

# THE ARAB SPRING: A TESTING TIME FOR THE APPLICATION OF INTERNATIONAL HUMANITARIAN LAW

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## I. INTRODUCTION

The term “Arab Spring” has been used to describe the series of political revolutions that swept through Tunisia, Egypt, Bahrain, Yemen, Libya and Syria in the (Northern) Spring of 2011. Each of these revolutions had different political, social, and historical backgrounds, although all were aimed at challenging autocratic or dictatorial regimes. The incumbent regimes responded to these challenges with different levels of violence but it was only in Libya and Syria that the use of force culminated in the outbreak of armed conflict.

This brief note begins with the basics of International Humanitarian Law (IHL) – its *raison d’être* and when it applies. It then considers the violence in Libya and Syria respectively. It notes that the violence in Libya quickly passed the threshold for the application of the humanitarian rules governing non-international armed conflict (NIAC) and almost as quickly evolved to include an international armed conflict (IAC) with the commencement of the United Nations (UN) authorised North Atlantic Treaty Organisation (NATO) military intervention. In contrast, determinations that the violence in Syria comprised an NIAC were slow and the ongoing high level of civilian casualties suggests the relevant rules of IHL are notable more for their breach than any observance. This note concludes with some comments on the residual utility of IHL rules as a means to hold alleged violators (both States and individuals) to account.

The view that the “Arab Spring” has been a testing time for IHL is apt because the events of 2011 (and subsequently) are a useful reminder of the criteria that must be satisfied in order to determine whether IHL applies and which body of rules applies with their concomitant levels of protection. Such questions may be difficult to answer but such answers are imperative to trigger the protective regime of IHL and, if that fails, to facilitate the accountability of States and individuals for their failure to adhere to it.

## II. IHL: AN OVERVIEW

IHL comprises treaty and customary law governing the conduct of armed conflict. The aim of these rules is to temper the goal of enemy submission with the requirement to minimise the death and suffering inherent in armed

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conflict by protecting those not directly participating in hostilities. Such protection is afforded by requiring a distinction to be made at all times between combatants and civilians and those *hors de combat*, as well as civilian and military targets.

The legal rules vary in relation to the two types of armed conflict regulated by IHL, namely, non-international and international. Customary rules of IHL apply to both types of conflict.<sup>1</sup> The conduct of IAC is extensively regulated by treaty law, which has Geneva Conventions I-IV<sup>2</sup> and Additional Protocol I at its core.<sup>3</sup> Common Article 2 (CA2) of Geneva Conventions I-IV provides that the Conventions apply to “all cases of declared war or of any other 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.” According to *Prosecutor v Dusko Tadic*, IAC occurs “whenever there is a resort to armed force between States”.<sup>4</sup>

NIAC is governed by Common Article 3 (CA3) of the four Geneva Conventions, which states:<sup>5</sup>

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

- (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ‘ hors de combat ‘ by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular humiliating and degrading treatment;

- 1 Jean-Marie Henckaerts and Louise Doswald-Beck *Customary International Humanitarian Law* (ICRC, Cambridge, 2005), xxvi.
- 2 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 75 UNTS 31 (opened for signature 12 August 1949, entered into force 21 October 1950) [First Geneva Convention]; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea 75 UNTS 85 (opened for signature 12 August 1949, entered into force 21 October 1950) [Second Geneva Convention]; Geneva Convention Relative to the Treatment of Prisoners of War 75 UNTS 135 (opened for signature 12 August 1949, entered into force 21 October 1950) [Third Geneva Convention]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War 75 UNTS 287 (opened for signature 12 August 1949, entered into force 21 October 1950) [Fourth Geneva Convention].
- 3 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) 1125 UNTS 3 (opened for signature 8 June 1977, entered into force 7 December 1979) [Protocol I].
- 4 *Prosecutor v Dusko Tadic* (Jurisdiction) ICTY Appeals Chamber IT-94-1-A, 2 October 1996 at [70] [*Tadic*].
- 5 See above n 2.

- (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

- (2) The wounded and sick shall be collected and cared for.

For ratifying States, Additional Protocol II (APII) will also apply.<sup>6</sup>

Although CA3 refers to a NIAC occurring in the territory of a State Party, it does not elaborate on what comprises such conflict.<sup>7</sup> APII provides some assistance in this regard as art 1(1) states that the Protocol applies to armed groups, which must be “under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol”.<sup>8</sup> According to the ICTY, internal armed conflict occurs “where there is protracted armed violence between governmental authorities and organized armed groups or between such groups within a State”.<sup>9</sup> Article 8(2)(c) and (f) of the Rome Statute draw a distinction between NIAC and internal disturbances whilst the latter paragraph further defines internal armed conflict as “protracted armed conflict between governmental authorities and organized armed groups or between such groups”.<sup>10</sup> The difficulty with such assessments is encapsulated in the Inter-American Commission on Human Rights’ observation that “the line separating an especially violent situation of internal disturbances from the lowest level Article 3 armed conflict may sometimes be blurred and thus, not easily determined”.<sup>11</sup>

A related difficulty is that many NIACs are “fought against or between groups that are not well structured. It is much more difficult to determine who belongs to an armed group than who belongs to government armed forces.”<sup>12</sup> The issue is significant because, although CA3 makes no explicit

6 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)1125 UNTS 609 (opened for signature 8 June 1977, entered in force 7 December 1978) [Protocol II].

7 See also Jean Pictet *Commentary to the First Geneva Convention of 1949* (ICRC, Geneva, 1952) at 49.

8 Protocol II, above n 6, art 1(1). However, art 1(2) excludes the application of APII from conflicts between non-state actors.

9 *Tadic*, above n 4, at [70]. Louise Arimatsu and Mohbuba Choudhury *The Legal Classification of the Armed Conflicts in Syria, Yemen and Libya* (Chatham House, London, 2014) at 17-18. But see, Laurie Blank and Geoffrey Corn “Losing the Forest for the Trees: Syria, Law, and the Pragmatics of Conflict Recognition” (2013) 46(3) *Vanderbilt Journal of Transnational Law* 693 at 731.

10 Rome Statute of the International Criminal Court 2187 UNTS 3 (opened for signature 17 July 1998, entered into force 1 July 2002).

11 Inter-American Commission on Human Rights *Abella v Argentina*, Rep No 55/97, Case No 11.127: Argentina, OEA/Ser/L/V/II.97, Doc 38, 18 November 1997 at [619]-[620]. But see, Mohbuba Choudhury, Aleksandra Bojovic and Louise Arimatsu “Chapter 6 Year in Review 2011” in Michael Schmitt and Louise Arimatsu (eds) (2011) 14 *Yearbook of International Humanitarian Law* 176 at 179.

12 Marco Sassoli and Laura Olson “The Relationship between International Humanitarian and Human Rights Law Where it Matters: Admissible Killings and Internment of Fighters in Non-International Armed Conflicts” (2008) 90(871) *International Review of the Red Cross* 599 at 609.

reference to the protection of civilians, customary IHL states that civilians are to be protected from attack unless and for such time as they participate directly. This leads to the question of who is a civilian in a NIAC.<sup>13</sup> According to customary law, those not members of a State's armed forces are civilians but practice is not clear as to whether members of armed opposition groups are civilians.<sup>14</sup> Recommendation II of the International Committee of the Red Cross's (ICRC) *Interpretative Guidance on the Notion of Direct Participation in Hostilities* states that civilians are all persons who are not members of State armed forces but it also includes organized armed groups of a party to the conflict so that both groups would be entitled to protection against direct attack unless and for such time as they took a direct part in hostilities.<sup>15</sup> Article 1 of APII infers that civilians are all persons who are not members of dissident armed forces or other organised armed groups under responsible command of such forces or groups. Consequently, fighters of armed groups, as well as those actively involved in hostilities at any particular time, lose their protection from attack<sup>16</sup> although there is the question of whether such attacks are only permissible when such individuals are actually using force at the time.<sup>17</sup>

The question of whether IHL applies also arises in the context of Chapter VII peace enforcement actions where the use of force is framed by the particular mandate of the operation. Whilst such operations do not fit the parameters of armed conflict as conceived by IHL, failure to apply IHL contravenes the basic – and generally accepted – principle that the *jus in bello* is independent of the *jus ad bellum*.<sup>18</sup> Furthermore, section 1(1) of the *Secretary-General's Bulletin Observance by United Nations Forces of International Humanitarian Law* provides that UN forces actively engaged as combatants in situations of armed conflict are bound by IHL and that the Bulletin is “accordingly applicable in enforcement actions”.<sup>19</sup> However, the application of IHL must be read in light of art 103 of the UN Charter which prioritises UN Member States' obligations under the Charter over

13 Henckaerts and Doswald-Beck, above n 1, Rule 6, at 19.

14 At Rule 5, at 17.

15 Nils Melzer *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (ICRC, Geneva, 2009) at 27.

16 At recommendations IV and V.

17 At recommendation VI. See also Annyssa Bellal and Louise Doswald-Beck “Evaluating the Use of Force During the Arab Spring” (2011) 14 Yearbook of International Humanitarian Law 3 at 4; Sandesh Sivakumaran “Re-envisioning the International Law of Internal Armed Conflict” (2011) 22(1) European Journal of International Law 219 at 247.

18 John Cerone “International Enforcement in NIAC: The Case of Libya” in Kenneth Watkin and Andrew Norris (eds) *Non-International Armed Conflict in the 21st Century* (US Naval War College, Rhode Island, 2012) at 393, n 63.

19 ST/SGB/1999/13 (1999), Section 1.1. See also Charles Garraway “Applicability and Application of International Humanitarian Law to Enforcement and Peace Enforcement Operations” in Terry Gill and Dieter Fleck *The Handbook of International Law of Military Operations* (OUP, Oxford, 2010) at [5.26].

their obligations under any other international agreement,<sup>20</sup> such as the IHL regime. Enforcement actions also raise the issue of the internationalisation of conflict,<sup>21</sup> on which there are a range of views.<sup>22</sup>

There is the final question of how to respond to violations of IHL. Acts such as summary execution, rape and torture are IHL violations but conflict status determines whether they are grave breaches, which only applies in IAC. The significance of finding an act to be a grave breach of the Geneva Conventions is that States are placed under a responsibility to find and prosecute the perpetrators.<sup>23</sup> Notwithstanding general international law on the responsibility of States<sup>24</sup> and/or International Organisations for violations of IHL,<sup>25</sup> third States can also violate IHL where their support for belligerent forces that violate IHL is itself a violation of the Geneva Conventions' Common Article 1 (CA1) obligation to undertake to respect and to ensure respect for the Conventions in all circumstances,<sup>26</sup> which applies in IAC and

- 20 Charter of the United Nations 1 UNTS XVI (24 October 1945). The ICJ has held that the powers of the Security Council must be exercised in accordance with general principles of international law (*Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident in Lockerbie (Request for the Indication of Provisional Matters)* [1992] ICJ Rep 3 at [56]. The Court regards IHL as part of customary international law (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)*) [2007] ICJ Rep 89 at [89]. See also Alexander Orakhelashvili "The Acts of the Security Council: Meanings and Standards of Review" (2007) 14 Max Planck Yearbook of International Law 143 at 149; Chris de Cock "Operation Unified Protector and the Protection of Civilians in Libya" (2012) 14 Yearbook of International Humanitarian Law 213 at 218.
- 21 Garraway, above n 19, at [5.26]; Marco Sassoli "Ius ad Bellum and Ius in Bello – the Separation between the Legality of the Use of Force and Humanitarian Rules to be Respected in Warfare: Crucial or Outdated?" in Michael Schmitt and Jelena Pejic *International Law and Armed Conflict: Exploring the Faultlines, Essays in honour of Yoram Dinstein* (Brill, Leiden-Boston, 2007); Kechihiro Okimoto "Violations of International Humanitarian Law by United Nations Forces and their Legal Consequences" (2003) 6 Yearbook of International Humanitarian Law 199.
- 22 According to the mixed school, the existing NIAC will proceed in parallel with the IAC taking place between the forces of the territorial State and the intervening State, with each conflict being governed by its own legal regime. Conversely, the objective or global school argues that any foreign intervention, regardless of whether it is in support of the government or insurgents, internationalises the conflict as a whole, so that CA2 applies to all hostilities. Within the latter school is the moderate objective view, which accepts that only intervention on behalf of the opposition internationalises conflict. See generally Katie Johnstone "Transformations of Conflict Status in Libya" (2012) 17(1) Journal of Conflict and Security Law 81.
- 23 First Geneva Convention, above n 2, art 50; Second Geneva Convention, above n 2, art 51; Third Geneva Convention, above n 2, art 130; Fourth Geneva Convention, above n 2, art 147; Protocol I, above n 3, art 85.
- 24 Articles on Responsibility of States for Internationally Wrongful Acts GA Res A/56/83, A/Res/56/83 (2001); *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep14 at [46] [*Nicaragua* case].
- 25 Draft Articles on the Responsibility of International Organizations GA Res A/66/10, A/Res/66/10(2011). UN Charter, above n 20, art 105.
- 26 Olivier Corten and Vaïos Koutroulis "The Illegality of Military Support to Rebels in the Libyan War: Aspects of Jus Contra Bellum and Jus in Bello" (2013) 18(1) Journal of Conflict and Security Law 59 at 62; Fritz Kalshoven "The Undertaking to Respect and Ensure Respect in all Circumstances: From Tiny Seed to Ripening Fruit" (1999) 2 Yearbook of International Humanitarian Law 3.

NIAC.<sup>27</sup> There is some uncertainty as to whether the rule applies to States irrespective of whether they are a party to a conflict or only when they are a party to the conflict, although it has been suggested that the former approach is to be taken.<sup>28</sup> In addition to these State-centric responses, the application of IHL triggers the relevant war crimes provisions of ICL as art 8(2) of the Rome Statute provides for individual criminal responsibility for war crimes, including grave breaches and other violations of IHL, that are committed in NIAC and IAC.<sup>29</sup>

Thus, even this brief overview of some of the core aspects of IHL reveals it to be a complex area of law. However, as the ensuing paragraphs reveal, the conduct of hostilities and suffering endured by those caught up in the armed conflict of the Arab Spring require that such challenges be confronted and overcome so as to reaffirm the humanitarian principles underpinning the conduct of armed conflict.

### III. APPLICATION OF IHL IN THE ARAB SPRING

Although the political revolutions of the Arab Spring led to significant numbers of deaths ranging from over 300 in Tunisia, to over 900 in Egypt and over 1,000 in Yemen in 2011 alone,<sup>30</sup> the organised nature of these protests and the related violence did not meet the NIAC threshold and political solutions succeeded in stemming much of the violence which remained governed by domestic law and international human rights law. In contrast, the almost immediate use of heavy force by both the Libyan and Syrian Governments to counter political protests was itself quickly met with an armed and organised opposition triggering the rules of IHL.<sup>31</sup>

#### *A. The Conflict in Libya*

The violence in Libya reveals the complexities entailed in the application of the rules of IHL. Political demonstrations in Libya began in mid-February in Tripoli and quickly spread across the state. Government forces responded violently.<sup>32</sup> By late February, the protestors were sufficiently armed, organised and exercised sufficient command and control to engage with Gaddafi forces.

27 Henckaerts and Doswald-Beck, above n 1, Rule 144.

28 Corten and Koutroulis, above n 26, at 83-84.

29 Rome Statute of the International Criminal Court, above n 10.

30 BBC News "Arab Uprisings" (5 May 2014) <www.bbc.com>.

31 However, the presence of organised armed groups engaged in heavy fighting with government forces in the Sa'ad region, as well as situations of combat between government forces and Al Qaeda comprised a NIAC, so that CA3 and APII, which Yemen ratified in 1990, applied: Arimatsu and Choudhury, above n 9, at 23-25; Marie Allansson, Jonas Baumann, Samuel Taub, Lotta Themnér and Peter Wallenstein "The First Year of the Arab Spring" (2012) SIPRI Yearbook 46.

32 "Massacres reported as Gaddafi imposes news blackout" *The Guardian* (online ed, London, 18 February 2011); "Libya protests: 140 'massacred' as Gaddafi sends in snipers to crush dissent" *The Telegraph* (online ed, London, 20 February 2011); "Libya launches airstrikes

As an opposition group they captured control of large parts of rural and urban Libya and the emergence of a unified command in eastern Syria suggests that the criterion of sufficient organisation was met.<sup>33</sup> On 26 February 2011, the Security Council urged the Libyan authorities to “respect international humanitarian law”,<sup>34</sup> confirming that it considered the fighting in Libya to have risen to the level of armed conflict. On 10 March, the ICRC also recognised that an armed conflict was occurring in Libya.<sup>35</sup> Whilst CA3 applied, at a minimum, the Libyan conflict is notable for attempts to apply APII.<sup>36</sup> The role of the National Transition Council (NTC), the main armed opposition group in the conflict is significant because, as early as 25 March 2011, it issued a code of conduct for treatment of detainees, which aimed at compliance with Geneva Convention III.<sup>37</sup> By the end of August it had openly affirmed its commitment to respecting all four Geneva Conventions and the two Additional Protocols. The NTC also commissioned and disseminated guidelines on the law of armed conflict to rebel troops.<sup>38</sup>

On 17 March 2011, the Security Council adopted Resolution 1973 and, exercising its Chapter VII peace enforcement powers, authorised UN member States to “use all necessary means” to enforce a flight ban and “to protect civilians and civilian populated areas under threat of attack.”<sup>39</sup> The scope of the mandate was delineated by paragraph 4’s exclusion of “a foreign occupation force of any form on any part of Libyan territory” and its clarification that “all necessary means” was not subject to the arms embargo contained in Resolution 1970. In addition, paragraph 5 stipulated that the mandate’s no fly zone was established “in order to help civilians” (although the preamble also noted that such a ban would be a decisive step for the cessation of hostilities in Libya). The ensuing air operations – comprising fighter jets equipped with Tomahawk missiles – by a coalition of the willing in Libyan airspace generated an IAC between Gaddafi forces and NATO states, thereby internationalising the conflict. The International Commission of Inquiry was clear that the IAC was legally separate to the

to quell protests as Muammar Gaddafi’s rule teeters on brink” *The Australian* (online ed, Sydney, 22 February 2011); Al Jazeera “Gaddafi vows to crush protesters” (26 February 2011) <[www.aljazeera.com](http://www.aljazeera.com)>.

33 Human Rights Council *Report of the International Commission of Inquiry to investigate all alleged violations of international human rights law in the Libyan Arab Jamahiriya* A/HRC/17/44 (2012) at [62]-[65] [Human Rights Council Libya Report].

34 S/Res/1970 (2011) at [2(a)].

35 International Committee of the Red Cross (ICRC) “Libya: Urgent to Apply the Rules of War” (press release, 10 March 2011). See also Cerone, above n 18, at 377.

36 Arimatsu and Choudhury, above n 9, 38.

37 Libyan Interim National Council “The Treatment of Detainees and Prisoners” (25 March 2011) <[www.libyauprisingarchive.com](http://www.libyauprisingarchive.com)>.

38 National Transitional Council “NTC Reaffirms its Commitments to International Laws Concerning Armed Conflict” (press release, 21 August 2011); Iain Scobbie “Operationalising the Law of Armed Conflict for Dissident Forces in Libya” (31 August 2011) EJIL: Talk! <[www.ejiltalk.org/](http://www.ejiltalk.org/)>.

39 S/Res/1973 (2011) at [4].

continuing NIAC between opposition forces and pro-Gaddafi forces, and thus the former was a “co-existing international armed conflict.”<sup>40</sup> Given the view that IHL applies to enforcement actions, CA2’s regime came into effect so that Libyan government forces and contributing States were bound accordingly. That said, it could be argued the authorisation of all necessary measures to protect civilians and civilian populations (primarily from government forces), the side-lining of the arms embargo of Resolution 1970 and the imposition of the no fly zone amounted to an intervention which did primarily benefit the opposition thereby internationalising the conflict on the basis of the moderate objective view of the internationalisation of conflicts.<sup>41</sup>

The question of conflict status emerged once again in mid-July when over 30 governments and international and regional organisations recognised the NTC as the “legitimate authority of Libya.”<sup>42</sup> Consequently, any armed conflict between the delegitimised Libyan forces and the coalition forces was no longer inter-State so that CA3 and APII applied again. After the overthrow of the Gaddafi regime and Gaddafi’s death in October 2011, the NTC declared the liberation of Libya.<sup>43</sup> The Security Council subsequently terminated its authorisation for the no-fly zone and civilian protection mission<sup>44</sup> and NATO ended its operations.<sup>45</sup> Any remaining armed conflict remained governed by CA3 and APII.<sup>46</sup>

The fluid nature of the conflict highlights the complexity of determining what rules govern the conduct of hostilities. The practical reality of which IHL regime applies can be seen in relation to the treatment of detained fighters, as only those detained during the IAC would have POW privileges, whereas those detained during the NIAC could be subject to criminal sanctions.<sup>47</sup> Nonetheless, CA3 suggests that greater protection can be afforded to those fighters detained in the NIAC, a point expanded upon in arts 4 and 5 of APII. Also noteworthy is art 4A(3) of the Third Geneva Convention which allows for POW status to be accorded to the regular army of the defeated party,<sup>48</sup> a view consonant with the NTC’s early

40 Human Rights Council Libya Report, above n 33, at [66].

41 Johnstone, above n 22, at 95.

42 Stefan Talmon “The Difference between Rhetoric and Reality: Why an Illegitimate Regime May Still be a Government in the Eyes of International Law” (3 March 2011) EJIL:Talk! <[www.ejiltalk.org/](http://www.ejiltalk.org/)>; Dapo Akande “Which Entity is the Government of Libya and Why does it Matter?” (16 June 2011) EJIL:Talk! <[www.ejiltalk.org/](http://www.ejiltalk.org/)>; “Libyan Rebels Win International Recognition as Country’s Leaders” *The Guardian* (London, 15 July 2011); Johnstone, above n 22, at 107-108.

43 BBC News “Libya’s New Rulers Declare Country Liberated” (23 October 2011) <[www.bbc.com](http://www.bbc.com/)>.

44 S/Res/2016 (2011).

45 NATO “Last Air Mission of Unified Protector Concluded” (31 October 2011) <[www.nato.int](http://www.nato.int)>.

46 David Kirkpatrick “In Libya, Fighting May Outlast the Revolution” *New York Times* (online ed, New York, 1 November 2011).

47 Bellal and Doswald-Beck, above n 17, at 4.

48 Johnstone, above n 22, at 113.



efforts in this regard. However, evidence suggests that many combatants were not afforded such protection but rather suffered the treatment clearly prohibited by CA3.<sup>49</sup> The circumstances of Gaddafi's capture by rebels and his subsequent death also raises some questions for the NIAC rule which permits targeting only where the individual is taking a direct part in hostilities.<sup>50</sup> In terms of the protection of civilians, there is also a sharp distinction between the protection afforded to those caught up in the IAC between NATO and Libyan Government forces by the extensive provisions of the Fourth Geneva Convention<sup>51</sup> and those caught up in the NIAC between opposition forces and pro-Gaddafi forces, which was governed by CA3 and APII. However, once again, evidence suggests that, irrespective of which rules applied, both sides in the Libyan conflict committed atrocities against civilians.<sup>52</sup>

There is the additional issue of the interplay between IHL rules and Resolution 1973's mandate to take all necessary measures to protect civilians and civilian populated areas under (threat of) attack.<sup>53</sup> The view that IHL binds the Security Council, as a UN body, and that it applies to peace enforcement operations suggests that Resolution 1973 should be interpreted in conformity with IHL as there was an IAC between Gaddafi forces and NATO forces, which were operationalising the Council's mandate. IHL then would require, in the implementation of the mandate: a clear nexus between protection of civilians and the conduct of hostilities; targets to be limited exclusively to those furthering the specific military objectives (the advantage expected from the attack as a whole, not from isolated or specific

49 Richard Sollom and Hani Mowafi *32nd Brigade Massacre: Evidence of War Crimes and the Need to Ensure Justice and Accountability in Libya* (Physicians for Human Rights, New York, December 2011).

50 Knut Ipsen "Combatants and Non-Combatants" in Gill and Fleck, above n 19, at 314; Dapo Akande "Clearing the Fog of War? The ICRC's Interpretive Guidance on Direct Participation in Hostilities" (2010) 59(1) *International and Comparative Law Quarterly* 180 at 186; Jeremy Bowen "Gaddafi death: The bloody birth of a new Libya" (22 October 2011) <www.bbc.com>; Human Rights Council *Report of the International Inquiry on Libya A/HRC/19/68* (8 March 2012) at [33]-[34]; Human Rights Watch "Death of a Dictator Bloody Vengeance in Sirte" (HRW, New York, 17 October 2012).

51 Articles 4 and 5 and Part IV.

52 See generally, Human Rights Council, above n 50, *Amnesty International Amnesty International Annual Report: Country Report – Libya* (AI, London 2012); Katherine Close and Richard Sollom *Witness to War Crimes: Evidence from Misrata, Libya* (Physicians for Human Rights, New York, 22 March 2011); Human Rights Watch "Libya: End Indiscriminate Attacks in Western Mountain Towns" (New York, 9 May 2011); Human Rights Watch "Libya: Opposition Forces Should Protect Civilians and Hospitals" (New York, 13 July 2011).

53 Christian Henderson "International Measures for the Protection of Civilians in Libya and Cote d'Ivoire" (2011) 60(3) *International and Comparative Law Quarterly* 767, at 772-775; Geir Ulfstein and Hege Fosund Christiansen "The Legality of the NATO bombing in Libya" (2013) 62(1) *International and Comparative Law Quarterly* 159 at 171.

parts of the attack);<sup>54</sup> and use of force sufficient only to repel the source of the violence or attack (or threat thereof) against Libyan civilians.<sup>55</sup> In spite of such limitations, it has been alleged that NATO bombings resulted in civilian death, injury and/or the destruction of civilian objects,<sup>56</sup> and it has been recommended that there be further investigations of some attacks on targeted areas which “showed no evidence of military utility” and resulted in “confirmed civilian casualties.”<sup>57</sup>

However, there are other complexities in the interplay between IHL and Resolution 1973’s mandate. The view that the enforcement action was to be informed by IHL would have meant that only Gaddafi forces that were actually threatening or attacking civilians or the civilian population could be legitimately targeted, an approach which would be congruent with the mandate’s *jus ad bellum*. However, there are tensions between this view and one whereby the mandate’s use of force could have permitted military units of the Gaddafi regime to be attacked at any time on the rationale that such attacks would contribute to the protection of civilians. In addition, the mandate also meant that force could also be used against rebels. As the IAC regime applied only to the conflict between NATO forces and Gaddafi forces, arguably civilians and civilian populated areas under (threat of) attack by rebels were left with a lesser degree of protection from NATO attacks as the NIAC treaty regime does not contain the elaborate rules of distinction between military and civilian targets and makes no explicit mention of the principle of proportionality in target selection as required by the CA2 legal regime. This outcome seems incongruent with Resolution 1973’s mandate in that regard. Further potential disjuncture between what IHL permits regarding use of force and what paragraph 4 of Resolution 1973 authorised raises the question of whether Gaddafi was a legitimate target on the basis that that civilians and civilian populated areas were under a constant threat of attack as a result of Gaddafi’s policies and orders. A further aspect of this question is the extent to which such targeting, ostensibly for the protection of civilians may have indirectly advantaged

54 Stefan Oeter “Methods and Means of Combat” in Gill and Fleck, above n 19 at [4.44]. Protocol I, above n 3, arts 48 and 51(5)(b).

55 Nicaragua case, above n 24, at [176]; *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion* [1996] ICJ Rep 226 at [41].

56 Ishaan Tharoor “How Many Innocent Civilians Did NATO Kill in Libya?” *Time* (New York, 16 May 2012); Human Rights Watch “Unacknowledged Deaths Civilian Casualties in NATO’s Air Campaign in Libya” (New York, 14 May 2012); CJ Chivers and Eric Schmidt “Strikes on Libya by NATO, an Unspoken Civilian Toll” *New York Times* (online ed, New York, 17 December 2011); Ernesto Londono “NATO confirms it hit wrong target, killing Libyan civilians” *The Washington Post* (online ed, Washington DC, 19 June 2011); BBC News “Counting the cost of NATO’s mission in Libya” (31 October 2011) <www.bbc.com>.

57 Human Rights Council, above n 50, at [818].

opposition forces in their NIAC with the pro-Gaddafi forces<sup>58</sup> where ‘threat of attack’ was used to justify strikes on more indirect threats, such as buildings and infrastructure of the regime.<sup>59</sup>

Although the Libyan conflict illustrates the complexity of IHL, what is regrettably clear is that many civilians and detainees were not afforded the protection of IHL’s basic humanitarian principles. The International Commission of Inquiry recorded violations by both opposition and Government forces and the issue of civilian deaths at the hands of NATO has been largely resolved for now.<sup>60</sup> The next step in the process is that of determining accountability for violations so as to avoid impunity by all actors – national and international – in the conflict.

### *B. The Conflict in Syria*

Similarly to the Libyan protests, the Syrian government responded violently to civil unrest with mass arrests, torture of detainees, the use of snipers to kill protesters, refusal of medical treatment to the wounded and the besieging and shelling of cities.<sup>61</sup> The result was the deaths of thousands of protestors and hundreds of others by the end of 2011.<sup>62</sup> Between February and July 2012, the situation further deteriorated and, by July, the intensity and duration of the conflict combined with the increased organisational capabilities of the Free Syrian Army (FSA) met the legal threshold for an NIAC.<sup>63</sup> Whilst the Libyan opposition was largely cohesive, the Syrian opposition can be characterised by its inchoate nature so that, by September 2013, the conflict comprised up to 1,000 rebel groups controlling around 100,000 fighters.<sup>64</sup> The observance of IHL has been inconsistent<sup>65</sup> and not all groups have a clear chain of command to coordinate operations, arms

58 de Cock, above n 20, at 217-218.

59 BBC News “Libya Crisis: NATO Strike Hits Gaddafi Compound” (25 April 2011) <www.bbc.com>.

60 Human Rights Council Libya Report, above n 33, at [235].

61 Human Rights Watch “We’ve Never Seen Such Horror” (New York, June 2011); Human Rights Watch “We live as in war” (New York, November 2011).

62 Allansson and others, above n 31, at 50; BBC News “Syria: The story of the conflict,” (14 March 2014) <www.bbc.com>.

63 Human Rights Council *Third Report of the Commission of Inquiry on the Syrian Arab Republic* GA Res A/HRC/21/50 (2012) at [3] and Annex II, at [2]; BBC News “The Syrian Arab Republic in Civil War, Red Cross says” (15 July 2012) <www.bbc.com>; BBC News “Syria in civil war, says UN official Herve Ladsous” (12 June 2012) <www.bbc.com>. Syria has not ratified APII but is bound by customary rules of IHL regarding NIACs.

64 Charles Lister “Syria’s insurgency beyond Good Guys and Bad Guys” *Foreign Policy* (online ed, 9 September 2013). Rebel groups include the Islamic Front, the Syrian National Council; the Islamic State of Iraq and the Levant (ISIS), the Syrian jihadist rebel group, al-Nusra Front, and the largely defunct the Syrian Islamic Front (SIF) and Syrian Islamic Liberation Front and a series of other independent groups: BBC News “Syria crisis: Guide to armed and political opposition(13 December 2013) <www.bbc.com>; Human Rights Watch *World Report 2014 – Syria* (HRW, New York, 2014) [HRW World Report Syria].

65 “Sometimes you cannot apply the rules – Syrian rebels and IHL” *IRIN News* (Dubai, 13 May 2013).

supplies or control over their fighters who have been increasingly committing crimes, much of them sectarian in nature.<sup>66</sup> Clashes between the FSA and ISIS, as well as between ISIS and al-Nusra Front have also been reported.<sup>67</sup>

Since July 2012, IHL violations in the treatment of civilians and *hors de combat* have been documented including murder, mutilation, rape, torture or other cruel, humiliating or degrading treatment, summary or arbitrary executions and hostage taking by Government forces (and pro-Government militia) and opposition groups.<sup>68</sup> Violations of IHL regarding the conduct of hostilities including unlawful attacks (shelling and aerial bombardment of civilian areas, use of snipers, car and suicide bombs in indiscriminate or deliberate attacks on civilians, and civilian installations such as power stations and water supply) and attacks on protected persons and objects (medical and religious personnel, journalists, hospitals and cultural property) have also been recorded.<sup>69</sup> Opposition groups are also using children for combat and other military purposes and have used schools as military bases, barracks, detention centres, and sniper posts.<sup>70</sup> Government forces have besieged a number of cities blocking access to food, water and medical transfers resulting in starvation amongst some civilians.<sup>71</sup> It has also restricted the delivery of humanitarian assistance whilst fighting between rebel groups has also threatened the delivery of humanitarian aid.<sup>72</sup> The use of chemical

66 Lina Sinjab “Syria rebel rifts deepen as Islamist ranks swell,” (25 September 2013) <www.bbc.com>; Human Rights Watch “Open Letter to the Leaders of the Syrian Opposition Regarding Human Rights Abuses by Armed Opposition Members” (New York, 20 March 2012).

67 Sinjab, above n 66; Al Jazeera “Syria FSA leaders condemn foreign involvement” (29 May 2014) <www.aljazeera.com>; “Rebel infighting spreads across Syria” (6 January 2014) <www.aljazeera.com>.

68 Human Rights Council *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic A/HRC/25/65* (2014) at [20]-[84]; Amnesty International “Rule of Fear: Isis Abuses in Detention in Northern Syria” (London, 19 December 2013); Amnesty International “Children among 15 civilians summarily killed in northern Syria” (London, 5 June 2013); Human Rights Watch, *Annual Report 2014: Country Report – Syria* (HRW, New York, 2014).

69 Human Rights Watch “Syria: Car Bombs, Mortars Hit Residential Areas” (New York, 1 May 2014); Human Rights Watch “Syria: Strong Evidence Government Used Chemicals as a Weapon Civilian Casualties in Barrel Bomb Attacks on 3 Towns” (New York, 13 May 2014); Human Rights Watch “Syria: New Barrel Bombs Hit Aleppo Attacks Defy UN, Hit Medical Facilities” (New York, 28 April 2014); Human Rights Watch “Death from the Skies: Deliberate and Indiscriminate Air Strikes on Civilians” (New York, 10 April 2013); Physicians for Human Rights “Syria’s Medical Community Under Assault” (PHR, New York, 2014); Amnesty International *Shooting the Messenger Journalists Targeted by all Sides in Syria* (AI, London, 2013); Amnesty International “Women, Children Held Hostage in Syria” (London, 25 October 2013); OHCHR, *Open Wounds Torture and ill-treatment in the Syrian Arab Republic* (OHCHR, Geneva, 14 April 2014).

70 HRW World Report Syria, above n 64; Amnesty International *2013 Report, The State of the World’s Human Rights* (AI, London, 2014) at 258-261.

71 Amnesty International “Briefing note on sieges across Syria” (press release, 16 April 2014).

72 Human Rights Watch “Syria: Defying Security Council on Aid Access” (New York, 28 March 2014).

weapons, allegedly by both sides,<sup>73</sup> has been a distinguishing feature of the Syrian conflict. Even though Syria did not accede to the Chemical Weapons Convention (CWC)<sup>74</sup> until October 2013 – in a deal brokered by Russia amidst threats of a limited military strike by the US<sup>75</sup> – the use of chemical weapons in NIAC (and IAC) was already prohibited by customary IHL.<sup>76</sup> However, the CWC goes further and requires the Syrian government to prevent and suppress any activity prohibited by the convention, including the use of chemicals as weapons.<sup>77</sup> Thus, the treaty applies to all actors in the conflict.<sup>78</sup>

Despite the presence of fighters from a range of States, including New Zealand,<sup>79</sup> the supply of arms from third States,<sup>80</sup> and the threat of a US military strike after the Ghouta chemical weapons attack, the conflict in Syria retains its non-international status thus far. In July 2013, it was estimated that on average 5,000 people a month were being killed during the conflict.<sup>81</sup> By May 2014, the death toll had surpassed 160,000, a third of whom were civilians.<sup>82</sup> Evidence shows that, in many instances, CA3's minimum requirement of humane treatment of those taking no direct part in hostilities and its list of prohibited acts have been disregarded. Rather, civilians have borne the brunt of the unrelenting spiral of violence<sup>83</sup> and, in that regard, the conflict epitomises a disregard for basic IHL.

### *C. Where to From Here? Responding to Violations of IHL in Libya and Syria*

Although it may have failed in its protective role as regards the conflicts in Libya and Syria, IHL retains a further purpose, namely the legal basis by which to hold alleged violators to account, be they individuals or States.

73 UN Office for Disarmament Affairs, *United Nations Mission to Investigate Allegations of the Use of Chemical Weapons in the Syrian Arab Republic – Final Report* (UNODA, New York, 12 December 2013) at 2-6.

74 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction 1974 UNTS 45 (opened for signature 3 September 1993, entered into force 29 April 1997) [CWC].

75 US State Department *Framework for Elimination of Syrian Chemical Weapons* (press release, 14 September 2013); UN Security Council “Security Council Requires Scheduled Destruction of Syria’s Chemical Weapons, Unanimously Adopting Resolution 2118” (press release SC/11135, 27 September 2013).

76 Rule 74, above n 1, at 259. See also Jillian Blake and Aqsa Mahmud “A Legal ‘Red Line’?: Syria and the Use of Chemical Weapons in Civil Conflict” (2013) 61 *UCLA Law Review Discourse* 244 at 255-257.

77 CWC, above n 74, art 1.

78 At art 1.

79 “Kiwis fighting in Syria – PM” *New Zealand Herald* (Auckland, 10 February 2014); Bevan Hurley “First Kiwi casualty in Syrian war” *New Zealand Herald* (Auckland, 8 June 2014).

80 “Britain and France using Qatar to arm Libyan rebels” *The Times* (online ed, London, 25 June 2011); Colum Lynch “UN Sanctions Panel Investigate French/ Qatari arms transfers to Libya’s rebels” *Foreign Policy* (15 March 2012); Kim Sengupta “Revealed: What the West has given Syria’s rebels” *The Independent* (online ed, London, 11 August 2013).

81 United Nations Security Council, 7000th meeting S/PV.7000 (2013).

82 CBC News “Syria war death toll tops 160,000” (19 May 2014) <www.cbc.ca>.

83 OHCHR “Commission of Inquiry on Syria: civilians bearing the brunt of the ‘unrelenting spiral of violence’ (press release, 12 September 2012).

IHL violations trigger potential international legal responses ranging from grave breaches, third State violations of CA1, State Responsibility and/or Responsibility on the part of International Organisations for violations of international law, and individual criminal responsibility for war crimes under the Rome Statute.

The Geneva Conventions and customary humanitarian law require States to investigate, and where appropriate, prosecute alleged grave breaches.<sup>84</sup> However, as this regime only operates in response to violations occurring during an IAC, it is only applicable to the conflict between NATO and pro-Gaddafi forces. The question of responsibility of States or International Organisations for internationally wrongful acts may arise in relation to how Resolution 1973's mandate facilitated regime change in Libya rather than civilian protection, an evolution which does not seem to sit well with the limitations contained in paragraphs 4 and 6 of the Resolution itself. The shift in mandate also conflicts with the UN Charter's prioritisation of state sovereignty and territorial integrity,<sup>85</sup> which is reflective of customary international law.<sup>86</sup> Similarly, States that provided support for opposition forces, both in Libya and Syria, may also face some potential problems given allegations that they violated IHL, if it was proven that they exercised effective control over IHL violators.<sup>87</sup> There is also the separate question of whether external support for opposition forces could itself amount to a possible IHL violation under CA1,<sup>88</sup> which binds all States, irrespective of whether they are party to the conflict. Thus, given the level of support by third States for the Libyan opposition, CA1 raises some interesting issues. Whilst the degree of support to both parties in the Syrian conflict is more nebulous, foreign support for both the Syrian government and the array of opposition forces means that the application of CA1 cannot be discounted.

To date, moves towards accountability stem from the ICC regime with its focus on individual criminal responsibility, as opposed to the State-centric legal regimes above. As neither Libya nor Syria is a party to the Rome Statute, ICC jurisdiction has been dependent upon a Security Council referral.<sup>89</sup> The Security Council unanimously referred the situation in Libya to the ICC in

84 Henckaerts and Doswald-Beck, above n 1, Rule 158, at 607.

85 UN Charter, above n 20, art 2.

86 GA Res 25/2625 A/Res/25/2625 (1970) at [1]; *Nicaragua* case, above n 24, at [187-90]; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136 at [87]; *Case concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* [2005] ICJ Rep 168 at [162]. See Corten and Koutroulis, above n 26, at 64-65.

87 United Nations Security Council, 6647th meeting S/PV.6647 (2011). The International Commission of Inquiry for Libya was "satisfied that the actions of NATO and other foreign States involved [were] not exercising control over the military actions of either of the parties to the non-international armed conflict": Human Rights Council Libya Report, above n 33, at [66].

88 Corten and Koutroulis, above n 26, at 62.

89 Rome Statute, above n 10, art 13.

February 2011.<sup>90</sup> Although the ensuing proceedings relate to crimes against humanity rather than war crimes,<sup>91</sup> the ICC prosecutor has previously stated that NATO forces, rebel soldiers and members of the Gaddafi regime would be investigated for war crimes and allegations of regime change in Libya raises the question of whether such actions comprise the crime of aggression.<sup>92</sup> Despite ever increasing evidence of war crimes, to date, the Security Council has failed to refer the situation in Syria to the ICC,<sup>93</sup> amid concerns regarding financing and accountability.<sup>94</sup>

## V. CONCLUSION

Although it may be apt to describe the Arab Spring as a testing time for IHL, the reality is that such challenges are no basis for either States or Non-State Actors to disregard the basic humanitarian principle of alleviating the suffering caused by conflict, particularly the suffering of those playing no direct part in that conflict. The litany of abuses in both conflicts is testimony to the fact that such challenges cannot facilitate impunity for breaches of IHL and the war crimes committed during the course of these armed conflicts.

90 SC/Res/1970 (2011) at [4].

91 *The Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senusi* ICC Appeals Chamber ICC-01/11-01/11-T-5,21 May 2014.

92 Cerone, above n 18, at 386.

93 Al Jazeera “UN bid to refer Syria to ICC vetoed” (23 May 2014) <[www.aljazeera.com](http://www.aljazeera.com)>; Ian Black “Russia and China veto UN move to refer Syria to international criminal court” *The Guardian* (online ed, London, 22 May 2014); Tiina Intelmann “The UN Security Council and the ICC: No Accountability in Syria for Now” *Huffington Post* (online ed, New York, 23 May 2014).

94 Kristen Boon “Implications of Security Council Veto on ICC Referral of Syrian Situation” *Opinio Juris* (19 June 2014); What’s in Blue “Syria: Vote on ICC referral” (15 May 2014) <[www.whatsinblue.org](http://www.whatsinblue.org)>.

