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The Classification of the Conflict in Libya and Syria

- A critique of the organization requirement

LAGF03 Essay in Legal Science

Bachelor Thesis, Bachelor of Law Programme
15 ECTS

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Semester: VT 2013

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Summary

The purpose of this paper is to examine what constitutes a non-international armed conflict (NIAC), using the conflicts in Libya respectively Syria as examples of how different this can be interpreted. This definition is of great importance when it comes to what rules to apply and criminal accountability. NIACs are regulated in international humanitarian law (IHL) conventions such as the Geneva Conventions article 3 and in Additional Protocol II (AP II). IHL provides protection from armed conflict. There is however no definition of a NIAC in these treaties, NIAC has instead been defined in case-law from the ICTY. There are two requirements for an armed conflict to exist: a certain amount of intensity in the conflict and organization of the parties. These are the demands for article 3's applicability, for AP II the demands are even higher requiring responsible command and a possibility to implement IHL among others. If one party does not fulfill the organization requirement than no party has to implement IHL, leaving civilians unprotected from all sides.

The difference between the conflict in Libya and Syria is the organization degree of the rebels. This is a usual difficulty when it comes to classifications of armed conflicts, not only for the armed group to fulfill but also for outside observers to obtain enough information about. The rebels in Libya however not only fulfilled the threshold for article 3 in just a few weeks, but also the one for AP II. In Syria the requirements for article 3 however were not fulfilled until over a year of fighting, in spring/summer 2012. When you look at these classifications, there seem to be a difference in how the information in the two cases is valued. Also in the case of Libya the classifiers seem to be more generous regarding the fulfillment of these criteria, in Syria however the requirements almost seem to be raised. The UN decision to legitimize other states to intervene in Libya might also have affected the classification process, even though political decisions should not.

The organization requirement has been criticized for being set to high. Unrealistic demands will just hurt the humanitarian values these rules are supposed to protect. This is especially true considering that a majority of the armed conflicts today are asymmetrical NIACs. Legal scholars have given different proposals regarding how to address this, however they always seem to lack something. One thing is clear though, that if IHL are going to be put to good use, these demands have to be lowered not raised, to avoid difficulties similar to those in the classification of Syria. Clearer criteria regarding the organization requirement may also help to avoid classification problems.

Sammanfattning

Syftet med den här uppsatsen är att undersöka definitionen av en icke-internationell väpnad konflikt. Konflikten i Libyen respektive Syrien kommer att användas som exempel på hur olika detta kan tolkas. Definitionen av en konflikt är av stor betydelse för vilka regler som ska appliceras på den och för straffansvar. IIVK regleras i internationell humanitär rättsliga (IHR) konventioner som Genèvekonventionernas artikel 3 och i dessa konventioners Tilläggsprotokoll II. IHR erbjuder skydd mot väpnade konflikter. Det finns dock ingen definition av IIVK i dessa traktat, det har istället utvecklats i praxis från ICTY. Det ställs två krav för att en väpnad konflikt ska existera: en viss grad av intensitet i konflikten respektive organisation av parterna. Detta är kraven för artikel 3:s tillämplighet, för TP II ställs ännu högre krav bl.a. innehållande krav på ansvarigt befäl och en möjlighet att implementera IHR. Om en part inte uppfyller organisationskravet så måste ingen part implementera IHR, vilket lämnar civila oskyddade från alla sidor.

Skillnaden mellan konflikten i Libyen och Syrien är organisationsgraden hos rebellerna. Detta är ett vanligt problem angående klassifikationen av väpnade konflikter, inte bara för den väpnade gruppen att uppfylla utan även för utomstående observatörer att erhålla tillräckligt mycket information om. Rebellerna i Libyen uppfyllde inte bara artikel 3:s krav under bara några veckor, utan även TP II:s. I Syrien uppfylldes kraven för artikel 3 först efter ca ett år av stridande, våren/sommaren 2012. När man tittar på klassifikationerna så verkar de skiljas åt rörande hur informationen i bägge fallen värderas. I fallet Libyen verkar kriterierna också ha tolkats mer generöst, i Syrien verkar det dock nästan ställas högre krav. FN:s beslut att legitimera utomstående staters inblandning i Libyen kan ev. också ha påverkat klassifikationsprocessen, trots att politiska beslut inte bör göra detta.

Organisationskravet har blivit kritiserat för att vara för högt ställt. Orealistiska krav skadar bara de humanitära värden som dessa regler syftar till att skydda. Detta är speciellt viktigt då de flesta väpnade konflikter idag är asymmetriska IIVK. Jurister har givit flera förslag för att åtgärda detta, varje förslag verkar dock innehålla brister. En sak som är klar är dock att ifall IHR ska komma till användning där den behövs, så måste dessa krav sänkas och inte höjas, för att undvika klassifikationssvårigheter som de i Syrien. Tydligare kriterier angående organisationskravet kan också vara till hjälp för att undvika klassifikationsproblem.

Abbreviations

| | |
|-------|---|
| AP I | Additional Protocol I to the Geneva Conventions |
| AP II | Additional Protocol II to the Geneva Conventions |
| FSA | Free Syrian Army |
| GA | General Assembly |
| GC | Geneva Conventions |
| HR | Human Rights |
| HRL | Human Rights Law |
| IAC | International Armed Conflict |
| ICC | The International Criminal Court |
| IHL | International Humanitarian Law |
| ICTR | International Criminal Tribunal for Rwanda |
| ICTY | International Criminal Tribunal for the former Yugoslavia |
| NGO | Non-Governmental Organization |
| NIAC | Non-International Armed Conflict |
| NTC | National Transition Council (of Libya) |
| R2P | Responsibility to Protect |
| SC | Security Council |
| SNC | Syrian National Council |
| UN | United Nations |

1. Introduction

1.1 Subject

What constitutes a non-international armed conflict (NIAC) is a debated subject, but an important one since the definition is of great importance regarding applicable rules and criminal accountability. How different NIAC is interpreted is however clear if you compare the conflict in Libya with the one in Syria. These two conflicts, although sharing many similarities from an outsider perspective, have been treated differently by IHL. While the conflict in Libya was characterized as a non-international armed conflict just weeks after the demonstrations had started, the conflict in Syria did not fulfill the demands of a NIAC until spring/summer 2012. Whether or not a conflict can be classified as a NIAC depends on the intensity and organization of the parties to the conflict. The differences in classification did not depend on the type and amount of violence in Syria, but on the circumstance that the rebels were not sufficiently organized there. This paper purports to look at the necessary elements for a conflict to be classified as a NIAC, taking Libya and Syria as examples of how these demands are interpreted in practice and the problems this can generate from a humanitarian perspective.

1.2 Purpose

The purpose of this paper is to investigate what constitutes a NIAC and why the conflict in Libya was classified as a NIAC much earlier in the conflict compared to Syria. This issue will lead to a problematization of the organization requirement.

1.3 Questions of research

- What characterizes a non-international armed conflict?
- How have the requirements for a NIAC been interpreted in the conflict in Libya respectively Syria?
- Is the organization requirement appropriate from a humanitarian perspective?

1.4 Delimitations

To be able to classify a NIAC you have to take your point of departure at least to some extent from what defines an international armed conflict (IAC). However I shall not enter more closely into the characteristics of an IAC than is absolutely necessary. The focus is on NIACs. Further, since the difference in the example conflicts comes down to the organization of the rebels, this requirement will be examined more closely than the intensity requirement.

When it comes to the two conflicts I shall not deal with the classification of the conflict in Libya after NATO had gotten involved. Depending on how the situation with Syria and Israel respectively Lebanon will unravel, this can change the classification quite drastically and therefore this will also not be taken into account.

1.5 Method and perspective

In all of the chapters a traditional legal dogmatic method is used to examine the definition of a NIAC. This is combined with a critical method and perspective to highlight the differences of NIAC-definitions and to illustrate and criticize the differences in the classifications of the so called example conflicts. The critical perspective is motivated by the purpose of the paper, especially the last research question.

1.6 Research situation

The definition of armed conflicts have long been a topic of discussion among legal scholars and much has been written about it. A majority seem to agree that the current system with different kinds of conflict is not suitable, some however want to lower the demands to expand the scope while other wants the raise the bar to establish a narrower but more precise applicability. Recent works in this field are for instance Anthony Cullen's book "The Concept of Non-international Armed Conflict in International Humanitarian Law" (2010), which deals exclusively with NIAC. Cullen, like me, generally arguments for lower demands. Elizabeth Wilmhurst's work "International Law and the Classification of Conflicts" (2012) is even more recent but deals with different kinds of conflicts, not just NIACs.

When it comes to the example conflicts there are not that much written about it yet, but there are a few articles in law journals. Katie A. Johnston published an article in 2012 called "Transformations of Conflict Status in Libya". Kubo Mačák and Noam Zamir also

published their article “The Applicability of International Humanitarian Law to the Conflict in Libya” in 2012. In the case of Syria, Krisztina Huszti Orban and Natia Kalandarishvili-Mueller published an article on SSRN in 2012 under the title “Is it a Bird? Is it a Plane? Is it an Armed Conflict? The Classification of the Situation in Syria”. The first article regarding Libya defines that conflict as a NIAC several months sooner than the second article, whereas the one concerning Syria characterize the conflict as a NIAC in spring 2012.

1.7 Material

Both primary sources (the GC, AP II etc.) and secondary sources have been used. Anthony Cullen’s book (mentioned above) has been of great help since it focuses entirely on NIACs. Other important sources have been commentaries to both the GC and AP II. Cases from the ICTY have also been of great importance, the most important one being the Tadic-case which defines the concept of armed conflict.

When it comes to the conflicts in Libya and Syria available material have been a bit of a problem, since the conflicts are so recent. The articles mentioned above are the main sources, together with the reports from UN’s High Commissioner or the International Commission of Inquiry on Syria. Reports from organizations like Human Rights Watch have also been useful. This type of organization however has a very specific purpose which can affect their objectivity, I have tried to keep that in mind. I have also used some newspaper articles and websites, not to help with the classification per se but in order to give an overall picture of what has happened in these countries. Newspaper articles have also been used in the above mentioned scientific articles. I am aware of the problems unorthodox sources or limited selections can result in, but I think it is important that legal science can examine new, not so researched topics as well, otherwise it would only be a historical discipline.

1.8 Outline

In the following chapter the threshold of a NIAC according to common article 3 of the GC and AP II will be examined. In doing this cases from the ICTY and legal doctrine will illustrate how the intensity and organization requirement for armed groups are defined in armed conflicts. The chapter will end with some comparative notes and I will also discuss some problems that these definitions have to battle.

Chapter three will focus on the conflicts in Libya and Syria. I will start with a short introduction regarding the conflicts and then proceed with the classifications. Even here the chapter will come to an end with some comparisons and conclusions.

After this (in chapter four) I will problematize the organization requirement from a humanitarian point of view, discussing different scholars' opinions. The paper will end with an analysis in chapter five. This will concentrate on the problems of the organization requirement and if this really enables IHL to fulfill its purpose to protect civilians, taking some examples from the conflicts in Libya and Syria.

2 Non-international armed conflicts

2.1 International humanitarian law – applicability in general

International Humanitarian Law (IHL) becomes applicable in armed conflict, with the general purpose of minimizing the effects and protecting civilians and those no-longer fighting.¹ There are two types of armed conflict: IAC and NIAC. IAC offers the most protection, but NAICs are the most usual conflicts today.² Some of the most important treaties in IHL are the Geneva Conventions (which mostly applies to IACs, only the so called common article 3 applies to NIACs) and the two Additional Protocols, where number one applies to IAC and number two to NIAC. There is no definition of armed conflict in these regulations, the concept has been developed mostly through case-law from the ICTY. If a conflict reaches the NIAC limit, then persons taking part can commit and be held accountable for war crimes at the ICC (ICCSt article 8). This is an advantage since national courts have shown difficulties with these cases.³

The concept of war is not the same as armed conflict, there is no need for a declaration of war for an armed conflict to exist. Article 3 and AP II become applicable automatically when the requirements for an armed conflict are reached. The parties' opinions about the situation or each other do not affect this. There is no demand for reciprocity for IHL to be applicable either.⁴ This is an advantage since very few states officially declare that they have an armed conflict on their hands, since they do not want to admit that things are out of control or have to deal with the responsibilities of IHL.⁵

In a state of peace IHL is of no use, instead HRL are the humanitarian upholder. A state can deviate from HR standards in a state of emergency. A state of emergency can be

¹ Holland, E: "The Qualification Framework of International Humanitarian Law: Too Rigid for Contemporary Conflicts", *Suffolk Transnational Law Review*, 2011, Vol. 34, Issue 1, p. 145 [hereinafter Holland].

² SOU 2010:72 Folkrätt i väpnad konflikt, p. 105 [hereinafter SOU 2010:72].

³ Cullen, A: "Definition of Non-International Armed Conflict in the Rome Statute of the International Criminal Court: An Analysis of the Threshold of Application Contained in Article 8(2)(f)", *Journal of Conflict and Security Law*, 2007, Vol. 12, Issue 3, p. 420-423.

⁴ Pictet, J. S. (ed.): *The Geneva Conventions of 12 August 1949: Commentary. 4, Geneva Convention relative to the Protection of Civilian Persons in Time of War*, 1994, First reprint Geneva: International Committee of the Red Cross, p. 34 [hereinafter Pictet]; Schindler, D: "The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols", *Collected Courses of the Hague Academy of International Law*, 1979, Vol. 163, Martinus Nijhoff Online (retrieved 23-04-2013), http://nijhoffonline.nl.ludwig.lub.lu.se/search_results?query=The+different+types+of+armed+conflicts+according+to+the+Geneva+conventions+and+protocols, p. 145-148 [hereinafter Schindler].

⁵ Cullen, A: *The Concept of Non-International Armed Conflict in International Humanitarian Law*, 2010, Cambridge: Cambridge University Press, p. 57-58 [hereinafter Cullen (2010)].

an armed conflict but it does not have to be. Neither in HRL or in IHL the state exclusively determines what kind of situation they are involved in, the final classification are usually made by courts afterwards.⁶ IHL and HR are interconnected since HRL is also applicable in armed conflict, but IHL are regarded as *lex specialis*. IHL interprets HR specifically for armed conflicts and HR definitions, of for example judicial guaranties, are used in IHL. States can deviate from HRL rules in some situations, which is not possible in the same way when it comes to IHL. Sometimes IHL expand the accountability for certain acts that are violations of both HRL and IHL. For instance the torture prohibition in IHL includes torture committed by armed groups, whereas in HRL torture can only be committed by the state.⁷

The qualifications required for a conflict to become a NIAC are laid down in common article 3, but then there are other demands for AP II to become applicable. These different thresholds are going to be illustrated and discussed during the following sections.

2.2 Common article 3

The area of application for the GC is mostly IAC, but article 3 concerns conflicts “not of an international character”⁸. In other words, a definition of a conflict of international character is required to define a NIAC. According to article 2 in the GC it is a conflict between two High Contracting Parties. This has later been defined as a conflict between at least two states where armed violence has been used and it has reached a certain amount of intensity.⁹ According to AP I article 1 armed conflicts against colonial domination, alien occupation and racist regimes in pursuit of self-determination are also IACs. The list in the article is exhaustive, so it is only applicable if a group riots against a regime with these characteristics.¹⁰ Some rules regarding IAC can still be relevant for NIAC, like the definition of civilians, which has become the same through customary law.¹¹

⁶ Provost, René: *International Human Rights and Humanitarian Law*, 2002, Cambridge: Cambridge University Press, Cambridge Books Online (retrieved 12-05-2013),

<http://dx.doi.org.ludwig.lub.lu.se/10.1017/CBO9780511495175.015>, p. 274 and 284-291 [hereinafter Provost].

⁷ Sassòli, M: “The Role of Human Rights and International Humanitarian Law in New Types of Armed Conflicts”, in: *International Humanitarian Law and International Human Rights Law* (Ben-Naftali, O. (ed.)), 2011, Oxford: Oxford University Press, p. 71-76 [hereinafter Sassòli The Role].

⁸ Convention (IV) relative to the Protection of Civilian Persons in Time of War, signed at Geneva on 12 August 1949, art. 3 [hereinafter GC (IV)].

⁹ SOU 2010:72, p. 85-87.

¹⁰ Pilloud, C.; Sandoz, Y.; Swinarski, C; Zimmermann, B.: *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, 1987, Geneva: Nijhoff, p.54-55 [hereinafter Pilloud].

¹¹ Study on customary international humanitarian law conducted by the International Committee of the Red Cross (ICRC), (retrieved 03-05-2013), <http://www.icrc.org/customary-ihl/eng/docs/home>, rule nr. 8 and 9.

Conflicts not matching these definitions are NIACs. This can be armed groups fighting against the government but not falling into the scope of AP I article 1 or armed groups fighting each other if it occurs on one of the High Contracting Parties territory. The expression “*one* [my italics] of the High Contracting Parties”¹² has led to some controversy, concerning whether it means that only one state can be involved or if it is enough that it is just High Contracting Parties involved. Most authors seem to agree that the second version is the most consistent with today’s IHL, otherwise the treaties would lose much of their purpose considering how usual transnational groups are. If the first state uses force against the armed group now located in a second state and this second state gives the first one permission to do so, then the conflict is still a NIAC.¹³ If the second state on the other hand sides with the rebels it becomes an IAC. The second state itself then has to take part in the fighting or control or plan the rebels’ military operations.¹⁴

Article 3 provides a broad minimum protection and has been viewed as small convention in itself.¹⁵ It does however have its flaws. There is no description of how the fighting parties have to behave towards each other and it does not explicitly mention civilians. In these areas AP II can be of use, but this treaty also carries issues of applicability with it (see section 2.3).¹⁶ First however a closer evaluation of the concept of armed conflicts.

2.2.1 The Tadic-case and the definition of armed conflict

The definition of armed conflict has been developed in case-law from ICTY, the most important one being the Tadic-case. The definition says that an armed conflict is: “whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State”¹⁷. In other words there are two elements required for an armed conflict: a certain amount of intensity and a certain organization degree among the parties. This is especially helpful in defining a NIAC. With these requirements you can establish a lower limit against

¹² GC (IV), art. 3.

¹³ Holland, p. 159-62; Pejic, J: “The Protective Scope of Common Article 3: More than Meets the Eye”, *International Review of the Red Cross*, 2011, Vol. 93, Nr. 881, p. 203-205 [hereinafter Pejic].

¹⁴Fleck, D: “The Law of Non-international Armed Conflicts”, in: *The Handbook of International Humanitarian Law* (Fleck, Dieter (ed.)), 2008, 2nd ed., Oxford: Oxford University Press, p. 604-607 [hereinafter Fleck].

¹⁵ Schindler, p. 145-8; Turns, D: “The Law of Armed Conflict (International Humanitarian Law)”, in: *International Law* (Evans, M. (ed.)), 2011, 3rd ed., Oxford: Oxford University Press, p. 127.

¹⁶ Stewart, J. G.: “Towards a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalized Armed Conflict”, in: *International Review of the Red Cross*, 2003, Vol. 85, Nr. 850, p. 319-321 [hereinafter: Stewart].

¹⁷ *Prosecutor v Dusko Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72 (2 October 1995), p. 70 [hereinafter Tadic].

internal disturbances and tensions, which IHL is not applicable for. Examples of what separates a NIAC from internal disturbances and tensions according to the commentaries are that the rebels have an organized military force with a responsible command and a possibility to implement the convention. Other examples are that the state has to resort to military force instead of law enforcement, that the government recognizes rebels as belligerents or that the rebels claim these rights, that it makes the agenda of the SC as a threat to peace or a violation of the prohibition on the use of force or that the opposition reminds of a state and has a civil authority willing to implement IHL. The acts themselves should also be collective in nature and not the product of a single group or sporadic forms of violence. These examples are not exhaustive and a conflict can still be a NIAC even though none of the examples exist.¹⁸ Some examples might not even be suitable, for instance a political organ like the SC should not decide the classification.¹⁹ This could cause problems in cases like Syria.

The lower limit is a bit unclear. Internal disturbances and tensions do not have a definition, but it does not reach the intensity or organization requirement.²⁰ States still want to have the opportunity to deal with riots and displays of violence according to national laws.²¹ Sometimes organized crime can reach up to the levels demanded. Legal scholars are divided around if this should be a NIAC or not. This depends on if the purpose of the group should be taken into account.²²

The temporal scope of a NIAC is according to the Tadic-case from the beginning of armed conflict until “a peaceful settlement is achieved”²³. When it comes to the personnel scope a person is considered to be a part of the armed group if he or she directly participates with a certain amount of continuity.²⁴ Other important conclusions from the Tadic-case are that violations of IHL can be committed in parts of the territory where no actual fighting are going on. The crime however needs to have a connection to the armed conflict, for instance with the motive of the crime. Also what is inhuman in an IAC is inhuman in a NIAC as well and a person can be held accountable for violations of article 3.

¹⁸ Pictet, p. 35-36; Schindler, p. 145-147.

¹⁹ Huszti Orban, K.; Kalandarishvili-Mueller, N.: “Is it a Bird? Is it a Plane? Is it an Armed Conflict?- The Classification of the Situation in Syria” (April, 24 2012). *1 Journal of International Law*, 2012 Forthcoming, (retrieved 10-04-2013), available at SSRN: <http://ssrn.com/abstract=2045696>, p. 8-9 [hereinafter Huszti Orban].

²⁰ Cullen (2010), p. 107-108.

²¹ Stewart, p. 344-349.

²² Wilmhurst, E: “Conclusion”, in: *International Law and the Classifications of Conflicts* (Wilmhurst, E. (ed)), 2012, Oxford: Oxford University Press, p. 481-482 [hereinafter Wilmhurst].

²³ Tadic, p. 70.

²⁴ Pejic, p. 221-223.

Customary law was assigned more significance because of this judgment.²⁵ The interpretation of article 3 in Tadic is consistent with the contemporary one, not with the one at the time of the GC's creation.²⁶

2.2.2 The intensity and the organization requirement

Whether the intensity or organization is high enough have to be examined from case to case.²⁷ In the Tadic-case the ICTY discusses protracted armed violence which has in time become more and more interpreted as an intensity element. All criteria do not have to exist at the same time. Examples of intensity-elements are: the number, the duration, and the intensity of individual confrontations, type of weapons and other equipment, ammunition, the number of people participating in the conflict and the kind of violence used, how much infrastructure etc. that has been destroyed and how many civilians that have died or are fleeing the conflict.²⁸

The organization does not have to be a typically state military organization, but it should enable the group to implement article 3. It is irrelevant if they actually implement IHL, the only thing that matters is that it is possible for the armed group to do it. The organization requirement does not require any advanced military operations, but the group should be able to use armed violence for a longer time. When the organization requirement is met the intensity can reach new levels. In this way the organization and intensity requirements are connected. The organization requirement is presumed to be fulfilled by state troops.²⁹

Examples of when an organization degree is high enough are: the existence of a spokesperson, a headquarters, a command structure, how orders are distributed, if the group is able to coordinate their attacks, to change tactics and sustain from military operations if necessary, the passing of regulations, the ability to discipline the members, the recruitment and training of new members, communication possibilities, how they get weapons, possibility to implement IHL, control over territory and the recognition and negotiation with external parties. In the case Limaj ICTY stated that the fact that the outside world did not see or

²⁵ Tadic p. 66-70, 119 and 128-134; *Prosecutor v. Ramush Haradinaj et.al*, Judgment, Case No. IT-04-84-T (3 April 2008), p. 61 [hereinafter Haradinaj]; Greenwood, C: "Scope of Application of Humanitarian Law", in: *The Handbook of International Humanitarian Law* (Fleck, D (ed.)), 2008, 2nd ed., Oxford: Oxford University Press, p. 56-57 [hereinafter Greenwood].

²⁶ Cullen (2010), p. 122.

²⁷ *Prosecutor v. Fatmir Limaj et. al*, Judgment, Case No. IT-03-66-T (30 November 2005), p. 90 [hereinafter Limaj].

²⁸ Haradinaj, p. 49.

²⁹ Huszti Orban , p. 5-7; SOU 2010:72, p. 88-90.

understand the command structure of the armed group concerned (the KLA) were a product of the KLA's situation in that conflict and did not mean that it was not sufficient enough.³⁰

In the Hadžihasanović-case the organization requirement was taken a bit further and required a responsible command. The judges looked at the commentary to article 3, which takes responsible command as an example of a difference from internal disturbances and applied this to their interpretation of the requirements for article 3. That responsible command is required for AP 2's applicability was also used to reach this result.³¹ The judgment has been criticized by Cullen amongst others, who think that the ICTY applies AP 2's responsible command to all NIACs, which is not appropriate. He also claims that the commentary should not be looked at too rigorously, since article 3's purpose when it was written is different from its purpose today, which is much wider. Also responsible command is just put forward as an example in the commentary, not as an absolute demand. The commentary even says that not all the examples have to be fulfilled for it to be a NIAC. The Court however makes this into a necessity for the organization of the group and by that makes the threshold for article 3 more like AP II article 1.³² Another result of the organizational requirement is that the state, which usually is sufficiently organized, does not have to implement IHL if the armed group is not organized, leaving civilians unprotected from both sides.³³

2.3 Additional Protocol II

AP II has a much higher threshold to become applicable to NIACs. For starters it is only applicable between a state and an armed group. The group should also be "under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol"³⁴. Sustained means that the operations should be characterized by a certain continuity and stamina and concerted that they should be planned and settled. These are supposed to be objective

³⁰ Limaj p. 98-132; Hardinaj, p. 60.

³¹ *Prosecutor v Enver Hadžihasanović et. al.*, Decision on Interlocutory Appeal Challenging Jurisdiction in relation to Command Responsibility, Case No. IT-01-47-AR72 (16 July 2003), p. 15-23 [hereinafter Hadžihasanović Appeal Chamber]; *Prosecutor v Enver Hadžihasanović et. al.*, Decision on Joint Challenge to Jurisdiction, Case No. IT-01-47-PT (12 November 2002), p. 161 [hereinafter Hadžihasanović Trial Chamber].

³² Cullen (2010), p. 148-159; Tahzib-Lie, B.; Swaak-Goldman, O.: "Determining the Threshold for the Application of International Humanitarian Law", in: *Making the Voice of Humanity Heard: Essays on Humanitarian Law in Honour to HRH Princess Margriet of the Netherlands* (Lijnzaad, L. & HRH Princess Margriet of the Netherlands (ed.)), 2004, Leiden: Martinus Nijhoff, p. 250-252 [hereinafter Tahzib-Lie].

³³ Paulus, A.; Vashakmadze, M.: "Asymmetrical War and the Notion of Armed Conflict – a Tentative Conceptualization", *International Review of the Red Cross*, 2009, Vol. 91, No. 873, p. 116 [hereinafter Paulus].

³⁴ Protocol II Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, signed at Geneva, on 8 June 1977, art 1.

characteristics not influenced by the parties' point of view. AP II does not change article 3's area of application and both treaties could be applicable at the same time. Although not sharing the same threshold, they do share a common lower limit towards internal disturbances.³⁵

If we start with the territory-requirement, its purpose is to enable sustained and concerted military operations (a higher intensity compared to article 3) and a possibility to implement the protocol. The control has to be stable, but the area does not have to become a state within the state. The organization requirement is higher in general in AP II. There is need of a more developed organization to execute sustained and concerted military operations. The command chain does not have to be as clear as in state troops, but this should enable the kind of military operations required. The requirements are interconnected just as in article 3.³⁶ For AP II to be applicable there is also an independent demand on responsible command. This requirement has a very high bar, which aggravates the usefulness of AP II.³⁷

Some claim that the most important criterion is that the armed group has a possibility to implement IHL. How efficiently this is done does not matter. As mentioned, the parties themselves do not decide if IHL is applicable or not. If a group has control over a territory and is sufficiently organized implementation should not be a problem.³⁸

The protocol's high demands have resulted in that almost no conflicts have crossed the threshold. Article 3 and HRL have to fill the void in these cases.³⁹ The reason why the bar is set so high was the concern states expressed when it was drafted. They were scared that the treaty would legitimize insurgents. Just like when it comes to article 3 states usually deny AP II's applicability in hopes of escaping their responsibility, which is useless. A big part of AP II's protective rules has however turned into customary law, but customary law implements a threshold more like the one in art 3. AP II's higher level of protection can in other words be used in conflicts not fulfilling its threshold.⁴⁰ The threshold between GK and AP II are maybe becoming redundant due to development of customary law.⁴¹

Article 3 in AP II says that nothing in the convention should be interpreted as a right for other states to intrude on the fighting state's sovereignty. Leslie C. Green questions

³⁵ Holland (2011), p. 159; Pilloud, p. 1350-1355.

³⁶ Green, L. C.: *The Contemporary Law of Armed Conflict*, 2008, 3rd ed., Manchester: Manchester University Press, p. 83-4 [hereinafter Green]; Pilloud, p. 1349-4; Cullen (2010), p. 101-5; Holland, p. 158-159.

³⁷ Sassòli, M: *Transnational Armed Groups and International Humanitarian Law*, 2006, Cambridge: Harvard University, p. 15 [hereinafter Sassòli "Transnational"].

³⁸ Pilloud, p. 1352-4; Huszti Orban, p. 12-14; Holland p. 158-159.

³⁹ Green, p. 83-84.

⁴⁰ Fleck, p. 622; Cullen (2010), p. 110-112. See also ICRC's Study.

⁴¹ Wilmhurst, p. 482-483.

though if crimes against IHL cannot lead to a humanitarian intervention or a R2P-act, as these concepts grow stronger. These controversial means are what states are left with, since they cannot sue the other state for violation of the treaty because they themselves have not been exposed to any harm. Otherwise they are just left to condemn the acts. AP II's lack of effective sanctions affects the confidence for it. Since so many conflicts today are NIACs, this is not a desirable reality. It is hard to amend though since the principle of sovereign states is what the international community is built on.⁴²

2.4 Comparison

AP II has a significantly higher threshold compared to article 3, in addition the protocol is not applicable between armed groups.⁴³ From a humanitarian perspective article 3's lower threshold is preferable and should be implemented generously.⁴⁴

Other differences between article 3 and AP II are the element of protracted armed violence compared to sustained military operations. Protracted armed violence does not entail the same kind of continuity and a larger period of time is being assessed in article 3. Protracted does not provide episodes early in the conflict with immunity from accountability.⁴⁵ The organization degree required for protracted armed violence is much lower than the degree that is needed to execute sustained and concerted military operations.⁴⁶ As shown above responsible command is not either entirely uncontroversial for article 3. If it should be an element in article 3 as well, should article 3 then make use of lower demands or the same as AP II to fulfill this requirement? The Tadic-case also does not require an armed group to have control over territory.⁴⁷

AP II and common article 3 also have similarities. Many of the demands in AP 2 are examples of when the intensity or organization degree is high enough for article 3, the requirements are interconnected in both treaties and in both treaties IHL becomes applicable automatically, no matter the parties' opinions.

No matter the threshold, NIACs are controversial since states do not want to let go of control and use anything other than their own laws in their own territory. Therefore the

⁴² Green, p. 85-86 and 360-361.

⁴³ Greenwood, p. 54-57.

⁴⁴ Sassòli Transnational, p. 15; Paulus, p. 119.

⁴⁵ Tahzib-Lie, p. 247-9; Cullen (2010), p. 128-130 and 146-148.

⁴⁶ Paulus, p. 117.

⁴⁷ Tahzib-Lie, p. 253.

threshold is usually set a bit higher.⁴⁸ AP II and article 3 does not affect the parties' status though. In other words IHL does not legitimize an armed group just because it has a possibility to implement IHL. The surrounding world's moral outlook on the group may however change.⁴⁹

2.5 Problems concerning NIACs

This section will illustrate some of the problems concerning IHL and NIACs. This will be done before the section about the conflicts and the critique of the organization requirement, since they can be tools helpful to have in mind when it comes to the problematization.

One big problem that IHL suffers from is the inability to so far engage armed groups. The armed groups are also bound by these conventions, which leads to problems of implementation since they have not signed or even known they exist sometimes.⁵⁰ I will not go in to how this is possible due to space limitations.

Since there is no world government who can force states or armed groups to implement IHL, some may ask why these classifications are so important. Without a classification you do not know which regulation to use, which decides what crimes have been committed.⁵¹ Violations of IHL are committed in every conflict, but without it armed conflicts would have been much worse. It is not politically attractive for a party to get a rumor of not following the international community's rules. Also, even if the system does not require reciprocity, there is always an incentive to follow the rules in hope that the other party will do the same. The development of individual accountability for war crimes in NIACs also discourages inhuman behavior. Information about IHL however needs to be spread, especially to the armed groups.⁵² The command chains in armed groups are often secretive and loose, which leads to decisions being made even by lower level members. Therefore everyone needs to be aware of their obligations.⁵³

Usual classifiers are NGOs (ICRC for example), third states and different courts. The UN does not have any special assignment to classify conflicts due to it being a political

⁴⁸ Stewart, p. 344.

⁴⁹ Pictet, p. 44.

⁵⁰ Fleck, p. 607-608; Pictet, p. 37.

⁵¹ Sassòli, M: *How does law protect in war? : cases, documents and teaching materials on contemporary practice in international humanitarian law, Vol.1: Outline of international humanitarian law*, 2006, 2nd ed., Geneva : International Committee of the Red Cross, p. 323 [hereinafter Sassòli Protect]; Wilmhurst, p. 490-493.

⁵² Fleck, p. 630-633.

⁵³ Sassòli Transnational, p. 30-40.

organ. Both the SC, the GA and HR Commission do however classify conflicts but their classifications are not higher ranked than anybody else's. Many of the actors also look at each other's classifications when doing their own.⁵⁴ The under-classification that the state involved often resort to has been an issue for quite a while, but a new problem is over-classification. Classifying a conflict prematurely deprives people of some of their HR (which gives them a better protection) and since IHL are not drafted for these situations they seem inadequate and therefore respect is lost for the rules.⁵⁵

If truth be told the parties, the organizations and legal scholars far from always classifies the conflicts in the same way. Classification is often easier when the conflict is over (which can affect classification in Libya compared to Syria). For that reason reality would be so much easier if the rules for IAC and NIAC were the same. Fewer options would lead to the same amount of protection for civilians no matter what kind of conflict. This is actually a work in progress in customary law in order to increase humanitarian protection.⁵⁶ Numerous conventions drafted more recently have not made a difference between IAC and NIAC.⁵⁷ ICTY and ICTR have been important actors in this universalization, just as the ICC Statute's definition of war crimes. The purpose of IHL compared to when the GC were drafted has also changed. It has gone from being a protector of state sovereignty to a protector of humanitarian values, the differences between IACs and NIACs then seem more and more illogical.⁵⁸ Mixed conflicts (when there is an IAC and a NIAC going on in in the same time in the same country) and internationalized conflicts also make double regulations inappropriate from a humanitarian perspective.⁵⁹ Some scholars however think that we should not make new rules, but apply the ones we got more generously.⁶⁰

States are afraid that a merger will encourage riots which they will be unable to fight, since they will be restricted by so many rules. The biggest difference between IAC and NIAC is the right to combatant status. Rebels' in NIACs do not have a right to this. If they had then they would be immune against prosecution for their involvement in the rebellion (except for crimes against IHL). How though are you supposed to motivate armed groups to

⁵⁴ Provost, p. 307-314 and 341.

⁵⁵ Sassòli, M: "The Implementation of International Humanitarian Law: Current and Inherent Challenges", *Yearbook of International Humanitarian Law*, 2007, Vol. 10, p. 50-2 [hereinafter Sassòli Implementation].

⁵⁶ Fleck, p. 609-615; Wilmhurst, p. 499-502.

⁵⁷ SOU 2010:72, p. 104 and 187; Sassòli Protect, p. 343-344.

⁵⁸ Kolb, R.; Hyde, R.: *An Introduction to the International Law of Armed Conflicts*, 2008, Oxford: Hart Pub., p. 68-70 and 258-60 [hereinafter Kolb]; Tadic p. 96-98.

⁵⁹ Stewart, p. 335; Schindler, p. 153-155.

⁶⁰ Holland, p. 180-181.

implement IHL if they will not get any advantages out from it?⁶¹ States are also afraid that a merger will lead to more involvement from outside actors in internal affairs, an action based on the R2P for instance. R2P can be motivated in cases of genocide, crimes against humanity, ethnical cleansing or war crimes. A R2P action also has to be preceded by a UN decision, which when it comes down to it makes it a political decision (see the conflict in Syria). When there is a right to act on the R2P should not be affected though, but it should be easier to claim that serious crimes are committed in armed conflict, especially if the parties do not abide to IHL.⁶²

James G. Stewart gives a proposal for a united IHL with a definition of armed conflict closer to AP II than article 3. It would however be applicable to conflicts between armed groups as well. He means that putting high demands on armed groups' organizational skills might solve issues like the under-classification of involved states and this could also provide members of armed groups with combatant status.⁶³

Another problem for the IHL of today is the asymmetrical conflicts that are becoming more and more usual. When an armed group fights a state's armed forces they have much less weapons, education and technique. This reflects what means they use in conflict.⁶⁴ A big problem is also to access enough information, especially regarding the organization requirement, to be able to classify a conflict. It is not just a problem obtaining information, but also proving it to be true.⁶⁵

Many of these problems really come down to the problem of implementation. Huge progress has been made in the last years in precautionary actions (information and training) just as in accountability after the conflict, but during the conflict there are still problems. Some wonder if the difficulties in classifying a conflict partly depend on the low implementation degree. For this to change you have to engage armed groups more.⁶⁶

The surrounding world changes constantly which is obvious when looking upon the changes article 3's purpose has gone through. Article 3 should be able to continue to change to fulfill its purpose of humanitarian protection and meet upcoming challenges.⁶⁷

⁶¹ Engdahl, O: "Internationell humanitär rätt", in: *Folkkrätten i ett nötskal* (Lindefalk, U. (ed.)), 2012, 2nd ed., Lund: Studentlitteratur AB, p. 223-228.

⁶² Dapu, A: "Classification of Armed Conflicts: Relevant Legal Concepts", *International Law and the Classification of Armed Conflict* (Wilmhurst, E. (ed.)), 2012, Oxford: Oxford University Press, p. 37-39 [hereinafter .Dapu]; Lohr gen Stahl, R: *R2P: skyldighet att skydda*, 2011, Stockholm, p. 209-213.

⁶³ Stewart, p. 344-349.

⁶⁴ Fleck, p. 603; Sassòli *The Role*, p. 36.

⁶⁵ Spieker, H: "The International Criminal Court and Non-International Armed Conflicts", in: *Leiden Journal of International Law*, 2000, Vol. 13, Issue 2, p. 412.

⁶⁶ Wilmhurst, p. 490-3; Sassóli *Implementation*, p. 46-47.

⁶⁷ Cullen (2010), p. 191.

3 The example conflicts

3.1 Libya

3.1.1 The conflict

The conflict in Libya was characterized by fast escalation. The demonstrations started the 17 of February 2011 (the so called day of rage) and both government forces and protesters soon took to violence. Somewhere in late February to early March the National Transition Council of Libya (NTC) formed and the organization degree among the rebels increased rapidly. Gaddafi became more violent as time moved on.⁶⁸ In late February big parts of eastern Libya were controlled by the rebels. Crimes against humanity, war crimes and violations of IHL were committed by the regime and violations of human rights and war crimes by the opposition during this conflict.⁶⁹

In SC resolution 1970 on the 26 of February the Council decided to refer the situation in Libya to the ICC, form a weapons embargo, a travel ban and freeze assets of some of the leaders in the regime.⁷⁰ The 17 of March the SC took resolution 1973, where they discussed the armed conflict. They established a no-flight zone, later upheld by NATO, and authorized member states to take all necessary means to protect civilians.⁷¹ China and Russia abstained from their votes. The conflict was over around the 20 of October when the rebels took the last Gaddafi stronghold, the city Sirte, and killed Gaddafi. The rebels declared Libya liberated the 23 of October and NATO withdrew the 31.⁷²

3.1.2 The classification

The violence during the first days does not reach the intensity requirement, but already around the 20 of February did the air force take part in the conflict. The organization requirement was

⁶⁸ Säkerhetspolitik.se: Libyen – fördjupning, 29-08-2011 (retrieved 07-04-2013), <http://www.sakerhetspolitik.se/Konflikter/Libyen/Fordjupning-Libyen/Libyen> [hereinafter Säkerhetspolitik Libyen]; Nationalencyklopedin: Libyen Årsöversikt 2011, (retrieved 10-04-2013), <http://www.ne.se.ludwig.lub.lu.se/libyen/2011#>, [hereinafter NE Årsöversikt Libyen].

⁶⁹ Amnesty International Report: *Libya: The Battle of Libya: Killings, Disappearances and Torture*, 13-09-2011 (retrieved 30-04-2013), <http://www.amnesty.org/en/library/info/MDE19/025/2011>, p. 7-8.

⁷⁰ Security Council Resolution 1970, 26-02-2011 (retrieved 06-05-2013), [http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1970\(2011\)](http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1970(2011)), p. 2-5. [hereinafter SC Res 1970].

⁷¹ Security Council Resolution 1973, 17-03-2011 (retrieved 06-05-2013), [http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1973\(2011\)](http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1973(2011)), p. 1-4 [hereinafter SC Res 1973].

⁷² Säkerhetspolitik Libyen; NE Årsöversikt Libyen.

also fulfilled quite fast. From the 19-28 of February there were signs of rebel units being formed, usually with a defector in charge. The communication difficulties made coordination hard for the units, but already in late February they controlled several cities. NTC also created military councils to coordinate attacks between units. NTC promised to abide to IHL and played a big part as the face of the opposition to the outside world. As mentioned some see the possibility of implementing IHL as the main reason for the organization requirement. According to Mačák and Zamir the opposition would then have been sufficiently organized around the 24 of February. They believe AP II should be fulfilled around the same time since the rebels' exercised control over territory, making it possible for them to execute sustained and concerted military operations.⁷³

Johnston agrees with article 3's date of applicability, despite information difficulties and critique of the rebels' organization degree in Mars and April. Another sign of the conflict being a NIAC was UN resolution 1973. However, she does not believe that AP II was fulfilled until August. Johnston's opinion regarding AP II is more restrictive and she points at the high demands regarding territory and organization. The rebels showed intent to follow IHL more or less from the beginning, but it was not until August an official declaration came. That is when AP II became applicable according to her.⁷⁴

UN's High Commissioner seems to agree with the first authors and claims that there was a NIAC going on in late February according to both article 3 and AP II (Libya is a party to both treaties). What is interesting here is the little amount of time this report spends on the organization requirement. It basically just says that it is hard to get information, the rebels are not as organized as the government's troops and that the command chain is unclear. NTC however does have a military council which coordinates attacks to some degree.⁷⁵ This is quite different from how much time the UN commission in Syria spends on looking into the organization of the rebels. Since there is no authority which makes a binding classification UN's classification is just one of many.

⁷³ Mačák, K.; Zamir, N.: "The Applicability of International Humanitarian Law to the Conflict in Libya", *International Community Law Review*, 2012, Vol. 14, Issue 4, p 405-411.

⁷⁴ Johnston, K. A.: "Transformation of Conflict Status in Libya", in: *Journal of Conflict and Security Law*, Apr2012, Vol. 17, Issue 1, p. 9-16.

⁷⁵ Report of the High Commissioner on the situation of human rights in the Libyan Arab Jamahiriya (A/HRC/17/45), 07-06-2011 (retrieved 13-04-2013), http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.45_AUV.pdf, p. 27-31.

3.2 Syria

3.2.1 The conflict

Peaceful demonstrations demanding political reforms started in Daraa the 15 of Mars 2011. The trigger was the arrest and torture of a couple of children who had written anti-regime messages on some walls. The state however began using indiscriminate, deathly violence soon and as a result the protesters demanded Assad's resignation. USA and the EU took measures in form of sanctions. In July the Free Syrian Army (FSA) was founded and it engaged in armed resistance against government forces. Many of its members were defectors. In September the Syrian National Council (SNC) was created, with a more peaceful approach than the FSA.⁷⁶

The violence continued to escalate, leading to condemnation from the international community. Kofi Annan's peace plan was agreed upon by both sides, but instead the violence increased. Kofi Annan resigned in 2012 because of the low compliance. The GA drafted a resolution shortly after which demanded political transition.⁷⁷ In 2012 there was fighting in practically every part of the country, even in Damascus.⁷⁸

China and Russia do not want the SC to authorize the use of force in the case of Syria, but to try and solve the situation with an open dialogue and have used their veto to stop all attempts at a SC resolution.⁷⁹ The GA has taken a resolution in late 2012 where they discuss the armed conflict and condemns the violations of international law and war crimes.⁸⁰

3.2.2 The Classification

The conflict in Syria is extremely brutal and many people have lost their lives because of it. The government is attacking the rebels with military means, which can be a sign of a NIAC. The issues of classification have depended on the organization requirement. The opposition

⁷⁶ Säkerhetspolitik.se: Syrien – fördjupning, 01-12-2011 (retrieved 17-04-2013), <http://www.sakerhetspolitik.se/Konflikter/Syrien/Fordjupning-Syrien/> [hereinafter Säkerhetspolitik Syrien]; BBC: *Guide to the Syrian Opposition*, 23-04-2013 (retrieved 26-04-2013), <http://www.bbc.co.uk/news/world-middle-east-15798218> [hereinafter BBC Guide].

⁷⁷ Säkerhetspolitik Syrien och General Assembly Resolution A/RES/66/253 B: The Situation in the Syrian Arab republic, 07-08-2012 (retrieved 05-05-2013), [http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/66/253 B](http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/66/253%20B), p. 5.

⁷⁸ Nationalencyklopedin: Syrien Årsöversikt 2012, (retrieved 20-04-2013), <http://www.ne.se.ludwig.lub.lu.se/syrien/2012>; BBC: *Syria: the Story of the Conflict*, 15-03-2013 (retrieved 20-04-2013), <http://www.bbc.co.uk/news/world-middle-east-19331551>.

⁷⁹ S/PV. 6710: The Middle East situation - Syria, 31 January 2012, meeting document from the SC (retrieved 05-05-2013), http://www.un.org/ga/search/view_doc.asp?symbol=S/PV.6710, p. 23-25.

⁸⁰ General Assembly Resolution 67/183: Situation of Human Rights in the Syrian Arab Republic, 20-12-2012 (retrieved 05-05-2013), http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/67/183, s. 1-4.

consists of loosely connected groups and up until recently the FSA and SNC did not coordinate. The conflict is asymmetrical and the rebels have resorted to guerilla attacks, which are effective but dangerous for the civilian population. How effective the command chain is has been the object of much discussion. Some say that FSA is just a brand name and that FSA's headquarters in Turkey just distributes guidelines. Others say they have control over the military operations that are going on in Syria. There is no clear answer, but it seems like local command chains exist at least. There have been rumors of negotiations of a ceasefire conducted by ICRC, involving both the government and FSA. This kind of recognition of the armed groups is of great importance. Because of the above mentioned reasons Huszti Orban and Kalandarishvili-Mueller thinks that there has been a NIAC in Syria since mid-spring 2012.⁸¹ However, the fact that this makes IHL applicable seems to be of greater importance to the authors than some of the elements required for a classification.

In their first report on the 23 of November 2011 the UN commission wrote that they did not have enough credible information about either the intensity or the organization to establish that the situation was a NIAC.⁸² In their second report (the 22 of February 2012) the main issue was the organization degree. How much actual control the FSA-leaders might or might not have over what was happening in Syria was a ground for concern. The commission did however point out that the FSA strategy had become much more offensive than defensive and that the headquarters in Turkey were coordinating between the different groups at least, but was unsure if they delivered actual orders. So far there was no substantial proof of an actual command chain. Both sides had committed crimes against HR, the government being the more active perpetrator but the rebels were also responsible. The report concludes with the remark that the situation was bordering on a NIAC.⁸³

The commission classified the conflict as a NIAC in the third report from 16 of August 2012. It pointed out that the intensity requirement had been fulfilled for quite a while and now the organization was as well. FSA had solved the problem of the lacking command chain and had for instance established local military councils which controlled the armed groups in their respective area. The groups vary in size, but some of the larger ones could control territory and were involved in sustained armed clashes. FSA had also announced that they had a new military chain (the Joint Military Command of the Syrian Revolution). The

⁸¹ Huszti Orban, p. 18-23; BBC Guide.

⁸² 1st Report of the Independent International Commission of Inquiry on Syria, 23-11-2011 (retrieved 07-05-2013), <http://www.ohchr.org/EN/countries/MENARRegion/Pages/SYIndex.aspx>, p. 18.

⁸³ 2nd Report of the Independent International Commission of Inquiry on Syria, 22-02-2012 (retrieved 07-05-2013), <http://www.ohchr.org/EN/countries/MENARRegion/Pages/SYIndex.aspx>, p. 7-10 and 17-21 [Report nr 2 Syria].

rebels had also become increasingly militarized and used their weapons more to throw the government of its balance, for instance by attacking infrastructure.⁸⁴ The increasing use of more militarized force reflected upon the civilian population's situation.

Report nr 4, which came early this year, did not change the classification and emphasized the continuing war crimes and HR crimes of both parties and the crimes against humanity committed by the government forces. The opposition had gotten more control over territory in the north and central parts of the country since the last report. Where the borders were to be drawn exactly were a hard question though, since they change repeatedly. The creation of the National Coalition for Syrian Revolutionary and Opposition Forces in November 2012 was put forward as a milestone for the opposition. FSA and SNC, among others, are members of the coalition. The coalition was also recognized abroad as the representative of the Syrian people. The coalition has later received critique of not being as effective as many would have wished for and that there are still problems with upholding an effective command over all the armed groups. FSA's organization, which according to the last report was increasing, is here not looked upon as favorably and their previous attempts towards a more structured leadership are deemed as a failure. Different alliances and organization are though working towards a common goal. The commission estimates that 60 000 people have become victims of the conflict so far with thousands fleeing.⁸⁵

Other international organizations also classified the situation as a NIAC in the summer of 2012, like the ICRC, but others did so earlier in the year.⁸⁶ HRW for instance classified it as a NIAC in the spring 2012. HRW claims that the armed groups were sufficiently organized at this time, at least in some parts of the country. The groups could plan attacks, withdraw and control their checkpoints HRW claims. The local military councils were put forward as coordinating both within their own area and with other military councils.⁸⁷ This earlier classification may of course be a product of this organization's purpose.

⁸⁴3rd Report of the Independent International Commission of Inquiry on Syria, 16-08-2012 (retrieved 07-05-2013), <http://www.ohchr.org/EN/countries/MENARRegion/Pages/SYIndex.aspxSyrien>, p. 8-9,23 and 60-62.

⁸⁵ Fourth Report of Commission of Inquiry on Syria - A/HRC/22/59, 05-02-2013 (retrieved 07-05-2013), <http://www.ohchr.org/EN/countries/MENARRegion/Pages/SYIndex.aspx>, p.. 1-2 and 6-9; NE årsöversikt 2012; BBC Guide.

⁸⁶ ICRC: *Syria: ICRC and Syrian Arab Red Crescent maintain aid effort amid increased fighting*, 17-07-2012 (retrieved 26-05-2013), <http://www.icrc.org/eng/resources/documents/update/2012/syria-update-2012-07-17.htm> [ICRC: Syria].

⁸⁷ HRW Report: *They Burned My Heart*, 03-05-2012 (retrieved 20-04-2013), <http://www.hrw.org/reports/2012/05/02/they-burned-my-heart-0>, p. 32-33; ICRC: Syria.

Syria is more divided than Libya in terms of religions and ethnicities, which effects the opposition and some still support Assad. This also affect how the international community can intervene, the wrong method might turn groups against each other and prolong the conflict.⁸⁸

3.3 Comparison

Libya and Syria are both asymmetrical conflicts, with the highest degrees of violence among the conflicts that started with the Arab spring. The reactions have been quite different though, in Libya the SC stepped in, whereas in Syria no such activities are in sight.⁸⁹ The Libyan conflict was characterized by fast escalation considering what forms of violence that were used, but also in terms of the rebellion movement itself. The intensity criterion usually is not the problem, nor was it that in this case either. The difficulty concerning the organization degree does not seem to have caused any frustration here either however, which means that not only have the rebels met these high demands but there has also been enough information about this available to outside actors. Not only did they fulfill article 3 in this short period of time, but also AP II. I think it is noteworthy how fast many seem to agree that these requirements were fulfilled. For articles written after the conflict had come to an end this might not be so surprising, but for the UN commission to be able to obtain so much reliable information in such a short time during the chaos of the conflict is surprising, since that has been such a problem for them in Syria. The report does not however give much information about the organization, not comparing to the discussion regarding this in the reports on Syria.

The fact that the SC already had made an official statement characterizing the situation as an armed conflict and had taken action, I believe may have played a part in how smoothly the classification went. The involvement of the SC is after all an example of a NIAC, but it does not equal a NIAC. Although there is not any official connection between armed conflicts and R2P, the crimes necessary to legitimize an intervention usually occur during an armed conflict.⁹⁰ Two UN bodies disagreeing on the classification might not have

⁸⁸ Huszti Orban, p. 27-28.

⁸⁹ Allanson, M. et.al: "The First Year of the Arab Spring", in: *SIPRI Yearbook 2012: Armaments, Disarmament and International Security*, 2012, Oxford: Oxford University Press, p. 1 and 8-10.

⁹⁰ Hubert, D.; Blätter, A: "The Responsibility to Protect as International Crimes Prevention", in: *Global Responsibility to Protect*, 2012, Vol. 4, Issue 1, p. 61-65.

hurt the intervention, but it probably would not have been helpful considering the criticism the resolution already was exposed to.⁹¹

I also find it surprising that according to some the requirements in AP II are fulfilled at the same time as the ones in article 3, considering that these are significantly higher. With this in mind maybe article 3 actually became applicable a little earlier or AP II a little later. That basically no conflict has reached the requirements of AP II before and then for this one to do it in just a couple of weeks sounds strange. One might wonder the same thing regarding the responsible command chain. Can it be established efficiently enough in this time-frame, no matter if this is necessary for both article 3 and AP II or just AP II.

When it comes to Syria, the conflict did not escalate as quickly, but it was not long until protestors were subjected to deadly force. To establish that this probably were an armed conflict however took more than a year. Some actors were faster in the classification process than others, which may depend on their agenda. According to me there are differences regarding how the information were valued and the discussion concerning the organization degree in the reports from the two countries. In the reports concerning Syria the inability to establish the required organization of the rebels is motivated by the fact that information is scarce and that were it is provided it is hard to prove.⁹² This may very well be true, but this does not change the fact that the information available in the two classifications seems to be valued quite differently without an explanation. That the SC cannot come to an agreement about how to handle Syria, when being so eager to act in Libya, may also lead to insecurity concerning the characteristics of the conflict. Many of the classifiers seem to agree that some groups fulfill the demands. One should perhaps consider the fact that due to the fragmented population there are several groups and not just one.

If the conflict in Libya were assigned to AP II perhaps a little too fast, it seems that some of this protocol's requirements are being used in Syria although Syria is not a party to this treaty. For instance the reports discuss if the rebels have any territory under control. They also spend a lot of effort on the command chain, trying to prove that this can lead to accountability for commanders, which in turn requires responsible command. This although it is still disputed whether this actually is a demand for article 3.⁹³

⁹¹ Pommier, B: "The Use of Force to Protect Civilians and Humanitarian Action: the Case of Libya and Beyond", *International Review of the Red Cross*, 2011, Vol. 93, Nr. 884, p. 1079-1080.

⁹² It is not necessary for outside observers however to see the command chain for it to be efficient enough and important in a trial later on (see Limaj).

⁹³ Report nr 2 Syria, p. 19-21; Hadzihazanovic Trial Chamber p. 70 and 93.

4 Critique of the organization requirement

The demands regarding the organization requirement have been said to be unrealistic and will make IHL meaningless if not adjusted to the reality of today. Some form of organization is necessary in order to see actual parties to the conflict, but does this really require this high demands? Presently a high intensity conflict with catastrophic consequences can fall below IHL because of the organization of one party, like in Syria.⁹⁴ This is complicated even more by the information and evidence difficulties regarding the organization requirement. ICRC has asked that the demands should be lowered for humanitarian cause's sake.⁹⁵

Marco Sassòli, who has criticized the organization requirements on numerous occasions, proposes a different approach to the organization of armed groups. He thinks that some rules can and should be followed by all groups no matter their organizational degree, such as the prohibition of torture. Judicial guarantees etc. demands a bit more from the group, but this does not mean that all groups cannot sustain from torture as a mean of warfare. How though can any group fulfill the judicial guarantees that require rule of law when they cannot or have not had the opportunity to legislate? This approach can be used on armed groups when an armed conflict already is ongoing. To define when there actually is an armed conflict the absolute minimum degree of organization for a group to be able to implement IHL should suffice. After the characterization is made all violations of IHL that has a connection to the conflict can be criminal.⁹⁶ Sassòli does not explain what this minimum degree of organization is however, which leaves us with unanswered questions.

If the armed groups do not fulfill the organization degree then the state does not have to apply IHL to its actions either. This is a particular danger in today's asymmetrical armed conflicts. Arne W. Dahl and Magnus Sandbu have criticized this. They think that too much depends on the intensity and organization requirement instead of how the state actually is acting. Should the state really be able to benefit from the asymmetrical character of today's conflicts? The state can just deny other actors access to avoid or complicate a classification. The authors also claim that it is easier for a state to be held accountable for HR crimes than IHL crimes, where they might even be trialed before ICC. The organization requirement should not be decisive, if the state uses force exceeding the right to life should however be.

⁹⁴ Pejic, p. 192-3; Sassòli Yearbook, p. 70-71.

⁹⁵ Sassòli Transnational, p. 15.

⁹⁶ Sassòli The Role, p. 57-59; Sassòli Implementation, p. 57-67.

That the state makes use of military means can be an example of this.⁹⁷ This proposal on the other hand leads to problem for NIAC just between armed groups.

The merger between IHL rules for different conflicts can be of great use in protecting civilians. If article 3 and AP II would form a singular regulation for NIAC that could be helpful, but the threshold for article 3 would have to be the one established. The other way around could rather lead to even fewer conflicts falling into the scope of IHL. Cullen raises concern if the threshold for article 3 was to be more like AP II, as in the Hadžihasanović-case. Since AP II is supposed to be so unattainable this is reprehensible from a humanitarian perspective. The armed group does not, as mentioned, have to bear resemblance to a state organization. There is a risk however that responsible command will be interpreted as similar to command chains in state forces, since that is what we are used to. Although these types of thresholds could be useful in making states more open to NIAC, it will ignore the humanitarian issues in the majority of them. It will leave a very few protected, whereas a majority would lack any protection from IHL at all.⁹⁸ The same problem is true for Stewart's proposal, only then it is regarding IAC and NIAC. Stewart primarily looks at the upsides for the fighting parties, but does not discuss civilians as much. Since the civilian population often is caught up in the middle, I believe this is as a shortage.

Sassòli purposes that IHL should be discussed and adjusted through a dialogue involving both states and armed groups. One should also reward those who follow the rules, which may mean that national laws have to be changed. For IHL to be an effective system there also has to be a supervision mechanism and an organ for punishment (such as ICC). Information about ICC also has to be spread.⁹⁹

The unrealistic rules and requirements put on armed groups and the gap between reality and theory affect the respect for IHL negatively. Some say that IHL are obsolete regulations, but that does not mean we can ignore them until we have satisfactory ones.¹⁰⁰

⁹⁷ Dahl, A. W., Sandbu, M: "The Threshold of Armed Conflict", in: *Military Law and Law of War Review*, 2006, Vol. 45, Issues 3 and 4, p. 374-377.

⁹⁸ Cullen (2010), p. 155-6; SOU 2010:72, p. 88-90.

⁹⁹ Sassòli Implementation, p. 62-67.

¹⁰⁰ Sassòli Implementation, p. 71.

5 Analysis

Classifying armed conflicts is far from an easy task and NIACs are even more controversial than armed conflicts in general. With the help of case-law however some real progress has been made. The problem is that the treaties that these criteria were created for were drafted up to 50 years ago. The purpose of IHL back then was to uphold the principle of sovereign states, today it has a responsibility to protect humanitarian values. Does it really fulfill its purpose or is change in order to accomplish that?

As pointed out above, a usual problem in the qualification process is the organization of armed groups. As the example conflicts and some of the critique this requirement has gotten show, maybe the bar is set too high considering the nature of armed groups in today's world. It is also an all or nothing demand, either all IHL responsibilities apply or none. Abstaining from torture should not require much, as Sassòli points out. Do we still find it reasonable for the organization requirement to stand in the way and not just absolve one of the parties of their responsibility, but all of them? A state is still organized enough and has a better base to build on to fulfill humanitarian values. If something often is the missing link then maybe it is time to reconsider. Considering NIAC's asymmetrical nature nowadays compared to the state-oriented reality when the GC were drafted, it is easy to see that the context is very different. Can IHL still claim to be humanitarian instruments when a criterion that does not match reality, are still decisive of whether it is implemented or not? Unrealistic demands will just hurt the purpose of IHL.

On the other hand you have to be realistic and although not being the only actors on the international arena anymore, states are still the biggest ones. They have to be comfortable with a solution for there even being a possibility of becoming one. You have to find a balance between not making the area of application too small and therefore too limited or too wide and then too insecure. The biggest concerns for states seem to be the fear of legitimizing riots etc. and the possibility of external involvement in state affairs. These are the problems that have to be addressed. When it comes to the later one maybe a solution is so easy as to make clearer criteria for R2P-actions, giving the states the security of knowing where the line is drawn and limiting political agendas. When it comes to the second one it is much trickier. Even if the treaties point out that legally the status of armed groups does not change, morally the case can be another. Engaging armed groups is a major problem, but for states to agree to negotiate with armed groups to come up with a solution is also one.

However if the organizational demand is set to low how can you engage a group so loosely organized that there are practically no control inside the group? And how will such a group make sure that humanitarian values are met?

As mentioned above a universalization of rules for different kinds of conflicts, with an appropriately low threshold, can be a big step forward in protecting civilians and the society. You can see examples of the consequences of a higher threshold in the UN reports on Syria, where criteria not necessary to fulfill article 3 still are being discussed, increasing the demands put on armed groups. The reports for instance discuss if the rebels control any territory and they also graze the responsible command criterion. These can indeed be examples of when a NIAC exist, they however do not analyze the other examples nearly as much. When extracting one criteria from AP II to apply in an article 3 case there is a risk that other AP II elements tag along, since so many of the requirements are interconnected. Mix-ups like these are unfortunate and if anything the requirements should be lower not higher, to make sure that IHL is used where it is needed. Usual classifiers also look at each other's classification and although no one has more authority than any other, some still have more power in general. This can also have an unwanted effect on qualifications, which should not be influenced by political games. For instance, the SC's decision might have influenced others' classifications concerning Libya more than it should have since a political organ should not be the sole authority for classifications. I do not mean that the situation in Libya was not a NIAC, however due to the SC's decision some may not have looked at the requirements as thoroughly as they would have otherwise, which is questionable.

The organization requirement has received a lot of critic, so has IHL in general. The proposals of new definitions discussed in these texts always seem to forget something though. They forget conflicts between armed groups, they focus on the fighting parties but forget the civilian environment or they are just not clear on exactly how to define new organization requirements, but agree on that a change has to be made. Unfortunately when it comes to the last flaw, this is perhaps easier said than done to amend. Maybe the solution is not to make new rules, but to interpret the ones we got more generously as some say. Perhaps you can use a more liberal view of article 3 and not the one resembling the threshold in AP II. However the criteria necessary for establishing an organized armed group have to be lower than in general practice today, if IHL are going to be put to good use. The criteria also need to be clearer if we do not want to end up with mix-ups and a slowly raising bar again. Clearer criteria might also help with the information and proof difficulties that seem to accompany this troublesome requirement.

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