Non-Belligerency*, *supra* note 141, at 98-99; Int'l Law Comm'n Rep. on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10, at 84-85 (2001).

does not constitute an armed attack or an act of aggression within the meaning U.N. General Assembly Resolution 3314.<sup>227</sup>

In the three cases put forth, Panama was a co-belligerent in one of the conflicts and a neutral state violating its duty of impartiality in the other two. During WWII, Panama was a co-belligerent because: 1) the *lege lata* established that by declaring war against another State, a country could become part of an armed conflict,<sup>228</sup> 2) it was part of a military coalition against the Axis Powers,<sup>229</sup> and 3) it had leased its territory to the U.S. for military purposes, thus effectively contributing to the war efforts.<sup>230</sup> The fact that Panama voluntarily agreed to lease its territory for the conduct of defensive military preparations and the transit of troops to and from the Pacific and Atlantic fronts constituted a violation of its neutral duty of prevention, which exposed the territory to belligerent action from the aggrieved belligerent. Even today, in similar circumstances, the international law would find this action by Panama inconsistent with its obligations under *jus ad bellum*, particularly in light of UNGA Resolution 3314.<sup>231</sup>

In the other two cases, Panama can only be considered a neutral State. The country did not provide any type of military or financial aid to the war efforts, and it did not allow belligerent factions to use its territory.<sup>232</sup> By joining the Coalition of the Willing and the Global anti-ISIL coalition, Panama violated its duty of impartiality. However, it is very difficult to argue that these violations were significant or systematic in any form, as it only involved an expression of political support for the coalition's military actions. The fact that Panama openly chose a side in each conflict could have given rise to the use of countermeasures by the aggrieved States (Iraq in 2003 and Syria in 2015 onwards) if the regimes of such States considered that they were or are subject to foreign military intervention by the US-led coalitions.

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<sup>227</sup> G.A. Res. 3314, *supra* note 166.

<sup>228</sup> *See*, Ley no. 104, Dec. 10, 1941, LEG. PAN. (Pan.); Decreto no. 14, Dec. 12, 1941, LEG. PAN. (Pan.); Decreto no. 15, Dec. 12, 1941, LEG. PAN. (Pan.).

<sup>229</sup> *Declaration by the United Nations*, *supra* note 22.

<sup>230</sup> Fabrega-Wilson Treaty, *supra* note 46.

<sup>231</sup> *Id.*

<sup>232</sup> *See*, Brockes, *supra* note 220 (on Panama's mere moral support to the Coalition of the Willing); *United We Stand*, *supra* note 83, at 73 (on Panama's failure to specify its concrete involvement in the Coalition to Counter ISIL).

## V. CONCLUSION

In 2007, Heintschel von Heinegg raised similar claims as the ones presented in this paper in regards to Germany's violations of the laws of neutrality in the context of Operation Iraqi Freedom (2003).<sup>233</sup> Although not a member of the coalition, Germany allowed and assisted the U.S. armed forces in the transport of military equipment and supplies through German territory.<sup>234</sup> Heintschel von Heinegg argues that Germany violated the laws of neutrality; the fact that Iraq failed to react is irrelevant.<sup>235</sup> According to the German scholar,

States should therefore think twice before departing from the essentials of neutrality. If they were to be confronted with a belligerent far more powerful than Iraq in a future conflict, the law of neutrality could prove to be the only legal order effectively protecting their legitimate interests as States not taking part in the conflict.<sup>236</sup>

This paper aimed at portraying a very troubling practice by Panama consisting of joining international coalitions without measuring possible international legal consequences in the context of both *jus ad bellum* and *jus in bello*. The fact that Iraq and Syria failed to react to Panama's violations of the laws of neutrality is irrelevant as a matter of law. Panama may have weighed the political advantages of joining the coalition against the legal and practical risks. In this sense, as a matter of policy, Panama seems have concluded that an attack from Iraq or Syria was highly unlikely at the time. In the future and prior to joining a coalition involved in an armed conflict, Panama should examine the possible legal consequences of such action.

It would also be relevant to learn from the experiences of other States. For reflection and correction we should examine Costa Rica's example. In 2004, after the country joined the Coalition of the Willing (2003), the Constitutional Chamber of the Supreme Court declared such act null, void, and unconstitutional as it affected the country's neutrality, constituted an unlawful declaration of war

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<sup>233</sup> Heintschel von Heinegg, *supra* note 187, at 543.

<sup>234</sup> *Id.* at 543.

<sup>235</sup> *Id.* at 567.

<sup>236</sup> *Id.* at 567-68.

(absent the approval of the Congress who has the exclusive competence for declaring war), and was contrary to relevant norms of international law.<sup>237</sup> The Court instructed the Executive Power to request that the United States exclude Costa Rica from the list of Coalition member States. Subsequently, Costa Rica's Foreign Minister asked Washington to remove its country from the coalition's "list" through a diplomatic note.<sup>238</sup>

For restraint, Indonesia is the perfect model. In January 2016, Indonesia was victim of a terrorist attack from ISIL.<sup>239</sup> Despite this, a diplomatic official stated that it was very unlikely that Indonesia would join the anti-ISIL coalition.<sup>240</sup> The diplomat stressed that Indonesia's contribution to the battle against ISIL was centered in winning the ideological struggle against violent extremism.<sup>241</sup> Additionally, he said that U.S.-Indonesia bilateral relations would continue to focus on the exchange of intelligence and the continuation of political cooperation in international forums.<sup>242</sup>

Countries without military forces and other victims of terrorism have shown more care for the legal consequences of joining an international coalition than Panama. In the case of the anti-ISIL coalition, if Panama wanted to contribute to the global fight against terrorism, compliance with several UNSC resolutions requiring countries to stop the flow of foreign combatants and the financing of ISIL would have sufficed. If Panama intended to provide humanitarian assistance to victims of ISIL attacks, it could have done so independently of its affiliation to the coalition. If Panama wanted to expose ISIL's true nature, a more proactive role in international forums dealing with the subject matter would have been sufficient.

Panama, as a small and peaceful State must comport with international law. Considering that it is one of the few States in the world

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<sup>237</sup> Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala Const. Sept. 8, 2004, M.P: L. Solano, Expediente 03-004485-0007-CO, Resolución 2004-09992 (Costa Rica).

<sup>238</sup> *Costa Rica Asks to Be Taken Off U.S. List of Iraq Coalition Partners*, L.A. TIMES (Sept. 10, 2004), <http://articles.latimes.com/2004/sep/10/world/fg-rica10>.

<sup>239</sup> Prashanth Parameswaran, *Indonesia Will Not Join US Anti-ISIS Coalition: Envoy*, THE DIPLOMAT (March 5, 2015), <http://thediplomat.com/2016/03/indonesia-will-not-join-us-anti-isis-coalition-envoy/>.

<sup>240</sup> *Id.*

<sup>241</sup> *Id.*

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

without a standing army and with a Canal that it has pledged to maintain neutral, it must exercise the utmost caution and restraint when taking delicate strategic and political decisions - such as joining a coalition with a military component. So far, there have been no consequences for Panama's actions in the cases presented above. However, in the near future, Panama may find that States are not so benevolent with violations of neutrality. In such cases, the best defense is maintaining and protecting the neutrality of the Canal *strictu sensu*, fully complying with UNSC resolutions and implementing the applicable collective security arrangements.