International Law PP 2014/01

The Legal Classification of the Armed Conflicts in Syria, Yemen and Libya

Louise Arimatsu

Chatham House

Mohbuba Choudhury

United Nations High Commissioner for Refugees

March 2014

BACKGROUND AND METHODOLOGY

On 13–14 March 2013 a two-day workshop was held at Chatham House to consider what law applied to the situations of violence in respect of Syria, Yemen and Libya during the period 2010–2013.[1] These three case studies were chosen because each appeared to raise specific legal questions meriting examination. This paper is based on the discussions at the workshop, and consequently the commentary reflects events at that time.

Three country experts[2] were invited to participate in the workshop to:

- Help the lawyers attending the workshop reach a better understanding of the history of the violence in each of the countries;

- Provide an insight into the prevailing situation on the ground; and

- Identify and correct any misconceptions and/or misinformation.

To facilitate a dialogue between the lawyers and the country experts, the participants were sent background briefing packs one week before the workshop. The packs contained the following: maps; lists of the known armed groups (state and non-state); a chronology of events; UN Security Council resolutions; reports and all relevant documentation issued by international and regional bodies concerning the situation of violence in each of the countries; and a list of factual questions (for the country experts) that would enable the lawyers to make a legal assessment.

The organizers were cognizant of a number of underlying problems posed by this exercise. Given the time constraint, only one expert per country could be invited to share his/her expert evidence with the group. This shortcoming was partly overcome by providing the legal experts with supplementary documentary evidence, including reports by fact-finding missions. The organizers also recognized that ascertaining all the relevant facts to enable a sound legal assessment would prove problematic given the level of ongoing violence in all three states. An equally intractable problem was that the questions identified by the lawyers as relevant were likely to shape and thus restrict the scope of the discussions.

The workshop was divided into four sessions. The first three sessions were devoted to an examination of the facts in respect of each of the case studies.[3] The final session was set aside to consider the legal issues that had been identified during the previous sessions. A conscious decision was made not to appoint a chair in the hope that a far more fluid and interactive dialogue among the participants would be promoted. This format proved successful in that it enabled the lawyers to intervene as and when appropriate, allowing a series of 'conversations' and exchanges to take place.

This paper first outlines the legal framework that informed the trajectory and content of questions put by the lawyers to the country experts. This is followed by summaries of the respective sessions based on the experts' presentations, the exchanges that followed and the content of the briefing packs provided by the organizers. The final section sets out the main legal questions that emerged during the workshop which merit further work.

---

1 Legal experts: Louise Arimatsu (Chatham House), Robin Geiss (Potsdam University), Françoise Hampson (University of Essex), Michael Schmitt (US Naval War College), Sandesh Sivakumaran (University of Nottingham) and Elizabeth Wilmshurst (Chatham House). Rapporteurs: Mohbuba Choudhury (UNHCR) and Annie O'Reilly (Chatham House). The workshop was facilitated by the generous support of the British Red Cross.
2 Dr Christopher Phillips (Queen Mary, University of London), Saleem Haddad (Saferworld) and Sir Richard Dalton (former ambassador to Libya).
3 The morning session on Day 1 was devoted to the situation in Syria and the afternoon session to Yemen. The situation in Libya was addressed during the morning session on Day 2.

LEGAL FRAMEWORK

As a rule, the applicability of the law of armed conflict (LOAC)[4] is dependent on the existence of an armed conflict. Situations of violence that do not amount to an 'armed conflict' in the legal sense are governed by international human rights law (IHRL). Assessing which regime applies in any particular situation is critical in that different standards and rules apply. For example, most violence that occurs within a state's borders would be regarded, first and foremost, as a law and order matter; consequently, any use of force by state authorities would be governed by human rights standards that restrict the use of lethal force to self-defence.[5] By contrast, in armed conflict situations, LOAC allows for the use of lethal force between belligerents, although it limits the manner in which such force is used.

The term 'armed conflict' is context-dependent in that the criteria for determining the existence of an armed conflict differ according to whether the armed violence is one fought between two or more states (international armed conflict) or between a state and one or more organized non-state armed groups or between two or more such groups (non-international armed conflict).

International armed conflict (IAC)

The generally accepted criteria for the existence of an IAC are derived from Common Article 2 of the 1949 Geneva Conventions, which provides that:

> The present Convention shall 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. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.[6]

For the law applicable to IAC to apply, the conflict must involve two or more states as parties on opposing sides. The term 'armed conflict' presupposes the existence of *hostilities* between the armed forces of the belligerents. Whether a minimum level of violence is required for the hostilities between states to be considered an armed conflict remains contested.[7] At one end of the spectrum is the view exemplified by the International Committee of the Red Cross (ICRC) Commentary to Common Article 2 of the Geneva Conventions, which states, 'Any difference arising between two States and leading to the intervention of armed forces is an armed conflict … It makes no difference how long the conflict lasts, or how much slaughter takes place.'[8] That said, state practice suggests that the threshold at which a violent exchange between states is regarded as amounting to an armed conflict rather than merely a series of armed 'incidents' may be relatively high.

Non-international armed conflict (NIAC)

Treaty law, together with the ad hoc tribunals' rich body of jurisprudence, provides detailed guidance as to when a situation of violence amounts to a NIAC and thus triggers the application of LOAC. Two instruments apply to NIAC: Common Article 3 of the Geneva Conventions (CA3) and the 1977 Additional Protocol II to the Geneva Conventions (APII). Of these, it is the latter that sets forth far more detailed rules, despite its narrower scope of application. As with IAC, there is no codified definition of NIAC, although treaty law does inform us as to what type of violence is *not* governed by LOAC.

---

4 The terms 'law of armed conflict' (LOAC) and 'international humanitarian law' (IHL) are used interchangeably.
5 Such standards would generally correspond to those set forth in the UN's Basic Principles on the Use of Force and Firearms by Law Enforcement Officials and its Code of Conduct for Law Enforcement Officials.
6 Common Article 2 of the Geneva Conventions (I-IV).
7 International Law Association, Final Report on the Meaning of Armed Conflict in International Law, 2010.
8 ICRC Commentary to Article 2 of the First Geneva Convention (Jean Pictet (ed.), 1952). See also the ICRC Commentary to Article 1 of Additional Protocol I, according to which: 'Humanitarian law also covers any dispute between two States involving the use of their armed forces. Neither the duration of the conflict nor its intensity plays a role: the law must be applied to the fullest extent required by the situation of the persons and objects protected by it' (Yves Sandoz et al. (eds), 1987).

Article 1(2) of APII identifies situations of violence that do not meet the 'armed conflict' threshold and includes in that category 'internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, and other acts of a similar nature'.[9] As elaborated in the Commentary to Article 1(2), even if the government is forced to deploy armed units, to the extent that the purpose is to restore law and order, such violence is considered *not* to constitute armed conflict in the legal sense.[10] This threshold also applies to CA3.

CA3 applies to 'armed conflicts not of an international character occurring in the territory of one of the High Contracting Parties'.[11] Although not spelled out in the text, it has always been assumed that the provision applies to hostilities between government forces and one or more armed groups as well as those between two or more such groups.[12] Over the years, the international tribunals have contributed significantly to our understanding of the requisite criteria for determining the existence of a NIAC.[13] In *Tadić*, the International Criminal Tribunal for the Former Yugoslavia (ICTY) affirmed that a NIAC exists when there is 'protracted armed violence between governmental authorities and organized armed groups or between such groups within a State'.[14] This holding is widely accepted as establishing the two key criteria for qualification as a NIAC: i) intensity of the hostilities; and ii) the involvement of an organized armed group (OAG).

The intensity threshold

Various indicative criteria have been suggested to facilitate the determination whether a given situation has met the required intensity threshold. The ICTY has considered such factors as the following: the gravity of attacks and their recurrence; the temporal and territorial expansion of violence and the collective character of hostilities; whether various parties were able to operate from a territory under their control; an increase in the number of government forces; the mobilization of volunteers and the distribution and type of weapons among both parties to the conflict; the displacement of a large number of people owing to the conflict; and whether the conflict is subject to any relevant scrutiny or action by the UN Security Council.[15]

The organizational element

As regards the second criterion, the non-state actors must be 'armed' to the extent that they have the *capacity* to mount attacks. Although there must be some degree of organization in order to be a party to the conflict, this does not have to reach the level of a conventional militarily unit. To determine whether this threshold has been met, the tribunals have assessed: the organization and structure of the armed group; the adoption of internal regulations; the nomination of a spokesperson; the issuing of orders, political statements and communiqués; the establishment of headquarters; the capacity to launch coordinated action between the armed units; the establishment of a military police and disciplinary rules; the ability to recruit new members; the capacity to provide military training; the creation of weapons distribution channels; the use of uniforms and various other equipment; and the participation by members of the group in political negotiations.[16]

---

9 Further insight is provided in the Commentary to Article 1 of APII, which adds 'riots, such as demonstrations without a concerted plan from the outset; isolated and sporadic acts of violence, as opposed to military operations carried out by armed forces or armed groups; other acts of a similar nature, including, in particular, large scale arrests of people for their activities or opinions'.

10 Commentary to Article 1of APII.

11 The assertion in the text that a NIAC occurs 'in the territory of one of the High Contracting Parties' has generated debate about the geographical scope of this type of NIAC. Although some commentators suggest that NIACs are confined to those that take place within the territorial boundaries of a single state, the dominant view is that 'one' is a reference to the territory of any of the Contracting Parties. The phrase imposes no territorial limitations so long as the relevant states are party to the 1949 Geneva Conventions.

12 See Commentary to Article 1 of APII.

13 That said, there was already widespread agreement that the existence of a NIAC requires 'open hostilities between armed forces which are organized to a greater or lesser degree'. Commentary to APII, para. 4341.

14 *Prosecutor v. Tadić,* Decision on the Defence Motion for Interlocutory Appeal, 2 October 1995, IT-94-1, para. 70.

15 See, for example, *Prosecutor v. Haradinaj* (IT-04-84-T), 3 April 2008, paras 40–49; and *Prosecutor v. Limaj* (IT-03-66-T), 30 November 2005, paras 135–67.

16 *Prosecutor v. Limaj* (IT-03-66-T), 30 November 2005, paras 94–129.

APII conflicts

An APII conflict is one that takes place between the armed forces of a state and dissident armed forces or other OAGs that control sufficient territory so 'as to enable them to carry out sustained and concerted military operations'.[17] Unlike CA3, the protocol does *not* apply to armed conflicts between OAGs. APII applies only to states that are party to the protocol and therefore does not apply to the armed forces of a non-signatory state that is engaged in a conflict on the territory of a state party.

'Internationalized' NIAC

In some circumstances, an armed conflict between a state and an OAG is more appropriately qualified as an IAC given the involvement of another state in the conflict. Whether the actions of an OAG may be attributed to another state such that a conflict is deemed international was addressed by the *Tadić* Appeals Chamber Judgment in the context of the Balkan conflicts.[18] In determining that Bosnian Serb units were sufficiently directed by the Federal Republic of Yugoslavia to conclude that an IAC existed, the tribunal reasoned:[19]

> [C]ontrol by a State over subordinate armed forces or militias or paramilitary units may be of an overall character (and must comprise more than the mere provision of financial assistance or military equipment or training). This requirement, however, does not go so far as to include the issuing of specific orders by the State, or its direction of each individual operation. Under international law it is by no means necessary that the controlling authorities should plan all the operations of the units dependent on them, choose their targets, or give specific instructions concerning the conduct of military operations and any alleged violations of international humanitarian law. The control required by international law may be deemed to exist when a State (or, in the context of an armed conflict, the Party to the conflict) has a role in organising, coordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group.[20]

The 'overall control' test has been adopted by courts and tribunals for the purpose of classification. State practice indicates that the overall control threshold is high and the evidence in support must be compelling.

'Internalized' IAC

As demonstrated in Afghanistan and Iraq, an existing IAC may evolve into a NIAC under certain conditions, including when the government of the country in which the IAC is ongoing is replaced by a new government that consents to foreign intervention. This prompts questions pertaining to the 'recognition' of governments under international law, a practice that is not shared by all states. The general rule for those states that do not recognize governments is to apply the principle of effectiveness. From this it would follow that, when it is clear from the facts on the ground that the new government is in effective control, the armed conflict would automatically become non-international.[21] One commentator has proposed additional criteria, namely that the reclassification of the conflict would occur only when:

> (1) The old regime has lost control over most of the country, and the likelihood of its regaining such control in the short to medium term is small or zero (negative element);

---

17 Additional Protocol II, art. 1(1).
18 *Tadić*, Appeals Chamber Judgment, paras 131–140, 145.
19 Ibid., paras 131, 145, 162.
20 Ibid., para. 137.
21 For further analysis, see the discussions on Syria ('Some legal issues for further thought', p. 17) and Libya ('External support for the anti-Gaddafi armed groups', p. 39) below. See also Françoise Hampson, 'Afghanistan 2001–2010', in Elizabeth Wilmshurst (ed.), *International Law and the Classification of Conflicts* (Oxford: Oxford University Press, 2012), p. 245.

(2) The new regime has established control over a significant part of the country and is legitimized in an inclusive process that makes it broadly representative of the people (positive element); and

(3) The new regime achieves broad international recognition (external element).[22]

Meeting only one of these criteria would not suffice since both the factual developments on the ground and the legitimacy of the new regime matter.

---

22 Marco Milanovic, 'How to Qualify the Armed Conflict in Libya?', EJIL: Talk!, Blog of the *European Journal of International Law,* 1 September 2011, http://www.ejiltalk.org/how-to-qualify-the-armed-conflict-in-libya/. It is further argued that insofar as both the positive and negative elements are concerned, 'the degree of control would be looked at holistically, taking into account not just troops on the ground but also direction over state institutions more generally, its economic assets, the media, and the like'.

SYRIA

Dr Christopher Phillips (Queen Mary, University of London)

Access to Syria remains difficult. Before 2011 it was possible for country experts to secure corroborative evidence to verify reports of specific events unfolding within the country. However, since 2011 the situation has been 'opaque' at best.

The intensity of the violence

The first protests took place in March 2011 in the areas in and around Damascus and the southern city of Dar'a. During this initial period the protestors' demands were limited to the release of political prisoners and the reform of the regime rather than its overthrow. Despite the non-violent nature of the demonstrations, government forces (including the armed forces, the security forces, the civilian police and the Alawite civilian militia or Shabbiha) resorted to harsh tactics to suppress the protests.[23] The use of live ammunition on the demonstrators led to scores of deaths and many people being injured. Arrests were widespread.

Over the following weeks, the protests spread to other parts of the country and a growing number of people began to take part in them. To contain the unrest, President Bashar al-Assad announced a number of conciliatory measures, including:

- The release of political prisoners;

- The dismissal of the government; and

- The lifting of the 48-year-old state of emergency.

The protesters continued to hold peaceful demonstrations that were marred by increasing levels of violence on the part of the authorities. Typically, the armed forces would open fire on the crowds, killing dozens of unarmed demonstrators, while other protesters came under sniper fire. Many civilians were beaten and arrested.[24] Towards the end of April 2011 a large-scale military operation was launched by the army and security forces, as a result of which Dar'a was under siege for two weeks.[25] Dozens of protesters were shot by the security forces following a demonstration in that city on 29 April.[26]

In a statement delivered the same day, the Deputy High Commissioner of the Human Rights Council criticized the unjustifiable level of force being used by government forces, including:

> [T]he widespread use of live fire against protestors; the arrest, detention and disappearance of demonstrators, human rights defenders, and journalists; the torture and ill-treatment of detainees; the sharp repression of press freedoms and other means of communication; and attacks against medical personnel, facilities and patients.[27]

The statement continued:

> Tanks have been deployed and shelled densely-populated areas. The delivery of food has been impeded. Access to electricity has been cut. And transportation systems have been shut down. There have been reports of snipers firing on persons attempting to assist the injured or remove dead bodies from public areas.[28]

---

23 See section E of the report of the UN High Commissioner for Human Rights on the situation of human rights in the Syrian Arab Republic, 15 September 2011 (A/HRC/18/53).
24 A/HRC/18/53.
25 Ibid., para. 36.
26 Al Jazeera and Reuters reported 62 deaths.
27 Special session of the Human Rights Council on 'The situation of human rights in the Syrian Arab Republic', 29 April 2011.
28 See also 'We've Never Seen Such Horror – Crimes against Humanity by Syrian Security Forces', Human Rights Watch report, June 2011, p. 12.

Throughout the late spring and early summer of 2011, the level of force used by the government intensified. In May 2011 army tanks entered Dar'a, Baniyas, Homs, Ar Rastan and the suburbs of Damascus in an effort to crush the anti-regime protests. Access points to the towns and cities were sealed with tanks and armoured vehicles to prevent the delivery of food and medical supplies.[29] There were reports of looting, indiscriminate shootings, damage to property and summary executions by government forces. An anti-government protest on 3 June in Hama was met with considerable force by the security forces and dozens were killed as a result of sniper fire.[30] Although in some cities and towns the authorities used non-lethal methods such as tear gas against demonstrators, witnesses increasingly described the use of live ammunition, snipers, rocket-propelled grenades and grenade launchers mounted on AK47s, heavy machine guns mounted on anti-personnel carriers and helicopters in urban areas.[31]

In early June Syrian state television reported the killing of 120 members of the security forces by 'armed gangs' in the northwestern town of Jisr al-Shughour. The story was disputed by residents who claimed the men had been executed by the Syrian army for refusing to fire on the protesters. Troops subsequently besieged the town.

By August 2011 the peaceful protests had all but ended. In response to the rise of an armed opposition, the government stepped up the level of force.

On 3 August the UN Security Council issued a presidential statement condemning the ongoing violence against protesters by Syrian forces and calling for restraint on all sides.[32] Also in August, the EU and a number of non-EU states imposed sanctions on Syria, including the boycott of Syrian oil, the freezing of government assets, the introduction of import duties on Syrian goods and travel bans on senior officials. On 4 October a draft resolution recommending possible measures against Syria under Article 41 of the UN Charter was vetoed by China and the Russian Federation.[33]

In early November the Syrian government agreed to end the violence against the protesters under a peace plan (Plan of Action) drawn up by the League of Arab States.[34] The violence nevertheless continued to escalate throughout that month; military operations targeted public assemblies and funeral processions in Homs, Dar'a, Hama, Dayr Az Zawr and Rif Damascus. During a period of three weeks 260 civilians were reported to have been killed. The Office of the High Commissioner for Human Rights (OHCHR) estimated that at least 3,500 civilians were killed between March and November 2011.[35] On 12 November 2011 the Arab League voted to suspend Syria's membership for failing to implement the Arab peace plan and at the same time it imposed sanctions.[36] In December Syria agreed to allow international observers to oversee the implementation of the plan. However, in January 2012 the mission was forced to suspend its work owing to the scale of the violence across the country.

On 16 February 2012 the UN General Assembly adopted Resolution 66/253, which condemned 'the continued widespread and systematic violations of human rights and fundamental freedoms by the Syrian authorities, such as the use of force against civilians, arbitrary executions, the killing and persecution of protestors, human rights defenders and journalists, arbitrary detention, enforced disappearances, interference with access to medical treatment, torture, sexual violence, and ill-treatment, including against children'.[37] General Assembly Resolution 66/253 endorsed the Plan of Action of the League of Arab States of 2 November. At the same time, it provided for the establishment of a joint special envoy to facilitate a UN-Arab League initiative to negotiate a peaceful solution to the crisis.

---

29 A/HRC/18/53, para. 46.
30 Ibid., para. 48.
31 A/HRC/18/53, paras 75–76.
32 S/PRST/2011/16,3 August 2011.
33 The 6627th meeting of the UN Security Council, 4 October 2011 (S/PV.6627).
34 Arab League Council Resolutions 7436 and 7437, 2 November 2011.
35 A/HRC/S17/2/Add.1.
36 Arab League Council Resolution 7438, 12 November 2011.
37 A/RES/66/253, 21 February 2012, para. 2.

In mid-March 2012 Kofi Annan, who had been appointed joint special envoy, outlined a six-point proposal that required the government to cease troop movements and the use of heavy weapons in city centres.[38] On 25 March the Syrian government agreed to implement the plan. One month later, on 21 April, the Security Council adopted Resolution 2042 authorizing the deployment of the UN Supervision Mission in the Syrian Arab Republic (UNSMIS) to monitor the plan's implementation.[39] On 23 April 2012 an agreement was reached between the Syrian government and the UN on the legal basis for the deployment of UNSMIS.[40]

Despite these efforts, from mid-May 2012 onwards the violence spread to other parts of the country and the intensity of the armed clashes increased significantly in some areas.[41] Government forces frequently shelled towns and used heavy weapons and air assets, targeting districts of the major cities of Damascus, Aleppo, Homs and Hama, where support for the opposition groups was concentrated.[42] During this period the anti-government armed groups appeared to benefit from improved access to weapons, funding and logistical support.

In June 2012 UNSMIS suspended its activities amid the intensifying violence.[43]

Owing to reporting restrictions imposed by the government, the precise number of people killed and injured since March 2011 remains contested. Reliable estimates put the total number of combat deaths at approximately 1,000 during the 12-month period from March 2011. According to government figures, nearly 8,000 people were killed between March 2011 and July 2012; humanitarian groups put the number at 20,000.[44] The Independent International Commission of Inquiry on the Syrian Arab Republic noted in August 2012 that nearly 8,000 people had been killed since the beginning of the unrest;[45] this figure was significantly revised in the commission's December 2012 report, which estimated that as many as 60,000 people had been killed since March 2011.[46]

As the violence spread and intensified, the number of refugees and internally displaced rose. In June 2011 Turkish officials reported that more than 4,000 Syrians had crossed into Turkey.[47] By the following summer the number had increased dramatically. In August 2012 it was estimated that those displaced by the fighting had reached 1.5 million, while more than 100,000 refugees had sought shelter in Turkey, Jordan, Lebanon and Iraq. Six months later both figures were significantly revised: more than two million people had been displaced and another 670,000 had become refugees.[48]

The armed opposition

Between March and June 2011 a small but growing number of personnel from the military and the security forces began to display their discontent with the government's use of lethal tactics by defecting to the opposition.[49] In July a handful of defectors from the armed forces announced the formation of the Free Syrian Army (FSA).[50] As more members of the armed forces defected, albeit in a piecemeal manner, ad hoc localized armed groups were formed and civilians joined their ranks to take up arms against the government forces. Over the following six months these armed groups

---

38 S/PRRST/2012/6,21 March 2012.
39 S/RES/2042 (2012)
40 S/2012/250.
41 *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, A/HRC/21/50, 15 August 2012, para. 21.
42 Ibid., para. 23.
43 A/HRC/21/50, para 17.
44 A/HRC/21/50, para. 39.
45 Ibid., para. 38. Syrian NGOs report 20,000 deaths for same period.
46 A/HRC/22/59, February 2013, para. 37. By summer 2013 it was estimated that more than 100,000 people had died in the conflict.
47 'Syrian Army "cracking" amid crackdown', *Al Jazeera*, 11 June 2011, http://www.aljazeera.com/indepth/features/2011/06/201161118126791811.html.
48 UNHCR data available at http://data.unhcr.org/syrianrefugees/regional.php.
49 'Syrian Army "cracking" amid crackdown'.
50 The formation of the FSA was announced on 29 July 2011 in a video released on the internet.

increasingly claimed responsibility for the attacks against government forces.[51] However, there was no reliable information on the size or structure of the armed groups, let alone what capacity they had to mount military operations.[52] The groups may have operated under a loose command structure limited to a particular area and they may have identified themselves with the FSA, but there was little to indicate the existence of a formal command structure and no evidence to suggest that the militia were taking orders from an FSA leadership inside or outside Syria.[53]

The original founders of the FSA – including its leader, Colonel Riad al-Assad – continued to operate from Turkey, where they had been located since their defection. Their role was limited to coordinating between the various armed groups within Syria and handling international outreach. The leadership therefore played no part in operational decision-making. As regards compliance with LOAC, the FSA leaders in Turkey maintained that defectors who took on command positions in the field drew up their own rules of engagement based on prior training received in the Syrian armed forces.[54] However, the FSA did request assistance in formulating appropriate rules of engagement since they were 'committed' to ensuring that FSA operations were conducted 'in accordance with international law'.[55]

Meanwhile, in August 2011 opposition activists had met in Istanbul to form a political umbrella organization – the Syrian National Council (SNC), whose diverse membership included the Muslim Brotherhood and other secular representatives.[56] In January 2012 the FSA leadership and the SNC agreed to improve coordination.[57] Three months later, in March 2012, an agreement was reached whereby the council would channel funds to the FSA; however, this agreement was not implemented and the two groups continued to operate independently.[58]

Neither the SNC nor any other militia group engaged in hostilities within Syria has made any formal statement about LOAC compliance.

It appears that in January 2012 there was still no real formal command and control structure between the leadership and the various armed groups claiming allegiance to the FSA.[59] Moreover, there was only a minimal level of command and control among the armed groups fighting on the ground.[60] But this did not mean that all of these militia groups were ineffective. For example, in late 2011 government forces had to withdraw temporarily from Rif Dimashq, Idlib and Homs owing to counter-offensive military operations carried out by militia groups in those areas.[61]

In March 2012 the FSA took measures to address the deficiencies in its overall command and control structure. It announced the creation of the Joint Military Command of the Syrian Revolution, which was to take responsibility for organizing and unifying all armed groups and coordinating

---

51 'By all means necessary – Individual and Command Responsibility for Crimes against Humanity in Syria', Human Rights Watch report, December 2011, p. 3.
52 A/HRC/S/17/2/Add.1, para. 29.
53 A/HRC/19/69, para. 13. However, see the August 2012 interview with Col. Riad al-Assad, who maintained that, as the head of the FSA, he had controlled the army – albeit from Turkey – since his defection from the Syrian army one year earlier. http://www.turkishweekly.net/news/140046/political-resolution-on-the-crisis-in-syria-is-impossible.html.
54 A/HRC/19/69, February 2012, para. 107.
55 However, see the oral update by the Independent International Commission of Inquiry on the Syrian Arab Republic (CoI): 'In June 2012 an FSA fighter told the CoI that his unit was currently holding four senior officers for exchange. Lower level soldiers were reportedly tried by a court applying Sharia law, according to the fighter. Multiple FSA soldiers interviewed told the CoI they had never heard of international humanitarian or human rights law. One soldier stated that he believed the creed "an eye for an eye", which he described as being part of Sharia law, supersedes international standards' (A/HRC/20/CRP.1, para. 91).
56 The SNC was formally established on 2 October 2011. In November 2012 it reached an agreement with other opposition groups to establish the National Syrian Coalition or Syrian Opposition Coalition (SOC), which replaced the SNC (until then the dominant opposition umbrella group in Syria). The SOC aims to 'unify support for the joint leadership of the military council, the revolutionary council and the Free Syrian Army' (http://www.etilaf.org/en/about/goals.html). Under the chairmanship of Ahmed Moaz al-Khatib, it proclaimed itself the legitimate representative of the Syrian people and called on states to recognize it as such.
57 A/HRC/19/69, para. 18.
58 A/HRC/21/50, para. 18.
59 Many of the armed groups claimed allegiance by displaying the FSA flag.
60 A/HRC/19/69, para. 108.
61 Ibid., paras 19–20, 39.

military activities with political partners.[62] In some governorates, the FSA created local 'military councils', which claimed leadership of the armed groups fighting in their respective areas.[63] Although not all armed groups operating within the designated areas agreed to operate under the command and control of the military councils, many did. Provincial military councils were established in Homs, Hama, Idlib, Dar'a and Damascus and each took responsibility for its operational decisions. And it was these provincial military councils, rather than the leadership in Turkey, that retained control over FSA operational decisions.

During this period anti-government armed groups stepped up their activities throughout the country and clashed with government forces on multiple fronts simultaneously. Offensives by the rebels in Idlib, Hama and Damascus provided evidence of the ability to launch coordinated attacks on government positions and to engage directly with government forces.[64] Leaders of the provincial military councils – or commanders – became identifiable figures who could exercise a relatively large degree of control over members of the armed groups within their respective areas.[65] However not every armed group within a certain area affiliated itself with the FSA and the increased presence of foreign fighters began to cause serious concern.[66] For example, members of the jihadist group Jabhat al-Nusra (the Al-Nusra Front), which established a presence in Syria in January 2012 and seeks to overthrow the Assad regime with the objective of creating an Islamist state, have fought against government forces but under a different flag from that of the FSA.

Not all existing armed groups operating in Syria were organized. Moreover, they varied in terms of capabilities, composition and tactics. Some were relatively small groups operating at the local level and comprised local defectors fighting alongside a handful of civilians. These groups avoided direct confrontation with the government forces. Meanwhile, some of the larger armed groups succeeded in integrating smaller groups into their ranks. These larger groups, which were based on a pyramid-like structure, controlled territory, directly confronted army units and conducted coordinated attacks on army positions.[67] Overall, coordination between these groups was good, and they tended to support one another with fighters and equipment.

By the spring of 2012 the armed groups were benefiting from improved access to weapons, some of which – mortars, rocket-propelled grenades and anti-tank missiles – were looted during the seizure of army positions.[68] Significant quantities of small arms and ammunition were reaching rebel hands from across the borders with Lebanon and Jordan. There is credible evidence to suggest that Qatar, Saudi Arabia, Turkey and Jordan were supplying the rebels with weapons, although such allegations continue to be refuted. What remains unclear is whether some of these states were merely transit states or whether they were, in fact, supplying the weapons. At the same time, there is compelling evidence to suggest that both Saudi Arabia and Qatar were paying the salaries of the FSA fighters since 2012.[69]

Despite the dynamic situation on the ground, by the spring of 2012 the FSA controlled some territory. The countryside north of Aleppo extending to the border with Turkey fell under rebel control following the withdrawal of government forces; Aleppo itself remained under government control. The FSA also had effective control over parts of the countryside around the cities of Homs, Dar'a, Idlib and Hama. By mid-2012 government forces had withdrawn from the Kurdish areas, including Al Qarmish in the northeast of the country. Nevertheless, in March 2013 government forces continued to exercise firm control over the coastal areas around Tartus, the Alawite

---

62 A/HRC/21/50, Annex III, para. 9. In December 2012 a new 30-strong unified command structure – the Supreme Joint Military Command Council or Supreme Military Command – was established. For a detailed analysis, see Elizabeth O'Bagy, 'The Free Syrian Army', *Middle East Security Report* 5, Institute for the Study of War, March 2013.
63 A/HRC/21/50, Annex III, para. 9. The concept of the revolutionary council (the political branch of the anti-government movement within Syria) emerged at the same time as the military council.
64 J. Holliday, 'Syria's Maturing Insurgency', *Middle East Security Report* 5, Institute for the Study of War, June 2012, p. 19.
65 For example, Colonel Qassim Suad al-Din (Homs Military Council), Colonel Abdel Hamid al-Shawi (Hama Military Council), Colonel Afeef Suleiman (Idlib Military Council), Captain Qais Qataneh and Lieutenant Sharif Kayed (Dera'a Military Council).
66 A/HRC/21/50, para. 26.
67 Ibid., Annex III, para. 10.
68 Some groups also possess heavy machine guns and anti-aircraft missiles – see A/HRC/22/59, para. 11.
69 'Qatar bankrolls Syrian revolt with cash and arms', *Financial Times*, 16 May 2013, http://www.ft.com/cms/s/0/86e3f28e-be3a-11e2-bb35-00144feab7de.html#axzz2TYNyoORm.

mountains, Homs, Hamah, central Damascus and the territories bordering Lebanon, Dar'a and the area around As-Suwayda.

Evidence in support of the existence of an armed conflict and its classification

It is common practice for a state to deny that a NIAC exists on its territory. However, since the existence of a NIAC is a matter of objective assessment based on the facts, the state, as a matter of law, will be bound by and expected to comply with the relevant LOAC architecture regardless of whether it concedes that it is engaged in an armed conflict. That said, determining the precise point in time from which an armed conflict exists for the purpose of concluding that LOAC applies is a difficult undertaking.

Syria

On 26 June 2012, in a televised address to his new cabinet, President Assad acknowledged that Syria was in a state of war.[70]

International Committee of the Red Cross

In a press release on 27 May 2012, the head of the ICRC delegation in Syria urged 'the parties to the fighting to distinguish at all times between civilians and those participating in the hostilities'. The statement continued: 'especially when fighting in populated areas, the parties must constantly take care in their choice of means and method of warfare to spare civilians the effect of the hostilities'.[71] This would suggest that the ICRC already regarded the situation in Syria to be governed by IHL. In a subsequent statement released on 17 July 2012, it expressly described the violence as constituting a 'non-international armed conflict'.[72]

Human Rights Council

Prompted by the US request of 27 April 2011, a special session of the Human Rights Council was convened to address the situation of human rights in Syria.[73] Two days later, the council adopted Resolution S-16/1, which unequivocally condemned 'the use of lethal violence against peaceful protesters by the Syrian authorities and the hindrance of access to medical treatment' and urged the government of the Syrian Arab Republic 'to immediately put an end to all human rights violations, protect its population and respect fully all human rights and fundamental freedoms, including freedom of expression and freedom of assembly'. It also urged the authorities 'to allow access to the internet and telecommunications networks and to lift censorship on reporting, including by allowing appropriate access by foreign journalists'.[74]

Under the same resolution, the High Commissioner's Office was authorized to dispatch a mission to Syria to investigate all alleged violations of international human rights law and to provide a preliminary report. The report, which was released on 18 August 2011, covered the period from 15 March to 15 July 2011.[75] In assessing the violence, it referred to three bodies of law – international human rights law, international criminal law and domestic law[76] – and concluded that the disproportionate use of force by military and security forces constituted 'a violation of the State's international human rights obligations'.[77]

---

70 'Syria in state of war, says Bashar Al Assad', BBC News, 27 June 2012, http://www.bbc.co.uk/news/world-middle-east-18598533.
71 'Syria: parties to the fighting must distinguish between civilians and fighters', ICRC News Release, 27 May 2012, http://www.icrc.org/eng/resources/documents/news-release/2012/syria-news-2012-05-27.htm.
72 'Syria: ICRC and Syrian Arab Red Crescent maintain aid effort amid increased fighting', ICRC Operational Update, 17 July 2012, http://www.icrc.org/eng/resources/documents/update/2012/syria-update-2012-07-17.htm.
73 A/HRC/S-16/2, report of the Human Rights Council on its 16th special session, 29 April 2011.
74 A/HRC/RES/S-16/1, report on 'The current human rights situation in the Syrian Arab Republic in the context of recent events', adopted by the Human Rights Council at its 16th special session.
75 A/HRC/18/53, report of the UN High Commissioner for Human Rights.
76 Ibid., paras 14–19.
77 Ibid., para. 72. In particular, the High Commissioner called on the Syrian government to 'put an immediate end to gross human rights violations, including the excessive use of force against demonstrators and the killing of protestors, torture and ill-treatment of detainees and enforced disappearances, and halt all violations of economic, social and cultural rights' Ibid., para. 93.

On 22 August 2011 the Human Rights Council adopted Resolution S-17/1, which established the Independent International Commission of Inquiry on the Syrian Arab Republic (CoI) to investigate all alleged violations of international human rights law since March 2011. On 23 November 2011 the CoI released its first report (A/HRC/S-17/2/Add.1), which covered the period March–November 2011.[78]

Whether an armed conflict existed for the purpose of applying IHL was specifically considered by the commission, which stated:

> According to the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia, an armed conflict exists when there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups, or between such groups within a State. The Trial Chamber in *Tadić* and subsequent cases interpreted the test for internal armed conflict as consisting of two criteria: the intensity of the conflict, and the organization of the parties to the conflict, as a way to distinguish armed conflict from banditry, unorganized and short-lived insurrections or terrorist activities, which do not fall within the scope of international humanitarian law.

> The commission was unable to verify the level of the intensity of combat between Syrian armed forces and other armed groups. Similarly, it has been unable to confirm the level of organization of such armed groups as the Free Syrian Army. For the purposes of the present report, therefore, the commission will not apply international humanitarian law to the events in the Syrian Arab Republic since March 2011.[79]

On 22 February 2012 the CoI released its second report (A/HRC/19/69), which covered the period until 15 February 2012. Once again, it concluded, for the reasons set out below, that IHL did not apply:

> The commission did not apply international humanitarian law for the purposes of the report and the period covered. International humanitarian law is applicable if the situation can be qualified as an armed conflict, which depends on the intensity of the violence and the level of organization of participating parties. While the commission is gravely concerned that the violence in certain areas may have reached the requisite level of intensity, it was unable to verify that the Free Syrian Army (FSA), local groups identifying themselves as such or other anti-Government armed groups had reached the necessary level of organization. By the same token, the commission uses the term 'FSA group' to refer to any local armed group whose members identify themselves as belonging to the FSA, without this necessarily implying that the group has been recognized by the FSA leadership or obeys the command of the FSA leadership abroad.[80]

On 15 August 2012 the CoI released its third report (A/HRC/21/50) for the period ending 20 July 2012. In this document, it applied IHL reasoning as follows:

> In its previous reports, the commission did not apply international humanitarian law. During the present reporting period, the commission determined that the intensity and duration of the conflict, combined with the increased organizational capabilities of anti-Government armed groups, had met the legal threshold for a non-international armed conflict. With this determination, the commission applied international humanitarian law in its assessment of the actions of the parties during hostilities.[81]

It added that:

---

78 A special session was convened on 2 December 2011 to consider the report (A/HRC/S-18/2).
79 A/HRC/S-17/2/Add.1, paras 98–99.
80 A/HRC/19/69, para. 13.
81 A/HRC/21/50, para. 12.

> [I]n its second report submitted in February 2012, the commission expressed its concern that the violence in the Syrian Arab Republic had reached the requisite level of intensity to trigger the applicability of International Humanitarian Law (IHL). However because it could not verify whether the FAS, or its associated groups, had reached the necessary level or organization, the commission determined that it could not apply IHL.
>
> ….
>
> [D]uring the period covered by this third report, the commission has determined that the intensity and duration of the conflict, combined with the increased organization capabilities of the FSA, do, in fact, meet the legal threshold for a non-international armed conflict. With this determination, the commission applied IHL, including Common Article 3, in its assessment of the actions of the parties during hostilities.[82]

Even more specifically, the commission concluded that:

> [A] non-international armed conflict developed in the Syrian Arab Republic during February 2012 which triggered the applicability of Common Article 3 of the Geneva Conventions as well as customary law relevant to non-international armed conflict.[83]

On 5 February 2013 the CoI released its fourth report (A/HRC/22/59) for the period to 15 January 2013.

UN Security Council

On 4 February 2012 a draft UN Security Council resolution (S/2012/77) authorizing measures under Article 42 of the Charter was vetoed by China and the Russian Federation.

On 30 August 2012 the UN High Commissioner for Refugees was invited to brief the Security Council. The exchanges among the participants provide evidence of a consensus that IHL applied to the hostilities.[84]

Humanitarian community

In a report released in May 2012,[85] Human Rights Watch took the position that by April 2012, the violence in Syria constituted a NIAC to which IHL applied. The report noted that given 'the prolonged nature of the conflict, the nature of the weapons used, and the number of casualties, the situation in some parts of Syria appears to meet the intensity requirement'.

In the light of research conducted in Idlib governorate, the report suggested that the organizational requirement was met too on the basis that:

> [T]he FSA fighters (including army defectors and civilians volunteers) appeared to be well-organized – they were able to set up defense positions before the attacks, plan and carry out their own attacks against the Syrian forces, withdraw from towns in a fairly organized manner, and manned checkpoints controlling movement in and out of the areas under their control. Their actions, according to the FSA members and other witnesses interviewed by Human Rights Watch, have been coordinated by local military councils that also maintained communication and coordination with military councils in other towns.[86]

---

82 Ibid., Annex II, paras 2–3.
83 Ibid., Annex II, para. 12.
84 S/PV.6826.
85 'They Burned My Heart – War Crimes in Northern Idlib during Peace Plan Negotiations', Human Rights Watch report, May 2012.
86 Ibid., p. 32.

Legal conclusions

Existence of an armed conflict

By late spring/early summer 2011 the violence had reached such a level of intensity as to warrant consideration that the requisite threshold had been crossed and that an armed conflict existed in Syria. Evidence in support included the type of weaponry used against the protesters (tanks, live ammunition), the fact that the government had deployed the armed forces to contain the situation and the use of methods against the protesters that were akin to military operations (shelling of areas populated by those opposing the government). The rise in the number of government forces that were deployed to respond to the growing number of armed protesters indicated that the government no longer considered that the violence could be contained within the framework of a law enforcement paradigm. The rising incidence of armed clashes between government forces and armed groups resulting in increasing numbers of casualties and considerable destruction of property pointed to hostilities of a collective nature. Moreover, the growing number of people seeking safety across international borders was further evidence of both the geographical spread and the recurrence of the armed hostilities. However, the existence of a NIAC is not contingent on the crossing of the intensity threshold alone. Since LOAC governs the 'parties to the conflict', there must be an identifiable organized armed group opposing the government forces.

Although as early as March 2011 the founders of the FSA had nominated a spokesperson, released political statements and communiqués and established headquarters in Turkey, there was little to suggest that military orders were being issued by the leadership and acted upon by the armed groups on the ground despite their affiliation with the FSA. However, by March 2012 FSA fighters operating in Syria had set up command structures of sorts, as evidenced by the emergence of the provincial military councils. It was apparent that, though based on separate and loose command structures, coordinated action between the various armed groups was becoming more frequent and that the groups had the capacity to mount sustained military operations against the state's security and armed forces. By March 2012 the FSA was clearly able to recruit new members and provide basic military training; it was also evident that it had access to a relatively regular supply of weapons from outside the country. These factors, together with the intensity of the violence, meant that at least by March 2012, a NIAC between government forces and OAGs fighting on behalf of the opposition and under the banner of the FSA existed in Syria, triggering the application of LOAC.

Classification

Determining whether *only* NIAC rules apply to the armed conflict in Syria requires an assessment as to the nature and degree of involvement of other states in the conflict.[87] Although the precise extent of external involvement is difficult to establish, there is considerable evidence to show that while some states have actively supported the FSA, others have continued to support the Assad regime.

External support for the government

The Russian Federation continues to sell weapons to Syria and to honour existing maintenance contracts in respect of military hardware.

Iran, too, provides military equipment as well as personnel and advisory support to the government. It also supports a number of pro-government militia groups.[88]

There are numerous foreign militia actively engaged in the hostilities against the FSA and opposition, including the Abu al-Fadl al-Abbas Brigade (comprising Hezbollah fighters from Lebanon and Iraqi Shi'a fighters).

External support for the FSA

---

87 It should be noted that human rights law continues to apply during international and non-international armed conflict.
88 W. Fulton, J. Holliday and S. Wyer, 'Iranian Strategy in Syria', Institute for the Study of War, May 2013.

Since the outbreak of violence Turkey has continued to support the opposition. It has provided sanctuary to the leadership of the FSA since July 2011. FSA fighters are able to move relatively freely between Turkey and Syria thanks to the porous border. Many suspect that Turkey is providing the FSA with training. Turkey is home to the largest Syrian refugee population fleeing the violence.

As in the case of the Turkish-Syrian frontier, the border between Jordan and Syria is porous. FSA fighters have allegedly moved freely between the two countries. There are uncorroborated allegations that Jordan, too, has provided training for FSA fighters within its territory. And it, too, is home to a large Syrian refugee population.

It is likely that both Qatar and Saudi Arabia are funding the FSA. It may also be the case that they are providing weapons.

The EU and the United States have been supplying the Syrian opposition and the FSA with 'non-lethal military aid' and 'technical assistance'.[89] This may include such items as body armour, night-vision goggles and advanced communications equipment.

On 13 November 2012 France recognized Syria's opposition coalition (the Syrian National Coalition or SOC) as the sole lawful representative of the Syrian people. Within a matter of weeks, Turkey, Italy, the United Kingdom, Spain, Denmark and Norway followed suit. The EU's stance has been more ambiguous.[90] In December 2012 the United States recognized the SOC as the legitimate representative of the Syrian people.

Despite the level of political and material support that both the opposition groups in Syria and the FSA have been able to secure from other states, the legal experts were of the opinion that the armed conflict – at least until March 2013 – remained non-international in character since there was inadequate evidence to suggest that any of the anti-Assad armed groups were under the overall control of another state. The level and nature of external involvement in the conflict may constitute violations of international law but neither would alter the character of the armed conflict. Syria is not a signatory to APII; consequently, the NIAC is governed by CA3 and customary international law.

A separate IAC?

The reports of an Israeli air strike on a convoy carrying anti-aircraft weaponry on the outskirts of Damascus in January 2013 raises a number of legal questions, including whether a separate IAC exists between Syria and Israel. The Syrian government described the attack as a 'flagrant breach of Syrian sovereignty and airspace'.[91] Although Israeli officials refused to comment, there is evidence to suggest that Israel did in fact conduct the operation in order to prevent delivery of the weapons to Hezbollah. In May 2013 further air strikes targeting missiles said to be en route to Hezbollah were allegedly mounted by Israel.[92] A textual reading of Common Article 2 would suggest that any military operation conducted by another state against government targets in Syria would be governed by LOAC rules presupposing the existence of an IAC. Although the legal experts did not take a view on whether an IAC existed between Syria and Israel, there was some limited discussion as to whether the existence of an IAC is preconditioned on an intention to wage war (*animus belligerendi*).

89 'EU paves way for Syrian opposition aid', BBC News, 18 February 2013, http://www.bbc.co.uk/news/world-middle-east-21500837; 'US government assistance to Syria', US Department of State Fact Sheet, 9 May 2013, http://www.state.gov/r/pa/prs/ps/2013/05/209197.htm.
90 Council of the EU, Doc 16392/12, 19 November 2012.
91 'Israeli airstrike in Syria targets arms convoy, US says', *New York Times*, 30 January 2013, http://www.nytimes.com/2013/01/31/world/middleeast/syria-says-it-was-hit-by-strikes-from-israeli-planes.html?_r=1&.
92 'Israel launches more "airstrikes" in Syria', *Al Jazeera*, 5 May 2013, http://www.aljazeera.com/news/middleeast/2013/05/20135502043908700.html.

Some legal issues for further thought

The legal experts had assumed that factual ambiguity would prove the primary challenge in determining whether an armed conflict existed. Although this did present an obstacle, the exercise revealed a number of unexpected legal questions that merit further exploration.

The threshold for a NIAC

By late 2011 the violence in Syria had escalated dramatically. Hundreds had been killed, thousands detained and thousands more displaced. Of note was that the violence was markedly asymmetric in that the level of force used by government forces far exceeded the violence on the part of the opposition supporters. The type of weapons used by the authorities and the tactics adopted against the demonstrators are more typically associated with an armed conflict situation; however, human rights law arguably remained the governing regime. With no OAG apparently opposing government forces during this period, the test for determining the existence of a NIAC (as elaborated in the ICTY's jurisprudence) was regarded (as exemplified by the CoI reports) as not having been fulfilled and therefore the applicability of IHL was not triggered. Setting aside the question of whether one or the other legal regime applied in the circumstance, what the case of Syria did was to refocus attention on the requisite threshold for the applicability of IHL.

The criteria for determining the existence of a NIAC were first elaborated by the ICTY Appeals Chamber in the *Tadić* case. Extrapolating from this decision, the *Tadić* Trial Chamber identified the 'intensity of the conflict and the organization of the parties to the conflict'[93] as the two closely related criteria for determining the existence of a NIAC. As emphasized by the *Tadić* Trial Chamber and repeatedly reaffirmed in the subsequent case law, the test serves solely to distinguish NIAC from 'banditry, riots, isolated acts of terrorism, or similar situations'.[94]

Neither the Trial Chamber nor the Appeals Chamber dwelled for long on the requisite organizational element since the primary parties involved in the fighting were either the armed forces of the respective states or insurgent groups operating with the support, or under the control, of other states. As for the element of intensity, in the Appeals Chamber's opinion the 'hostilities *exceed[ed]* the intensity requirements applicable to both international and internal armed conflicts' notwithstanding the temporary ceasefire agreements [emphasis added].[95]

While successive tribunals have pointed to a catalogue of facts that serve as evidence in support of the two criteria, the question that has confronted the ICTY from *Tadić* onwards has been whether the specific situation under consideration is indeed a NIAC to which IHL applies rather than asking: 'what is the threshold of a NIAC?'.

This observation raised a number of subsidiary questions.

Has the threshold for the existence of a NIAC as elaborated over the years by the ICTY been set too high? Does the threshold as currently interpreted and applied lead to counter-intuitive outcomes? Would a lower threshold suffice? What would be the consequences?

The element of intensity refers exclusively to the violence that is a consequence of armed exchanges *between* at least two armed groups. As the case of Syria aptly demonstrates, the level of violence inflicted by the state's forces on its population is irrelevant for the purpose of IHL applicability. Without the existence of an opposing entity that is also armed and capable of inflicting a certain degree of violence, IHL simply does not apply.[96]

As commonly interpreted, the applicability of IHL is contingent on the existence of an *identifiable OAG*. But what level of organization is required and what level of capability must be demonstrated by an armed group before IHL applies? In its second report, the CoI noted that in November 2011

---

93 *Prosecutor v. Tadić*, Case No IT-94-1-T, Trial Chamber, May 1997, para. 562.
94 *Prosecutor v. Haradinaj*, para. 38.
95 *Prosecutor* v. Tadić, Decision on the Defence Motion for Interlocutory Appeal, Case No IT-94-1-AR72, October 1995, para. 70. In *Prosecutor v. Tadić*, Case No IT-94-1-T, Trial Chamber, May 1997, para 568, also held that the armed conflict taking place was of sufficient scope and intensity for the application of the laws and customs of war.
96 *Prosecutor v. Haradinaj*, para. 60: an armed conflict can exist only between parties that are sufficiently organized to confront each other with military means.

government armed forces were forced to retreat from Homs and Idlib following a number of attacks by the FSA.[97] Yet IHL, in the CoI's opinion, did not apply until February 2012 because the FSA appeared to lack the requisite command and control structure. Is this threshold for determining the existence of an *organized* armed group appropriate?

In its report published one year later, the CoI appears to concede that adopting a standard that is too formalistic results in counter-intuitive outcomes:

> Despite its persistent fragmentation and inability to unify under a single command, the Syrian armed opposition has continued to mature into a fighting force increasingly able to challenge the State's control of the country and to strike at strategic targets.[98]

In other words, a single unified command may be evidence of organization but it is neither determinate nor, for that matter, necessary. Is the capacity of the armed group to challenge the authority of the state through force therefore a more significant factor? Certainly, the ability to mount coordinated military operations would appear to be of greater significance; but is *coordination* necessary? Can an armed conflict exist if the combined effect of force exerted by a number of armed groups engaged in hostilities against a state's forces satisfies the intensity threshold in the absence of any organized leadership or any attempt to centralize or coordinate operations between the various groups?

Likewise, if there are multiple OAGs linked by a loose command and control structure but the capacity of the individual groups to mount military operations is limited, should the intensity element be assessed by combining the level of violence that the multiple armed groups are inflicting? Or is the intensity element satisfied only if, at a minimum, at least one of the armed groups has the capacity to meet the threshold?

In June 2012 the chair of the CoI commented:

> In some areas the fighting bears the characteristics of a non-international armed conflict. The violence has shifted dramatically from confrontations between protestors and the Government's security apparatus to fighting between its army – together with what appear to be pro-Government militia – and numerous anti-Government armed groups.[99]

If IHL has been operationalized, does it govern the conduct of all those armed groups operating within the territory, including those not under the command and control of the OAG that originally triggers the applicability of IHL?

'Internationalized' NIAC

Whether the involvement of other states in the existing NIAC in Syria is sufficient to 'internationalize' the NIAC or whether there is, in fact, at least one parallel IAC between Syria and those states opposing the government was considered. There is significant evidence to suggest that some of Syria's neighbouring states are supplying weapons, military equipment and training and may even be providing operational support to the FSA; such support constitutes a violation of the principle of non-intervention and the prohibition on the use of force.[100] However, there is inadequate evidence, if any, to suggest that those states, or indeed any others, are organizing, coordinating or planning the military actions of the FSA. Since no state appears to have overall control over the FSA, the NIAC (on the available evidence) is not internationalized.

This still leaves open the question of whether there are any other armed groups operating under the direction or overall control of another state against the Syrian government. Moreover, a separate IAC may exist if another state has deployed – albeit covertly – members of its armed forces to fight against the Syrian armed forces.

There is compelling evidence to conclude that a number of militia groups sponsored by other states are fighting *with* the Syrian armed forces against the FSA and other armed groups opposing the

97 A/HRC/19/69, para. 13.
98 A/HRC/22/59, para. 10.
99 Oral update by the CoI, 26 June 2012, para. 104 (A/HRC/20/CRP.1).
100 Nicaragua v United States of America [1986] I.C.J 14, paras 209,246.

Syrian government. However, the involvement of these armed groups does not alter the classification of the conflict, which remains non-international in character.[101] In the event that the balance of both military and political power shifts decidedly to the Syrian opposition, the continued involvement of these foreign-sponsored armed groups has the potential to internationalize the conflict. How this might occur was considered next.

Recognition in international law

The Syria case study, as with that of Libya, prompted the question as to what effect 'recognition' has in international law. In other words, does the act by a state of recognizing the political opposition have legal consequences including the potential to change the classification of an existing NIAC for that state? In situations in which another state or groups of states are directly involved in the hostilities against the incumbent government, this question is potentially of some significance. The legal ramifications are addressed more fully in the context of the Libya case study below. Nevertheless, it is worth recalling a number of general principles of international law that are equally relevant to the case of Syria.

There are three categories of 'recognition' that must be distinguished:

- *Recognition of a state*[102] refers to the acknowledgement by an existing state (groups of states) that another entity is considered to have attained statehood with all its legal consequences;

- *Recognition of belligerency* refers to the recognition that two or more entities are engaged in hostilities of such a character and scope as to entitle the parties to be treated as belligerents engaged in a war in the sense ordinarily attached to that term by international law;[103] and

- *Recognition of a government*[104] refers to the recognition of a state's governing entity as entitled to represent that state for all international purposes. Some states (including the United Kingdom and some other Europeans) do not recognize governments but only states; their criterion for 'dealing with' a new government is, however, the same as the criterion for recognition, namely that a government is in effective control of a significant part of the territory with a reasonable prospect of permanence.

The recognition of a government may be differentiated from other forms of recognition on the basis that it is a matter of political discretion, although the criterion of effectiveness mentioned above is usually employed. That said, a distinction must also be made between extending *recognition for political purposes* to an opposition as the legitimate representative(s) of the people and the act of *recognition of a government* with legal consequences. Close scrutiny of the statements made by states reveals a highly nuanced attitude towards recognizing the Syrian opposition: most states choose to recognize the SOC as the legitimate representative of the people rather than as the governing authority.

The ambivalence displayed by states is well founded. The main criterion in international law for recognizing government status is the exercise of effective control over all or, at least, a large part of the state's territory.[105] In addition, the party claiming to be the incumbent government is generally expected to have control over the machinery of a state, usually as evidenced by control over the capital city. Neither of these criteria applies to Syria. Furthermore, to recognize the SOC would be to absolve the Syrian government of responsibility in the areas that remain under its effective control.

---

101 Nor does the continued supply of weapons to the government constitute a violation of international law.
102 Recognition of a state is a question of international existence.
103 Hersch Lauterpacht, *Recognition in International Law* (Cambridge University Press, 2012); Yair Lotsteen, 'The Concept of Belligerency in International Law', 166 *Military Law Report* (2000), p. 109.
104 Recognition of a government is a question of entitlement to representation of the state.
105 Lauterpacht, *Recognition in International Law*. In response to why the US had not offered 'legal recognition' to the SOC, the US State Department explained that 'legal recognition goes to the question of physical control of territory'; see US Department of State Daily Press Briefing, 12 December 2012, www.state.gov.

YEMEN

Saleem Haddad (Saferworld)

The popular protests in Yemen in 2011, inspired by similar events across the Arab world, were met by significant levels of force on the part of the government. In Yemen's case, the government's reaction to the demonstrators cannot be viewed in isolation from the other situations of violence that, for several decades, have plagued the country given the links between them.

As might be expected, access to accurate, verifiable facts is difficult. This problem is particularly acute in Yemen because of the government's lack of effective control over large parts of the territory. Analysis is further hindered by the perpetually changing loyalties among the various armed groups and by complex allegiances and shifting motivations, which engender unstable relationships within Yemen as well as between Yemen and its neighbours. The result is often a complex pattern of violence. Moreover, because Yemen has not attracted the attention of the international community to the same degree as have other conflict zones, there have been relatively few attempts to document systematically and comprehensively the situations of violence that have troubled the country over the years.

The Republic of Yemen was established in 1990 following the unification of the north (the former Yemen Arab Republic) and the south (the former People's Democratic Republic of Yemen). The first multiparty elections took place in 1993 and resulted in a clear divide between southern Yemen, which voted for the Yemeni Socialist Party (YSP), and northern Yemen, which voted for the Islah party (an Islamic group) and the General People's Congress (GPC), headed by then President Ali Abdullah Saleh. Differences between the YSP and GPC escalated into a civil war that ended in 1994 with the defeat of the south.

The tension between the north and the south persists. In addition, there are at least another three situations of armed violence (fuelled by doctrinal and sectarian differences and political disagreement) that form the context within which the popular protest movement and its attendant violence must be assessed. All of these situations of armed violence (prior to 2011) are discussed immediately below.

The north–south divide

In 2007 small-scale protests by former military officers who, on unification, had been forcibly retired struck a chord among the wider population in the south, which had been feeling increasingly marginalized by the dominant political elites in the north. By 2009 the Southern Movement (popularly known as 'Harak') had formed; it was composed of a loose coalition of political groups united by a common interest in redressing perceived inequalities between the north and the south.[106] Over time, Harak has adopted an increasingly secessionist agenda, although not all its members have called for the re-establishment of an independent state.[107] Violent clashes between a minority of its members and the government during the period 2007–10 resulted in more than 100 deaths.[108]

The conflict with the Houthis

From 2004 to 2010 the government was engaged in hostilities against an armed group – the Houthis – in the northern governorate of Sa'ada along the border with Saudi Arabia. During this

---

106 See Ginny Hill, *Yemen: Corruption, Capital Flight and Global Drivers of Conflict,* Chatham House Report, September 2013.
107 'Days of Bloodshed in Aden', Human Rights Watch report, March 2011, p. 4.
108 A/HRC/18/21, UNHCHR report of the on the visit by the Office of the High Commissioner for Human Rights to Yemen, 16 September 2011, para. 9.

period the fighting between the parties reached a significant level of intensity.[109] The causes of the armed violence included sectarian divisions,[110] political differences[111] and economic discontent.

The Sa'ada conflict was complicated by the involvement of multiple actors, including members of local tribal militia groups. The government recruited members of some of those groups (primarily from the Hashid confederation)[112] to support the regular forces, while other tribes aligned themselves with the Houthis (Bakil confederation). At the same time, the government allegedly paid jihadi groups to assist in the fighting against the Houthis.[113] Over the years, in order to distinguish themselves from the Saleh government, which was regarded as pro-US, the Houthis adopted an increasingly anti-US/Israel posture. Claims that the Houthis are supported by Iran and Lebanese Hezbollah also surfaced. In November 2009 Saudi Arabia became directly embroiled in the hostilities against the Houthis following cross-border raids conducted by the latter, ostensibly to attack a Yemeni military base in Saudi Arabia. In January 2010 Saudi Arabia launched a series of air strikes against Houthi strongholds.[114] Humanitarian agencies have estimated that the Sa'ada wars resulted in the deaths of thousands and the displacement of tens of thousands of people.

The tribal divisions

Tribal conflict has been a common feature of Yemen's history.[115] However, for many contemporary tribal groups the capacity to deliver internal social benefits is more important than waging war.[116] That said, both the place and the role of the tribe in Yemeni culture vary across the country. The general lack of knowledge on the part of external observers about how the various tribal groups function often impedes informed analysis.[117]

The most distinguishing characteristic of the tribe is its system of mediated justice, which is administered by a group of elders in the respective local village, town or neighbourhood. The propensity to focus on local interests means that tribes align themselves with individual leaders based on perceived local, rather than regional or national, priorities. It is important to note that individual tribal loyalty is neither pre-determined by tradition nor necessarily automatic; consequently, 'the relationship between the individual tribesman, his fellow tribesmen, and the tribal leadership is far more contingent and consensual than is often portrayed'.[118] In some areas (primarily in the north), there are powerful tribal sheikhs who command a measure of support based on ideology; but, as a rule, the distribution of power is diffuse and often there are no clearly identified individuals who assert a leadership position within tribes. In other words, both within and between tribes, a pyramidal command and control structure is absent.

There is no clear boundary between the state and the tribal system. In the north, the Hashid and Bakil are the two large tribal confederations – that is, groupings of tribes – that have traditionally held positions of power in Yemeni society.[119] Of the two, the Hashid tribal confederation is more powerful; it comprises about seven tribes, including the Sanhan tribe, to which former president Saleh belongs. However, within the Hashid confederation, it is the al-Ahmar family that has

---

109 In Yemen the armed hostilities are referred to as the 'six wars'. These took place between the following dates, which mark official government declarations of hostilities and ceasefires: (1) 18 June to 10 September 2004; (2) 19 March to 12 April 2005; (3) 12 July 2005 to 28 February 2006; (4) 27 February to 14 June 2007; (5) 5 May to 17 July 2008; (6) 12 August 2009 to 11 February 2010. See 'All Quiet on the Northern Front?' Human Rights Watch report, March 2010, p. 10.
110 The Houthis are members of the Zaydi Shi'a based in Sa'ada governorate, where the population is predominantly Zaydi Shi'a. Former president Saleh's support for the Saudi-funded Sunni-Salafi madrasas in the Sa'dah region led to the increased popularity of Salafism but also fuelled feelings of resentment among the Houthis.
111 According to some sources, the emergence of the al-Houthi religious movement in the early 1990s was facilitated by the Yemeni government itself as part of a broader political agenda.
112 'All Quiet on the Northern Front?', Human Rights Watch report, March 2010, p. 15.
113 'Yemen: Defusing the Saada Time Bomb', Crisis Group Middle East Report No. 86, 27 May 2009, p. 16.
114 'All Quiet on the Northern Front?', Human Rights Watch report, March 2010, p. 17.
115 'Yemen: Defusing the Saada Time Bomb', International Crisis Group Middle East Report No. 86, 27 May 2009, p. 15.
116 Charles Schmitz describes the tribes as 'geographically limited social organizations whose interests are primarily focused on their own local territories'. See 'Understanding the Role of Tribes in Yemen', 31 October 2011. http://www.ctc.usma.edu/posts/understanding-the-role-of-tribes-in-yemen.
117 Sasha Gordon, 'Abyani Tribes and al Qaeda in the Arabian Peninsula in Yemen', Critical Threats report, July 2012.
118 Schmitz, 'Understanding the Role of Tribes in Yemen', *CTC Sentinel*, Vol. 4, October 2011, p. 17.
119 There are around seven major Hashid tribes and 15 Bakil ones. The former, which were led by Sheikh Abdullah ibn Husayn al-Ahmer until his death in 2007, are more united and organized than the latter.

dominated; members of this family hold leading positions within Yemen's public institutions and private sector. Both the al-Ahmar and Saleh families have controlled the country's resources through patronage networks that have dominated the political and military leadership of the country for more than 33 years.[120] The two families collaborate when expedient but the relationship between them can be inimical.

The terrorist threat

Al-Qaeda's presence in Yemen dates back to the early 1990s. It was from this country that Al-Qaeda launched a series of attacks on foreign targets, including, most notably, the bombing of the *USS Cole* in Aden in 2000. An intensive counter-terrorism campaign by Saudi Arabia that coincided with the winding down of the military operation in Iraq resulted in many militants relocating to Yemen. Among those who relocated there was Anwar al Awlaki, the US-Yemeni cleric who was later killed in a drone attack by the United States under its targeted-killing policy.

During the second half of this decade Al-Qaeda 'reconstituted' itself in Yemen, and in 2009 the Saudi and Yemeni operations merged to form Al-Qaeda in the Arabian Peninsula (AQAP). AQAP's self-proclaimed leadership consisted of Nasser al Wahayshi (commander), Said al Shihri[121] (deputy commander), Qasim al Raymi (military commander) and Mohammed al Awfi (field commander).[122] The relationship between AQAP and other parts of the Al-Qaeda network, including those in Pakistan, remains ambiguous. In December 2009 the United States launched two missile strikes in south Yemen targeting AQAP bases;[123] the high number of civilian casualties prompted criticism by some humanitarian groups.[124] Several terrorist plots targeting the United States were directly linked to AQAP, including the failed 2009 'Christmas Day bomber' case and the October 2010 package bomb case.[125] AQAP's tactical decision actively to use the internet to promote its global jihadi agenda – exemplified by the launch in July 2010 of the on-line English-language magazine *Inspire* – enabled it to reach, recruit and mobilize a wider constituency of individuals.

During this same period increasing discontent among some tribes with the Saleh government enabled AQAP to extend its sphere of influence and its support base. Under the leadership of al-Wahayshi, AQAP adopted a strategy of directly confronting the Saleh regime.[126] The relationship between the tribes and AQAP, nevertheless, is founded principally on mutual convenience rather than on a shared ideology. Following pressure from Saudi Arabia and the United States, in January 2010 Saleh declared 'open war' on AQAP.[127] US military aid to the Saleh government increased significantly in 2010; and in August the CIA announced that the threat to the US homeland from AQAP exceeded that from Al-Qaeda in Afghanistan or Pakistan.[128] By 2011 UK and US military trainers were stationed in Sana'a and the latter were assisting Yemeni armed forces to plan military operations.

120 'Yemen: Enduring Conflicts, Threatened Transition', International Crisis Group Middle East Report No. 125, 3 July 2012, p. i.
121 AQAP confirmed on 16 July 2013 that al Shihri had been killed in a US drone strike.
122 'Profile: Al Qaeda in the Arabian Peninsula', BBC News, 11 September 2012, http://www.bbc.co.uk/news/world-middle-east-11483095.
123 See the leaked cable 10SANAA4, sent by Ambassador Seche, on the meeting between General Petraeus and Saleh to discuss security issues, http://wikileaks.org/cable/2010/01/10SANAA4.html.
124 See, for example, 'Wiki-leaks cable corroborates evidence of US airstrikes in Yemen', Amnesty International, 1 December 2010, http://www.amnesty.org/en/news-and-updates/wikileaks-cable-corroborates-evidence-us-airstrikes-yemen-2010-12-01. See also 'US launches cruise missile strikes against al Qaeda in Yemen', *The Long War Journal*, 19 December 2009, http://www.longwarjournal.org/archives/2009/12/us_launches_cruise_m.php.
125 Statement by Dr Christopher Boucek of the Carnegie Endowment for International Peace before the US House of Representatives' Subcommittee on Counterterrorism and Intelligence, 2 March 2011.
126 Ginny Hill and Gerd Nonneman, 'Yemen, Saudi Arabia and the Gulf States', Chatham House Briefing Paper, May 2011, p. 15.
127 'Yemen declares "open war" on al-Qaeda', *The Telegraph*, 14 January 2010, http://www.telegraph.co.uk/news/worldnews/middleeast/yemen/6989542/Yemen-declares-open-war-on-al-Qaeda.html.
128 'CIA see increased threat in Yemen', *The Washington Post*, 25 August 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/08/24/AR2010082406763.html.

The intensity of the violence

In January 2011, inspired by the events in Tunisia and Egypt, 'pro-democracy' protesters began to take part in peaceful demonstrations demanding Saleh's resignation.[129] The protests were triggered by the latter's announcement in late 2010 that he intended to make amendments to the electoral laws and the constitution that would allow him to stand for re-election when his seventh term expired in 2013.[130] Initially, the protesters were students and civil society activists, but within weeks the protest movement garnered broader popular support and the demonstrations spread across the country.

By February 2011 the Al-Harak, the Houthis and the Joint Meeting Parties – a six-party opposition coalition that included both Islah and the YSP – had united in support of the protesters, taking the number of demonstrators into the hundreds of thousands.[131] Sit-ins were held in several cities. The protesters were united by their call for political reform, which included the removal of Saleh as president. Some of those who joined the demonstrations in the southern provinces also demanded secession.

During the initial period it was not the regular army units but the internal security forces that used excessive force against the demonstrators. The Central Security Forces (a paramilitary unit) and the Republican Guard repeatedly used live ammunition; and, according to witness accounts, the police did little to stop Saleh loyalists who used sticks, clubs, knives and, in some cases, live ammunition against the demonstrators. Throughout February the security forces continued to deploy harsh tactics – including tear gas, electric stun guns and polluted water cannon – against the demonstrators, although the level of violence varied from locality to locality.[132]

On 18 March 2011, during a demonstration in Sana'a (the capital of Yemen), pro-Saleh gunmen opened fire on the crowds, killing 53 people and injuring hundreds. The incident was regarded by the opposition as a 'massacre' and a symbolic turning point.[133] Several officials resigned, including the minister of human rights. For his part, Saleh declared a state of emergency.[134] On 22 March General Ali Mohsen al-Ahmar (commander of the First Armoured Division of the Yemeni army) defected and announced that his troops would protect the protesters taking part in the Sana'a sit-in. The tribal leader of the Hashid confederation, Sheikh Sadeq al-Ahmar, and his counterpart in the Bakil tribal federation announced their joint support for the protesters amid growing criticism of Saleh.[135]

Although Saleh was able to organize massive counter-demonstrations based on tribal loyalties and the entrenched patronage system, the pro-democracy protests continued to gather momentum and the number of the demonstrators continued to increase throughout April.

In May 2011 fighting broke out in Sana'a between the armed forces who remained loyal to Saleh, on the one hand, and members of the al-Ahmar family and its tribal followers who had joined the opposition, on the other. The use of artillery fire by the parties to the fighting caused heavy damage to buildings and many residents fled the city. The violence quickly spread beyond Sana'a as other armed groups took advantage of the spiralling instability. In the northern areas, the Houthis extended the territory under their control and armed Islamist groups seized several towns in the southern governorate of Abyan.[136] The Yemeni air force was allegedly involved in hostilities with armed groups in and around Sana'a and Abyan, while the Yemeni navy reportedly supported ground troops fighting in Abyan by shelling from the sea.

---

129 Hill and Nonneman, 'Yemen, Saudi Arabia and the Gulf States'.
130 'Popular Protest in North Africa and the Middle East (II): Yemen between Reform and Revolution', International Crisis Group, Middle East/North Africa Report No. 102, 10 March 2011.
131 A/HRC/18/21, para. 12.
132 Ibid., para. 34.
133 The US Department of State commented as follows: 'The nature of the wounds – many victims were shot in the head – indicated a level of proficiency suggesting formal military training, and many of the gunmen fired from properties owned by government officials.' See the US Department of State's 2011 Country Report on Human Rights Practices for Yemen, p. 3.
134 A/HRC/18/21, para. 13.
135 'Major Yemen tribes join protestors', Al Jazeera, 26 February 2011, http://www.aljazeera.com/news/middleeast/2011/02/2011226121359764591.html.
136 A/HRC/18/21, para. 15.

During this period of escalating violence, most of the casualties occurred in Sana'a, Aden (the capital of the south) and Taiz (a city south of Sana'a).[137] On 29 May 2011 government security officials used force to clear Freedom Square in Taiz, the locus of the sit-in, burning tents and killing protesters. Tanks were deployed and the city was shelled at night.[138] Throughout June 2011 there were armed hostilities in Taiz between government forces and armed groups dispatched by local tribal leaders to protect the protesters. Weapons used by the parties to the fighting included AK-47 automatic rifles, sniper rifles, machine guns, rocket-propelled grenades, mortars and artillery. Moreover, the government employed air strikes against some tribes in the north.

On 3 June 2011 an explosion inside the mosque of the presidential palace in Sana'a killed 11 people and injured Saleh, who was evacuated to Saudi Arabia for medical treatment.

The precise number of protesters killed and injured in 2011 remains uncertain. Some Yemeni organizations estimated that nearly 1,000 were killed and many thousands injured. Other sources put the number killed at more than 2,000.[139]

It is difficult to gauge the number of persons displaced in 2011 as a result of the violence. In mid-2011 there were about 400,000 internally displaced persons; but more than half of these had been displaced as a result of the pre-existing conflict in the north. By March 2012 the overall figure had risen to more than 500,000.[140] UN humanitarian agencies estimated that tens of thousands were displaced as a result of the hostilities in Aden, Sana'a and Abyan. Yemen has traditionally hosted a large refugee population from Somalia. Of the estimated 200,000 refugees in the country, thousands were displaced as a consequence of the hostilities.[141]

Throughout the summer of 2011 armed clashes between various parties continued unabated. In the north, AQAP members launched multiple attacks on the Houthis; meanwhile, in the south, scores of civilians were killed as AQAP attempted to take control of Zinjibar. The countrywide violence prompted the UN Security Council to issue statements in June and August 2011 expressing concern over the worsening humanitarian situation in Yemen. On 24 September it issued another statement urging an end to the violence and the implementation of a 'Yemeni-led process of political transition, on the basis of the Gulf Cooperation Council Initiative'.[142] The GCC Initiative (supplemented by a UN-backed implementation plan setting out a timetable for political transition) required the president to delegate his powers to the then vice president, Abdo Robo Mansour Hadi, in exchange for immunity from domestic prosecution. On 21 October international pressure and the threat of sanctions mounted as the Security Council unanimously adopted Resolution 2014, which called on all parties to sign immediately the transition initiative.[143]

On 23 November 2011 Saleh put his signature to the GCC agreement, thereby paving the way for the formation of a government of national unity. In February 2012 presidential elections were held and Hadi was elected with overwhelming support.[144] Soon after taking office, he began reforming the military and security services as mandated under the GCC Initiative.

Compared with 2011, the level of violence across the country was lower in 2012. However, Hadi's inauguration in February 2012 prompted a series of AQAP attacks on government targets across Yemen, principally in the form of suicide bombings. In late February a suicide bomber killed 26 Republican Guard troops in the southern governorate of Hadramawt, and in March the Republican

137 'Days of Bloodshed in Aden', Human Rights Watch report, March 2011, p. 5.
138 A/HRC/18/21, para. 15.
139 Sharp, 'Yemen', p. 4.
140 Security Council Meeting Records for 29 March 2012 (S/PV.6744). See also United Nations High Commissioner for Refugees '2014 UNHCR country operations profile – Yemen', http://www.unhcr.org/pages/49e486ba6.html.
141 United Nations High Commissioner for Refugees, 'UNHCR worried about refugees and displaced people in strife torn Yemen', 3 June 2011, http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=country&docid=4dec6a732&skip=0&coi=YEM&querysi=refugees&searchin=title&sort=date.
142 Security Council press statement of 24 September 2011 (SC/10394).
143 S/RES/2014 (2011).
144 'Yemen gets new leader as struggle ends calmly', *The New York Times*, 24 February 2012, http://www.nytimes.com/2012/02/25/world/middleeast/yemen-to-get-a-new-president-abed-rabu-mansour-hadi.html?_r=0.

Guard base in Bayda was targeted. On 21 May 2012 a suicide bomber affiliated with AQAP killed 96 soldiers and wounded more than 300 at a military parade in Sana'a.

In May 2012 government forces supported by local tribal militias mounted an offensive to drive AQAP from Abyan. Many hundreds of people were reported killed during the military operation, while tens of thousands were displaced by the fighting. In the north, armed hostilities between Houthis, on the one hand, and supporters of Sunni Salafi sects and the Islah party, on the other, continued to claim lives. Commenting on the situation in December 2012, the UN Special Adviser on Yemen observed that in the north of the country, an 'armed conflict persists and armed clashes still occur'.[145]

The armed opposition

The government's disproportionate use of force in response to the popular protests created an opportunity for pre-existing armed groups to further their particular interests. The main non-state armed groups that were involved in armed hostilities against government forces and the pro-government tribal proxies included: the Houthi militias; a number of Islamic insurgent groups, including AQAP and its offshoot, Ansar al-Shari'a (AAS); and the anti-Saleh militia groups affiliated with opposition groups in strategic towns and cities. Armed groups affiliated with some tribes continued to operate as a reserve force under the Ministry of Interior and, in that capacity, participated in the violent suppression of the demonstrations. However, some tribal militia groups fought government forces, while others took on AQAP-affiliated groups and still others fought among themselves.[146] As the violence escalated, members of the Yemeni security and armed forces continued to defect – individually and in groups – in support of the pro-democracy movement. Many joined the ranks of those loyal to Ali Mohsen. Nevertheless, during the same period the pro-Saleh Republican Guard was able to increase its numbers significantly too.[147]

The Southern Movement (Harak)

In 2011 the Southern Movement benefited from the pro-democracy movement to the extent that its support among the disillusioned public in the south increased. Many protests were held in the south and by July most of the government forces in Aden had retreated from the area in the face of the sheer number of demonstrators. Although the overwhelming majority of Harak supporters favoured peaceful protest, a small minority resorted to violence, including Haraka Taqree al-Maseer (HATAM), which has been described as the armed wing of Harak. Little is known about HATAM, although some experts suggest that the group comprises several hundred fighters.[148]

The Houthis

In March 2011 armed members of the Houthis were involved in violent exchanges with pro-government armed groups in the city of Sa'ada. Within a matter of weeks, the local governor was forced to flee, as was the local police force. The Houthis took control of the city and installed their own provincial governor.[149] In July 2011 fighting erupted between the Houthis and the armed wing of the Islah party in the neighbouring governorate of al-Jawf. The violence escalated over the following months and hundreds were killed. By November 2011 the Houthis were in control of al-Jawf, but the violence had spread to Hajjah governorate, which also shared a border with Sa'ada. There, the Houthis clashed with tribesmen loyal to the Islah party; according to some sources, more than 600 people were killed in the fighting between November and April 2012. In 2012 armed

---

145 *Report to the Security Council by the Secretary-General's Special Adviser for Yemen*, 4 December 2012 (S/PV.6878).
146 A/HRC/18/21, para. 25.
147 'Yemen's Military Security Reform: Seeds of New Conflict', International Crisis Group Middle East Report, No, 139, 4 April,2013, p. 12.
148 'Breaking Point? Yemen's Southern Question', International Crisis Group Middle East Report, No 114, 20 October 2011, p. 20.
149 ICRC Annual Report 2011, p. 403.

clashes increased between the Houthis, on the one hand, and the Salafi group and tribal groups associated with the Islah party in the governorate of Sa'ada, on the other.[150]

The Houthis continue to control significant parts of northern Yemen, including the Sa'ada province and parts of the governorates of Hajjah, Amran and al-Jawf',[151] and have repeatedly repelled government incursions into areas that they regard as their exclusive domain. The group's military wing is said to be significantly larger than its political wing. There is some evidence to suggest that Iran extends financial support to the group.[152] However, although the Houthis are heavily armed, there is little evidence that Iran provides them with weapons.

Tribal militia groups

Given the inextricable links between the state and the tribal system, it was inevitable that the popular revolt that in March 2011 evolved into a confrontation between elites competing for political power drew in many of the armed groups affiliated with tribes. However, both the pattern and the level of tribal involvement in the violence – whether in support of the pro-democracy movement or to defend against armed groups affiliated with AQAP or even simply to take up arms against other tribal groups – varied significantly across the country. Especially in the south, the diffuse distribution of power within and among tribes was such that involvement in the violence was erratic and contingent on perceived local threats to the community. Divisions within some tribes, often founded on personal rivalries, led some tribesmen to join the ranks of AAS, which was viewed as a vehicle through which to further personal ambitions.

AQAP and its affiliates

Despite the plethora of references to AQAP, experts remain divided over whether there is a formal organization with an established hierarchy since both the structure of AQAP and the way it operates remain obscure.[153] It would appear that the core AQAP members comprise militants who fought in Iraq and Afghanistan as well as former Guantánamo prisoners and individuals who were once incarcerated in Saudi Arabia.

The available evidence also suggests that AQAP operatives work in cells throughout Yemen, although it was among the tribes in the south that they found both sanctuary and fertile ground for recruits to join the ranks of AAS. The precise relationship between AQAP and AAS remains disputed, despite the fact that in October 2012 the US State Department redefined AAS as a new alias of AQAP: 'AAS is simply AQAP's effort to rebrand itself, with the aim of manipulating people to join AQAP's terrorist cause'.[154] Those local tribesmen who joined AAS, principally as mid-level cadres and 'foot soldiers', did so for a variety of reasons, including economic reward, discontent with the government and as a result of personal grievances linked to internal disputes within the respective tribes. Although some joined out of ideological and religious conviction, it would appear that few local tribesmen within AAS considered themselves part of a global jihadist movement.

The deployment of the armed forces to areas where the popular protests were gaining momentum created an opportunity for AAS to seize territory in southern Yemen. In March 2011, in what appeared to be a coordinated attack, AAS militants took over the town of Ja'ar in the province of Abyan. By late May AAS had extended its authority to Zinjibar, the provincial capital, which is 30 kilometres from Ja'ar. The militants overran the city with relative ease when the local security forces fled, leaving only the 25th Mechanized Brigade, based on the outskirts of Zinjibar, to defend the city. Over the following months, AAS extended its control to towns in the neighbouring governorate of Shabwah. The areas under its control were declared Islamic 'emirates', governance

---

150 *Report to the Security Council by the Secretary-General's Special Adviser for* Yemen, 4 December 2012 (S/PV.6878).
151 *Report to the Security Council by the Secretary-General's Special Adviser for Yemen*, 29 May 2012 (S/PV.6776).
152 US Department of State Country Reports on Terrorism, 2012, http://www.state.gov/j/ct/rls/crt/2012/209985.htm.
153 Boucek, US House of Representatives Subcommittee on Counterterrorism and Intelligence, p. 8.
154 'Terrorist designations of Ansar al-Sharia as an alias for Al-Qaida in the Arabian Peninsula', US Department of State Media Note, 4 October 2012, http://www.state.gov/r/pa/prs/ps/2012/10/198659.htm.

structures were established and the local population was provided with basic social services. AAS imposed law and order based on a sharia justice system.[155]

Heavy fighting continued to erupt between the AAS militants and government forces that had been subsequently deployed to Zinjibar and the surrounding areas. In March 2012, in a surprise attack by the AAS militants against an army artillery battalion based outside Zinjibar, 185 soldiers were killed and another 73 captured.[156] In April the soldiers were released. In May a major military operation was mounted by Yemeni forces with US support. By June the Yemeni armed forces had re-established control over Zinjibar and Ja'ar. The operation was supported by local tribal militias referred to as 'popular resistance committees', which were created in 2011 to deal with the threat posed by AAS. Despite the part success of this operation, AAS continued to retain some control over territory in the Abyan-Shabwah border region.

During the latter half of 2012 there was a significant rise in the number of kidnappings of foreigners for ransoms, targeted strikes on oil pipelines and suicide attacks across the country. AQAP claimed responsibility for a large proportion of violent incidents of these types.

Evidence in support of the existence of an armed conflict and its classification

Yemen

In a statement to the UN Security Council in March 2012, Yemen's representative said that his country was in an 'unstable political situation'.[157] The government did not publicly concede at any point that it was engaged in an armed conflict.

UN Security Council

Although the Security Council was first briefed by the UN envoy to Yemen in April 2011, it was not until June 2011 that a press statement was released by the council expressing grave concern at the deteriorating situation in the country.[158] In two further press statements released in August and September 2011, the council reiterated its concern about the deterioration of the humanitarian situation and reminded 'all the parties to respect their obligations under applicable international law'.[159]

On 21 October 2011 the council unanimously adopted Resolution 2014, which strongly condemned the continued 'human rights violations by the Yemeni authorities, such as the excessive use of force against peaceful protestors as well as the acts of violence, use of force, and human rights abuses perpetrated by other actors' and stressed that 'all those responsible for violence, human rights violations and abuses should be held accountable'.[160] It implicitly recognized the existence of at least one armed conflict when it demanded that 'the Yemeni authorities immediately ensure their actions comply with obligations under applicable international humanitarian and human rights law, allow the people of Yemen to exercise their human rights and fundamental freedoms, including their rights of peaceful assembly to demand redress of their grievances and freedom of expression, including for members of the media, and take action to end attacks against civilians and civilian targets by security forces'.[161] In paragraph 9 of the resolution, the council expressed its 'concern over the presence of Al-Qaida in the Arabian Peninsula, and its determination to address this threat in accordance with the Charter of the United Nations and international law including applicable human rights, refugee and humanitarian law'. This wording appears to recognize that a separate armed conflict involving AQAP existed.

---

155 S/PV.6776.
156 Katherine Zimmerman, 'Insurgency in Yemen: The New Challenge to American Counter-Terrorism Strategy', Critical Threats report, March 2012, p. 3.
157 Yemen's representative at a Security Council meeting on 29 March 2012 (S/PV.6744). See also S/PV.6776 (transcript of a meeting of the Security Council on 29 May 2012).
158 SC/10296, 24 June 2011. See also 'Insights on Yemen', What's in Blue, 19 April 2011, http://www.whatsinblue.org/2011/04/insights-on-yemen-1.php.
159 SC/10357, 9 August 2011; and SC/10394, 24 September 2011.
160 S/RES/2014, 21 October 2011. The resolution provided for regular updates by the Secretary-General's Special Adviser on Yemen.
161 UN Security Council Resolution 2014, para. 5.

International Committee of the Red Cross

In its 2011 annual report, the ICRC acknowledged that several 'armed conflicts' existed in both the north and the south of Yemen.[162] In its 2012 report, it concluded that 'multiple armed conflicts and situations of violence persisted'.[163]

Human Rights Council

The April 2011 request by the United Nations High Commissioner for Human Rights to send an OHCHR team to assess the human rights situation in Yemen was granted by the Yemeni government in May 2011.[164] The OHCHR report, which was released on 16 September 2011, referred exclusively to human rights treaties in assessing the violations of international law.[165]

Humanitarian community

In its February 2012 report, Human Rights Watch concluded that the armed clashes that erupted between government forces and the opposition fighters of Yemeni elites vying for power in May 2011 constituted an armed conflict to which IHL applied.[166]

Other states

In its 2011 annual report on Yemen, the US State Department concluded that 'there were several major internal conflicts during the year'. According to the report, an internal armed conflict broke out at the beginning of May[167] between 'government units, including the Central Security Forces (CSF), Republican Guards, and Yemeni Special Operations Forces, and progovernment tribal proxies', on the one hand, and 'tribal fighters, including tribesmen aligned with the al-Ahmar family in Sana'a and with Sheikh Hamud al-Mikhlafi in Ta'iz, and the First Armored Division after its defection in March'.[168] In a parallel conflict in the south, 'the army and air force were deployed to combat an insurgency in Abyan governorate waged by AQAP and affiliated militants, which had taken over the governorate's capital of Zinjibar'. A third conflict existed in the north involving 'tribes affiliated with the Shia Houthi movement in the governorates of Sa'ada and al-Jawf' that fought with 'tribesmen affiliated with the conservative Islamic and tribal opposition party, al-Islah, as well as Salafist groups'.[169]

Legal conclusions

Existence of an armed conflict

Between January and May 2011 the level of violence across Yemen varied significantly among governorates.[170]

Despite the excessive use of force by government forces against the demonstrators, the situations of violence triggered by the mass demonstrations appeared to correspond more closely to 'internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, and other acts of a similar nature'.[171] Human rights law continued to apply exclusively – possibly until early May – primarily because the attacks against the demonstrators, albeit lethal at times, were sporadic for the most part and because those armed groups that sided with the pro-democracy protesters appeared to limit their use of force to defending the demonstrators against attacks rather than pro-actively engaging with government loyalists or state forces. The units of the armed forces that

---

162 ICRC Annual Report 2012, p. 403.
163 Ibid., p. 448.
164 A/HRC/18/21, UNHCHR report on the visit by the Office of the High Commissioner for Human Rights to Yemen, 16 September 2011, para. 1.
165 A/HRC/RES/18/21, para. 28.
166 'No Safe Place: Yemen's Crackdown on Protests in Taizz', Human Rights Watch report, February 2012, p. 16.
167 US Department of State, Country Report on Human Rights Practices of States for 201 – Yemen, Executive Summary, p. 1.
168 Ibid., p. 12
169 Ibid., p. 13.
170 A/HRC/18/21, para. 34.
171 Article 1(2) of APII. See the discussion above ('Legal Framework', subsection 'Non-international armed conflict', p. 3).

defected with General Ali Mohsen al-Ahmar in March 2011 operated under a responsible command so they arguably met the organizational threshold. However, the mere existence of an OAG does not automatically operationalize LOAC without there being some degree of armed hostilities between that group and the armed forces (or another OAG). The evidence appears to suggest that it was not until May 2011 that armed clashes between the defecting units and those that remained loyal to former president Saleh reached the requisite threshold of intensity to trigger an armed conflict.

It was also around this time that hostilities between the armed groups affiliated with the al-Ahmar family and Saleh loyalists broke out in some of the strategic towns including Sana'a. Owing to the limited availability of information on the organizational make-up of these armed groups, assessment is difficult. Nevertheless, the armed clashes between these militia groups and government forces were of such magnitude and severity as to meet the intensity threshold.

Notwithstanding the fact that the hostilities between the armed groups fighting on behalf of the political elites did not evolve into an armed conflict until May 2011, an armed conflict between the Houthis and government forces existed in Sa'ada governorate from March 2011. There is ample evidence to conclude that the Houthis are a well-established OAG with an effective command structure. That the Houthis were able to oust government forces from Sa'ada city and install a new administration demonstrates their capacity to launch coordinated military operations as well as the leadership's ability to issue orders that are acted upon. These attributes were further evidenced by the expansion of the Houthis' power base to neighbouring governorates during 2011. The Houthis were able to assert effective control over territory (exhibited by the exclusion of state forces from that territory) to achieve the following: establish a system of governance in the areas under their control; recruit new members and provide military training; secure regular access to weapons and other military equipment; and participate in political negotiations.

Likewise, from March 2011 an armed conflict existed between AAS and the government. The coordinated attacks by AAS militants in Abyan province in March 2011 marked the beginning of a year-long period of armed hostilities between members of the group and government forces during which the fighting reached such a level of severity as to satisfy the intensity criteria. Additional evidence to support a finding that AAS was an OAG at the material time includes the subsequent territorial extension of its authority and the group's ability to introduce a system of governance in areas under its control and sustain military operations to exclude government forces from such areas. Moreover, the ability of the AAS leaders to enter into negotiations and agree a settlement for the release in April 2012 of the soldiers who had been captured during an earlier attack indicates that there was an established hierarchy that could issue commands that were obeyed by the group's members.

The treatment of AQAP as a separate entity from AAS should not be interpreted as precluding the possibility that it is more appropriate to class it and AAS as one and the same organization. That said, there is no question that as a distinct armed group, AQAP possesses the *capacity* to mount attacks, albeit principally in the form of suicide bombings. Apart from a handful of high-profile leaders whose identities are known, there is little public information on how AQAP is organized, let alone how many individuals make up its core membership. Nevertheless, there is evidence to suggest that orders issued by those in leadership positions are carried out by the group's core members. AQAP's ability to recruit new members (not least through the internet) and provide training and weapons is not in doubt. If AQAP is treated as an OAG separate from AAS, a judgment as to whether the hostilities between the Yemeni armed forces and members of AQAP are more appropriately framed within a counter-terrorism or armed conflict paradigm would require additional factual information.

Classification

The legal experts agreed that during the period in question,[172] there were multiple parallel and over-lapping NIACs in Yemen to which CA3 applied.[173] Since Yemen is a signatory to APII,[174] the experts

---

172 From January 2011 to March 2013.
173 All customary international law obligations applicable to NIAC would apply too.
174 Yemen ratified Additional Protocols I and II in 1990.

considered whether that instrument, too, applied to the fighting between government forces and the Houthis in the north. The 'responsible command' criterion implies some degree of organization but, as already noted, does not require a hierarchical system of military organization similar to that of regular forces.[175] The experts were agreed that the degree of control exercised by the Houthis over large swathes of northern Yemen was evidence of the group's ability to: i) carry out sustained and concerted military operations; ii) impose discipline in the name of a *de facto* authority; and iii) implement the protocol. Hence APII did apply to the conflict.

The armed clashes between the Houthis and armed members of the Salafi group and tribal groups associated with the Islah party in the governorate of Sa'ada during 2012 may have constituted another NIAC between the armed groups. The lack of information about the organizational characteristics of the militia groups makes an assessment difficult. If, however, it is shown that these militia groups satisfied the organizational criteria, CA3 and customary international law would have applied.[176]

In 2011 a separate NIAC arose pitting the armed forces and Saleh-loyalists against the anti-Saleh militia groups affiliated with opposition groups that had declared their support for the demonstrators. The last-named comprised units that remained loyal to General Ali Mohsen al-Ahmar as well as other militia groups affiliated with the al-Ahmar family. The legal experts did not take a position on whether the armed hostilities should be treated as one or two parallel NIACs. Either way, CA3 and customary international law applied to the fighting.

In addition to its involvement in these armed conflicts, the government of Yemen was embroiled in a separate armed conflict with AAS in the south. Like the Houthis, AAS controlled territory in parts of southern Yemen that enabled it to carry out sustained and concerted military operations as well as implement the protocol. Accordingly, the conflict between government forces and AAS was governed by APII. The United States' involvement in the military operations against AAS did not affect the classification of the armed conflict since such operations were conducted either jointly with the Yemeni authorities or, in the case of unilateral action, with the government's consent. APII did not govern the hostilities between AAS and US forces as the United States is not a signatory to the protocol. Even if it were, the text of APII would have precluded the application of the protocol since it applies only to conflicts taking place on the territory of a party between *its* armed forces and OAGs.

The question that remained unanswered was whether the Yemeni government regarded AAS as representing the armed wing of AQAP and therefore considered itself engaged in an armed conflict with AQAP or whether AQAP was viewed as a separate terrorist organization. If AAS and AQAP are treated as separate OAGs, it is possible that a third, albeit CA3 NIAC existed between AQAP, on the one hand, and the Yemeni government, supported by the United States, on the other. Since both Saleh and his successor, President Hadi, gave their consent to the United States to run targeted killings operations in Yemen, the experts were agreed that questions pertaining to state sovereignty did not arise. However, no view was taken on what body of law governed those operations.

To determine whether any of the NIACs in Yemen were internationalized or whether there was parallel IAC, the involvement of other states in the armed conflicts was considered.

External support for the non-state armed groups

There is evidence to suggest that for some years Iran has been providing financial support to the Houthis and may have facilitated the transfer of weapons to the group, albeit in small quantities.[177]

---

175 Commentary to APII, para. 4463.
176 APII applies only to armed conflict between government forces and OAGs.
177 'With arms for Yemen rebels, Iran seeks wider Mideast role', *The New York Times*, 15 March 2012, http://www.nytimes.com/2012/03/15/world/middleeast/aiding-yemen-rebels-iran-seeks-wider-mideast-role.html?pagewanted=all&_r=0.

Iran has also been accused of providing weapons to the armed wing of the Southern Movement[178] and additional support to the Houthis and Harak through Hezbollah.[179] If proved, such conduct would constitute violations of treaty and customary international law. However, there is no evidence to suggest that Iran (or for that matter any other state that may have provided such assistance) was in overall control of any of the non-state armed groups in Yemen. Consequently, none of the NIACs was 'internationalized' as a result of external involvement.

<u>External support for the government</u>

During the period under consideration, Saudi Arabia provided financial support to the Yemeni government. There is no evidence to suggest that it has used military force in Yemeni territory since 2009.

The United States' involvement in Yemen has been determined, above all, by its assessment that, like Afghanistan, Yemen offers an ideal training base and safe haven for Al-Qaeda and its affiliates, which continue to pose a threat to the United States. A review of US policy towards Yemen in 2009 led to the adoption of a new Strategic Plan focusing on combating AQAP and increasing development assistance. In 2011 US military and intelligence activities against AQAP increased and the Obama administration expanded the CIA's authority to conduct 'signature strikes' using drones in Yemen. The military operation by the Yemeni armed force in May 2012 to oust AAS from Abyan province was preceded by several weeks of air attacks reportedly carried out by US drones and jets from Djibouti.[180] The extent of US involvement in Yemen was acknowledged by President Obama in his 2012 'War Powers Resolution 6-Month Report', which, released in June 2012, stated:

> The U.S. military has also been working closely with the Yemeni government to operationally dismantle and ultimately eliminate the terrorist threat posed by al-Qa'ida in the Arabian Peninsula (AQAP), the most active and dangerous affiliate of al-Qa'ida today. Our joint efforts have resulted in direct action against a limited number of AQAP operatives and senior leaders in that country who posed a terrorist threat to the United States and our interests.[181]

Counter-terrorism cooperation between the United States and Yemen may have increased under President Hadi but even under Saleh, the US military operations in Yemen were founded on the consent of the Yemeni government. Irrespective of whether such operations are defined as joint operations (with the Yemeni authorities) or as part of a separate armed conflict between the United States and Al-Qaeda and its affiliated forces, to the extent that the criteria for the existence of a NIAC are satisfied, the conflict between the parties was non-international in character since the typology of any armed conflict is determined by the parties to that conflict rather than the geographical location of the fighting. As the United States is not a party to APII, only CA3 and customary international law applied in its military operations (whether unilateral or jointly with Yemeni forces) against AAS/Al-Qaeda.

Some legal issues for further thought

The legal experts were struck by the complexity of the violent situations that had engulfed Yemen during the period under examination. As in the case of Syria, securing the relevant facts for the purpose of classification was challenging, particularly in the light of the array of armed actors who played an active role in the multiple and often overlapping situations of violence. This fact, coupled with the dearth of information about how the different groups operated, raised a number of supplementary legal questions that remained unanswered.

178 'Fears grow over Yemenis' ties to Iran', *The Wall Street Journal*, 20 June 2013, http://online.wsj.com/article/SB10001424127887324904004578536884215565420.html.
179 'US says Iran active in north, south Yemen – report', Reuters, 25 March 2012, http://in.reuters.com/article/2012/03/25/us-yemen-ambassador-idINDEE82O06R20120325.
180 Sharp, 'Yemen', p. 10.
181 Presidential Letter 'War powers resolution 6 month report', 15 June 2012, http://www.whitehouse.gov/the-press-office/2012/06/15/presidential-letter-2012-war-powers-resolution-6-month-report.

Absence of reliable and accurate information

Obtaining accurate and reliable facts always poses a difficulty in armed conflict situations. This impediment is all the more acute when the conflict is fought on territory that has not traditionally been under the effective control of the state or, for that matter, accessible to independent observers. To the extent that the legal tests for determining the existence of an armed conflict are reliant on securing the relevant facts, the fundamental question raised in the case of Yemen was if the facts remained obscure and consequently it was impossible to conclude whether an armed conflict existed in the legal sense, what body of law should apply? Logic would dictate that human rights law as a default regime applies unless the existence of an armed conflict operationalizes LOAC. But human rights law assumes that the state has effective control of the said territory. So should LOAC be the default regime on territory that is not under the effective control of the state and where the level of violence is significant but where the facts necessary to determine the existence of an armed conflict are not available?

The existence or otherwise of an IAC is more likely to pivot on disputes over whether the exchange of armed hostilities was so serious as to trigger the application of LOAC. However, in the case of NIACs, and particularly those between armed groups, disputes over the applicability of LOAC more commonly hinge on whether the organizational requirement is fulfilled. If there is inadequate information on the internal operations of an armed group (as in the case of certain tribal groups in Yemen) or if the nature of the relationship between different armed groups is unknown or the available information unreliable (for example, some armed groups may adopt a strategy based on misinformation, which may indeed be the case in respect of AQAP and AAS), a judgment may simply be impossible. In such circumstances, can (and should) the organizational element be inferred? If so, would it be appropriate to assess the capacity of the armed group to challenge the authority of the state by reference to the record of harm and disruption inflicted by that group to conclude that the organizational criterion is satisfied?

It should, however, be noted that the absence of information at the time of the armed confrontations does not mean that judgment cannot be reached at a later stage in the context of criminal prosecutions. As the ICTY has stressed, to the outside observer an armed group may appear to lack an organizational structure and hierarchy but that may be a reflection of the conditions under which the group has chosen to operate. In other words, a careful analysis is required before definitively concluding that a group does *not* satisfy the organizational criterion since, for example, it may in fact be operating under conditions of secrecy to protect its leadership from the threat posed by an adversary.[182]

The Tadić *criteria revisited*

As in the case of Syria, the legal experts once again confronted the question of whether the organizational element for determining the existence of an armed conflict requires reconsideration. In contrast with Syria, where the issue concerned the emergence of an OAG – in other words, what level of organization had to be demonstrated before an armed group would be regarded as 'organized' – the question that prompted debate in the case of Yemen was whether the organizational criterion could ever be satisfied if the membership of the armed group was perpetually in flux.

As noted, the ICTY case law makes clear that the armed group in question does not have to reach the level of a conventional militarily disciplined unit and that determining whether the requirement has been fulfilled must be done on a case-by-case basis. That said, there must be some structure that enables a group to act as a group. In Yemen, the fluid movement of fighters between various armed groups called into question whether some measure of stability is required before an armed group is regarded as 'organized'. If (as the case of Yemen seems to suggest) both the membership of an armed group and the roles within it are constantly changing, can that group ever qualify as an 'organized armed group'? In short, must there be a stable and core membership for the armed group to be considered organized?

---

182 *Prosecutor v. Limaj*, IT-03-66-T, Judgment of 30 November 2005, para. 132.

The involvement of some tribes in the armed hostilities in southern Yemen – whether against the armed groups that remained loyal to former president Saleh or against AAS – prompted a further question concerning the relationship between armed groups.[183] If such groups are fighting a common adversary but do not come under a single command and are not coordinating their activities, should they be treated as separate OAGs? Is it necessary to show that each of the armed wings of the tribal groups fulfilled the organizational requirement before concluding that LOAC governed the hostilities between AAS and the various tribal groups? Or is there a point at which LOAC insists on treating the separate armed groups as a single entity?

The temporal question

The conditions that must be met for LOAC to be applicable have dominated the legal discourse in recent years. By contrast, little attention has been paid to whether the end of an armed conflict can likewise be ascertained by reference to an objective legal test. Do the *Tadić* criteria apply? If an OAG no longer exists or has ceased to function as an organized group, does human rights law automatically apply as the default regime? If the intensity of the armed hostilities falls below the requisite threshold, is LOAC no longer the appropriate governing body of law? Or is there a temporal frame within which LOAC continues to apply even though the level of violence has dipped below the NIAC threshold? If an OAG controls territory, does LOAC continue to apply even if there are no armed hostilities between that OAG and government forces for an extended period?

The spatial question

The legal experts were divided over the question of whether the existence of an armed conflict in one part of the state's territory operationalized LOAC throughout the entire country. However, the majority took the view that LOAC was not limited to the conflict zone ('battle space') but extended throughout the state's territory. If that is indeed the case, do NIAC rules follow the individual members of the OAG (including the armed forces) wherever they are located within the territory? Does the law follow the fighters across borders? What implications are there for the civilian population in locations that are otherwise peaceful and, if it were not for the temporary presence of a member of an OAG within their midst, would be protected by human rights law? Though pertinent to all armed conflict situations, this issue has an added dimension in the context of the United States' targeted-killing policy towards members of Al-Qaeda and its associated forces, including AQAP.

---

183 This issue was also relevant to the armed hostilities between the pro-Saleh groups and those affiliated to the al-Ahmar family.

LIBYA

Sir Richard Dalton (former UK ambassador to Libya)

The intensity of the violence

Inspired by the popular uprisings in Tunisia and Eygpt, a number of high-profile human rights defenders – including Fathi Terbil, a well-known lawyer – began in early February 2011 to call for public demonstrations to demand democratic reform.[184] On 15 February the Libyan internal security forces arrested Terbil, triggering a protest in the eastern city of Benghazi the following day. The security measures adopted by the regime to pre-empt the spread of the protests proved counter-productive: within days, the demonstrations had spread from Benghazi to other towns in the east, including Al-Bayda, Derna and Tobruk. The use of live ammunition by the security forces at some of these locations led to scores of deaths, sparking even more protests.[185] The largest mass protests took place in and around Benghazi, where both the security forces and the demonstrators resorted to considerable levels of force.[186] On 20 February, following a succession of unsuccessful attempts by the demonstrators to attack the army base in Benghazi using improvised weapons,[187] one protester drove a car laden with gas canisters through the barracks, enabling the demonstrators to take control of the base.[188] Confronted by this unexpected mass unrest, the security and armed forces began to retreat from Benghazi and other towns and cities in the east. From around this time the regime's rhetoric became increasingly belligerent, as exemplified by the public pronouncement by one of Muammar Gaddafi's sons that, 'We will keep fighting until the last man or even the last woman standing … If everybody is armed, it is civil war; we will kill each other.'[189]

On 22 February the High Commissioner for Human Rights condemned the reported use of 'machine guns, snipers and military planes against the demonstrators' and called for a full and independent investigation into the allegations, adding that the 'widespread and systematic attacks against the civilian population may amount to crimes against humanity'.[190] The same day the UN Security Council issued a press statement condemning the use of force against the protesters and expressing deep regret at 'the deaths of hundreds of civilians'.[191] Similar statements were issued by the Council of the League of Arab States, the Organization of Islamic Cooperation, the African Union and the EU.

The violence continued to spread west to Tripoli and Misrata, and by 24 February the pro-Gaddafi forces, overwhelmed by the number of demonstrators who had taken to the streets, had lost control of Benghazi, Tobruk and Misrata.[192] The protesters were able to seize considerable caches of weapons abandoned by the security and armed forces when the latter retreated from the towns and cities. As defecting members of the security and armed forces with access to weapons joined the protesters, the anti-Gaddafi opposition groups became increasingly well-armed.

On 25 February the Human Rights Council adopted Resolution S-15/1, which condemned the 'gross and systematic human rights violations committed in Libya, including indiscriminate armed attacks against civilians, extrajudicial killings, arbitrary arrests, detention and torture of peaceful

---

184 *Report of the International Commission of Inquiry on Libya to investigate all alleged violations of international human rights law in the Libyan Arab Jamahiriya*, 1 June 2011, A/HRC/17/44, para. 37.
185 'Libya Security forces kill 84 over three days', *Human Rights Watch,* 19 February 2011,
http://www.hrw.org/en/news/2011/02/18/libya-security-forces-kill-84-over-three-days.
186 'Popular protest in North African and the Middle East (V): Making Sense of Libya', International Crisis Group Middle East/North Africa Report No. 107, 6 June 2011.
187 'Battle at army base broke Gadhafi hold in Benghazi', *The Washington Post*, 25 February 2011,
http://www.washingtonpost.com/wp-dyn/content/article/2011/02/25/AR2011022505021.html.
188 'On Libya's revolutionary road', *The New York Times*, 30 March 2011,
http://www.nytimes.com/2011/04/03/magazine/mag-03Libya-t.html?pagewanted=all&_r=0.
189 Channel 4 News, 21 February 2011, cited in 'Popular protest in North African and the Middle East (V): Making Sense of Libya', International Crisis Group Middle East Crisis Group Report No. 107, 6 June 2011, p. 4.
190 'Pillay calls for international inquiry into Libyan violence and justice for victims', Office of the High Commissioner for Human Rights, 22 February 2011,
http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10743&LangID=E.
191 SC/10180, 22 February 2011.
192 A/HRC/17/44, para. 65.

demonstrators, some of which may also amount to crimes against humanity'. At the same time, it decided to establish an international commission of inquiry to investigate all alleged violations of international human rights law in Libya. On 26 February the Security Council adopted Resolution 1970, which urged the Libyan authorities 'to respect human rights and international humanitarian law'. Pursuant to Article 41 of the UN Charter, the council declared an arms embargo (including a ban on the provision of armed mercenaries[193]), imposed targeted sanctions on Gaddafi and his family and referred the situation in Libya to the International Criminal Court. On 1 March the General Assembly suspended Libya's membership of the Human Rights Council.[194]

In late February the number of people who had crossed the borders into Tunisia and Egypt in order to flee the violence was put at 37,000.[195] The UN High Commissioner for Refugees estimated that by early March close to 100,000 people had fled to neighbouring countries, although most were foreign migrants.[196] Around this time pro-Gaddafi forces began to mount military operations to retake control of territory. Air strikes were launched not only to stop the opposition from accessing stockpiles of weapons[197] but also to support ground troops that were advancing on Zawiya and Misrata with the help of tanks and heavy artillery.[198]

On 3 March the Libyan National Transitional Council (NTC), which was based in Benghazi and led by Mustafa Abdul Jalil (former minister of justice), declared itself the sole representative of Libya.[199] On 10 March France recognized the NTC as the 'legitimate representative' of the Libyan people. However, it was not until 15 July 2011 that the international Contact Group on Libya formally recognized the NTC as the 'legitimate governing authority' of Libya.

On 17 March 2011 the Security Council adopted Resolution 1973, which authorized a no-fly zone over Libya and 'all necessary measures' to protect civilians. The resolution was adopted by a vote of 10 in favour, zero against and five abstentions.[200] Air strikes commenced on 19 March.

In early August, after months of military stalemate, militia groups mounted a counter-attack on the town of Zawiya; by late August the fighting had reached the suburbs of Tripoli. At the end of August anti-Gaddafi armed groups controlled most of Libyan territory with the exception of Sirte and Bani Walid. On 20 October Gaddafi was captured by a militia group on the outskirts of Sirte after NATO jets had bombed the armoured convoy in which he had been travelling. Gaddafi was killed in circumstances that remain unclear. On 23 October the NTC declared Libya officially 'liberated' and announced plans to hold elections within eight months.[201]

The armed opposition

There is little evidence to suggest that the violence on the part of the anti-Gaddafi demonstrators in the early days was in any way organized. For example, the attacks by the protestors on military establishments and government buildings in Benghazi are best described as a spontaneous response to the use of live ammunition by the armed forces. By the end of February the residents of towns and cities from which pro-Gaddafi forces had been ousted – including Benghazi, Zawiya, Misrata and Zuwarah – began to organize themselves into committees to defend against a counter-attack by the state forces.[202] Those who took up arms in the cities and towns were predominantly young men who referred to themselves as 'thuwars' or revolutionaries. Although they formed

193 Allegations that Gaddafi had recruited foreign mercenaries from sub-Saharan Africa proved to be largely unfounded. Nevertheless, as a consequence of those allegations, many black African migrants and dark-skinned Libyan nationals were targeted and lynched during the conflict. See, for example, 'The Battle for Libya: Killings, Disappearances and Torture', Amnesty International report, 13 September 2011.
194 A/RES/65/265, 3 March 2011.
195 Statement by UN Secretary-General to the Security Council on 25 February 2011, S/PV.6490.
196 'Libya revolt as it happened: Sunday', BBC News, 27 February 2011, http://news.bbc.co.uk/1/hi/world/9409004.stm.
197 For example, air strikes on the ammunition dump at Brega. See 'Libya revolt as it happened: Wednesday', BBC News, 2 March 2011, http://news.bbc.co.uk/1/hi/world/africa/9412340.stm.
198 Report of the Independent Civil Society Fact-Finding Mission to Libya, January 2012, para. 96; 'Misratah – Under Siege and Under Fire', Amnesty International report, 6 May 2011.
199 A/HRC/17/44, para. 41.
200 Brazil, China, Germany, India and the Russian Federation abstained.
201 A/HRC/19/68 (of 2 March 2012), Annex I, paras 93–97.
202 'Libya unrest: eyewitness accounts', BBC News, 1 March 2011, http://www.bbc.co.uk/news/12614978.

themselves into loosely organized groups or 'kataeb' ('kata'ib'), these geographically rooted armed units generally operated independently of one another.[203] Even when augmented by defectors from Gaddafi's forces, there was no attempt to introduce a command structure. Moreover, coordination between groups was rare.

During the initial wave of violence, many of the civilians had armed themselves with 'homemade' weapons. However, after the Gaddafi forces had retreated, the protesters seized abandoned weapons, including AK-47 rifles, rocket-propelled grenades and anti-aircraft machine guns mounted on pick-up trucks. In Benghazi, as early as the end of February, defecting soldiers provided volunteers with military training on weapons use.[204] As the violence spread across the country, the number of defectors to the opposition (including those from the higher echelons of the armed forces[205]) increased.[206] However, this trend notwithstanding, the command structure remained fragmented and the volunteers were often in disarray, with little or no coordination between the various armed groups.[207] In territory under the control of Gaddafi forces, armed opposition fighters appeared to operate in small cells that comprised four or five individuals and were sometimes under the direction of a local leader.[208]

Although on 5 March 2011 the NTC established a military council, headed by Omar Hariri, to coordinate security matters,[209] no attempt was made to create a central command for the scores of kataeb that came into existence across the country.[210] Some of these armed groups eventually evolved into effective militia groups capable of mounting coordinated military operations, as was the case in Benghazi, Misrata and Zintan. The lack of reliable evidence makes it difficult to identify a date for this transformation. Nevertheless, by late summer and certainly by the time the final offensive on Tripoli was launched in August, some of these militias were well-organized armed groups capable of mounting complex military operations, having benefited from training provided by British, French and Qatari special forces.

Evidence in support of the existence of an armed conflict and its classification

Libya

On 22 February 2011, in a televised address Gaddafi threatened to use force against the Libyan people and encouraged his supporters to fight the protestors.[211] However, Gaddafi did not state at any point that Libya was engaged in an armed conflict.

UN Security Council

In Resolution 1970, which was adopted on 26 February 2011, the Security Council expressly called on the Libyan authorities to respect human rights and IHL. The reference to IHL in the text of the resolution suggests that the council had already assumed the existence of a NIAC in Libya. However, close scrutiny of the individual statements at the time of the adoption of Resolution 1970 reveals that some states chose to limit their comments to the obligations of the Libyan government to comply with IHRL rather than reference IHL.[212] By contrast, when the Security Council adopted Resolution 1973 on 17 March, there was general agreement that a NIAC existed in Libya.

203 A/HRC/19/68, para. 62.
204 'Libya unrest: Eyewitness accounts', BBC News, 1 March 2011, http://www.bbc.co.uk/news/12614978; 'Libya revolt as it happened: Tuesday', BBC News, 1 March 2011, http://news.bbc.co.uk/1/hi/world/africa/9410847.stm. There is little evidence that legal training was provided to the volunteers.
205 Following his defection on 22 February, General Abdul Fatah Yunis, former commander of an army special force, became the top field commander of the opposition forces, while General Khalifa Hufer became his deputy.
206 On 2 May Staff Brigadier General Mansour Mohammed Abu Hajar, head of the Libyan army's armoured vehicles and infantry division in Benghazi, announced that he and the division's personnel had joined the opposition. See 'Libya revolt as it happened: Tuesday', BBC News, 1 March 2011m, http://news.bbc.co.uk/1/hi/world/africa/9410847.stm.
207 Report of the Independent Civil Society Fact-Finding Mission to Libya, January 2012, paras 48–52. See, in particular, the reports cited in footnote 37.
208 A/HRC/17/44, para. 57.
209 Ibid.
210 A/HRC/19/68 (of 2 March 2012), Annex I, paras 66–67.
211 'Gaddafi's speech; the highlights', *The New Statesman*, 23 February 2011, http://www.newstatesman.com/blogs/the-staggers/2011/02/gaddafi-speech-defiant
212 The 6491st meeting of the Security Council on 26 February 2011 (S/PV.6491).

Moreover, with the adoption of the said resolution, there was agreement that a separate co-existing IAC commenced between states involved in the military intervention and the Libyan government for which the norms of IHL relating to international conflicts were applicable.[213]

Prosecutor of the International Criminal Court

On 4 May 2011 the prosecutor of the International Criminal Court submitted his first report, which concluded that 'since the end of February there has been an armed conflict in Libya'.[214]

International Committee of the Red Cross

On 10 March 2011 the president of the ICRC, Jakob Kellenberger, stated that a NIAC existed in Libya.[215]

Civil society groups

In January 2012 the Independent Civil Society Fact-Finding Mission to Libya, established by the Arab Organization for Human Rights in cooperation with the Palestinian Centre for Human Rights, issued a report concluding that a NIAC between the government and the anti-Gaddafi opposition groups existed [on] or around, 10 March 2011'. According to the mission, 'by this point armed hostilities had been occurring for approximately 18 days, and had escalated to involve heavy weaponry; Gaddafi had mobilized his *Katiba* and launched major offensives to retake a number of cities; the NTC and an associated Military Council had been established, and had issued press releases and communiqués; and the hostilities had involved significant urban fighting causing damage to property, a significant number of casualties, and resulted in the displacement of civilian populations.'[216]

The mission also found that the air operations conducted by foreign powers on 19 March 2011 had 'triggered the existence of an international armed conflict between the participating States and Libya'.[217] It should also be noted that the mission agreed with the assessment of the UN Commission of Inquiry on Libya that 'the actions of NATO and other foreign States involved are not exercising control over the military action of either of the parties to the non-international armed conflict' and that, consequently, the IAC between third states and Libya was legally distinct from the NIAC between the anti-Gaddafi armed groups and the Libyan state forces.

Legal conclusion

Existence of an armed conflict

Much of the evidence upon which the international community relied to determine whether an armed conflict existed in Libya came from a handful of media reports and social networking sites. That there was a serious breakdown in law and order from around 16 February 2011, particularly in the eastern towns and villages, was apparent. There was also considerable evidence of live ammunition being used against the protesters, which led to scores of deaths and hundreds being injured.

The unexpected retreat of Gaddafi's forces from many of the villages and towns in the east was followed by a short period during which the level of violence normally associated with the outbreak of an armed conflict – very high casualties and serious destruction of infrastructure – was not witnessed. At the same time, what was not apparent during the first weeks of the violence was the extent to which the anti-Gaddafi protesters had armed themselves with weapons seized from barracks that had been deserted by the armed forces. The difficulty of ascertaining whether the intensity threshold had, in fact, been met in February was compounded by two other factors. First, the belligerent rhetoric used by the Gaddafi leadership towards the protesters – including the threat

213 A/HRC/17/44, p. 4.
214 First Report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to UNSCR 1970 (2011) 4 May 2011 para. 37 [hereafter Prosecutor's First Report], www.icc-cpi.int.
215 'Libya: urgent to apply the rules of war', ICRC News Release 11/53, 10 March 2011.
216 Prosecutor's First Report, para. 62.
217 Ibid., para. 63.

of 'civil war' and references to the use of foreign mercenaries – conveyed the impression that within the first week of the violence, an armed conflict already existed. Second, this, in turn, triggered the mass flight of foreign nationals into neighbouring states and required many foreign governments to take immediate protective measures to assist their nationals. Thus foreign nationals comprised a large proportion of those fleeing in the face of *possible* civil war.

The intensity threshold was nevertheless met when, in early March, Gaddafi's forces mounted a series of operations to retake control over towns and villages in the east. Evidence in support include the number of forces mobilized by the government, the type of weaponry used (artillery, tanks, air power) and the rising number of casualties as well as the damage to and destruction of property.

Notwithstanding its express acknowledgement that it lacked 'full information concerning several aspects of the opposition forces' organization', the UN Commission of Inquiry on Libya nevertheless reached the view in June 2011 that 'by or around 24 February [2011], a non-international armed conflict had developed sufficient to trigger the application of APII and Common Article 3 of the Geneva Conventions'.[218] In its subsequent report of March 2012, the commission reaffirmed its earlier assessment that by late February 2011 an armed conflict had developed between pro-Gaddafi and 'thuwar' forces.[219]

If the organizational criterion as currently interpreted under international law is preserved, unless there is evidence to indicate that the anti-Gaddafi armed groups were, in fact, far more organized than existing evidence in the public domain seems to suggest, it is difficult to share the commission's view. As the Commentary to APII observes, although there need not be a hierarchical system of military organization similar to that of regular armed forces, there must be an organization capable, on the one hand, of planning and carrying out sustained and concerted military operations and, on the other, of imposing a certain level of discipline.[220] The ad hoc manner in which the armed groups operated during the first two weeks of the violence, the generally fragmented nature of the armed opposition and the absence of a command structure all militate against the commission's finding. However, by early March the capacity of the armed groups to engage in coordinated attacks appeared to have increased considerably. This is evidenced by the fact that the armed opposition was able to repel the counter-offensive by Gaddafi's forces and to prevent government forces from reasserting control over the towns and villages in the east. The intensity of the fighting between the armed groups was considerable: heavy weaponry was used by all sides; the number of casualties as a consequence of the violence rose; and the damage to and destruction of property was significant, albeit primarily in the east. By early March 2011 an armed conflict existed in Libya, triggering the application of LOAC.

Classification: legal conclusions

It would not be unreasonable to conclude that by 10 March a NIAC governed by CA3 and APII existed between pro-Gaddafi and anti-Gaddafi forces. What is noteworthy about the case of Libya is the speed at which APII was operationalised to govern the parties to the conflict.[221] The more common pattern is for a CA3 NIAC to evolve over time into an APII NIAC as government forces lose territorial control to opposition/rebel forces in the course of hostilities. What was extraordinary in the case of Libya was that within a matter of days, the armed forces had ceded vast swathes of territory to a disorganized civilian population acting spontaneously following relatively limited armed hostilities. As a consequence of the government's almost overnight loss of control over territory and its failure to reassert control in early March, APII was operationalized.

The international community's reaction to the unfolding violence in Libya was unusual in two respects. First, there was widespread condemnation of the way in which Gaddafi was responding to the violence. Most, if not all states, were agreed that the regime had lost all legitimacy; as a

---

218 A/HRC/17/44 (of 1 June 2011), para. 65.
219 A/HRC/19/68, para. 80.
220 Commentary to APII, para. 4463.
221 Libya had acceded in 1978 to the Additional Protocols, including APII, which applies to armed conflict taking place 'in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, 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'.

result, Gaddafi did not benefit from any foreign support, political or otherwise. Second, this broad global consensus enabled the Security Council to take enforcement measures under its Chapter VII authority with unusual speed, including the authority to intervene militarily in Libya. More specifically, Resolution 1973 authorized 'Member States …. acting nationally or through regional organizations or arrangements … to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahariya.'[222]

The air strikes that began on 19 March and initially involved the United Kingdom, France and the United States marked the beginning of an IAC between Libya and those states involved in the military operation. On 31 March NATO assumed operational command under 'Operation Unified Protector',[223] which added 15 states to the list of those involved in the IAC.[224]

External support for the anti-Gaddafi armed groups

There is evidence that from as early as March the anti-Gaddafi armed groups were receiving support – principally in the form of equipment – from some states, including Qatar and France.[225] Media reports suggest that Qatar, in particular, was providing not only funding but weapons to individuals and groups opposed to the regime. The extent of foreign state involvement in the violence is difficult to verify, as is the point in time when the support evolved from simply protecting civilians and civilian-populated areas (as mandated pursuant to Resolution 1973) to pro-actively aiming at working with, or through, the anti-Gaddafi armed groups to overthrow the regime. However, in May 2011 reports began to emerge that foreign forces were operating on the ground and may have been instrumental in coordinating NATO air strikes on pro-Gaddafi targets.[226]

Given the level of external support extended to the anti-Gaddafi forces, the question arises as to whether the existing NIAC was 'internationalized'. As is now well established in international law, a NIAC may become 'internationalized' if another state has overall control over foreign militias or paramilitary units that are engaged in a NIAC with the armed forces of the state. Since the mere provision of financial assistance or military equipment or training does not suffice, if Qatar or indeed any other state assisting the anti-Gaddafi armed groups was providing only such support, the armed conflict would have remained non-international in character. However, if a foreign state takes on a role in organizing, coordinating or planning the military actions of the military group – in addition to financing, training and equipping, or providing operational support to, that group – the NIAC will be considered international in character.

According to the jurisprudence of the ICTY, it is not necessary that the controlling state plan all the operations of the units that depend on it, choose their targets or give specific instructions concerning the conduct of military operations. The determination of whether the anti-Gaddafi armed groups were under the overall control of another state is a factual one and the threshold appears to be relatively high. There is some evidence to suggest that some states did, in fact, deploy their special forces to operate alongside the anti-Gaddafi groups prior to the recognition of the NTC as the legitimate governing authority in mid-July 2011; moreover, after the commencement of NATO operations, it would appear that foreign forces were present on the ground, albeit in small numbers. An assessment of the typology of the conflict therefore pivots on uncovering the precise nature of the role of the foreign armed forces insofar as their relationship with the anti-Gaddafi armed groups was concerned, which, without additional factual evidence, is impossible to do. Put simply, at what point, if at all, did another state assume overall control over any of the anti-Gaddafi forces?

The case of Libya raises the possibility not only of the internationalization of a NIAC but also of the internalization of an existing IAC. In this regard, several issues arise. The air strikes that

---

222 S/RES/1973.
223 A/HRC/19/68, para. 604.
224 These were Belgium, Bulgaria, Canada, Denmark, Greece, Italy, Jordan, the Netherlands, Norway, Qatar, Romania, Spain, Sweden, Turkey and the United Arab Emirates.
225 A/HRC/19/68, para. 69; See 'Behind Qatar's intervention in Libya', *Foreign Affairs*, 28 September 2011, http://www.foreignaffairs.com/articles/68302/david-roberts/behind-qatars-intervention-in-libya.
226 'Al Jazeera footage captures 'western troops on the ground' in Libya', *The Guardian*, 30 May 2011, http://www.theguardian.com/world/2011/may/30/western-troops-on-ground-libya.

commenced on 19 March 2011 brought into existence an IAC between the states participating in the coalition and Libya that was regulated by Common Article 2 to the Geneva Conventions. As the commentaries to the conventions make clear,

> any difference arising between two or states and leading to the intervention of armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war. It makes no difference how long the conflict lasts, or how much slaughter takes place.[227]

What is more difficult to ascertain is the end date of the *international* armed conflict and its possible transformation into a *non-international* armed conflict. Legal commentators are generally agreed that with the fall of Gaddafi and the NTC's assumption of the role of sole legal representative, the IAC was transformed into a NIAC. However, what remains uncertain is the criteria that must be met to trigger any such transformation. Is the recognition of the opposition as the legitimate government sufficient? Does recognition have the legal effect of transforming an existing IAC into a NIAC for the recognizing state party alone? And what forms of recognition are relevant? For example, if France's recognition of the NTC as the legitimate *representative* of the Libyan peoples on 10 March 2011 were equated to the recognition that the NTC was the legitimate *governing* authority in Libya, would the armed involvement by France in support of the anti-Gaddafi armed groups be governed by NIAC rather than IAC rules? Is recognition of a government only one of several criteria that must be fulfilled for a transformation to occur? What are those criteria and is there an identifiable tipping point?[228] At the other extreme, if a state involved in a multinational operation refuses to recognize the opposition as the legitimate governing authority, despite the majority of its partners having done so, do IAC rules continue to apply for that state alone?

Some legal issues for further thought

The UN Security Council's authority to declare the existence of a NIAC

Even in early March, the evidence in support of the existence of a NIAC was tenuous at best. As conceded by the UN Commission of Inquiry on Libya in its June 2011 report, 'information is more readily available concerning the intensity of the conflict and how the opposition forces have gained territorial control than many aspects of the organization of the armed opposition forces'.[229] Nevertheless, this did not stop the Security Council from adopting Resolution 1970 on 26 February 2011, which expressly called on the Libyan authorities to respect IHL, thereby implying the existence of a NIAC. It may be doubted whether the council was declaring the existence of a NIAC by this reference to the law; but if it was making such a declaration, this raises an important question as to the scope of the Security Council's powers under its Chapter VII mandate. In short, does the council possess the authority to declare the existence of a NIAC regardless of whether the *Tadić* criteria are satisfied?

The Tadić *criteria revisited*

As with the case studies of Syria and Yemen, Libya posed a number of difficulties in regard to the organizational criterion. The legal experts were once more confronted with the fundamental question of whether one can conclude that an OAG exists (for the purpose of applying the law) if the armed wing of an opposition movement does not operate under any organized command structure. The experts were broadly in agreement that the existence of a political leadership alone was inadequate. But to what degree must there be a military leadership capable of issuing orders and asserting a degree of control?

This recurring question led the experts to ask whether too much emphasis is placed on the organizational criterion or whether the problem lay with the indicia of an OAG rather than with the existence of such a group. In Benghazi, for example, the anti-Gaddafi armed groups were far from

---

227 J. Pictet, *Commentary on the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, ICRC, Geneva, 1952, p.32.
228 See the discussion at the beginning of this paper under 'Legal Framework', subsection 'Internalized IAC' (p. 5).'
229 *Report of the International Commission of Inquiry to investigate all alleged violations of international human rights law in the Libyan Arab Jamahiriya, Human Rights Council*, para. 65 (A/HRC/17/44).

being organized under any kind of command and control structure, but that did not prevent many from concluding that a NIAC existed. When faced with a similar factual situation, the ICTY had held in *Prosecutor v. Haradinaj* that an armed conflict existed in Kosovo from April 1998 notwithstanding its own finding that until August 1998 the Kosovo Liberation Army (KLA) had 'no rigid hierarchical structure' (but rather a 'horizontal command structure') and that 'communication between KLA groups was limited'.[230] As in the case of Libya, the villagers in Kosovo had organized themselves on their own initiative and many had voluntarily taken on roles more akin to maintaining security than fighting. The tribunal observed that as the number of volunteers claiming allegiance to the KLA rose, 'a mainly spontaneous and rudimentary military organization at the village level'[231] began to develop. The Kosovo example led the experts to consider whether 'collective coordination' could serve in some situations as a more useful indicator for the organizational criterion.

Parallel NIACs

The existence of a political leadership is a relevant factor in assessing whether single or multiple parallel NIACs exist in any particular location. If the armed groups operating in a theatre of conflict display a level of loyalty towards the overall objectives articulated by the political leadership, it would seem that although they might be operating separately, their participation in the hostilities would fall under a single NIAC. This observation raised the question of whether it was possible to identify the criteria for grouping together the armed groups for the purpose of fulfilling the intensity criterion. Common cause was discussed but rejected by some experts on the grounds that this would indirectly introduce a further criterion in the form of motive. Moreover, if common cause is treated as a valid indicium of intensity, a global battle space is possible.

---

230 *Prosecutor v. Haradinaj* (IT-04-84-T), 3 April 2008, para. 68.
231 Ibid., para. 89.

CONCLUSION: FURTHER LEGAL RESEARCH?

The three case studies raised a number of legal questions revealing the need for further research in the following areas:[232]

The intensity criteria

- If the level of the intensity of violence in an existing NIAC dips below a certain threshold, does the situation still qualify as a NIAC?

- What indicators should be taken into account to determine that the intensity of violence has dipped to such a degree that the situation is more appropriately governed by IHRL alone?

- How, if at all, should the temporal dimension of a dip in the violence be factored into any assessment?

- In a situation where violence breaks out between state forces and an organized armed group, can an armed conflict be activated only when the exchange of violence on the part of *both* parties crosses a certain threshold?

- The intensity of violence is generally not regarded as relevant to whether an IAC exists. However, in the light of state practice, should it be?

Groups and parties

- Who is a 'party' to an armed conflict?[233]

- Does a 'party' to an armed conflict possess the same attributes as an OAG?

- Is there a link between the two?

- Should the violent acts of the various armed groups operating in a particular space be 'combined' for the purpose of assessing the intensity threshold?

- If so, on what basis is that particular space defined?

- If territory is not under the effective control of the state but the level of violence within that area meets the intensity threshold, should LOAC apply even if the organizational element necessary for concluding the existence of an armed conflict cannot be identified/does not exist?

Recognition

- To what extent is the classification of an armed conflict contingent on the recognition of a government?

- What are the consequences for the classification of a conflict involving multinational operations if states adopt different political positions?

---

232 See also the questions raised in each subsection entitled 'Some legal issues for further thought' – Syria, p. 17; Yemen, p. 31; and Libya, p. 40 above.

233 'A party to an armed conflict is usually understood to mean armed forces or armed groups with a certain level of organisation, command structure and, therefore, the ability to implement IHL. The very logic underlying IHL requires identifiable parties … because this body of law … establishes equality of rights and obligations among them under IHL (not domestic law) when they are at war'. *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts,* ICRC report published on the occasion of the 28th International Conference of the Red Cross and Red Crescent, December 2003.

ABOUT THE AUTHORS

Louise Arimatsu is an Associate Fellow at Chatham House and speaks and publishes extensively on international humanitarian law. She is the author of 'The Democratic Republic of Congo: A Case Study', in E Wilmshurst (ed.), *International Law and the Classification of Conflicts* (OUP, 2012); *Conflict Minerals: the Search for a Normative Framework* (Chatham House Briefing Paper, 2012); 'The Law of State Responsibility in Relation to Border Crossing: An Ignored Legal Paradigm' (US Naval War College International Law Studies, 2013); 'Spatial Conceptions of the Law of Armed Conflict', in R. Barnidge (ed.), *The Liberal Way of War* (Ashgate, 2013); '*Jus in Bello* and the Rule of Law' in R. Liivoja and T. McCormack (eds), The *Routledge Handbook of the Law of Armed Conflict* (2014, forthcoming); 'Cyber Warfare and the Classification of Conflict', in N. Tsagouris and R. Buchan (eds), *International Law and Cyberspace* (Elgar, 2014, forthcoming). She was a Senior Fellow at the NATO Cooperative Cyber Defence Centre of Excellence and Managing Editor of the *Yearbook on International Humanitarian Law*.

Mohbuba Choudhury is a Senior Protection Associate at the Office of the United Nations High Commissioner for Refugees in London. She is working on a collaborative project with the Home Office (Quality Integration Project), which continues the development and integration of quality assurance mechanisms in various areas to address international protection concerns. She has worked as a researcher on UNHCR's publication *Beyond Proof: Credibility Assessment in EU Asylum Systems* (2013) and is co-author with Louise Arimatsu of 'The Benefits and Limitations of a Cyber Arms-control Treaty', in *Securing the Cybersphere* (International Cybersecurity Research Group, 2014).

The views expressed here are those of the authors and do not represent the position of UNHCR or of the United Nations.