

The Applicability of International Humanitarian Law to the Conflict in Libya

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Abstract

The purpose of this article is to examine the applicability of international humanitarian law to the 2011 conflict in Libya in its consecutive phases. We argue that the situation in Libya rose to the level of non-international armed conflict between the government forces and insurgents united by the National Transitional Council by the end of February 2011. The military intervention by a multi-state coalition acting under the Security Council mandate since March 2011 occasioned an international armed conflict between Libya and the intervening States. We consider and reject the arguments in favour of conflict convergence caused by the increased collaboration between the rebels and NATO forces. Similarly, we refute the propositions that the Gaddafi government's gradual loss of power brought about conflict de-internationalisation. Finally, we conclude that both parallel conflicts in Libya terminated at the end of October 2011. The article aspires to shed light on the controversial issues relating to conflict qualification in general and to serve as a basis for the assessment of the scope of responsibility of the actors in the Libyan conflict in particular.

Keywords

Libya; NATO; NTC; non-international armed conflict; international armed conflict; internationalisation of armed conflicts; humanitarian law

Introduction

After over forty years of an 'especially corrupt and inefficient' rule, the tribes of Libya rose up against their hated leader. A violent civil war ensued and the ruler's son played a prominent role in it. The rebellious tribesmen from outlying regions took up position outside of Tripoli, a city heavily defended by fighters loyal to the ruler. As these events were unfolding in the mid-1790s, an intervention of international forces was not forthcoming to affect the balance of fighting. The Tripolitan civil war was decided in 1795 when Yusuf Karamanli, son of the former

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ruler Ali, crushed his opponents, secured the throne, and tamed the tribes of the interior.³

More than two hundred years later, a conflict displaying some remarkably similar characteristics ended in a significantly different way. In the Libyan civil war of 2011, the intervention of the NATO forces proved decisive in tipping the balance in favour of the insurgents fighting the regime of Muammar Gaddafi. Unlike its historical predecessor, the recent conflict was subject to modern-day law of armed conflict (also known as international humanitarian law or IHL).

As the initial peaceful demonstrations grew into an insurgency against the government, which then was assisted by the foreign forces, which in turn gradually became more intertwined with the rebels, then contributed to the defeat of the Libyan leader, and finally withdrew as violence all but disappeared again, the legal qualification of the situation developed and changed.

In this article, we set out on a journey through time, identifying the breaking points in the 2011 Libyan conflict from the point of view of applicability of IHL. We first look at what point the fighting that grew out of the demonstrations surpassed the threshold of a non-international armed conflict (NIAC). Second, we identify the moment by which an international armed conflict (IAC) between the Libyan government and the intervening forces came about. Third, we analyse whether the nature of any of these conflicts changed with the assumption of the operations by NATO or by its gradually closer co-operation with the rebels. Fourth, we ask whether the IAC in Libya could have changed into NIAC after Gaddafi lost his grip on power. Finally, we turn to the question at what point the conflict in Libya ended and what IHL obligations may have survived that development.

Determining the conflict nature during its various phases is important for reasons going beyond completeness of the historical record. Whether a situation can be qualified as a NIAC or IAC determines the scope of applicable norms of IHL at the relevant time. Although we have observed a certain trend of confluence between the two, the law of IAC retains its wider latitude and deeper level of detail as compared to the law of NIAC.⁴ Understanding the breaking points in which the nature of the conflict changed in Libya will shed light on future conflicts with similar factual patterns. More importantly, the analysis presented here should contribute to the assessment of accountability for the violations of IHL

³ Ronald B. St John, *Historical Dictionary of Libya* (2006) p. 141; John Wright, *A History of Libya* (2012) p. 80.

⁴ See, e.g., Robert Kolb and Richard Hyde, *An Introduction to the International Law of Armed Conflicts* (2008) pp. 69–70; Jelena Pejić, “Status of Armed Conflicts”, in E. Wilmshurst and S. C. Breau (eds.), *Perspectives on the ICRC Study on Customary International Humanitarian Law* (2007) p. 77; Marko Milanović and Vidan Hadži-Vidanović, “A Taxonomy of Armed Conflict”, in N. White and C. Henderson (eds.), *Research Handbook on International Conflict and Security Law* (2012) p. 2 (forthcoming, available at SSRN: <http://ssrn.com/abstract=1988915>, all page references refer to the SSRN version of the chapter).

committed during the Libyan conflict, whether it will be conducted on the national or international level.

As Richard Baxter observed nearly forty years ago, ‘the first line of defence against international humanitarian law is to deny that it applies at all’.⁵ The main aim of this article is to provide a rigorous analysis of the situations occurring during the 2011 Libyan conflict in order to identify the time-span during and the extent to which this line of defence inevitably falls short.

1. Peaceful Demonstrations Develop into NIAC (February 2011)

1.1. *Beginning of Protests (15–20 February 2011)*

The wave of civil society uprisings spreading across Northern Africa reached Libya later than other countries in the region but it may well have become the most severely affected State thus far. In the beginning of 2011, Libyan Arab Jamahiriya had for over forty years been ruled by an authoritarian regime with Muammar Gaddafi at its top. Although Gaddafi’s military rank was only that of a Colonel and he did not hold an official position in the government of Libya, there is no doubt that he acted as the *de facto* head of the Libyan State and was recognized as such in internal and international affairs alike.⁶

Upheaval in the region had already resulted in the ousting of two heads of States by the time protests reached Libya. Following intensive demonstrations in their home countries, Tunisia’s Zine al-Abidine Ben Ali and Egypt’s Hosni Mubarak were forced to step down on 16 January and 11 February, respectively.⁷ In Libya, protests first erupted in Benghazi, an Eastern Libyan city, following the arrest of a human rights campaigner and lawyer Fathi Terbil on 15 February.⁸

The protests were peaceful during the first few days.⁹ A ‘Day of Rage’ was announced by the protesters for Thursday 17 February, intended to take place

⁵ Richard Baxter, “Some Existing Problems in Humanitarian Law”, in C. Pilloud (ed.), *The Concept of International Armed Conflict: Further Outlook* (1974) pp. 1–2.

⁶ *Prosecutor v. Gaddafi et al.* (Decision on the “Prosecutor’s Application Pursuant to Article 58 as to Muammar Mohammed Abu Minya GADDAFI, Saif Al-Islam GADDAFI and Abdullah AL-SENSUSI”) Pre-Trial Chamber I, ICC-01/11 (27 June 2011), para. 17.

⁷ See, e.g., Angélique Chrisafis and Ian Black, “Zine al-Abidine Ben Ali Forced to Flee Tunisia as Protesters Claim Victory”, *The Guardian* (15 January 2011) <www.guardian.co.uk/world/2011/jan/14/tunisian-president-flees-country-protests> accessed 29 July 2012; Chris McGreal and Jack Shenker “Hosni Mubarak Resigns and Egypt Celebrates a New Dawn” *The Guardian* (11 February 2011) <www.guardian.co.uk/world/2011/feb/11/hosni-mubarak-resigns-egypt-cairo> accessed 29 July 2012.

⁸ UN Human Rights Council, “Report of the International Commission of Inquiry on Libya”, UN Doc A/HRC/19/68 (2 March 2012), Annex I, para. 76 (hereinafter “International Commission of Inquiry March 2012 Report”).

⁹ This was disputed by the Government of Libya. In its appraisal of the facts, the International Commission of Inquiry concluded that it was “likely” that the protesters engaged in peaceful assemblies. UN Human Rights Council, “Report of the International Commission of Inquiry to Investigate All Alleged

across whole Libya and to mark the fifth-year anniversary of the government's crackdown on a protest about cartoons depicting the Prophet Mohamed in front of the Italian Embassy in Tripoli.¹⁰ Despite the non-violent nature of these protests, the government reacted with force, resulting in a number of deaths especially in Benghazi.¹¹

Soon, the protesters started to arm themselves. According to various reports, by 19 or 20 February, local armed units started emerging in western cities of Al Zawiyah and Misrata as well as in the east of the country in Benghazi and Shahat.¹² Fighting between the government forces and the armed rebels soon ensued. Whether and when these clashes fulfilled the criteria for the existence of an armed conflict forms the first substantive question discussed in this article.

1.2. *Organised and Protracted Armed Violence (after 20 February 2011)*

Treaties on international humanitarian law do not contain any definition of a NIAC. Common Article 3 of the Geneva Conventions, a 'mini-convention'¹³ of norms applicable in NIACs, rather unhelpfully describes it only as an 'armed conflict not of an international character occurring in the territory of one of the High Contracting Parties'.¹⁴ Although Jean Pictet suggested that Common Article 3 should apply as widely as possible,¹⁵ the *travaux préparatoires*¹⁶ indicate and modern-day case-law¹⁷ confirms the generally accepted view that the provision

Violations of International Human Rights Law in the Libyan Arab Jamahiriya", UN Doc A/HRC/17/44 (12 January 2012), paras. 72 and 88 (hereinafter "International Commission of Inquiry January 2012 Report").

¹⁰ International Commission of Inquiry March 2012 Report, *supra* note 8, Annex I, para. 75 note 89.

¹¹ See, e.g., Ian Black, "Libya's Day of Rage Met by Bullets and Loyalists", *The Guardian* (17 February 2011) <www.guardian.co.uk/world/2011/feb/17/libya-day-of-rage-unrest> accessed 29 July 2012; see also International Commission of Inquiry March 2012 Report, *supra* note 8, Annex I, para. 77 (clashes occurred in Misrata, Al Zawiyah, and central Tripoli and provoked a particularly violent reaction by the government forces in Tripoli).

¹² Arab Organization for Human Rights, "Report of the Independent Civil Society Fact-Finding Mission to Libya" (January 2012), para. 23 (hereinafter "ICSFFM Report"); International Commission of Inquiry January 2012 Report, *supra* note 9, paras. 28, 55, 87.

¹³ Frits Kalshoven and Liesbeth Zegveld, *Constraints on the Waging of War: An Introduction to International Humanitarian Law* (3rd ed., 2001) p. 69.

¹⁴ Common Article 3 to the 1949 Geneva Conventions.

¹⁵ Jean Pictet (ed.), *Geneva Convention relative to the Protection of Civilian Persons in Time of War: Commentary* (1958) pp. 35–36 (hereinafter "GC IV Commentary").

¹⁶ See Rogier Bartels, "Timelines, Borderlines and Conflicts: The Historical Evolution of the Legal Divide between International and Non-international Armed Conflicts," 91 *International Review of the Red Cross* (2009) pp. 63–64.

¹⁷ See *Prosecutor v. Tadić* (Jurisdiction Appeal) IT-94-1-AR72 (2 October 1995), para. 70 ("[A non-international] armed conflict exists whenever there is [...] *protracted* armed violence between governmental authorities and *organized* armed groups or between such groups within a State") (emphasis added), as applied in *Prosecutor v. Tadić* (Trial Judgement) IT-94-1-T (7 May 1997), para. 562; *Prosecutor v. Limaj, Bala and Musliu* (Trial Judgement) IT-03-66-T (30 November 2005), paras. 88–170; *Prosecutor v. Haradinaj, Balaj and Brahimaj* (Trial Judgement) IT-04-84-T (3 April 2008), paras. 37–60 (especially at

implies a twofold requirement of minimum organisation of the conflict parties and minimum intensity of the conflict itself.¹⁸

It should be emphasised at this point that these requirements, unparalleled in the case of IACs,¹⁹ confirm that despite the text of Common Article 3,²⁰ NIACs do not form a residual category. In other words, at present there is not a generic category of ‘armed conflict’ of which IAC and NIAC would form specific types.²¹ For a situation to change from one to the other, it thus has to acquire all required attributes of the latter category, and not merely lose those of the former.

The dual requirements of intensity and organisation have been elaborated upon and expanded in the case-law of the UN *ad hoc* tribunals. Among the indicators of the first requirement of conflict intensity, various ICTY chambers have considered, for example, the number of persons and type of forces partaking in the fighting,²² the geographical spread and frequency of armed clashes,²³ and the need for mobilisation of armed forces to counter the insurrection.²⁴

There is little doubt that fighting in Libya soon surpassed this quite liberal requirement of intensity. Demonstrators started taking up arms against the Gaddafi regime as early as 19 February, with reported incidents of first military successes in the form of taking over garrisons and even towns from all across Libya.²⁵ The government responded with the use of heavy armed force. By 20 February, governmental units opened machine-gun fire on the protesters²⁶ and the Libyan Air Force warplanes and Navy warships bombarded rebel-controlled cities.²⁷ We would conclude that due to widespread serious fighting that met with a fierce

para. 49: “The criterion of protracted armed violence refers more to the *intensity* of the conflict rather than its duration”) (emphasis added).

¹⁸ See, e.g., Dietrich Schindler, “The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols” 163 *Recueil des Cours* (1979) p. 147; Marco Sassòli and Antoine A. Bouvier, *How Does Law Protect in War?* (3rd ed., 2011) Part I, ch 2, pp. 22–23; Kolb and Hyde, *supra* note 4, p. 78.

¹⁹ Cf. *Prosecutor v. Delalić et al.* (Čelebići Trial Judgement) IT-96-21-T (16 November 1998) para. 184 (“the existence of armed force between States is sufficient of itself to trigger the application of international humanitarian law”).

²⁰ “. . . armed conflict *not* of an international character . . .” (emphasis added).

²¹ Milanović and Hadži-Vidanović, *supra* note 4, p. 13; Dino Kritsiotis, “The Tremors of Tadić”, 43 *Israel Law Review* (2010) pp. 293–299; Schindler, *supra* note 18, p. 131.

²² *Haradinaj* Trial Judgement, *supra* note 17, para. 48.

²³ *Limaj* Trial Judgement, *supra* note 17, para. 168; *Prosecutor v. Tadić* (Trial Judgement) IT-94-1-T (7 May 1997), para. 565; Čelebići Trial Judgement, *supra* note 19, para. 189; *Prosecutor v. Milošević* (Decision on Motion for Judgement of Acquittal) IT-02-54-T (16 June 2004), para. 28.

²⁴ *Milošević* Decision on Motion for Judgement of Acquittal, *supra* note 23, para. 30.

²⁵ ICSFFM Report, *supra* note 12, para. 48; International Commission of Inquiry January 2012 Report, *supra* note 9, paras. 28, 55.

²⁶ BBC, “Libya Unrest: Scores Killed in Benghazi ‘Massacre’” (20 February 2011) <<http://www.bbc.co.uk/news/world-africa-12517327>> accessed 29 July 2012.

²⁷ See, e.g., Haaretz, “Report: Libya air force bombs protesters heading for army base” (21 February 2011) <www.haaretz.com/news/world/report-libya-air-force-bombs-protesters-heading-for-army-base-1.344775> accessed 29 July 2012; STRATFOR, “Unrest and the Libyan Military” (21 February 2011) <www.stratfor.com/analysis/20110220-unrest-libyan-military> accessed 29 July 2012.

response by the government forces, by that point in time the intensity requirement had been met.

As for the second requirement of organisation, various ICTY chambers have looked into factors including the existence of a command structure and disciplinary mechanisms within the non-State armed group; the group's unity in internal and external relations; and its ability to gain access to weapons, equipment, recruits, and training.²⁸ The situation in Libya did not allow for a single unified front against Gaddafi to come about at this stage. In February 2011, much of the fighting against the regime erupted spontaneously and was not subject to a united command structure. For example, a report published by International Crisis Group stated that between 100 and 300 anti-Gaddafi armed militias have been formed across Libya.²⁹

However, we would argue that at the heart of the organisation requirement is a concern that the group must be able to effectively implement IHL in its activities.³⁰ The armed group need not have a structure on par with that of the State forces; 'some degree of organisation' will suffice.³¹ Pockets of protesters that stormed weapons caches and attempted to take control over buildings and towns in the early days of the uprising arguably did not fulfil this requirement yet.³² The spontaneous nature of these activities did not yet allow for responsible commanders to emerge who would be capable of enforcing compliance with IHL by these fighters.³³

However, consolidation processes commenced soon after. The resistance fighters gradually organised themselves into geographically rooted militias (or *kataeb*), each led by a single military commander, who was often recruited from the ranks of defectors from the national army.³⁴ The communication constraints prevailing in the early phase of the conflict prevented the *kataeb* from fusing into a unified military structure with a single chain of command.³⁵ However, the rebel forces

²⁸ *Limaj* Trial Judgement, *supra* note 17, para. 90; *Haradinaj* Trial Judgement, *supra* note 17, para. 60.

²⁹ International Crisis Group, "Holding Libya Together: Security Challenges After Qadhafi – Middle East/North Africa Report N°115" (14 December 2011) p. 19 (hereinafter "ICG Report").

³⁰ Milanović and Hadži-Vidanović, *supra* note 4, p. 26; Pejić, *supra* note 4, pp. 191–192; Schindler, *supra* note 18, p. 147; Lindsay Moir, *The Law of Internal Armed Conflict* (2002) p. 36; but see International Law Association, "Final Report on the Meaning of Armed Conflict in International Law" (2010) p. 15 (emphasising that the *Tadić* definition does not require the armed groups to be capable of meeting IHL obligations).

³¹ *Limaj* Trial Judgement, *supra* note 17, para. 89; see also Marco Sassòli, "The Implementation of International Humanitarian Law: Current and Inherent Challenges" 10 *Yearbook of International Humanitarian Law* (2007) p. 59 (warning that a too strict requirement of organisation would render IHL inapplicable to modern day asymmetrical conflicts).

³² See International Commission of Inquiry March 2012 Report, *supra* note 8, Annex I, para. 79 (demonstrators took up arms that they seized from abandoned government depots across Libya).

³³ See René-Jean Wilhelm, "Problèmes relatifs à la protection de la personne humaine par le droit international dans les conflits armés ne présentant pas un caractère international" 137 *Recueil des Cours* (1972) p. 348 (the organisation requirement includes notably the precondition of responsible command).

³⁴ International Commission of Inquiry March 2012 Report, *supra* note 8, Annex I, paras. 61–63.

³⁵ *Ibid.*, Annex I, para. 61.

were able to acquire and maintain their hold over a number of towns and cities already by 24 February.³⁶ We consider the level of organisation necessary to coordinate a successful subjugation of a municipality defended by the government forces to be sufficient to allow for the internal enforcement of compliance with IHL by the rebel forces.³⁷

Soon after, the National Transitional Council (NTC) emerged as the ‘political face of the uprising’.³⁸ Its establishment has been dated by various sources between 27 February and 5 March 2011³⁹ and it soon became understood and recognised as the principal opposition group in Libya.⁴⁰ The NTC was complemented by a military council set up to coordinate armed activities that oversaw at least some of the opposition troops.⁴¹ As the conflict progressed, the NTC affirmed its commitment to IHL by issuing ‘codes of conduct’ on the treatment of detainees and prisoners⁴² and a frontline manual on the fundamental rules of IHL.⁴³

These milestones confirmed the existence of organised structure on the side of the rebels but we do not consider this development determinative for the fulfilment of the organisation requirement analysed here.⁴⁴ The importance of NTC’s emergence lay rather in the ability of the insurgents to enter into external relations, including with third States and international organisations, than in their ability to implement and enforce IHL. Similarly, even when the conflict in Somalia featured over 30 independent warring groups without a common political representation, the Security Council considered that Common Article 3 was applicable.⁴⁵

³⁶ Kareem Fahim and David D. Kirkpatrick, “Libyan Rebels Repel Qaddafi’s Forces Near Tripoli”, *New York Times* (24 February 2011) <www.nytimes.com/2011/02/25/world/africa/25libya.html?pagewanted=all> accessed 29 July 2012.

³⁷ Whether the fighters actually adhered to the rules of IHL is irrelevant. It is the capacity to do so that matters in the determination of the organisation requirement. See *Prosecutor v. Boškoski & Tarčulovski* (Trial Judgement) IT-04-82-T (10 July 2008), para. 205.

³⁸ Reuters, “Anti-Gaddafi Figures Say Form National Council” (27 February 2011) <<http://www.reuters.com/article/2011/02/27/libya-council-revolution-idUSWEB194120110227>> accessed 29 July 2012.

³⁹ *Ibid.* (27 February 2011); International Commission of Inquiry March 2012 Report, *supra* note 8, Annex I, para. 82 (2 March 2011); Founding Statement of the Interim Transitional National Council (5 March 2011).

⁴⁰ International Commission of Inquiry January 2012 Report, *supra* note 9, para. 31.

⁴¹ ICSFFM Report, *supra* note 12, para. 46; International Commission of Inquiry March 2012 Report, *supra* note 8, Annex I, para. 65.

⁴² NTC, “The Treatment of Detainees and Prisoners” (25 March 2011) <<http://www.ntclibya.org/english/prisoners>> accessed 29 July 2012.

⁴³ NTC, “Frontline Manual on the Fundamental Rules of Armed Conflict” (19 May 2011) <<http://www.ejiltalk.org/wp-content/uploads/2011/08/Final-Libyan-LOAC-Guidelines-17-May-2011.ppt>> accessed 29 July 2012.

⁴⁴ But see ICSFFM Report, *supra* note 12, para. 62 (“[By 10 March 2011, the date considered as the first day of the NIAC,] the NTC and an associated Military Council had been established, and had issued press releases and communiqués”).

⁴⁵ Liesbeth Zegveld, *The Accountability of Armed Opposition Groups in International Law* (2002) pp. 138–141.

In summary, on or around 24 February, anti-Gaddafi forces were able to effectively implement IHL in their activities, as evidenced by the co-ordination of their military operations and gradual acquisition of control over a large part of Libyan territory. We suggest that this ability should be seen as a sufficient confirmation that the organisation requirement had been met by that point. With both the requirements fulfilled, we may thus conclude that a NIAC in Libya commenced most likely in late February 2011.⁴⁶

Libya has been a State Party to the Additional Protocol II to the Geneva Conventions since 1978.⁴⁷ This instrument contains norms regulating conduct and providing protection beyond the scope of Common Article 3. However, its conditions of applicability are also more stringent than those of Common Article 3. It has been suggested that most of the rules under Additional Protocol II have been transposed to Common Article 3 conflicts by way of development of customary law.⁴⁸ However, the extent to which this process has been comprehensive is subject of ongoing academic discussion⁴⁹ and thus assessment of applicability of the Additional Protocol II to the conflict in Libya remains pertinent.

In addition to conditions discussed above in relation to a Common Article 3 conflict, Article 1 of the Protocol requires, in particular,⁵⁰ the insurgent group to be in control of a discernible part of the State's territory, such that would allow them 'to carry out sustained and concerted military operations and to implement this Protocol'. This requirement thus excludes guerrilla-type violence from its scope.⁵¹

Opposition armed forces established themselves in the Eastern city of Benghazi soon after the commencement of the protests and maintained control over the

⁴⁶ Accord International Commission of Inquiry January 2012 Report, *supra* note 9, para. 55 and International Commission of Inquiry March 2012 Report, *supra* note 8, Annex I, para. 28 (24 February 2011); ICC, "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 (considering an armed conflict existed "[s]ince the end of February"); Katie A. Johnston, "Transformations of Conflict Status in Libya" 17 *Journal of Conflict & Security Law* (2012) pp. 92–93 (28 February 2011); but see ICSFEM Report, *supra* note 12, para. 62; ICRC, "Libya: urgent to apply the rules of war", News Release 11/53 (10 March 2011), <<http://www.icrc.org/eng/resources/documents/news-release/2011/libya-news-2011-03-10.htm>> accessed 29 July 2012 (both dating the start of the conflict on or around 10 March 2011).

⁴⁷ ICRC, List of State Parties to the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) <www.icrc.org/ihl.nsf/WebSign?ReadForm&id=475&ps=P> accessed 29 July 2012.

⁴⁸ Milanović and Hadži-Vidanović, *supra* note 4, p. 28.

⁴⁹ See, e.g., Pejić, *supra* note 4, p. 88; John B. Bellinger and William J. Haynes, "A US Government Response to the International Committee of the Red Cross Study on Customary International Humanitarian Law" 89 *International Review of the Red Cross* (2007) p. 448.

⁵⁰ For a more detailed exposition of the conditions of applicability of Additional Protocol II, see, e.g., Eve La Haye, *War Crimes in Internal Armed Conflicts* (2008) pp. 8–9.

⁵¹ For example, in the Guatemalan Civil War, the insurgents were able to carry out sustained and concerted military operations without placing any part of the national territory under their control, which made AP II inapplicable to the conflict. René Provost, *International Human Rights and Humanitarian Law* (2002) p. 263.

city until the close of hostilities.⁵² By late February, rebels took over several other cities including Shahat, Tobruk, and Misrata.⁵³ Although control over particular areas of Libyan territory was shifting between the conflict parties as the fighting developed, anti-government forces' maintained their hold on at least parts of it throughout the conflict.⁵⁴ On this basis, we conclude that the conditions for the applicability of Additional Protocol II were met simultaneously with the commencement of NIAC in Libya.⁵⁵

2. Foreign Intervention Commences IAC (March 2011)

2.1. *UN-authorized Intervention from the Perspective of IHL (26 February–19 March 2011)*

The Security Council, a United Nations organ often decried for being too slow and ineffective in responding to mass atrocities,⁵⁶ moved unusually swiftly in relation to Libya. Little more than a week after the eruption of violence, it unanimously adopted Resolution 1970, demanding, first and foremost, an immediate end to the fighting.⁵⁷ The Libyan government did not comply with the terms of this Resolution; on the contrary, it announced the intensification of its offensive against the rebels in no unclear terms.⁵⁸

⁵² Alexander Dziadosz, "Benghazi, Cradle of Revolt, Condemns Gaddafi", *The Star* (23 February 2011) <http://thestar.com.my/news/story.asp?file=/2011/2/24/worldupdates/2011-02-23T222628Z_01_NOOTR_RTRMDNC_0_-550982-4&sec=Worldupdates> accessed 29 July 2012.

⁵³ See, e.g., "Gaddafi Loses More Libyan Cities", *Al Jazeera* (24 February 2011) (regarding Tobruk and Misrata) <www.aljazeera.com/news/africa/2011/02/2011223125256699145.html> accessed 29 July 2012; Kareem Fahim and David D. Kirkpatrick, "Libyan Rebels Repel Qaddafi's Forces Near Tripoli", *New York Times* (24 February 2011) <www.nytimes.com/2011/02/25/world/africa/25libya.html?pagewanted=all> accessed 29 July 2012 (regarding Misrata, Zuwarah and Sabratha); International Commission of Inquiry January 2012 Report, *supra* note 9, para. 55 (regarding Tobruk, Misrata, and Shahat).

⁵⁴ Cf. Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987) pp. 1352–1353, paras. 4464–4467 (as long as there is a degree of stability in the control it may relate even to a modest area of land in order for this condition to be fulfilled) (hereinafter "APs Commentary").

⁵⁵ Accord International Commission of Inquiry March 2012 Report, *supra* note 8, Annex I, para. 20 (AP II was triggered simultaneously with Common Article 3); but see Johnston, *supra* note 46 (considering the conditions for the applicability of AP II were met "at the latest" following the NTC's declaration of respect for the Geneva Conventions and their protocols in August 2011).

⁵⁶ See, e.g., Zeynep Elibol, "The Security Council Response to Mass Atrocities: A Case Study of Rwanda and Darfur" 58 *Annales XLI* (2009) p. 19 ("the Security Council was too slow and late to act [in Rwanda]"); Adekeye Adebajo, "Ethiopia/Eritrea" in D. Malone (ed.), *The UN Security Council: from the Cold War to the 21st century* (2004) p. 585 (criticising the Security Council's "lethargic reaction to the Ethiopia-Eritrea conflict").

⁵⁷ UN SC Res. 1970 (2011) para. 1.

⁵⁸ Peter Beaumont, Ian Traynor and Nicholas Watt, "Gaddafi Takes Key Towns as NATO Squabbles over Libya Action", *The Guardian* (10 March 2011) <www.guardian.co.uk/world/2011/mar/10/gaddafi-libya-nato> accessed 29 July 2012 ("Gaddafi's son said the renewed offensive, which has been building for

In response, on 17 March 2011 the Security Council passed Resolution 1973 which established a no-fly zone over Libya and authorized the taking of ‘all necessary measures’ to protect civilians and civilian populated areas.⁵⁹ Already two days later, a multi-state coalition began a military intervention against the Libyan government forces. On 19 March 2011, the US and British forces fired cruise missiles against Libyan air defences, the French Air Force and the British Royal Air Force undertook sorties across Libya, and the British Royal Navy established a naval blockade.⁶⁰

According to Common Article 2 of the Geneva Conventions, the rules of IHL 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’.⁶¹ As interpreted by the widely accepted definition of the ICTY, this means ‘a resort to armed force between States’,⁶² with virtually no threshold requirement of intensity or duration of the conflict.⁶³

Under these criteria, there is little doubt that an IAC between Libya on the one side and the intervening States on the other side came to existence when first strikes against the government forces commenced. It is interesting to consider whether this effect could have been produced already by the Security Council’s authorisation to use force against Libya. Similarly to a declaration of war, which expressly triggers application of IHL under Common Article 2, an authorisation by the Security Council creates a *potentiality* that force will be used in inter-State relations. However, the crucial difference between the two is that while a

several weeks, would be launched following the refusal of rebels to negotiate or lay down arms. ‘Time is now. It’s time for action . . . we gave them two weeks [for negotiations],’ Saif al-Islam said in a speech to supporters.”); David D. Kirkpatrick and Kareem Fahim, “Qaddafi Warns of Assault on Benghazi as U.N. Vote Nears”, *New York Times* (17 March 2011) <www.nytimes.com/2011/03/18/world/africa/18libya.html?pagewanted=all> accessed 29 July 2012 (“‘We are coming tonight,’ Colonel Qaddafi said. ‘You will come out from inside. Prepare yourselves from tonight. We will find you in your closets.’ Speaking on a call-in radio show, he promised amnesty for those ‘who throw their weapons away’ but ‘no mercy or compassion’ for those who fight.”).

⁵⁹ UN SC Res. 1973 (2011) paras. 4, 6.

⁶⁰ See, e.g., Chris McGreal, Ian Black, Toby Helm and Kim Willsher, “Allied strikes Sweep Libya as West Intervenes in Conflict”, *The Guardian* (20 March 2011) <www.guardian.co.uk/world/2011/mar/19/libya-air-strikes-gaddafi-france> accessed 29 July 2012; “Libya: US, UK and France Attack Gaddafi Forces”, *BBC News* (20 March 2011) <<http://www.bbc.co.uk/news/world-africa-12796972>> accessed 29 July 2012.

⁶¹ Common Article 2 to the 1949 Geneva Conventions.

⁶² *Tadić* Jurisdiction Appeal, *supra* note 17, para. 70.

⁶³ GC IV Commentary, *supra* note 15, p. 20; see also *Čelebići* Appeal Judgement, *supra* note 19, para. 184 (juxtaposing IACs and NIACs insofar as the requirement of intensity and duration is concerned); but see Christopher Greenwood, “Scope of Application of Humanitarian Law” in D. Fleck (ed.), *The Handbook of International Humanitarian Law* (2nd ed., 2008) p. 48 and Gary D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (2010) p. 151 (both arguing for a more restrictive view); see also United Kingdom Declaration on Signature of the 1977 Geneva Protocols, para. (a) (contending that the term “armed conflict” used in Additional Protocol I implies a level of intensity equal or greater to that required for the application of Protocol II).

declaration of war brings about legal effects for two specifically identified parties (the declaring and the target State), at the moment when the authorising resolution is adopted, it remains uncertain which of the UN members – if any – would act on it until one of them *actually* resorts to armed force. Thus, we argue that an IAC commenced on 19 March 2011 when France, the UK, and the US resorted to armed force against Libya.⁶⁴

2.2. *One or Two Conflicts? (after 19 March 2011)*

Has the beginning of an IAC in Libya altered or subsumed the previously existing NIAC? Proponents of the so-called ‘global’ characterisation of situations of armed violence⁶⁵ argue that a foreign military intervention ‘transforms or contaminates’ the ongoing NIACs in the target State’s territory resulting in the existence of one single (‘global’) IAC in that territory.⁶⁶ Following this logic, the NIAC between the rebels and the Libyan government should be reclassified as soon as outside forces commenced their attack.

We reject the global characterisation both as a matter of principle as well as in relation to the particular case of Libya. On the general level, proponents of this approach laud it for its ease of application and consistency. In other words, the global approach is praised for using one set of norms (‘easy’)⁶⁷ to all conflict-related situations and relationships in a conflict-stricken State territory (‘consistent’).⁶⁸ Both arguments are misguided. First, ease of application is irrelevant as a question of *lex lata*. Lawyers often have to put up with the application of complex norms to complex facts and while simplification of application may be an expedient goal *de lege ferenda*, it cannot in and of itself serve as a justification to create a new meta-rule of application.⁶⁹

Second, the call for consistency appears in a clear form in Judge Rodríguez’s dissent in *Aleksovski* where he argued for two kinds of consistency: the consistency

⁶⁴ Accord International Commission of Inquiry January 2012 Report, *supra* note 9, para. 56; ICSFFM Report, *supra* note 12, para. 63.

⁶⁵ See James Stewart, “Towards a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalized Armed Conflict”, 85 *International Review of the Red Cross* (2003) pp. 333–335 (describing the competing “global” and “mixed” approaches).

⁶⁶ See, e.g., Tamás Hoffmann, “Squaring the Circle? – International Humanitarian Law and Transnational Armed Conflicts”, *Hague Academy of International Law* (2010) p. 11 and the references cited therein.

⁶⁷ See, e.g., Johnston, *supra* note 46, p. 101 (“it is... likely impossible in the heat of the battle to determine an enemy fighter’s origin, allegiance and the legal regime to which he is subject”).

⁶⁸ See, e.g., *Prosecutor v. Aleksovski* (Trial Judgement) IT-95–14/1-T (25 June 1999), Dissenting Opinion of Judge Rodríguez, para. 27.

⁶⁹ Cf. Marco Sassòli, “The Legal Qualification of the Conflicts in the Former Yugoslavia: Double Standards or New Horizons for International Humanitarian Law?”, in S. Yee and W. Teyea (eds.), *International Law in the Post-Cold War World: Essays in Memory of Li Haopei* (2001) p. 330 (“the fact that a situation is difficult to qualify under existing law is, except for first-year students, no argument to apply a new, easy solution”).

of protection of ‘victims of similar acts’ and the consistency of judicial determination of conflict nature in such complex situations.⁷⁰ The risk of inconsistency in both of these senses is, however, an inevitable consequence of the existence of a distinction between IACs and NIACs in IHL. As long as there will be two types of conflict, there will be some glaring discrepancies in the protection of victims of acts that are ‘similar’ or even identical – except for the type of conflict in which they occur.⁷¹ The possibility of various tribunals (or even differently composed chambers of the same tribunal) reaching different conclusions as to the conflict nature is definitely not a desirable outcome but it results from the courts’ primary responsibility to determine and assess the facts before them.⁷²

Our position that the conflict pairs occurring in a State’s territory following an outside intervention should be considered separately is also supported by an examination of the drafting history of the Additional Protocols to the Geneva Conventions. In the run-up to the diplomatic conference of 1974–1977, the ICRC’s proposal that foreign military assistance should trigger the full applicability of IHL was rejected twice and eventually dropped from the final draft of the Additional Protocols.⁷³ This refusal should be seen as an expression of a clear view of the international community that outside military assistance does not *per se* modify the nature of the conflict at hand. What is more, the government experts

⁷⁰ *Aleksovski* Trial Judgement, *supra* note 68, Dissenting Opinion of Judge Rodrigues, para. 27.

⁷¹ This has been criticised on numerous occasions. See, e.g., Emily Crawford, “Unequal before the Law: The Case for the Elimination of the Distinction between International and Non-international Armed Conflicts” 20 *Leiden Journal of International Law* (2007) p. 441; Yves Sandoz, “Foreword” in J.-M. Henckaerts and L. Doswald-Beck (eds.), *Customary International Humanitarian Law* (2005) Vol. 1, p. xxii (“For the average person this [distinction] is completely absurd. Indeed, how can one claim the right to employ against one’s own population means of warfare which one has prohibited for use against an invader?”); Stewart, *supra* note 65, p. 313 and references cited therein. However, these arguments are properly made on the level of *lex ferenda*, not with respect to *lex lata* to be applied to existing conflicts.

⁷² See, e.g., *Prosecutor v. Tadić* (Appeal Judgement) IT-94-1-A (15 July 1999), para. 64 (“The task of hearing, assessing and weighing the evidence presented at trial is left to the Judges sitting in a Trial Chamber. Therefore, the Appeals Chamber must give a margin of deference to a finding of fact reached by a Trial Chamber. It is only where the evidence relied on by the Trial Chamber could not reasonably have been accepted by any reasonable person that the Appeals Chamber can substitute its own finding for that of the Trial Chamber. It is important to note that *two judges, both acting reasonably, can come to different conclusions on the basis of the same evidence.*”) (emphasis added). This relative mutual independence of the individual trial chambers is occasionally overlooked by commentators who perceive the Tribunal as a rather monolithic bloc. See, e.g., Johnston, *supra* note 46, p. 100 nn 111–112 (arguing that the “position of the ICTY” on the global v. mixed view controversy is likely in support of the global view because the adoption of the mixed view would preclude even a single application of the global view).

⁷³ ICRC, “Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, 24 May–12 June 1971: Report on the Work of the Conference” (1971) paras. 301–302 (hereinafter “ICRC Experts Report 1971”); ICRC, “Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, 3 May–3 June 1972: Report on the Work of the Conference” (1972) Vol. I, para. 2.347 (hereinafter “ICRC Experts Report 1972”).

seemed to be unanimous in their opinion that the relationship between the opposing States should be governed by the provisions applicable in cases of IAC.⁷⁴ This position is now the prevailing view among the community of international law scholars.⁷⁵

As regards Libya in particular, reclassifying the whole situation from day 1 of the military intervention would also be tantamount to ignoring the reality on the ground. In the first days of the intervention, the overall goals, strategy and tactics of the intervening States differed significantly from those of the rebels. While the rebels continued their struggle on the ground to overthrow Gaddafi's regime, Western forces used precision air strikes to halt the progress of government forces and protect the civilians under threat.⁷⁶ There was little to no co-ordination between the intervening Powers and the insurgents on the ground.⁷⁷

We thus consider the situation in Libya immediately following the foreign intervention as being characterized by the existence of two discrete conflict pairs. A NIAC continued between the government of Libya and armed insurgents, while a separate co-existing IAC arose between the government of Libya and the intervening States.⁷⁸

⁷⁴ ICRC Experts Report 1971, *supra* note 73, paras. 303–304; ICRC Experts Report 1972, *supra* note 73, Vol. I, para. 2.347.

⁷⁵ See, e.g., Christopher Greenwood, "International Humanitarian Law and the Tadic Case", 7 *European Journal of International Law* (1996) p. 271; Hans P. Gasser, "Internationalized Non-International Armed Conflicts: Case Studies of Afghanistan, Kampuchea and Lebanon", 33 *American University Law Review* (1983) p. 147; Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (2010) pp. 26–28; Milanović and Hadži-Vidanović, *supra* note 4, p. 42; Hoffmann, *supra* note 66, pp. 20–22; Moir, *supra* note 30, pp. 46–47; but see Johnston, *supra* note 46, p. 102 note 114 (highlighting recent writing in support of the global view).

⁷⁶ See, e.g., Chris McGreal, Ian Black, Toby Helm and Kim Willsher, "Allied strikes Sweep Libya as West Intervenes in Conflict", *The Guardian* (20 March 2011) <www.guardian.co.uk/world/2011/mar/19/libya-air-strikes-gaddafi-france> accessed 29 July 2012; "Libya: US, UK and France Attack Gaddafi Forces", *BBC News* (20 March 2011) <<http://www.bbc.co.uk/news/world-africa-12796972>> accessed 29 July 2012.

⁷⁷ See, e.g., Peter Walker, "No Apology from Nato for Air Strike on Libyan Rebel Tanks", *The Guardian* (8 April 2011) <<http://www.guardian.co.uk/world/2011/apr/08/nato-no-apology-libya-air-strike>> accessed 29 July 2012 (complete lack of mutual information about the basics of operational tactics and methods of warfare: "It would appear that two of our strikes yesterday may have resulted in [rebel] deaths," he told reporters in Naples, where the operation is based. "I am not apologising. The situation on the ground was and remains extremely fluid and until yesterday we did not have information that [rebel] forces are using tanks."); Statement of the NATO Secretary General dated 13 May 2011 <http://www.nato.int/cps/en/natolive/opinions_74038.htm> accessed 29 July 2012 ("The NATO mandate does not give us any authority to decide on sides at a NATO level. The operational activities that are being carried out, as I've said, are to protect the civilian population. Any relationship with pro- or anti-Qadhafi forces is beyond this forum for myself at this stage.").

⁷⁸ Accord International Commission of Inquiry January 2012 Report, *supra* note 9, para. 56; ICSFFM Report, *supra* note 12, para. 63; contra Johnston, *supra* note 46, p. 102.

3. Potential Transformation and Convergence of the Conflicts (April–May 2011)

In the following weeks and months, two further developments occurred in relation to the outside intervention in Libya. First, on 31 March 2011, NATO assumed control of all international forces. This has given some potency to the claims that a situation cannot be qualified as an IAC anymore when one of the conflict parties is an international organisation.⁷⁹ Second, between April and May 2011, co-operation between NATO forces and the rebels intensified which, according to some reports, culminated in the establishment of a ‘joint operations centre’ in Benghazi.⁸⁰ Has this changed the nature of the conflict in Libya? We will discuss the relevance of both events in turn.

3.1. Assumption of Operational Control by NATO (after 31 March 2011)

The argument that an international organisation cannot be a party to an IAC is predicated on a literal reading of Common Article 2 which speaks of conflicts between ‘High Contracting Parties’ only.⁸¹ As an example in support of this line of reasoning, Michael Lewis cites the argument of the US government from the proceedings before the US Supreme Court in *Hamdan v. Rumsfeld* that the conflict between the US and Al Qaeda could not have been an IAC because one of the conflict parties was not a party to the Geneva Conventions.⁸² Similarly, Katie Johnston supports the view that only States, and not ‘subjects of international law’ may become parties to armed conflicts; she argues that the latter proposition would allow for a too diverse field of actors (including ‘even individuals’) to become parties to armed conflicts.⁸³

The underlying contention is flawed in several aspects. First, it ignores the possibility that an international organisation may become party to an IAC on the basis of customary international law.⁸⁴

⁷⁹ Michael Lewis, “How Should the Conflict in Libya be Categorized?”, *Opinio Juris* (30 March 2011) <<http://opiniojuris.org/2011/03/30/how-should-the-conflict-in-libya-be-categorized>> accessed 29 July 2012; see also Johnston, *supra* note 46, p. 104 (arguing that NATO does not become a party to the conflict).

⁸⁰ Bruno Waterfield, “Libya: British Military Advisers Set up ‘Joint Operations Centre’ in Benghazi” *The Telegraph* (18 May 2011) <www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/8521977/Libya-British-military-advisers-set-up-joint-operations-centre-in-Benghazi.html> accessed 29 July 2012.

⁸¹ See text to *supra* note 61.

⁸² Lewis, *supra* note 79. Lewis erroneously ascribes this argument to Justice Stevens who, however, only mentioned it in his opinion, before holding that “the merits of this argument” need not be decided on because Common Article 3 applied to the US-Al Qaeda conflict irrespective of whether or not the conflict parties were signatories of the Conventions. See *Hamdan v. Rumsfeld* 548 US 557, 628–629 (2006).

⁸³ Johnston, *supra* note 46, p. 104.

⁸⁴ Scope of the article precludes a detailed analysis of this point. Suffice it to say that no State raised an objection against the adoption of the UN Secretary-General’s Bulletin on “Observance by United Nations forces of international humanitarian law”, which obliged the UN peace-keeping and peace-enforcement forces to observe IHL in situations of armed conflict while they are actively engaged as combatants. UN

Second, accepting this argument would allow States to skirt international legal responsibility by using international organisations as vehicles to circumvent their legal obligations arising from IHL.⁸⁵ This would flout the general legal maxim *nemo plus juris transferre potest quam ipse habet*⁸⁶ as well as the now-customary prescription in Common Article 1 stipulating that the States are bound to respect the full extent of IHL ‘in all circumstances’.⁸⁷ In this light, the comparison of NATO with Al Qaeda or with individuals is clearly revealed as inapposite. International organisations, including NATO, are created by States who thus confer on them international personality along with certain powers.⁸⁸ The transfer of the States’ power to use force to such an international organisation cannot, however, entail a free ticket to resort to force without the constraints of legal norms that would bind the States in the first place. This would amount to attributing to that organisation a power its constituent States did not possess and as such must be rejected.⁸⁹

Doc ST/SGB/1999/13 (6 August 1999). See also UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (2004) p. 378, paras. 14.3–14.4 (stating that when international forces become party to an armed conflict with the armed forces of a State, they must observe IHL in its entirety).

⁸⁵ In part, this problem would be solved by the rule in Article 61 of the Draft Articles on the Responsibility of International Organisations, which prescribes that a member State of an international organisation incurs international responsibility when it causes the organisation to commit an act that, if committed by the State in question, would have constituted a breach of one of the State’s obligations. However, this rule is silent about the corresponding obligations of the organisation in question, which is what we focus on in the ensuing text.

⁸⁶ “No one can transfer more rights than one possesses.” See Dig. 50.54 (Ulpian, Ad Edictum 46) (original statement of the maxim); Maarten Bos, *A Methodology of International Law* (1984) p. 5 (discussing the maxim as a general legal principle).

⁸⁷ See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Merits, Judgment*, I.C.J. Reports 1986, para. 220 (confirming that the obligation to respect and to ensure respect for the Conventions derives not only from the Conventions themselves, but is also part of international customary law).

⁸⁸ *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion*, I.C.J. Reports 1949, p. 179. Although some commentators have questioned whether NATO in particular possesses international legal personality, this is now a minority position. Moreover, NATO Member States have repeatedly recognized NATO’s personality in various proceedings before international tribunals. See further Marten Zwanenburg, *Accountability of Peace Support Operations* (2005) pp. 66–68 (concluding that under both prevailing theories of international legal personality, NATO is an international legal person); ILC Report on the Responsibility of International Organizations, UN Doc A/64/10 (2009), pp. 47–48 (embracing ICJ’s ‘liberal’ approach towards acquisition of legal personality by international organizations under international law); but see Jan Klabbers, *Research Handbook on the Law of International Organizations* (2011) p. 40 (stating that the ‘exclusive’ attribution of responsibility to NATO Member States for acts carried out during the 1999 intervention in Yugoslavia ‘militates’ against NATO’s legal personality); Joe Verhoeven, *Droit international public* (2000) p. 613 (using NATO as an example of an organisation without international legal personality).

⁸⁹ Cf. Terry D. Gill, “Legal and some Political Limitations on the Power of the UN Security Council to Exercise its Enforcement Powers under Chapter VII of the Charter” 26 *Netherlands Yearbook of International Law* (1995) p. 82 (making a similar argument in relation to UN Security Council’s obligation to respect humanitarian law in military enforcement action); August Reinisch, “Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions” 95 *American Journal of International Law* (2001) p. 858 (making a similar argument in relation to

Third, the restrictive textual interpretation of Common Article 2 should give way to a purposive reading. The Geneva Conventions and their Protocols share a profound humanitarian underpinning and a desire to alleviate the suffering of the victims of wars. Mindful of these goals, we reject the suggestion that an alteration in the command structure of the intervening forces should bring the entire conflict outside of the scope of the law of IAC. The fact that an international organisation of NATO's calibre possesses the material capacity to become party to an armed conflict on par with the States gives rise to its subjective capacity to be bound by IHL to the same extent.⁹⁰ Therefore, Common Article 2 should be interpreted broadly to include hostilities between a High Contracting Party (the territorial State such as Libya in the present case) and an international organisation composed exclusively by States who are all High Contracting Parties themselves.

3.2. *Enhanced Co-operation between the Intervening and the Rebel Forces (April–May 2011)*

Have the intervening forces become more interconnected with the insurgents on the ground with the passage of time? The answer is undoubtedly yes. While in the first days of the intervention there was scant to no mutual communication⁹¹ and some of the air strikes even hit rebel units and materiel,⁹² this picture soon began to change. NATO personnel were dispatched to Libya in order to provide logistical support and to co-ordinate air strikes from the ground.⁹³ NATO provided operational support and military training to insurgent units.⁹⁴ In return, opposition forces selected and identified installations to be destroyed and passed their GPS co-ordinates to NATO that then carried out air strikes against these targets.⁹⁵ According to some reports, NATO established a joint operations centre in Benghazi, the purpose of which was to 'coordinate and make more effective the processing of military and tactical information back to NATO'.⁹⁶

The relationship between an outside intervening force and the domestic insurgents can take on many different forms. At the opposite end of complete operational separation and independence, it is conceivable for the intervening State to absorb the rebels wholly and thus to integrate them in its armed forces. One might think, for example, of the partisan groups fighting the Nazi regimes in the occupied Eastern European countries at the end of the Second World War who

UN Security Council's obligation to respect human rights and humanitarian law in adopting economic sanctions).

⁹⁰ Cf. Tristan Ferraro, "IHL Applicability to IOs Involved in Peace Operations", 42 *Proceedings of the Bruges Colloquium* (Autumn 2012) p. 17.

⁹¹ See text to *supra* notes 76–77.

⁹² Walker, *supra* note 77.

⁹³ ICSFFM Report, *supra* note 12, para. 56.

⁹⁴ *Ibid.*, paras. 53, 56.

⁹⁵ *Ibid.*, para. 56.

⁹⁶ Waterfield, *supra* note 80.

were incorporated in the Red Army upon its progress across the continent towards the heart of the Reich.⁹⁷ Such assimilation would turn the rebels into an organ of the third State⁹⁸ and thus, because afterwards there would be only two States left fighting each other, there is no doubt that the law of IAC would apply to the situation as a whole.⁹⁹

Provided the outside intervening and the domestic non-State actors do not merge fully, can their alignment under any circumstances nevertheless result in making the law of IAC applicable to the whole situation? In addition to the ‘global view’ that proposes that any intervention in a civil war in support of the rebels should internationalise the conflict as a whole,¹⁰⁰ which we already rejected above,¹⁰¹ there are two notable approaches that attempt to answer this question affirmatively.

First, according to the ICTY in *Tadić*, a NIAC is internationalised when the non-State group is acting on behalf of a foreign State.¹⁰² According to the Tribunal, by examining if a militia or a paramilitary group belongs to a ‘Party to the conflict’ under Article 4A(2) of Geneva Convention III, we can determine not only if the group members may be regarded as lawful combatants but also whether the armed conflict is international.¹⁰³ The non-State group is seen as belonging to the foreign State if it is considered to be acting on that State’s behalf as its *de facto* organ.¹⁰⁴ The Tribunal determined that the relevant test of attributing the conduct of an organised armed group to a State in such circumstances is the test of ‘overall control’.¹⁰⁵ This test requires the intervening State to provide financial and training assistance, military equipment and/or operational support (first step), and to participate in the organisation, coordination or planning of

⁹⁷ See, e.g., Edgar M. Howell, *The Soviet Partisan Movement 1941–1944* (6th ed., 2006) p. 230.

⁹⁸ Cf. Art. 4 of the International Law Commission’s Draft Articles on State Responsibility; see also *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, paras. 391–392 (entities that act in “complete dependence” on the third State may be equated with an organ of that State).

⁹⁹ It bears noting that the qualification of the conflict on the Eastern front did not change following the partisans’ absorption by the Red Army. The conflict had been international from the start due to the Nazi invasion and occupation of the countries in question. The example is used for illustrative purposes only.

¹⁰⁰ See, e.g., Johnston, *supra* note 46, pp. 97–102 (with regard to Libya); Theodor Meron, “Classification of Armed Conflict in the former Yugoslavia: Nicaragua’s Fallout” 92 *American Journal of International Law* (1998) p. 238 (with regard to Yugoslavia); Theodor Meron, “The Hague Tribunal: Working to Clarify International Humanitarian Law”, 13 *American University International Law Review* (1998) p. 1515 (in general, with respect to conflicts “where practically all the fighting is done by a foreign power alongside the rebels, but *where the rebels maintain their independence* from the intervening country”, emphasis added).

¹⁰¹ See Section 2.2 *supra*.

¹⁰² *Tadić* Appeal Judgement, *supra* note 72, para. 84.

¹⁰³ *Ibid.*, para. 92.

¹⁰⁴ *Ibid.*, paras. 96, 104.

¹⁰⁵ *Ibid.*, paras. 98–131.

military operations (second step), in order to attribute the rebels' acts to the State and, by extension, to internationalise the conflict as a whole.¹⁰⁶

The 'overall control' test was upheld in subsequent cases of the ICTY,¹⁰⁷ and was considered as reflecting the applicable law by the Special Court for Sierra Leone.¹⁰⁸ Although in the *Bosnian Genocide* case the ICJ rejected this test as unpersuasive in relation to attribution of State responsibility, it expressly did not take any position on its applicability to conflict classification.¹⁰⁹

Second, it has been argued that the issue of conflict qualification is a matter of IHL, and not of the law of State responsibility and therefore the test for internationalisation should be an independent IHL test which does not derive its validity from the law of state responsibility.¹¹⁰ It has been argued that not only the 'overall control' test may be used as an independent IHL test but that also weaker links between the intervening State and the rebels may be enough in order to internationalise NIACs.¹¹¹ Del Mar argues, for instance, that an express or even tacit acceptance by both sides that the rebels are fighting on behalf of the State is sufficient to satisfy the requirement of belonging to a conflict party under Article 4A(2) of the Third Geneva Convention.¹¹²

Although these approaches differ in where they place the crucial threshold of parties' interconnection, they share the assumption that once it is met, the law of IAC applies to a situation that features, among other conflict parties, a non-State actor. The following text highlights some of the challenges facing each of them.

First, it is improbable that the territorial State will be willing to extend the protections found in the law of IAC to the members of the rebel group, considered typically to be acting treasonously against the government, despite their

¹⁰⁶ *Ibid.*, paras. 131, 145, 162; cf. Stefan Talmon, "The Responsibility of Outside Powers for Acts of Secessionist Entities" 58 *International and Comparative Law Quarterly* (2009) p. 506.

¹⁰⁷ See, e.g., *Prosecutor v. Blaskić* (Trial Judgement) IT-95-14-T (3 March 2000), para. 75; *Prosecutor v. Kordić and Čerkez* (Trial Judgement) IT-95-14/2-T (26 February 2001), para. 66, paras. 111–115; *Prosecutor v. Aleksovski* (Appeal Judgement) IT-95-14/1-A (24 March 2000), para. 134; *Prosecutor v. Delalić et al. (Čelebići Appeal Judgement)* IT-96-21-A (20 February 2001), para. 26; *Prosecutor v. Naletilić* (Trial Judgement) IT-98-34-T (31 March 2003), paras. 182–184; *Prosecutor v. Kordić and Čerkez* (Appeal Judgement) IT-95-14/2-A (17 December 2004), paras. 299–313.

¹⁰⁸ See *Prosecutor v. Brima et al.* (Trial Judgement) SCSL-04-16-T (20 June 2007), para. 251.

¹⁰⁹ *Bosnian Genocide*, *supra* note 98, para. 404.

¹¹⁰ Marko Milanović, "State Responsibility for Genocide" 17 *European Journal of International Law* (2006) p. 587.

¹¹¹ Dapo Akande, "Classification of Armed Conflicts: Relevant Legal Concepts" in E. Wilmshurst (ed.), *International Law and the Classification of Conflicts* (2012) p. 61; Katherine Del Mar, "The Requirement of 'Belonging' under International Humanitarian Law" 21 *European Journal of International Law* (2010) pp. 111–112 (discussing the test of "belonging to a party" to an IAC).

¹¹² Del Mar, *supra* note 111, p. 112. Although Del Mar does not expressly extend her argument to conflict qualification, she considers the fulfilment of the requirement of belonging to a conflict party as a *conditio sine qua non* for bringing a non-State armed group under the purview of the law of IAC, thus effectively internationalising the conflict between such group and the State it is fighting.

interconnection with an outside State.¹¹³ In fact, on one of the sole occasions when government representatives expressed themselves on the matter, their position was damning. In relation to the abovementioned ICRC proposal to internationalise NIACs in cases of direct military intervention, it was said that if it were adopted,

then as soon as a foreign State sent its troops over the border to help the rebels, thereby trespassing to begin with on the territorial rights of the neighbouring State, the State which suffered such aggression would have to treat its own rebels as prisoners of war and its local population as that of an occupied territory. [...] *No government could accept that.*¹¹⁴

If this proposal was unacceptable for the governments, then the suggestion that a conflict should be considered international just because an outside State assumed a loosely understood relationship of control or co-ordination with the insurgents, would likely suffer a similar fate.

Second, the law of IAC was designed for States. Thus, it may be seen as problematic how some non-State groups would be able to fully comply with the requirements of this body of law, which often presume a State-like infrastructure or are based on concepts alien to intra-State conflicts.¹¹⁵ The lack of infrastructure argument was put forward already at the Diplomatic Conference of the Additional Protocols, where several delegations argued that non-State groups cannot comply with regulations of IAC which require a functioning judicial system.¹¹⁶ As for the IAC-specific concepts, one can mention notions of belligerent occupation of territory or enemy nationality, which are difficult to apply in conflicts occurring in the territory of a single State.¹¹⁷

Third, accepting that NIACs may be internationalised in this way may run the risk of encouraging foreign interventions. Under any of these approaches, non-State groups willing to solicit assistance from foreign States and to accept a certain loss of autonomy (the extent of which would depend on the threshold chosen) would be rewarded with a possible entitlement to POW status and the imposition of further legal constraints on their enemy.¹¹⁸

¹¹³ See, e.g., Emily Crawford, *The Treatment of Combatants and Insurgents Under the Law of Armed Conflict* (2010) p. 73; Moir, *supra* note 75, pp. 46–47 (making a similar argument by rejecting the proposition that NIAC between territorial States and non-State groups should be considered as international due to direct military interventions of a foreign State in favour of non-State groups).

¹¹⁴ ICRC Experts Report 1972, *supra* note 73, p. 51, para. 301(1).

¹¹⁵ Cf. G. I. A. D. Draper, “The Implementation and Enforcement of the Geneva Conventions of 1949 and the Two Additional Protocols of 1978” 164 *Recueil des Cours* (1979) p. 48.

¹¹⁶ See, e.g., statements by the following States: Israel (*Official Records (1974–1977)*), Vol. vi, CDDH/SR.36, p. 42), Belgium (*Official Records (1974–1977)*), Vol. viii, CDDH/I/SR.2, pp. 11–12; United Kingdom (Vol. viii, CDDH/I/SR.4, pp. 28–29), United States (Vol. viii, CDDH/I/SR.4, p. 25).

¹¹⁷ Richard Baxter, “Comments”, in P. D. Trooboff (ed.), *Law and Responsibility in Warfare: The Vietnam Experience* (1975) p. 65.

¹¹⁸ See also ICRC Experts Report 1972, *supra* note 73, paras. 301–302 (expressing a similar view in relation to situations of direct military intervention).

Thus, while the pro-internationalisation approaches should certainly be acknowledged as appealing moves to humanise the law of war by making it less state-centred and more human-oriented, as we can nevertheless see, certain challenges still need to be considered further. Thus, the proposition that the conflict in Libya was internationalised in full with respect to all parties has to be approached cautiously.

Although the question of conflict qualification does not depend on the proclamation of the actors involved, it is worth mentioning that none of the sides involved in the armed conflict claimed that the armed conflict between the loyalists and the rebels should be classified as international. In fact, the ‘public face’ of the insurgents, the NTC, accepted that the applicable framework was that of the law of NIAC.¹¹⁹

We accept that one of the main elements in the process of internationalisation is the control exercised by the foreign State over the non-State group. However, even the liberal threshold of interconnection required by the test of ‘overall control’ appears to not have been met, since the generally accepted forms of NATO-rebel collusion do not fulfil both steps of this test. It has been widely reported that NATO provided military equipment and training to the rebels and that rebels in return supplied operational data and GPS co-ordinates to NATO in order to facilitate its air strikes against government targets on the ground.¹²⁰ Although these forms of co-operation arguably amount to operational support and assistance (the first step of the test), they are insufficient to do away with the rebels’ operational autonomy (the second step). The two actors thus appeared to have remained separate and autonomous in their use of force against the government of Libya.

Admittedly, there have been additional reports that a joint operations centre was established in April or May 2011 in Benghazi, whose purpose was described as co-ordination of NATO and rebels’ operations against the Libyan government. The UK government and the rebels confirmed the existence and functioning of this centre, but NATO notably denied it.¹²¹ The factual situation is thus unclear.¹²²

¹¹⁹ NTC, Press Statement (August 2011) <<http://ntclibya.us.files.wordpress.com/2011/08/ntc-ps-laws2.pdf>> accessed 29 July 2012 (“[W]e recognize that in the conduct of hostilities, we are bound by Common Article 3 to the four Geneva Conventions and to the provisions of Additional Protocol II Relating to the Protection of Victims of Non-International Armed Conflicts, as are the Qadhafi regime’s forces”).

¹²⁰ See *supra* notes 93–95.

¹²¹ Maher Chmaytelli and Peter S. Green, “Libya Rebels, NATO Don’t Have Joint Operations, Official Says”, *Bloomberg* (16 April 2011) <<http://www.bloomberg.com/news/2011-04-16/libya-rebels-nato-don-t-have-joint-operations-official-says.html>> accessed 29 July 2012 (confirmation by the rebels and denial by NATO); Waterfield, *supra* note 80, (confirmation by the UK).

¹²² NATO’s refusal to confirm the existence of the centre may be better understood in the light of the terms of the Security Council Resolution 1973, which authorized use of force against Libyan forces only insofar as it was aimed to protect civilians and civilian populated areas. Military support of the rebels and joint planning of military operations with the rebel forces would thus arguably fall outside of the Security Council mandate. See SC Res. 1973 (2011) para. 4.

Nevertheless, a facility through which operations would be organised, co-ordinated and planned jointly would have diminished the operational autonomy of the allied conflict parties. As such, this co-operation would have fulfilled the second step of the ‘overall control’ test, as well, thus changing the conflict qualification under an approach featuring that test.¹²³ However, given the contradicting factual reports and lack of precise information about the extent of mutual co-ordination and considering the yet unanswered challenges posed by the available pro-internationalisation approaches, the most plausible conclusion is that the armed conflict remained a mixed one despite the enhanced links between NATO and the rebels.¹²⁴ Finally, this conclusion would be no different under a test akin to that proposed by Del Mar, as neither of the parties appeared to have accepted that the rebels were acting *on behalf of* NATO.¹²⁵

4. Potential De-internationalisation of the Conflict (August–October 2011)

In the period between August and October 2011, the rebel forces seized most of the territory including the capital city of Tripoli and the forces loyal to Muammar Gaddafi retreated mainly to the area around the city of Sirte.¹²⁶ This period highlights the question whether the armed conflict between the foreign States and the pro-Gaddafi forces became non-international again (de-internationalised or internalised). The crux of the matter is in the fact that the classification of armed conflicts as international or non-international is contingent on the parties to the conflicts. Since IACs in principle require the existence of two States on the opposite sides of an armed struggle,¹²⁷ it could be argued that when the Gaddafi government no longer represented the State of Libya, the armed conflict transformed from IAC to NIAC. Accordingly, some commentators have made the point that with the widespread recognition of the NTC as the government of Libya, the armed conflict in Libya was de-internationalised.¹²⁸ On the other hand, reports issued by the UN and by the representatives of the civil society did not consider

¹²³) Independently fighting rebel groups would fall outside of this arrangement. The conflict between them and the government would thus remain a NIAC.

¹²⁴) Accord ICSFFM Report, *supra* note 12, para. 63 (concluding that the conflict was of a mixed nature for its whole duration).

¹²⁵) Cf. text to *supra* note 112.

¹²⁶) International Commission of Inquiry March 2012 Report, *supra* note 8, Annex I, paras. 93–95.

¹²⁷) Dinstein, *supra* note 75, pp. 25–28 (adding two exceptions, namely wars of national liberation under Art. 1(4) AP I and conflicts in which the insurgents are recognized as belligerents by the government).

¹²⁸) Milanović and Hadži-Vidanović, *supra* note 4, pp. 23–24 (emphasising NTC’s control over Tripoli and the government’s endorsement by the Security Council); Johnston, *supra* note 46, pp. 107–112 (emphasising NTC’s recognition as government of Libya by third States and the Security Council).

that the IAC between the outside States and the Libyan government has changed in nature over time.¹²⁹

The two most prominent examples of supposed de-internationalisation are taken to have occurred in Iraq and Afghanistan.¹³⁰ These conflicts featured armed interventions by US-led multinational coalitions and as such were at that point undoubtedly international in nature. Some scholars and international organisations have argued that as Afghanistan and then Iraq installed new, coalition-friendly governments, these armed conflicts became non-international.¹³¹ This reclassification, however, is not without doubts. Not only do writers differ on the identification of the precise point at which these conflicts changed their legal nature,¹³² some have also challenged the conclusion that this change had happened at all.¹³³

There are some obvious instances in which a transition from IAC to NIAC occurs. For example, if all foreign intervening forces withdraw from the target State, any conflict still ongoing in that territory afterwards can only be described as non-international.¹³⁴ The cases like Afghanistan, Iraq, or indeed Libya, are however more complicated in that all the actors remain involved in the conflict; the only purported change is in the status of the erstwhile government. A clear and objective test of conflict de-internationalisation in such situations could alleviate some of the controversy and contribute towards coherence in conflict classification. Regrettably, a test of that sort has not developed in international law thus far. Accordingly, Milanović and Hadži-Vidanović have set out on the

¹²⁹) International Commission of Inquiry March 2012 Report, *supra* note 8, Annex I, paras. 19–22; ICSFFM Report, *supra* note 12, paras. 60–63 and 68–70.

¹³⁰) Siobhan Wills, “The Legal Characterization of the Armed Conflicts in Afghanistan and Iraq: Implications for Protection”, 58 *Netherlands International Law Review* (2011) p. 173. There are other instances of armed conflicts where the argument of de-internationalisation was raised but not to such extent as the armed conflicts in Afghanistan and in Iraq. Due to the limited scope of this article, we focus on these two most prominent armed conflicts. For discussion of other recent armed conflicts, see, e.g., Milanović and Hadži-Vidanović, *supra* note 4, pp. 22–23 (discussing the 2011 Côte d’Ivoire conflict).

¹³¹) See, e.g., Wills, *supra* note 130, p. 194 (claiming that this view is shared by the majority of commentators), Milanović and Hadži-Vidanović, *supra* note 2, p. 23, note 147 (calling it “a strong majority view”); Johnston, *supra* note 46, p. 107.

¹³²) Compare, e.g., Jelena Pejić, “Terrorist Acts and Groups: A Role for International Law?” 75 *British Year Book of International Law* (2005) p. 76 (IAC ended when the new government was established) with Susan Breau, Marie Aronsson and Rachel Joyce, “Discussion Paper 2: Drone Attacks, International Law, and the Recording of Civilian Casualties of Armed Conflict”, (2011) <<http://www.oxfordresearchgroup.org.uk/sites/default/files/ORG%20Drone%20Attacks%20and%20International%20Law%20Report.pdf>> accessed 29 July 2012, p. 11 (IAC ended when the old government was defeated).

¹³³) Yoram Dinstein, “Terrorism and Afghanistan” in M. N. Schmitt (ed.), *The War in Afghanistan: A Legal Analysis* (2009) p. 51 (“the inter-State war in Afghanistan that started on October 7, 2001 continues unabated to this very day”); Jordan J. Paust, “Self-Defense Targetings of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan” 19 *Journal of Transnational Law & Policy* (2009) p. 261, note 55.

¹³⁴) See, e.g., *Čelebići* Trial Judgement, *supra* note 19, para. 215; see also *Aleksovski* Trial Judgement, *supra* note 68, Dissenting Opinion of Judge Rodrigues, para. 17 (emphasising the need for the genuineness of the withdrawal, as opposed to a formal retreat without corroborative evidence of its effectiveness).

commendable journey of proposing such a test, with the following suggested destination:

[T]he conflict would transform from an IAC into a NIAC only when (1) the old regime has lost control over most of the country, and the likelihood of it regaining such control in the short to medium term is small or none (negative element); (2) the new regime has established control over a significant part of the country, and is legitimized in an inclusive process [not necessarily requiring democratic elections, but certainly favouring them] that makes it broadly representative of the people (positive element); (3) the new regime achieves broad international recognition (external element). None of these elements is enough by itself, but jointly they take into account both questions of legitimacy and factual developments on the ground while providing safeguards against abuse. With regard to both the positive and the negative elements, 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.¹³⁵

While we appreciate the authors' aim to structure the thinking about the process of de-internationalisation, the test they propose does not satisfy the twin goals of clarity and objectivity. Each of the proposed elements of the test contains vague qualifiers that are open to arbitrary interpretation ('most of the country', 'a significant part of the country', 'broad international recognition'), thus exacerbating the subjectivity of IHL.¹³⁶ In addition, it is not clear why each element is important for this test and what the balance between them is, as we can see when we look at the elements one by one.

Firstly, with regard to the negative element, it is hard to conceive how we can estimate objectively the likelihood of regaining control at the relevant time. History is replete with examples of near-defeat situations that transform into victories.¹³⁷ In Libya, before the foreign military intervention, the rebels were briefly on the brink of destruction when the governmental forces almost retook Benghazi.¹³⁸ Similarly, Gaddafi's chances of regaining territorial control following

¹³⁵ Milanović and Hadži-Vidanović, *supra* note 4, p. 23; see also Marko Milanović, "How to Qualify the Armed Conflict in Libya?", *EJIL Talk!* (1 September 2011) <www.ejiltalk.org/how-to-qualify-the-armed-conflict-in-libya> accessed 29 July 2012.

¹³⁶ Apart from reduced legal certainty, the inclusion of subjective considerations into norms of IHL often results in strong State opposition to the emergence of the norm in question. See, e.g., Statement of the French representative at the 1974–77 diplomatic conference, Official Records, Vol. VIII, CDDH/II/SR.2, p. 14 ("humanitarian law... must not be subordinated to subjective considerations of any sort"); Letter of Transmittal from President Ronald Reagan dated 29 January 1987, reprinted in 81 *American Journal of International Law* (1987) p. 911 ("[t]o rest on... subjective distinctions... would politicize humanitarian law").

¹³⁷ See, e.g., William Slim, *Defeat Into Victory: Battling Japan in Burma and India, 1942–1945* (2000) (describing the enticing story of the retreating British forces on the verge of defeat in World War II, who managed to overturn the battle of India and Burma and liberate both from the Japanese occupation).

¹³⁸ See, e.g., Anthony Shadid, "Libyan Forces Rout Rebels as West's Effort for No-Flight Zone Stalls", *New York Times* (16 March 2011) <www.nytimes.com/2011/03/16/world/africa/16libya.html> accessed 29 July 2012.

the fall of Tripoli appear slim with the benefit of hindsight¹³⁹ but assessing them objectively was trickier at the time.¹⁴⁰

Secondly, with regard to the positive element, it is not clear why the new regime actually needs to be in control of ‘a significant part of the country’. In Afghanistan, for example, the extent of the Karzai government’s control over Afghanistan has long been controversial.¹⁴¹ Nevertheless, there is strong scholarly support – including the authors of the analysed test – of the argument that the armed conflict between the foreign States and the Taliban became a NIAC in 2002.¹⁴² Moreover, the requirement of the ‘inclusive process’, although novel, is unwarranted. It should be reiterated that the question of a government’s democratic legitimacy is completely absent from the generally accepted criteria for conflict qualification.¹⁴³ Introducing it into the determination of applicability of IHL would only offer an additional line of defence to those wishing to deny this body of law applies to a particular situation.¹⁴⁴

Finally, with regard to the external element, three points should be noted. First, as for the status of the new regime (the former rebels), putting so much emphasis on external recognition seems inconsistent with IHL in light of the fact that for the purposes of the initial classification of an armed conflict as IAC, a State is deemed to be represented by its *de facto* government regardless of its legal standing or its international recognition.¹⁴⁵ Thus for example, although the Taliban were never considered as the legitimate government of the Afghanistan by the international community,¹⁴⁶ the armed conflict between the Taliban forces and the US-

¹³⁹ See, e.g., Wright, *supra* note 3, p. 236 (“When Tripoli fell to rebel forces... the uprising had clearly succeeded”).

¹⁴⁰ Cf. Kareem Fahim and Rich Gladstone, “Libya Rebels Fight Loyalists, and Put Bounty on Qaddafi”, *New York Times* (24 August 2011) <www.nytimes.com/2011/08/25/world/africa/25libya.html> accessed 29 July 2012 (Gaddafi called his retreat from Tripoli a “tactical manoeuvre” and Russian president Medvedev still considered there to have been “two powers” in the country, emphasising Gaddafi’s “influence and military potential”).

¹⁴¹ See, e.g., Griff Witte, “Taliban Establishes Elaborate Shadow Government in Afghanistan”, *The Washington Post* (8 December 2009), <www.washingtonpost.com/wp-dyn/content/article/2009/12/07/AR2009120704127.html> accessed 29 July 2012 (a shadow government run by the Taliban had a significant portion of Afghanistan under control).

¹⁴² See Milanović and Hadži-Vidanović, *supra* note 4, pp. 23 and 32; see further references in note 131 *supra*.

¹⁴³ Cf. Schindler, *supra* note 18, p. 129 (noting that humanitarian conventions should not be made subject to political considerations).

¹⁴⁴ See text to note 5 *supra*.

¹⁴⁵ Milanović and Hadži-Vidanović, *supra* note 4, p. 21; Louise Arimatsu, “Territory, Boundaries and the Law of Armed Conflict”, 12 *Yearbook of International Humanitarian Law* (2009) p. 175; Schindler, *supra* note 18, pp. 128–130.

¹⁴⁶ President Burhanuddin Rabbani, ousted from power by the Taliban in 1996, was considered to be representing the legitimate government of Afghanistan until the Karzai government was acknowledged by the UN. See Wills, *supra* note 130, p. 194.

led coalition was undoubtedly international.¹⁴⁷ Second, it seems problematic that the status of the old regime would be attached to the international recognition of the new regime (especially when considering scenarios where the old regime was never recognised by the international community like in Afghanistan). Third, it is questionable whether recognition by the international community – an act which is inherently political and open to subjective interests of different States – should be given so much weight in determining the normative framework of IHL that applies in a given conflict.¹⁴⁸ This point is highlighted when one considers that after the Khmer Rouge were driven out of power by the Vietnamese forces in 1978, they remained recognised as the legitimate government of Cambodia by the UN for four more years.¹⁴⁹

Even putting aside Milanović and Hadži-Vidanović's test for de-internationalisation, we believe that there are several crucial difficulties inherent in any proposition for de-internationalising an ongoing IAC without there being a genuine complete withdrawal of the intervening Power's forces.¹⁵⁰

First, allowing for de-internationalisation means creating an unacceptable dilemma. We can either claim that the armed conflict continues but has just changed its nature from IAC to NIAC. This position would, however, be wrongly based on perceiving armed conflict as a generic concept. As we argued earlier, IAC and NIAC are *not* two species of the genus of armed conflict; instead, they are two separate independent legal concepts.¹⁵¹ Consequently, if we reject this first position, we have to accept the other alternative, namely that in the process of de-internationalisation, the former IAC ends and a separate NIAC begins. This position may, however, lead to absurd outcomes. There are certain duties that belligerent sides must comply with at the end of a conflict. These include the obligation to release the detained persons after the cessation of active hostilities.¹⁵² Therefore, it may be argued that de-internationalisation would thus entail the duty of the foreign State to release individuals who were detained during the IAC

¹⁴⁷ See, e.g., Dinstein, *supra* note 75, p. 29; see further references in note 131 *supra*. The classification of the fighting between the US and al-Qaeda was more controversial. While some scholars considered it an IAC, (see e.g., Dinstein, *ibid.*, pp. 56–57), the US Supreme Court considered Common Article 3 to be the legal framework applicable to the conflict. *Hamdan v. Rumsfeld* 548 US 557, 625–632 (2006). It is, however, beyond the scope of this article to address the issue of classification of transnational armed conflicts or of the 'war on terror' in depth. For further discussion see Hoffmann, *supra* note 66.

¹⁴⁸ Cf. Wills, e.g., *supra* note 130, p. 176 (arguing that the international community's acceptance of the legitimacy of a government is not "a sound basis on which to base critical judgments that have the effect of depriving the population of a state of the protections of the Geneva Conventions in the midst of an on-going war").

¹⁴⁹ In 1980 the Khmer Rouge even signed the International Covenant on Civil and Political Rights on behalf of the Democratic Republic of Kampuchea. See Wills, *supra* note 130, p. 176.

¹⁵⁰ See note 134 and accompanying text.

¹⁵¹ See text to *supra* notes 19–21.

¹⁵² GC III, Art. 118; GC IV, Art. 133. See also Knut Dörmann and Laurent Colassis, "International Humanitarian Law in the Iraq Conflict", 47 *German Yearbook of International Law* (2004) p. 329.

and a possible struggle to re-detain them under the newly applicable legal framework of the incipient NIAC.¹⁵³ Needless to say, actual State practice in the alleged cases of de-internationalisation does not in the least resemble this game of ‘catch and go’.

Second, even if this problem was brushed aside as a merely theoretical complication, allowing for de-internationalisation may have severe practical consequences by removing, in certain circumstances, the situation from the scope of IHL altogether. As we know, NIAC implies more stringent requirements of organisation and intensity than IAC.¹⁵⁴ It is thus conceivable that a previously IAC, in which minimal force was used by the outside State against the government, would be changed by the purported de-internationalisation into a situation falling below the threshold of NIAC. Therefore, IHL safeguards for protected persons would disappear, without necessarily being matched by protection under the law of human rights (so-called ‘Meron’s gap’).¹⁵⁵

Third, a de-internationalisation rule inevitably introduces undesirable political considerations and incentives into the process of conflict qualification. Even proponents of de-internationalisation admit taking external recognition into consideration has ‘the disturbing consequence’ of making the *jus in bello* dependent on the *jus ad bellum*.¹⁵⁶ More specifically, the intervening State would get the perverse incentive to change the classification of conflict unilaterally and deny thus POW protection to the government forces captured after the putative de-internationalisation simply by arguing that they have lost their grip on power and territory.¹⁵⁷ Even worse, it could induce the outside States to establish friendly puppet governments in order to claim the conflict should be downgraded to non-international.¹⁵⁸

Finally, Article 4A(3) of the Third Geneva Convention highlights that modern IHL anticipates the possibility that the balance of power changes in an IAC to the detriment of the original government, without the need to reclassify the conflict. This provision provides that POW status must be granted to members of regular

¹⁵³ John B. Bellinger, “Legal Issues in the War on Terrorism – A Reply to Silja N. U. Vöneky”, 8 *German Law Journal* (2007) p. 872, note 7.

¹⁵⁴ Compare text to notes 16–18 with text to notes 61–63 *supra*.

¹⁵⁵ Theodor Meron, “Towards a Humanitarian Declaration on Internal Strife” 78 *American Journal of International Law* (1984) p. 859. Milanović and Hadži-Vidanović seem to acknowledge this problem, although without offering any solution or remedy. See Milanović and Hadži-Vidanović, *supra* note 4, p. 24.

¹⁵⁶ Johnston, *supra* note 46, p. 108.

¹⁵⁷ See *ibid.*, pp. 113–114 (making a similar argument with regard to the possible ramifications of the de-internationalisation for members of non-State groups who were captured before the de-internationalisation and the possible solution for their protection via Article 4A(3) of GC III).

¹⁵⁸ Cf. Michael W. Reisman and James Silk, “Which Law Applies to the Afghan Conflict?” 82 *American Journal of International Law* (1988) p. 481 (arguing that IHL should apply in full to the post-1979 conflict in Afghanistan because the “invitation” to the Soviet Union to enter Afghanistan had been illegitimate).

armed forces who profess allegiance to a government not recognized by the other conflict party. The provision was adopted specifically to reflect on the experience of the Free France forces of General de Gaulle during the Second World War. These forces continued fighting even after the effective French government based in Vichy accepted to cease their armed struggle in a peace treaty signed with the Nazi Germany. Led by the desire to clarify that such situations should remain within the scope of the law of IAC, the drafters agreed on the text of Article 4A(3).¹⁵⁹ This provision thus confirms that the loss of effectiveness of the original government should not by itself transform the situation into a NIAC.

Thus, considering that the international law does not have an acceptable test for de-internationalisation and that reclassification of an ongoing IAC can result in serious conceptual and policy difficulties, we believe that it should be avoided in the Libyan context. Accordingly, even when the rebel forces took over Tripoli and received recognition by a large part of the international community,¹⁶⁰ the former government forces were still not defeated and the fighting continued for nearly two more months.¹⁶¹ Thus, we consider that the conflict maintained its international nature for the entire duration of hostilities.¹⁶²

5. Armed Conflict Ends (October 2011)

5.1. Termination of IAC and NIAC in Libya (Late October 2011)

Following the capture and the violent death of Muammar Gaddafi on 20 October 2011, the extent of violence in Libya decreased significantly. The overwhelming defeat of the forces loyal to the Libyan leader did not leave anyone in a position to make an official proclamation on their behalf with respect to the conflict termination. As for the opposing forces, on 23 October, the NTC Chairman Mustafa Abdul Jalil officially declared that the war was over.¹⁶³ On 31 October,

¹⁵⁹ See Jean Pictet (ed.), *Geneva Convention relative to the Treatment of Prisoners of War: Commentary* (1960) pp. 61–64 (hereinafter “GC III Commentary”).

¹⁶⁰ The recognition was never universal. Even the strongest piece of evidence put forward by the proponents of “widespread recognition”, the UN General Assembly vote to approve the NTC as the representative of Libya on 16 September 2011, was far from unanimous, securing fewer than 80% votes of the voting members. Notably, many of the abstaining or opposing votes came from African States. See UN GA, “After Much Wrangling, General Assembly Seats National Transitional Council of Libya as Country’s Representative for Sixty-sixth Session” (16 September 2011) <www.un.org/News/Press/docs/2011/ga11137.doc.htm> accessed 29 July 2012. See, however, Johnston, *supra* note 46, p. 110 (seeing the vote as “persuasive, although not conclusive evidence that the NTC had gained widespread recognition”).

¹⁶¹ International Commission of Inquiry March 2012 Report, *supra* note 8, Annex I, paras. 93–98.

¹⁶² Contra Milanović and Hadži-Vidanović, *supra* note 4, pp. 23–24; Johnston, *supra* note 46, pp. 111–112. See also Wills, *supra* note 130, p. 177 (arguing in favour of refraining from reclassifying an armed conflict that began as international whilst international forces remain engaged in hostilities).

¹⁶³ “NTC declares ‘Liberation of Libya’”, *Al Jazeera English* (23 October 2011). <www.aljazeera.com/news/africa/2011/10/201110235316778897.html> accessed 29 July 2012.

NATO proclaimed the end of its military operations in Libya.¹⁶⁴ When, if at all, did IHL cease to apply to the Libyan conflict?

It is generally accepted that IHL applies from the beginning of an armed conflict until its end. The question what brings an armed conflict to its end, however, is not free from controversy. According to Article 6 of GC IV and Article 3(b) of AP I, the application of the Conventions ‘shall cease on general close of military operations’. The ICRC commentary considers that moment to be equivalent to ‘the final end of all fighting between all those concerned’.¹⁶⁵ The ICTY Appeals Chamber, however, opined in the *Tadić* case that the application of IHL ‘extends beyond the cessation of hostilities until a general conclusion of peace is reached; or in the case of internal conflicts, a peace settlement is achieved.’¹⁶⁶

There are two possible interpretations of the *Tadić* formula. The first interpretation would equate the end of the application of IHL with the end of the conflict; a conflict would thus only terminate with the conclusion of peace or the achievement of a peace settlement. The second interpretation would see the armed conflict end with the general close of military operations and allow for certain obligations of IHL continue to be applicable after the conflict ends. We consider the second interpretation to be the correct one.

While the first interpretation might be motivated by the aim to promote humanitarian protection,¹⁶⁷ armed conflict is ‘not a technical, legal concept but a recognition of the fact of hostilities’.¹⁶⁸ It would therefore be artificial to argue that the armed conflict continues even if the hostilities have completely ceased. This holds especially for NIACs, which often end without a peaceful settlement but with the factual defeat of one of the fighting sides.¹⁶⁹ In fact, state practice shows that most modern-day armed conflicts were not concluded by a formal peace agreement.¹⁷⁰ In addition, in the context of a NIAC, the continuation of the armed conflict would have inopportune consequences in allowing the government to continue to resort to the use of armed force under the armed-conflict

¹⁶⁴ Richard Norton-Taylor, “NATO Ends Military Operations in Libya”, *The Guardian* (31 October 2011). <www.guardian.co.uk/world/2011/oct/31/nato-ends-libya-rasmussen> accessed 29 July 2012; NATO, “‘We answered the call’ – the end of Operation Unified Protector” (31 October 2011) <www.nato.int/cps/en/natolive/news_80435.htm> accessed 29 July 2012.

¹⁶⁵ GC IV Commentary, *supra* note 15, p. 62 (citing, with some approval, the opinion of the Rapporteur of Committee III that this threshold is to be understood as the moment “when the last shot has been fired”).

¹⁶⁶ *Tadić* Jurisdiction Appeal, *supra* note 17, para. 70.

¹⁶⁷ Ariel Zeman, “Taking War Seriously: Applying the Law of War to Hostilities Within an Occupied Territory”, 38 *George Washington International Law Review* (2006) p. 687.

¹⁶⁸ Greenwood, *supra* note 75, p. 72.

¹⁶⁹ Laurie R. Blank, “A Square Peg in a Round Hole: Stretching Law of War Detention Too Far” 63 *Rutgers Law Review* (2011) p. 1182 (noting that in the context of terrorism, what is here referred to as the first interpretation “can easily lead to a definition paralysis because it is unlikely that a “general conclusion of peace” will be achieved in any foreseeable period of time”).

¹⁷⁰ Akande, *supra* note 111, p. 42; Greenwood, *supra* note 75, pp. 71–72.

paradigm, instead of the arguably more appropriate law-enforcement paradigm.¹⁷¹ In the context of an IAC, the extension of the armed conflict may mean that States would remain entitled to use force against one another for an indefinite time.¹⁷²

Accordingly, we subscribe to the second interpretation, under which an armed conflict is considered to end with the general close of military operations, even without a formal agreement or by way of a unilateral declaration.¹⁷³ Specific norms of IHL pertaining to occupation¹⁷⁴ and to protected persons who could not be released or repatriated¹⁷⁵ continue to be applicable following the end of armed conflict, making this interpretation more desirable even from the humanitarian perspective.¹⁷⁶

Another distinction that should be made in the terminal phase of an armed conflict is between the ‘general close of military operations’ and the ‘cessation of active hostilities’. As we have argued above, an armed conflict only ends with the former threshold. Crossing the latter threshold, however, already activates certain important duties, especially the obligation to repatriate prisoners of war and protected persons under the Third and Fourth Geneva Conventions.¹⁷⁷ Although in practice they may certainly occur at the same time, these two thresholds are not identical¹⁷⁸ as their purposes are different. The return of the internees can and should take place immediately after the fighting is over and when these persons pose no risk to the captor State (i.e., with the ‘cessation of active hostilities’).¹⁷⁹ This happens as soon as there is an express or implied agreement between the former belligerents that the hostilities would not continue.¹⁸⁰ The ‘general close of

¹⁷¹ Cf. David Kretzmer, “Rethinking the Application of International Humanitarian Law in Non-International Armed Conflicts” 42 *Israel Law Review* (2009) pp. 17–19 (demonstrating the undesirable implications of the characterization of borderline situations such as NIAC).

¹⁷² See Akande, *supra* note 111, pp. 42–43.

¹⁷³ See Yoram Dinstein, *War, Aggression, and Self-defence* (4th ed., 2005) pp. 44–47; D. Ottensooer, “Termination of War by Unilateral Declaration”, 29 *British Year Book of International Law* (1952) p. 442.

¹⁷⁴ See especially Art. 3(b) of AP I; Art. 6(2)-(3) and Section III of Part III (Occupied Territories) of GC IV.

¹⁷⁵ See especially Art. 3(b) and Art. 75(6) of AP I; Art. 5 of GC III; Art. 6(4) of GC IV.

¹⁷⁶ Cf. text to note 167 and the reference cited therein.

¹⁷⁷ Article 118 of GC III and Arts 133 and 134 of GC IV. Although GC IV uses a slightly different term “close of hostilities”, the ICRC commentary emphasises that the wording “should be understood in the same sense” as that used in Art. 118 of GC III. GC IV Commentary, *supra* note 15, p. 514. See also Akande, *supra* note 111, p. 43; Derek Jinks, “The Temporal Scope of Application of International Humanitarian Law in Contemporary Conflicts (Background Paper)”, *International Humanitarian Law Research Initiative* (2003) p. 3; Greenwood, *supra* note 75, p. 72.

¹⁷⁸ APs Commentary, *supra* note 54, p. 68 (noting that the general close of operations may occur after the cessation of active hostilities); but see, e.g., Greenwood, *supra* note 75, p. 72 (arguing that cessation of hostilities should be enough to terminate the armed conflict); Kolb and Hyde, *supra* note 4, p. 102 (arguing that an “effective and final cessation of hostilities” terminates the applicability of IHL).

¹⁷⁹ GC III Commentary, *supra* note 159, pp. 546–547.

¹⁸⁰ Wolf Heintschel von Heinegg, “Factors in War to Peace Transitions” 27 *Harvard Journal of Law & Public Policy* (2004) p. 853; see also Hersch Lauterpacht (ed.), *Oppenheim’s International Law* (7th ed., 1952) p. 613 (as for the defeated party, “cessation of active hostilities” means it cannot resume fighting);

military operations’ then brings the whole armed conflict and the application of the majority of IHL norms to an end.

With respect to NIAC, an additional issue to consider is whether the conflict may end already before the general close of hostilities, namely when one of two NIAC-specific criteria of organisation and intensity is no longer fulfilled.¹⁸¹ Rejecting this proposition might be superficially appealing as it would strengthen the unity between NIAC and IAC in terms of their temporal scope. It could also be argued, to some extent analogically to our argument regarding the de-internationalisation process,¹⁸² that even a NIAC should continue until ‘the last shot’¹⁸³ since an armed conflict is ‘not over until it is over’.¹⁸⁴ However, we do not find this interpretation persuasive.

As a starting point, it has been correctly observed that ‘if armed conflict exists when organized armed groups are engaged in intense fighting, then, logically... armed conflict ends when the criteria are no longer present’.¹⁸⁵ Furthermore, a situation of a NIAC should be seen as an exception to the normal reality in which the State only uses law enforcement mechanisms against its own citizens. Bearing in mind that the law of NIAC allows the State to target its own civilians who participate in the armed conflict,¹⁸⁶ there is no reason why in a given NIAC in which the level of violence has been reduced to sporadic acts of violence, the State should not deal with the conflict through the prism of law-enforcement again.¹⁸⁷

Moreover, many NIACs, especially those characterised by the participation of terrorist groups or guerrilla movements, do not feature the ‘last shot’ or a consensual conclusion. The notion of the ‘general close of military operations’ might thus be difficult or even impossible to apply in practice and could lead to the conclusion that the armed conflict will continue *ad infinitum*.¹⁸⁸ The possibility

but see Yoram Dinstein, “The Release of Prisoners of War” in Christophe Swinarski (ed.), *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet* (1984) p. 44 (putting greater emphasis on the parties’ expectations with respect to the resumption of hostilities).

¹⁸¹ See Jinks, *supra* note 177, pp. 7–8; see also Douglas Guilfoyle, “The Mavi Marmara Incident and Blockade in Armed Conflict”, 81 *British Year Book of International Law* (2011) p. 21 (questioning whether the level of violence between Israel and Hamas as it stood on 31 May 2010 could still be classified as an ongoing armed conflict).

¹⁸² See Section 4 above.

¹⁸³ See *supra* note 165.

¹⁸⁴ Cf. Dinstein, *supra* note 133, p. 51 (using this language to argue that an IAC in Afghanistan does not end until the Taliban are defeated).

¹⁸⁵ International Law Association, “Final Report on the Meaning of Armed Conflict in International Law” (2010) p. 30.

¹⁸⁶ See Kretzmer, *supra* note 171, pp. 24–25.

¹⁸⁷ See Kenneth Watkin, “Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict”, 98 *American Journal of International Law* (2004) p. 13 (reminding that internal control emphasises maintaining order through the application of the rule of law).

¹⁸⁸ See Laurie Blank, “Defining the Battlefield in Contemporary Conflict And Counterterrorism: Understanding the Parameters of the Zone of Combat” 39 *Georgia Journal of International and Comparative Law* (2010) p. 22 (a similar argument with regard to armed conflicts between States and terrorist groups).

that a conflict will end when one of the constitutive criteria is not met is therefore highly practical. As a side-note with regard to conflict intensity, its reduction below the required threshold should not, however, be confused with mere suspensions of fighting due to weather conditions or reorganisation needs of the belligerent sides. It is only when the decrease in intensity is of a long-term nature that we may speak of conflict termination.

Finally, it bears noting that due to different intensity requirements in IAC and NIAC, respectively, an intertwined ‘mixed’ conflict may feature different points of termination of these conflict strands. In other words, it is possible that following a decrease in the intensity of fighting, the outside Power would still find itself in an IAC and thus be allowed to target the members of the armed forces of the territorial State, while its domestic ally would no longer be permitted to do the same as the NIAC to which it had been a party would have come to an end. This may be problematic especially if the original government loses its effectiveness and becomes replaced by the former rebels in the course of the conflict as in the Libyan case. In such situations thus, somewhat paradoxically, the reduction of violence leaves the foreign Power with wider latitude of action than the effective government, which may encourage circumvention and reduce the prospects for peace.

Turning to the application of these rules to the conflict in Libya, we can see that the official proclamations made by the actors carry little weight as to the determination of the end of the conflict. As for the IAC in Libya, NATO took the decision to end the operations in Libya by a deadline of 31 October 2011.¹⁸⁹ Its last sortie took place at midnight on that day, which brought NATO’s military operations in Libya to a general close.¹⁹⁰ The conflict thus ended on 31 October 2011.¹⁹¹

The NIAC between the Libyan government and the rebels, presuming it had not been internationalised previously,¹⁹² ended soon after the death of Muammar Gaddafi. Admittedly, although most hostilities ceased afterwards, not all violence ended immediately. According to different reports, minor clashes between Gaddafi loyalists and the NTC continued in the upcoming months and even well into 2012.¹⁹³ Nevertheless, these clashes have been minor, sporadic and isolated and

¹⁸⁹ “Press Conference by NATO Secretary General on the Latest Developments in Libya and Operation Unified Protector”, NATO (21 October 2011) <www.nato.int/cps/en/natolive/opinions_79807.htm?selectedLocale=en> accessed 29 July 2012.

¹⁹⁰ NATO, “NATO and Libya” (28 March 2012) <http://www.nato.int/cps/en/natolive/topics_71652.htm> accessed 29 July 2012 (“On 31 October 2011 at midnight Libyan time, a NATO AWACS concluded the last sortie; 222 days after the operation began.”)

¹⁹¹ See also International Commission of Inquiry March 2012 Report, *supra* note 8, Annex I, para. 98 (dating the end of hostilities after the fall of Sirte and the proclamation of the Declaration of Liberation by the NTC on 23 October 2011, but not pronouncing expressly about the end of the conflict itself).

¹⁹² See Section 3.2 *supra*.

¹⁹³ See ICG Report, *supra* note 29, pp. i–ii; see also, e.g., David D. Kirkpatrick, “Offices of Premier Attacked in Libya”, *New York Times* (8 May 2012) <www.nytimes.com/2012/05/09/world/africa/truckloads-of-libyan-militiamen-attack-prime-ministers-office-in-tripoli.html> accessed 29 July 2012; “Battle

have not as such surpassed the level of intensity required for the finding of a NIAC.¹⁹⁴ As argued above, the absence of a peaceful settlement is also not determinative as to the conflict termination. The conflict should thus be seen as having ended with the reduction of the intensity of violence following Muammar Gaddafi's death on 20 October 2011.¹⁹⁵ Since both types of conflict in Libya ended around the same time, the difficulty described above with regard to termination of mixed conflicts¹⁹⁶ does not appear to have become a problem in the Libyan situation.

5.2. *Continuing Obligations (after October 2011)*

Although the armed conflict in both of its possible limbs, international and non-international, ended in late October 2011, certain IHL obligations remained applicable even after that date. A full analysis is beyond the scope of this article, but three key points bear mentioning.

First, the application of the law of occupation has not been triggered in Libya. NATO's military operations were limited to the use of air and naval forces and it never acquired the control necessary for the activation of occupation law.¹⁹⁷ Moreover, NATO fully withdrew from Libya by 31 October 2011 and did not maintain any presence there after that date.¹⁹⁸

Second, Libya remains bound by the IHL obligations pertaining to detained persons. Even if the only applicable framework to the conflict between the rebels and the former government forces was the law of NIAC, both Common Article 3 and Additional Protocol II are very clear in their requirement of humane treat-

Between Rival Libyan Militias Kills at Least 22", *New York Times* (3 April 2012) <<http://www.nytimes.com/2012/04/04/world/africa/clash-of-libyan-militias-kills-at-least-22.html>> accessed 29 July 2012; "Libya timeline: How events unfolded after Gaddafi", *Gulf News* (12 June 2012) <<http://gulfnews.com/news/region/libya/libya-timeline-how-events-unfolded-after-gaddafi-1.1034898>> accessed 29 July 2012.

¹⁹⁴ See, e.g., "Libya Recovery: Better than it Sounds", *The Economist* (28 January 2012), <www.economist.com/node/21543586> accessed 29 July 2012 ("[the new government forces] are strong enough to deal with a low-level insurgency if one were to spring up... Clashes are, for the moment, little more than unpleasant, but isolated, incidents."); "The Uncalm South", *The Economist* (12 May 2012), <www.economist.com/node/21554576> accessed 29 July 2012 (reporting outbreaks of violence in some Libyan towns but no organised insurgency or widespread fighting).

¹⁹⁵ Accord ICSFFM Report, *supra* note 12, para. 26 (claiming that NIAC ended with the capture of Sirte by opposition forces on 20 October 2011). New tribal clashes marked by the use of armed violence have erupted and are disturbing the stability of Libya at the time of writing. It is, however, beyond the scope of this article to evaluate these later developments. For more, see, e.g., "The Uncalm South", *The Economist* (12 May 2012), <www.economist.com/node/21554576> accessed 29 July 2012 (reporting outbreaks of violence in some Libyan towns but no organised insurgency or widespread fighting). According to recently adopted Libyan legislation, Libya is currently in a state of war. George Grant, "Constitutional Legality of Law 37 to be Debated in Open Court", *Libya Herald* (30 May 2012) <<http://www.libyaherald.com/?p=8148>> accessed 29 July 2012.

¹⁹⁶ See text to *supra* notes 188–189.

¹⁹⁷ Article 42 of the Hague Regulations.

¹⁹⁸ NATO, "NATO and Libya" (28 March 2012) <http://www.nato.int/cps/en/natolive/topics_71652.htm> accessed 29 July 2012.

ment of the detainees.¹⁹⁹ Recent alarming reports informing about the maltreatment of detainees and harsh detention conditions thus desire attention also from the point of view of IHL, in spite of the conflict's end.²⁰⁰

Third, at the end of every NIAC, conventional and customary law alike encourage the authorities in power to grant 'the broadest possible amnesty' to persons who have participated in the conflict or who have been detained or interned on its basis.²⁰¹ Although this rule is supposed to 'encourage gestures of reconciliation which can contribute to re-establishing normal relations in the life of a nation which has been divided',²⁰² it does not authorise or legitimise granting amnesties for war crimes.²⁰³ On its basis, amnesty may only be granted for taking part in hostilities, which would otherwise be prosecutable as a violation of municipal law.²⁰⁴ Thus, the law passed by Libya in May 2012, which according to the reports by Human Rights Watch grants a blanket amnesty to all individuals who committed crimes if their actions were simply aimed at 'promoting or protecting the revolution',²⁰⁵ appears to be overbroad and likely flouts the customary law obligation to prosecute and punish war crimes.²⁰⁶

6. Conclusion

Whatever challenges Yusuf Karamanli and his contemporaries were facing over 200 years ago, we may safely assume issues of conflict qualification did not wake them up at night. In contrast, belligerents in the 21st century face an intricate web of norms determining the scope of law applicable to their conduct in armed conflict. We have attempted to highlight, against the backdrop of the 2011 Libyan conflict, the areas in which these norms pose difficulties and to propose solutions to these problems.

¹⁹⁹ See Common Article 3 to the 1949 Geneva Conventions; AP II, Art. 6.

²⁰⁰ See, e.g., IRIN, "LIBYA: Detained migrants face harsh conditions, legal limbo" (3 May 2012) <www.irinnews.org/Report/95403/LIBYA-Detained-migrants-face-harsh-conditions-legal-limbo> accessed 29 July 2012; Human Rights Watch, "Libya: Apparent Execution of 53 Gaddafi Supporters" (24 October 2011) <www.hrw.org/news/2011/10/24/libya-apparent-execution-53-gaddafi-supporters> accessed 29 July 2012. On the continuing detention of civilians who were arrested during the NIAC under the accusation of supporting Gaddafi, see Mustafa Fetouri, "Libya's Prisoners Languish Despite Government Takeover", *Al Monitor* (18 June 2012) <www.al-monitor.com/pulse/originals/2012/al-monitor/in-libya-legalizing-kidnapping-a.html> accessed 29 July 2012.

²⁰¹ AP II, Art. 6(5); Henckaerts and Doswald-Beck, *supra* note 71, Vol. 1, p. 611, Rule 159.

²⁰² APs Commentary, *supra* note 54, p. 1402, para. 4618.

²⁰³ Henckaerts and Doswald-Beck, *supra* note 71, Vol. 1, pp. 612–614.

²⁰⁴ Laura M. Olson, "Provoking the Dragon on the Patio: Matters of Transitional Justice: Penal Repression vs. Amnesties" 88 *International Review of the Red Cross* (2006) p. 286.

²⁰⁵ Libya, Law 38 (2012), On Some Procedures for the Transitional Period. See Human Rights Watch, "Libya: Amend New Special Procedures Law" (11 May 2012) <<http://www.hrw.org/news/2012/05/11/libya-amend-new-special-procedures-law>> accessed 29 July 2012.

²⁰⁶ Henckaerts and Doswald-Beck, *supra* note 71, Vol. 1, p. 607, Rule 158.

Based on the examination of organisation of the conflict parties and intensity of the fighting, we concluded that the NIAC between Gaddafi's forces and the rebels began around 24 February 2011. This conclusion is based on a more extensive interpretation of the requirement of organisation, placing the group's ability to abide by IHL at the heart of the analysis.

On 19 March, following Security Council Resolution 1973 (2011) adopted on 17 March, the US, British and French forces began to use force against Libya, which resulted in an IAC between these countries and Libya. By rejecting the "global approach", we posited that at this point, there were two armed conflicts in Libya: one international and one non-international (i.e., a mixed armed conflict).

After classifying the two armed conflicts, we examined the effect of further factual development on their legal qualification. We submitted that NATO's assumption of control of all international forces on 31 March did not change the qualification of the armed conflict between Libya and foreign States as international. Similarly, despite the coordination between the rebels and NATO, we rejected the claim of internationalisation and posited that the armed conflict between Gaddafi's forces and the rebels remained non-international.

We further argued that the armed conflict between Gaddafi's forces and NATO remained international in spite of the shift of power in favour of the rebels (NTC) and the partial international recognition that they received. This argument was based on the lack of acceptable test for de-internationalisation and the conceptual and policy difficulties that de-internationalisation may create.

We submitted that the NIAC ended following the death of Muammar Gaddafi on 20 October and the ensuing decrease of intensity of fighting and that the IAC ended with the last NATO sortie at midnight on 31 October. This conclusion was based on our analysis that IACs end with the general close of military operations by the actors involved and that NIACs end once either of two NIAC-specific criteria of organisation and intensity is no longer fulfilled.

The issues discussed in this article do not only carry theoretical weight but they also entail important practical ramifications for *ex ante* law abidance and for *ex post* accountability for the violations of the law. For example, the date when the NIAC ended is the moment following which any use of lethal force must be again assessed through the lens of the law-enforcement paradigm, which renders it illegal to target persons without first attempting to arrest them.

Bearing these practical ramifications in mind, it is disturbing (from the perspective of the actors on the battlefield) that basic issues with regard to the classification of a given armed conflict remain controversial and can only be fully assessed *ex post* a given armed conflict. We therefore hope that this article will contribute not only to the discussions on the extent to which the Libyan conflict was subject to IHL but also to the general discourse regarding the contemporary problems of applicability of this body of law.