Chapter 1
Evaluating the Use of Force During the Arab Spring

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1.1 Introduction

When, on 17 December 2010, Mohamed Bouazizi, a 26-year old, set himself on fire as a desperate act of protest in Sidi Bouzid, Tunisia, he did not know that he was going to spark a historical movement of political revolutions that would sweep through the nations bordering the Mediterranean Sea. The 'Arab Spring', which in the spring of 2011 touched Tunisia, Egypt, Bahrain, Libya, and most recently

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Syria, among other countries, has so far led to mixed results in terms of regime change.[1] Whereas in Tunisia and Egypt, autocratic leaders relinquished power relatively quickly and with limited bloodshed, in Libya, Bahrain, Yemen and Syria protests were, and still are in the latter three of these countries, harshly repressed over the course of several weeks and months leading to thousands of people being killed or wounded. Of course, each of these revolutions has different political, social, and historical backgrounds. It is almost trite to note that power structures in Egypt or Libya are not the same, nor are, for example, the characteristics of society in Syria or Bahrain. This helps to explain the difference between the types of revolution that have taken place. Nevertheless the common aspiration that has pushed huge numbers of ordinary citizens to risk their lives, namely, to achieve freedom by bringing to an end longstanding despotic governments, unites all these cases. The courage of those who have risked all to secure change and those of many others who are still confronting death and torture for exercising their right to peaceful protest, has attracted widespread admiration.

The legal questions raised by the Arab Spring are almost as numerous and as complex as the scenarios that occurred. In Libya, for instance, the late Colonel Qaddafi, in response to civil protests in the east of the country, launched armed attacks against protesters, and then later plunged the country into an armed conflict of a non-international character with groups that became organised and armed, thereby triggering the application of international humanitarian law (IHL). This had the paradoxical consequence under IHL of allowing the Libyan government to use force against persons participating directly in hostilities, who could also be tried for having taken up arms against the regime. In Syria, at the time of the writing of the present article, the movement of civil protest has largely been engaged in an unarmed struggle despite the continued use of force and violence by the regime. There have been recent statements, however, that the degree of violence could now have reached that of a non-international armed conflict.[2]

The evaluation of the use of force in such contexts needs to start with an analysis of the right to protest under international law and to its regulation. May a government use force to limit or control mass protest, and if so, what is its scope? In particular, what does public international law have to say, if anything, about *armed* civil resistance against oppressive political regimes? Can a State commit the equivalent of aggression against its own people and, were this the case, is there a collective right to self-defence for a population in danger? Would this change the applicable law?

We will discuss these issues from different angles. After a summary of facts and applicable law, the article will review human rights law applicable to civil protest.

[1] Countries concerned are, albeit to a different extent: Algeria, Bahrain, Egypt, Iran, Iraq, Israel, Jordan, Kuwait, Lebanon, Libya, Morocco, Palestine, Saudi Arabia, Syria, Tunisia, the United Arab Emirates, and Yemen. For an interesting time line of the events, see, for example—Blight et al. 2011.

[2] Bakri 2011, citing a statement made by the UN High Commissioner for Human Rights.

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We next examine whether there is, under international law, the right of a population to rebel against an oppressive government, what force may be lawfully used in such circumstances and whether protesters can resort to self-defence. Finally, we will discuss whether any of the above considerations make any difference to the IHL applicable to a non-international conflict arising from organised armed resistance in response to the force used by the government.

1.2 Summary of Facts and Applicable Law

At the time of the writing of this article, among the 'Arab Spring' countries where civil protest took place, Yemen was, and still is, in a situation of armed conflict; Syria may be entering such a situation; and an armed conflict took place in Libya from March to October 2011.

Before the popular uprising, Yemen was already in situation of armed conflict which began in 2000, and was opposing government forces and Huthi rebels in the Sa'ad region.[3] A conflict between Al Qaeda elements present in Yemen against Yemeni and US forces has also been on going for several years.[4] Civil unrest, however, started in January 2011. Following the wave of protest in Tunisia, mass street demonstrations called for the resignation of President Ali Abdullah Saleh. Finally, after months of protests, President Saleh signed an agreement on 23 November 2011, immediately transferring power to his vice-president.[5] It seems clear that human rights law standards on law enforcement restricting the use of force during demonstrations would apply in that case, and that the application of IHL be limited to the zone of conflict in the Sa'ad region and in situations of combat against Al Qaeda.[6]

Libyan protesters took to the streets in February 2011. After the brutal repression of the demonstration by the Qaddafi regime, which was condemned by

[3] Human Rights Watch 2008, and Geneva Academy of International Humanitarian Law and Human Rights, Rule of Law in Armed Conflicts Project: Country Profile, Yemen, available at http://www.adh-geneva.ch/RULAC/current_conflict.php?id_state=234.

[4] See the assessment of the Council for Foreign Policy on Al Qaeda in Yemen, Council on Foreign Policy 2011.

[5] New York Times (2011).

[6] Thus for example, in the context of Afghanistan, Denmark took the view that where its soldiers are in direct combat with the Taliban in Helmand province, such actions are regulated by international humanitarian law on non-international armed conflict. Where, however, its soldiers are patrolling 'the more peaceful areas north of Helmand' and they 'detain a person outside the framework outside of the armed conflict', it is human rights law that is applicable. Text cited in Stigall et al. 2009, p. 1379; See also Casey-Maslen 2013, who underlines that a same conclusion must be implied regarding the legality of the use of weapons other than as a method of warfare, or in riot control situations.

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the international community,[7] an insurgency started to organise, took control of the eastern part of the country and announced that it had formed 'a national council.'[8] On 17 March 2011, acting under Chapter VII of the UN Charter, the Security Council authorized the use of 'all necessary measures' to protect civilians in Libya.[9] By late February 2011, Libya was in a situation of a non international armed conflict and from mid-March it was engaged in an international armed conflict governed by IHL with the States participating militarily in the implementation of the measures to protect civilians, including a no-fly zone, authorised by UN Security Council resolution 1973, fighting against the Libyan regime.[10] Common Article 3, as well as Additional Protocol II, to which Libya is a party, applied to the simultaneous non-international armed conflict between the rebels and the regime. It is also worth noting that Libya did not derogate from any of the provisions in the International Covenant on Civil and Political Rights (ICCPR); accordingly, all of these rights applied throughout the country. However, heavy fighting rather than protest took place in the country until the death of Qaddafi on 20 October 2011.[11] In its report, the International Commission of Inquiry for Libya, which was established by the UN Human Rights Council in February 2011, examined the excessive use of force by the Libya government during the demonstrations. The applicable law was the ICCPR and the Code of Conduct for Law Enforcement Officials and the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials. The Commission concluded that there was:

> sufficient evidence to suggest that the Government forces engaged in excessive use of force against demonstrators, at least in the early days of the protests, leading to significant deaths and injuries. The nature of injuries inflicted in several locations (with high proportions shot in the head or upper body) is indicative of "shoot to kill" operations. From the common style of response in many parts of the country, it would appear likely that the forces were given orders to engage in the harsh crackdown of demonstrators. Such actions represented a serious breach of a range of rights under the ICCPR including the right to life, the right to security of person, as well as freedom of assembly and freedom of expression. In relation to the latter days of protests as the situation escalated, more investigation would be required to assess the security forces' use of force, in particular

[7] The United Nations Human Rights Council ordered inquiries into abuses and suspended Libya from its membership. It was the first time a country was suspended from membership to the Council following serious human rights violations—UN News Centre 2011a.

[8] Geneva Academy of International Humanitarian Law and Human Rights, Rule of Law in Armed Conflicts Project: Country Profile: Libya, available at http://www.adh-geneva.ch/RULAC/current_conflict.php?id_state=128.

[9] UNSC Res. 1973, 17 March 2011, para 4—UN News Centre 2011b.

[10] See the UN Human Rights Council, Report of the International Commission of Inquiry to investigate all alleged violations of international human rights law in the Libyan Arab Jamahiriya, 1st June 2011a, A/HRC/17/44, available at http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.44_AUV.pdf, para 40 (Accessed 13 December 2011) ('Hereinafter 'UN Human Rights Council Libya Report').

[11] The Guardian 2011b.

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more detail concerning the actions taken by demonstrators in these days in order to assess the response by Government authorities.[12]

Civil unrest reached Syria in March 2011. The regime of Al-Assad violently repressed the peaceful protests and, according to the UN, more than 4,000 people were killed between March and the end of November.[13] As of November 2011, there have been reports of soldiers deserting the official army to join protesters[14] and the political opposition has met with the UK's foreign secretary. It may be the case, therefore, that an organised armed opposition group fighting governmental forces has formed in Syria and the country is on the brink of a non-international armed conflict. Until that is established, however, international human rights law, including the provision on the use of force and arbitrary killings, regulates the situation. That being said, the legal situation in Syria regarding use of force would probably become more complex if defected soldiers were to use force in defence of civilians, as was reported in the news.[15] The report of the Independent International Commission of Inquiry on the Syrian Arab Republic established by the UN Human Rights Council based itself on Syria's human rights obligations under human rights treaty law to report excessive use of force and extrajudicial executions, arbitrary detentions, enforced disappearances, torture and other forms of ill-treatment, violation of children rights, displacement and restriction of movement and violations of economic and social rights.[16] The Commission also noted that it was 'concerned that the armed violence in the Syrian Arab Republic risks rising to the level of an "internal armed conflict" under international law.' It also noted that it believed crimes against humanity had been committed by the Syrian military and security forces, irrespective of the existence of an armed conflict and the application of IHL.[17]

1.3 The Human Rights Dimension of Civil Protest

Civil protest has always been perceived as being a potential risk for the State and for society as a whole. This is because of the inherently political dimension of acts of protest which can lead to changes in government (freedom of association and assembly, for example, include the right to form political parties) and therefore

[12] UN Human Rights Council Libya Report, n. 10, para 99.

[13] The Guardian 2011c; Bakri 2011.

[14] Haaretz 2011.

[15] See France 24 2011.

[16] UN Human Rights Council, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, 23 November 2011b, UN doc. A/HRC/S-17/Add.1, available at http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/17/docs/A-HRC-S-17-2-Add1.pdf.

[17] *Id*, paras 97–100.

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predictably, 'authoritarian States of each ideological kind are paranoid about assemblies of their subjects.'[18] Protest can also endanger democratically established structures (adopted legislation can be challenged on the streets) but, in addition, represents a risk to the human rights of others, in particular, property rights and the right to physical integrity and security. This potentially 'explosive' character of protest has been acknowledged in international human rights law, notably through the possibility to restrict, in certain circumstances, the exercise of that right.

International human rights law does not recognize *per se* a 'right to protest', but it is, however, covered both by the right to freedom of expression and the right to freedom of assembly, two of the oldest human rights protected by law. The First Amendment of the American Constitution of 1791, for instance, guarantees a 'right of the people peaceably to assemble', while the 1789 French *Declaration of the Rights of Man and of the Citizen* recognizes that '(t)he free communication of ideas and opinions is one of the most precious of the rights of man.'[19] In contemporary international law, freedom of expression and freedom of assembly are protected by a wide range of international instruments.[20]

In addition to the historical origins of the freedom of expression and of assembly, their longstanding protection at both national and international levels, bears some significance on their status under customary international law. It is not the place here to elaborate more on this issue, but it suffices to note that government statements made during the Arab Spring could constitute an *opinio juris* with regard to the customary nature of these freedoms. One can quote, for instance, the US Secretary of State, Hillary Clinton, on the Syrian events: 'The Syrian people, like people everywhere, have the inherent right to exercise their universal freedoms, including peaceful assembly, expression, and speech.'[21]

For the purpose of this article, we will focus on the right to freedom of assembly and its scope. Article 21 of the ICCPR states the following:

> The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (order public), the protection of public health or morals or the protection of the rights and freedoms of others.

[18] Weiss 2011, para 1.

[19] Ibid., para 2.

[20] Articles 19–20 of the Universal Declaration of Human Rights (UDHR), Articles 19 and 21 of the International Covenant on Civil and Political Rights (ICCPR), Articles 10–11 of the European Convention of Human Rights (ECHR), Articles 13 and 15 of the American Convention of Human Rights (ACHR), Articles 9 and 11 of the African Charter on Human and Peoples Rights (AfCHPR), and Articles 24 and 32 of the Arab Charter on Human Rights (ArCHHR).

[21] Clinton HR (2011) Press Statement: Violence in Syria, US Department of State, 6 May 2011, available at http://www.state.gov/secretary/rm/2011/05/162843.htm (Accessed 13 December 2011).

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Three elements must be noted here: only *peaceful* assembly is protected, and it comprises a *negative* as well as a *positive* obligation for the State.

Case law[22] and a literal reading of the texts have shown that 'peaceful' should be understood as meaning 'without arms',[23] the 'absence of violence', or 'without uproar disturbance of the use of arms.'[24] A protest is not peaceful if protesters carry weapons even if they do not use them (except for 'protective' objects such as helmets).[25] If the right to assembly must be exercised peacefully in order to be protected, States Parties to the ICCPR have nevertheless the obligation 'to prevent a peaceful assembly from leading to riots due to provocation or use of force by the security forces or by private parties (individual extremists, counter-demonstrators, or 'agents provocateurs'), because the organisers and the peaceful participants would thereby lose their human rights protection.'[26] A demonstration that turns violent may be prohibited or dispersed without the need to observe the conditions laid down in Article 21. However, it needs to be noted that because the right of peaceful assembly rests with the individual, it is that individual's intention and behaviour that matters; in other words, if others become violent, the police are not thereby entitled to arrest and charge those remaining non-violent.[27]

The negative duty entails an obligation upon the State not to interfere in the exercise of freedom of assembly. Thus, participants must be able to hold a demonstration without fear of being subjected to physical violence. States also have a positive obligation to ensure that freedom of peaceful assembly can be exercised (an obligation to organise traffic to provide police protection against clashes, as well as a public space to meet).[28]

Article 21 of the ICCPR stipulates the standard limitations on the freedoms protected in the Covenant: they must be imposed in conformity with the law, serve one of the listed purposes (national security or public safety, public order, the protection of public health or morals, or the protection of the rights and freedoms

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[22] See, *Stankov and the United Macedonian Organisation Llinden v Bulgaria*, nos. 29221/95 and 29225/95, ECHR 2001; and *United Macedonia Organization Llinden and Others v Bulgaria*, Case no. 59491/00 ECHR, 2006, in which the Court recognized that a hostile environment, while requiring preventive measures of protection, does not preclude per se the exercise of freedom of assembly. See also Weiss, para 19.

[23] Article 15 ACHR.

[24] Manfred 2005, p. 374.

[25] Weiss 2011, para 7; Clapham and Marks 2005, p. 279.

[26] Manfred 2005, p. 376.

[27] *Ezelin v. France*, no. 21/1990/212/274 ECHR, 1991, paras 40–41. Also, Doswald-Beck 2011, p. 412.

[28] Weiss 2011, para 8; see also *Plattform 'Ärte für das Leben' v. Austria*, no.10126/82 ECHR 1988: 'genuine, effective freedom of peaceful assembly cannot, therefore, be reduced to a mere duty on the part of the State not to interfere: a purely negative conception would not be compatible with the object and purpose of Article 11. Like Article 8, Article 11 sometimes requires positive measures to be taken, even in the sphere of relations between individuals, if need be', para 32.

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of others)[29] and be necessary in a democratic society for attaining this purpose. In that respect, an important body of case law deals with the requirement of prior notification as a lawful restriction to peaceful assembly. Case law from the treaty bodies shows that notification, or even authorisation, may be required for demonstrations so that the authorities may organise the necessary security measures. Such requirements may not, in practice, amount to a prohibition. Restrictions may be allowed, provided that they can be shown to be necessary for one of the legitimate aims; in other words, such restrictions may not be arbitrary or unreasonable. On the other hand, the requirement of unreasonable notifications or authorisations prior to a demonstration, which in practice would make it impossible to hold it, would be considered a violation of the right of freedom of assembly and speech.[30]

Finally, freedom of peaceful assembly can be theoretically derogated from in time of emergency "to the extent strictly required by the exigencies of the situation" (Article 4, ICCPR). In this context, the Human Rights Committee has considered that the 'possibility of restricting certain Covenant rights under the terms of, for instance […] freedom of assembly (Article 21) is generally sufficient during such situations and no derogation from the provisions in question would be justified by the exigency of the situation.'[31] In other words, derogations to freedom of assembly even in times of public emergency would not normally be considered "strictly required by the exigencies of the situation" and would therefore be unlawful, given that States already have the possibility to limit this right under the conditions imposed by Article 21.

At this stage, one can note that international human rights law has recognized the right to peaceful assembly as one of the core elements of democratic entitlements. This freedom is the rule and not the exception. Even though it can be limited, case law has shown that the restrictions must be interpreted narrowly. Hence, although States have the possibility to restrict the exercise of peaceful assembly under certain circumstances, human rights law makes it clear that the people are the final holder of sovereignty, even if protest ultimately leads to a change of government.

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[29] For example, war propaganda could be limited for reasons of national security (but only in serious cases of political or military threats to the entire nation); public morals would require that an assembly in a cemetery could be forbidden and finally, respect for the freedoms of others, such as the right to property or reputation, would justify in some cases that freedom of assembly be limited. See White and Ovey 2010, pp. 453–461; De Schutter 2009, pp. 288–322; Boyle 2010, pp. 450–461.

[30] See, e.g. UNHRCte, *Velechkin v. Belarus,* Com. 1022/2001, 23 November 2005, paras 7.2–7.3; AComHPR, *Amnesty International and others v. Sudan*, Coms. 48/90 et al., 15 November 1999, para 82; *Oya Ataman v. Turkey*, no. 74552/01 ECHR 2006, para 37; Doswald-Beck 2011, pp. 440–443.

[31] Human Rights Committee, General Comment n. 29, on State of Emergency (Article 4), CCPR/C/21/Rev1/Add.11, 31 August 2011, para 5.

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1.4 Is There a Right to Rebellion?

If most of the revolutions that have occurred or are still occurring in the Arab world in 2011 have been manifestations of peaceful protest, which were subsequently repressed by the governing regimes, it remains interesting to briefly reflect upon the legality of the use of force by the people against the government in certain situations and, in particular, against oppressive regimes.

One possible source that some might cite is the right of self-determination as expressly mentioned in Articles 1(2) and 55 of the UN Charter and in Article 1 of both the ICCPR and the International Covenant on Economic, Social and Cultural Rights (CESCR). However, the Arab Spring revolutions are not technically self-determination movements as the notion of self-determination has been normally applied to peoples under colonial rule or military occupation. It suffices to note here that, although the legality of the use of force in order to achieve decolonisation has been historically discussed among scholars, the UN Charter does not itself authorize the use of force for self-determination: 'the dominant view in the community of nations denies a right of secession by force. This implies that the sovereignty of States remain the highest priority.'[32] On the other hand, international law does not positively prohibit the use of force by non-State actors. A possible use of force to achieve self-determination is, for example, contemplated in the *1970 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations.* The Declaration reaffirms that 'Every State has the duty to refrain from any forcible action which deprives peoples (…) of their right to self-determination and freedom and independence. In their actions against and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and receive support in accordance with the purpose and principles of the Charter.' Hence as noted by Ben Saul, 'liberation movements have no legal right to use force to secure self-determination, but they do not breach international law by using force (defensively) against its forcible denial.'[33]

The same point could be made with regard to rebellions. The 'right to rebel' has been the subject of much debate in both the legal and philosophical literature. For some scholars, a right to rebel, individual as well as collective, must exist to ensure the respect for and remedy to other fundamental human rights: 'the right to rebel (…) must be a secondary rather than a primary right. It exists only when a wrong has been committed. Its point is to provide remedy in the vent of the violation on a large scale of primary rights like the right to freedom from arbitrary arrest.'[34] A right to rebel against an oppressive government does exist in the constitutions of some states in the United States (including New Hampshire, Pennsylvania, and

[32] Doehring 2002, p. 61; Saul 2008, p. 10; Crawford 2001, p. 42.

[33] Saul, p. 10.

[34] Honoré 1988, p. 38.

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Delaware, but not in the US Constitution).[35] More notably, Article 20(4) of the Constitution of the German Federal Republic authorizes citizens to exercise a right to resistance against attempts to destroy the democratic constitutional order (and not to change the regime).[36]

At the international level, the preamble of the Universal Declaration of Human Rights would give some credit to this interpretation when it states that 'whereas it is essential, if man is not to be compelled to have recourse, as a last resource, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law…'. However, although there was much discussion among delegations during the drafting of the Universal Declaration, a right to rebel against tyranny was not listed as a protected right in the final text, as it was feared it could be abused to undermine genuinely democratic governments or might lead to political destabilisation.[37]

Nor was a right to armed rebellion against tyranny included in subsequent human rights treaties and, as we saw, only peaceful protest is protected. As the European Court of Human Rights made clear in its judgment in *Yazar and other v. Turkey*, the purpose of allowing a plurality of views to be expressed is to enable democratic debate and not to force a change of government to take place through the use of armed violence.[38] The provision of abuse of rights present in human rights treaties constitutes another qualification of the right to protest. Article 5(1) of the ICCPR states that: 'Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.' An *armed* protest would most probably lead to violations of other persons' human rights (to life or security or property rights) and could constitute in that sense an abuse of rights. On the other hand, human rights treaties specify that their purpose is to protect democracy so that recourse to violence in self-defence against unlawful force used by an autocratic government against protesters could be seen as not involving an abuse of rights.

As international law does not expressly confer a right to rebel, 'there are no correlative duties on affected States not to suppress or criminalize rebellions.'[39] International human rights law hence allows a State to use lethal force, provided the conditions of necessity and proportionality are respected, 'in action taken for the purpose of quelling a riot or insurrection.' (ECHR, Article 2(2)). We will return to this point later.

It is clear, therefore, that international law does not positively grant the right to rebel. As noted by one author, 'sovereign states can hardly be expected as a matter

[35] Ibid., p. 42.

[36] Ibid, p. 43.

[37] Morsink 1999, p. 312.

[38] *Yazar and others v. Turkey*, Nos. 22723/93, 22724/93 and 22725/93 ECHR 2002-II, para 57.

[39] Saul 2008, p. 21; see also Crawford 2001, pp. 48–49.

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of course to grant their subjects a right to secede or rebel.'[40] However, it is equally true that for time immemorial many recognised governments have come into being through rebellion, and this continues to be the case. It is therefore quite clear that international law does not positively prohibit such rebellion. The situation is, by analogy, similar to the use of spies in international conflict: the use of spies by a State is not a violation of international law, but a capturing State may punish such spies under its national law. In other words, the right to punish under national law does not thereby mean that the punished action is a violation of international law.

This is precisely the rationale for not applying counter-terrorism treaties to armed conflicts. The definition of a terrorist act, in such treaties, is typically the use of violence in order to force the government to do something. An example of such exclusion is the following:

> The activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law, are not governed by this Convention…[41]

The purpose of excluding the "armed forces" in "an armed conflict" is to cover groups, not associated with the government, that are fighting in a non-international armed conflict. Although such fighters may be punished by the government of the State concerned, until now starting an armed rebellion has not been seen as an international crime. Indeed, members of quite a few governments began their life as insurrectionists and it would be a very strange situation if they were to carry the label of "terrorist" or "international criminal" for the rest of their days. Such a result also presents the danger of repressing the right to protest. As noted by Ben Saul:

> Unless non-state armed forces in internal conflicts (…) are excluded from an international crime of terrorism, there is an acute danger of internationally legitimising State repression of internal dissidence.[42]

This result would also contradict the IHL rule that encourages an amnesty for those actions that do not amount to war crimes, and many peace treaties adopted after non-international armed conflicts include such amnesties.[43]

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[40] Honoré 1988, p. 42.

[41] International Convention on the Suppression of Terrorist Bombing, 1997, Article 19; also International Convention on the Suppression of Acts of Nuclear Terrorism, 2005, Article 4 § 2. The 1979 International Convention against the Taking of Hostages specifies, in Article 12, that it does not apply to any hostage-taking occurring in a situation covered by the 1949 Geneva Conventions or their Additional Protocols.

[42] Saul 2008, p. 24.

[43] See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)(AP2), Article 6 § 5; Rule 159 and commentary thereto of the ICRC Customary law study: Henckaerts and Doswald-Beck 2005, pp. 611–612.

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In conclusion, therefore, international law neither allows nor prohibits rebellions. It does, however, regulate what force may be used by governments, a point to which we will now turn.

1.5 State Responses to Protests and the Use of Force

During the Arab Spring, but also more broadly in other parts of the world where mass protest happens, arbitrary killings are not the only serious violations that take place. Torture, enforced disappearances, arbitrary arrest, and prolonged unlawful detention are part of the many violations that can and do occur during protest.[44] In this article, however, we will concentrate on the use of force.

A typical articulation of the legal regime applicable to the use of force has been that human rights law governs a law enforcement regime whereas IHL governs the conduct of hostilities. This is an oversimplification. Although it is certainly true that IHL cannot be relevant unless there is an armed conflict (or military occupation), and that without such a situation only human rights law is applicable, the evaluation of the lawfulness of any particular use of force will depend on the degree of control over territory or over a person in both human rights law and humanitarian law.

It should be noted from the outset that excessive use of force during protest does not only occur in oppressive regimes. In Europe or the USA, there has been a rise in recent years of public protest, fuelled in part by anti-globalisation movements. This led, for example, to the massive anti-globalisation demonstrations in Seattle in 1999.[45] Demonstrations have since been held regularly for each of the G8, World Trade Organization, World Bank and International Monetary Fund meetings. More recently, the Occupy Wall Street movement in the USA has attracted worldwide attention. Those different demonstrations have sometimes been met with tough police responses,[46] causing injury to, and even on occasion the death of, a number of protesters.[47]

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[44] See, for example, Human Rights Watch 2011b.

[45] Clapham and Marks 2005, p. 271.

[46] See, for example, Wolf 2011.

[47] On 20 July 2001, during an anti-G8 demonstration in Genoa, Carlo Giuliani, 23, was shot in the head during violent clashes between police and militant radicals. His family complained to the ECtHR of a violation of Article 2 (right to life). In a decision issued in March 2011, the Court found that the policeman who fired the fatal shot had "acted in the honest belief that his own life and physical integrity and those of his colleagues were in danger from the attack to which they were being subjected" and found no violation of the right to life of C. Giuliani by the police officer; *Giuliani and Gaggio v. Italy* [GC], no. 23458/02 ECHR, 2011, para 189. In 2009, Anti-G20 demonstrations took place in London where serious allegation of mistreatment and abusive use of force were made against law enforcement officials, notably after the death of a passer-by, Ian Tomlinson, BBC News 2011a. See also Mead 2010 for a recent study on peaceful protest in the UK.

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The human right to life, which is protected by treaty law[48] and is part of customary international law, is not an absolute right in that there are circumstances in which a State can legally use potentially lethal force. The use of lethal force by the State takes into account the different interests and obligations at stake. Therefore, while States have the obligation to respect and ensure the exercise of the right to peaceful assembly, they also have the obligation to maintain public order and to protect the rights and freedom of others.

In a situation outside armed conflict, and also in a situation of occupation which is relatively "peaceful", it is generally accepted that the law enforcement standard will be relevant. Human rights law will evaluate the use of force more strictly in such a context than during hostilities, and the same is true for the interpretation of an occupying State's duties to ensure security in the case of demonstrations and other unrest not amounting to military hostilities by the occupied population.[49] It may also be pointed out that IHL does not allow the use of deadly force against people that are in the adversary's power. This is not only evident from the prohibition of attacking a soldier *hors de combat*, but also from the rules regulating the treatment of prisoners of war and civilian internees which would not allow the use of deadly force against demonstrating prisoners.[50] Indeed, deaths in detention have to be investigated and a suspected guilty perpetrator prosecuted.[51]

In the specific context of protest and peaceful assembly, the right to life under human rights law concerns the life of protesters, of the people not participating in the protest, but also the life of policemen or other law enforcement officers.

The ECHR states specifically when the deprivation of life can be considered as not arbitrary:

> Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary
> (a) in defence of any person from unlawful violence;
> (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
> (c) in action taken for the purpose of quelling a riot or insurrection.[52]

[48] ICCPR, Article 6(1); ACHR, Article 4(1); and Arab Charter on Human Rights 2004 (ArCHR), Article 5(2).

[49] To this effect, see, University Centre for International Humanitarian Law (2005) Expert Meeting on the Right to Life in Armed Conflicts and Situations of Occupation, 1–2 September 2005, available at www.adh-geneva.ch/docs/expert-meetings/2005/3rapport_droit_vie.pdf, p. 23. Although not stated, the understanding was that this was the most appropriate way to ensure public order and safety as required by Article 43 of the Hague Regulations.

[50] An example of the need to avoid, if at all possible, the use of force is to be found in Article 42 of the Third Geneva Convention which provides that the use of weapons against escaping prisoners of war is an extreme measure that must be preceded by warnings.

[51] Third Geneva Convention, Article 121; Fourth Geneva Convention Article 131.

[52] The term 'insurrection' should be understood as referring to 'non international armed conflict', see Doswald-Beck 2011, p. 193.

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Apart from the different provisions on the right to life stipulated in human rights treaties, the most significant document relating to the protection of life during law-enforcement operations is the *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.*[53] A footnote to this document specifies that '[i]n countries where police powers are exercised by military authorities, whether uniformed or not, or by State security forces, the definition of law enforcement officials shall be regarded as including officers of such services.' Principle 8 of this document states that '[e]xceptional circumstances such as internal political instability or any other public emergency may not be invoked to justify any departure from these basic principles.'

Although it is true that this document is not a treaty and therefore not formally binding, it can be said to reflect a widespread understanding of what level of force would be appropriate or not for such operations. The UN Human Rights Committee, in its Concluding Observations to States Parties' reports, has frequently stated that States should ensure that their legislation and practice conform to this document and the document has also been referred to by other treaty bodies as an important reference in their analysis of the right to life.

The document as a whole stresses the need to avoid a disproportionate use of force and that 'force and firearms' may only be used 'if other means remain ineffective or without any promise of achieving the intended result.' The actual use of firearms is regulated in Principle 9 which reads as follows:

> Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.

Policing violent demonstrations is a context where the principle of necessity and proportionality of force apply. The UN Basic Principles simply state that:

> In the dispersal of violent assemblies, law enforcement officials may use firearms only when less dangerous means are not practicable and only to the minimum extent necessary. Law enforcement officials shall not use firearms in such cases, except under the conditions stipulated in principle 9.[54]

The regional treaties have interpreted the right to life in the context of demonstrations and riots in the same manner, including in cases where such demonstrations took place in the context of occupation or armed conflict.

In the case of *Solomou and Others v.Turkey,* which concerned the shooting of a protester by Turkish troops in the buffer zone between occupied and southern

[53] Adopted by the 8th United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Cuba, 1990; See also the Code of Conduct for Law Enforcement Officials adopted by the General Assembly Resolution 34/169 of 17 December 1979.

[54] UN *Basic Principles on the Use of Force and Firearms*, Principle 10.

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Cyprus, the European Court stressed that the use of any specific act of force will only be acceptable if it is aimed at calming or dispersing a violent demonstration or riot.[55] The use of live bullets was found to be a violation in the case of *Güleç v. Turkey*. This concerned an illegal and violent pro-PKK demonstration, taking place in south-eastern Turkey (which could be classified as experiencing armed conflict, even if this has always been denied by the government). In response to serious acts of violence, which damaged property and injured some police, the security officers sent reinforcements in the form of armoured vehicles. One of these fired a machine gun into the crowd, resulting in deaths. The European Court accepted that force may be used, under Article 2, para 2 (c), to suppress a riot or insurrection, but then stressed that a balance must be struck between the aim pursued and the means employed to achieve it. The Court criticised in particular the lack of preparation of the authorities to deal with such demonstrations. This region was already experiencing violence and the police should have been equipped with non-lethal means to disperse the protesters.[56]

The use of law-enforcement criteria to evaluate the use of force in the context of a riot, even when the country is experiencing a non-international armed conflict, is illustrated in the Inter-American Court of Human Rights case of *Neira Alegrìa* et al. *v. Peru.* This case concerned the use of force to suppress an armed riot in a prison. During the raid, 111 inmates died and 34 were injured. The pavilion where the rioters were was demolished by the Peruvian Navy and it would seem that many of the dead had been killed by being crushed under the collapsed structure. No effort had been made to find and rescue any who might still have been alive. The Court suspected that the confrontation was in the nature of a political one.[57] It found that although the detainees were highly dangerous and were armed, the amount of force was disproportionate and held that the persons concerned had been arbitrarily deprived of their life by the Peruvian forces.[58] Although the case concerned an armed confrontation between the Peruvian government and alleged

[55] *Solomou and Others v. Turkey*, no. 36832/97 ECHR, 2008, paras 75–78. This may be compared with the ECtHR case of *Guiliani and Gaggio v. Italy*, where, during a violent demonstration an injured police officer used a firearm in genuine personal self-defence against imminent likely death at the hands demonstrator; the circumstances were such that this was his only option. The organisation of the demonstration was found to be adequate in the circumstances: *Giuliani and Gaggio v. Italy*, no. 23458/02 ECHR, 2010, paras 183–194 and 252–262.

[56] *Güleç v. Turkey,* no. 54/1997/838/1044 ECHR, 1998, para 71. A similar point was made by the African Commission in a case concerning the death of two students during a demonstration. It specified that even when the demonstrations are not authorised, those responsible for public order must use adequate means to cause the barest minimum of damage AComHPR, *Mouvement Burkinabé des Droits de l'Homme et des Peuples v. Burkina Faso*, Com. 204/97, 7 May 2001, para 43.

[57] IACtHR, *Neira Alegrìa et al. v. Peru*, Judgment, 19 January 1995, paras 74–75.

[58] IACtHR, *Neira Alegrìa et al. v. Peru*, Judgment, 19 January 1995, para 76.

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members of the guerrilla group *Shining Path*, the principle of proportionality[59] was applied in a law-enforcement manner because the events took place in a prison and the use of such heavy weaponry by the security forces was excessive.

In the light of these cases it is evident that using live bullets against unarmed protesters, such as has been the case in Bahrain Egypt, Syria, and Tunisia, is in flagrant violation of these principles.[60]

But let us note finally that the use of firearms against protesters or any other use of deadly force is not the only way that life or physical integrity during the Arab Spring has been threatened. Certain so-called 'non-lethal weapons' notably tear gas, and rubber bullets have also sometimes led to fatalities.[61] Tear gas and pepper spray are qualified as chemical weapons and although their use as a method of warfare is forbidden by the *1993 Chemical Weapons Convention,* they can still be used for 'law enforcement including domestic riot control purposes.'[62] In Tunisia, during the 'jasmine revolution', it has been reported that the use of tear gas led to a number of deaths of as a result of either the effects of the gas or following the trauma caused by the firing of tear gas canisters.[63] Hence, because of their possible deadly effects, the legislation, training and modalities for the use of tear gas is crucial to prevent deaths, as required by the positive obligation to respect the right

[59] In law-enforcement the principle of proportionality is applied to all aspects of an operation, including the degree of violence inflicted against people using force. This is unlike the conduct of hostilities under IHL, where proportionality is applied to evaluate the likely extent of collateral injuries and damage compared with the expected military advantage obtained from an attack against a valid military target.

[60] See, for example, the Report of the Bahrain Independent Commission of Inquiry (available at http://files.bici.org.bh/BICIreportEN.pdf) which reported 12 cases of death caused by the use of a shotgun and a firearm, pp. 223–232. Other persons died because of acts of torture, p. 214.

[61] See for a legal assessment of non-lethal weapons under human rights law, Casey-Maslen 2013. Rubber bullets have also caused deaths. The relatively old case of *Kathleen Stewart v. United Kingdom* concerned the death of a young boy by a plastic baton round fired by the army in Northern Ireland during a violent demonstration. The case was declared inadmissible on the basis that the weapon was not shown to be as dangerous as alleged and, more to the point, the boy was only hit because the soldier's aim was disturbed at the moment of discharge: *Kathleen Stewart v. United Kingdom* (Admissibility), no. 10092/82 EComHR, 1984, paras 28 and 29. The Report of the Independent Commission on policing for Northern Ireland noted that '[s]ince 1981, a total of 41,657 [of plastic baton rounds] have been discharged by the police, and 14,572 by the army. 11 deaths have been attributed to PBRs since 1981 (and 5 before that), and 615 injuries. The most recent fatality was in 1989, but the issue of PBRs remains highly controversial' see Report of the Independent Commission on policing for Northern Ireland ("The Patten Report") September 1999, available at http://cain.ulst.ac.uk/issues/police/patten/patten99.pdf, para 9.12, p. 54.

[62] Article 2, para 9, 1993 Chemical Weapons Convention.

[63] Human Rights Watch has reported the death of a 7 year old baby who died of a teargas-related cause, Human Rights Watch 2011a. On 17 January 2011, a French journalist, Luca Mebrouk Dolega who was covering the events in Tunisia, died following trauma caused by the firing of a tear gas canister which hit him in the face. See The Guardian 2011a.

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to life.[64] The same is true for new technologies, which also need to be carefully evaluated and any use properly regulated.[65]

In conclusion, if we look at the conditions laid down by international law for the policing of demonstrations, the deadly use of force against protesters is almost never justified. If a person is not a direct threat to the life of other persons, or if other less lethal methods were possible to apprehend dangerous persons, case law systematically finds a violation of the right to life.[66]

This means that, under human rights law, governments do not have the right to create a non-international armed conflict. This conclusion is supported by the reaction of the international community to violence inflicted on protesters in Libya, Syria and Yemen. In the case of Libya, the UN Security Council not only deplored the "repression of peaceful protesters" and underlined "the need to respect the freedoms of peaceful assembly and of expression", but also demanded "an immediate end to the violence" and called for "steps to fulfil the legitimate demands of the population."[67] This resolution was followed by the suspension of Libya from the Human Rights Council on 1 March 2011.[68] Security Council resolution 1973, that adopted the no-fly zone, similarly referred to the "legitimate demands of the Libyan people" and the need for "dialogue to lead to the political reforms necessary to find a peaceful and sustainable solution."[69] United Nations resolutions on Syria[70] and Yemen[71] also condemned government attacks on peaceful protesters and insisted on the need for a peaceful settlement.

The effect of human rights law is that governments are positively prohibited from creating a non-international conflict, whereas, as we have seen above, international law traditionally neither allows nor prohibits a rebellion. It is interesting to consider, therefore, whether there could be, by analogy to Articles 2 (4) and Article 51 of the UN Charter, a right for protesters to resort to self-defence in case of excessive use of force by law enforcement officers. The question is not without importance, not only from the point of view of 'just war' theory, but also

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[64] Doswald-Beck 2011, pp. 162 and 165–167.

[65] Doswald-Beck 2011, p. 171.

[66] See e.g. *McCann and others v. United Kingdom* [GC], no.18984/91 ECHR 1995; *Nachova and others v. Bulgaria* [GC], no. 43577/98 ECHR 2005; *Erdogan and Others v. Turkey*, no. 19807/92 ECHR 2006; *Güleç v. Turkey,* n. 56; UNHRCte, *Guerrero v. Columbia*, Com. 45/1979, 31 March 1982, paras 13.2–13.3.

[67] UNSC Res. 1970, 26 February 2011, UN DOC S/RES.1970 preambular paras 2 and 10, and operative para 1.

[68] UNGA, General Assembly Suspends Libya from Human Rights Council, 1 March 2011, GA/11050 available at http://www.un.org/News/Press/docs/2011/ga11050.doc.htm (Accessed 13 December 2011).

[69] UNSC Res. 1973, 17 March 2011, UN DOC S/RES.1973, operative para 2.

[70] UN Human Rights Council, The Human Rights Situation in the Syrian Arab Republic, 2 December 2011, A/HRC/RES/S-18/1; UNGA Third Committee, Situation of Human Rights in the Syrian Arab Republic, A/C.3/66/L.57/Rev.1, Adopted by the Third Committee on 22 November 2011.

[71] UNSC Res. 2014, 21 October 2011, UN DOC S/RES.2014, operative paras 2–5.

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because it could perhaps have consequences for the *jus in bello* applicable to non-international armed conflict. This issue will be treated in the following section.

1.6 Do Protesters Have a Right to Individual or Collective Self-Defence Against a Government That Uses Excessive Force?

What comes to mind when one thinks of cases of collective self-defence in the context of the Arab Spring, is the particular situation that prevailed in Libya. By using excessive force against peaceful protesters, Colonel Qaddafi and his agents were not only in violation of basic human rights rules, but have also allegedly committed crimes against humanity. The understandable reaction of the Libyan people was to resort to force against the illegal actions of the government. Was the organisation of a rebellion in that case a legal act of self-defence?

Article 51 of the UN Charter reaffirms the right to self-defence for States (and international organisations established by states) and for recognized self-determination movements.[72] Indeed, even if the monopoly of violence that resides in the State has been challenged on moral grounds, the traditional approach has been that 'international law considers the use of force by non-State actors (outside armed conflict) largely as an internal affair, subject to basic human rights obligations. There is no right to collective 'self-defence' by sub-States communities.'[73] Ben Saul pleads for the recognition of a group's right to self-defence which is closer to 'individual self-defence.' He notes that a State policy of genocide or violent persecution, even if it does not amount to a military armed attack, is 'clearly serious enough to trigger group self-defence. Whether conduct is necessary in self-defence should be based on a strict and objective assessment, leaving no room for discretion by the group itself, just as these requirements apply to State actors.'[74]

The right for an *individual* to use violence in his or her self-defence in case of a threat to life, including during a demonstration, is a general principle of criminal law.[75] Thus, the 1998 Rome Statute excludes criminal responsibility when '[t]he person acts reasonably to defend himself or herself or another person (…) against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person of the other person.' However, there does not seem to be significant State practice authorising self-defence beyond this individual protection. It appears to be generally understood that 'self-defence does not confer a license to use violence in a strategic way in protest at a generalized policy of State

[72] Saul 2008, p. 52; Cassese 1996, p. 197; Benjamin 2009.

[73] Saul 2008, p. 54.

[74] Saul 2008, p. 55.

[75] *Prosecutor v Kordic and Cerkez*, Judgment, Trial Chamber (IT-95-14/2-T) 26 February 2001, para 449.

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oppression.'[76] An exception to this was the case of Libya where the air campaign by NATO States unambiguously assisted the rebels. This was made possible by Security Council resolution 1973 which authorised the use of force "to protect civilians and civilian populated areas under threat of attack in the Libyan Jamahiriya, including Benghazi."[77] The specific reference to Benghazi, the hub of the rebellion, revealed the international community's implicit support of the rebels.[78] Moreover, it was somewhat unrealistic to imagine that in practice it would be possible to protect civilians without attacking the Government's forces. Nevertheless, such positive military help to the rebels led some States, in particular Russia and China, to adopt a far more reticent position in the case of the resolutions concerning Syria and Yemen later in the same year.

In the case of Syria, Russia and China voted against resolutions primarily on the basis that they could lead to outside military interference. As explained by the representative of China when voting against the Human Rights Council resolution of 2 December, "United Nations Member States should not use force or the threat of the use of force to solve differences or undermine the territorial integrity of a country." Like the representative of Russia, China stressed the need for "national reconciliation and dialogue."[79]

The resolution adopted by the Security Council in relation to Yemen is even more blatant in its desire to avoid giving an impression of a positive right to rebel using force. After strongly condemning the excessive use of force against peaceful protesters by the Yemeni authorities, it also condemned "the use of force and human rights abuses perpetrated by other actors."[80] Additionally it demanded that "all sides immediately reject the use of violence to achieve political goals" specifying that it was essential to achieve "political transition" through a peaceful "political settlement."[81]

It is, of course, the standard rule that IHL applies in non-international conflicts equally to both sides. The intention, when drafting common Article 3 of the 1949 Geneva Conventions, was to try to copy the same equality principle as in the case of IHL applicable to international conflicts. The reality is that this is not quite true. Although behaviour that would be a violation of IHL is described in the same way

[76] Saul 2008; p. 37.

[77] UNSC Res. 1973, n. 69, operative para 4.

[78] Support for rebels in Libya is not the only example, of course, of States actively helping rebels, despite this being contrary to classical international law. NATO military involvement in the insurgency of Kosovo rebels against the Serbian government in 1999 springs to mind. However, unlike Libya, both this involvement, and all the others, did not have the permission of a UN Security Council resolution.

[79] UN Human Rights Council, Human Rights Council Concludes Special Session on Situation of Human Rights in the Syrian Arab Republic, 2 December 2011, available at www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11680&LangID=E (Accessed 13 December 2011).

[80] UNSC Res. 2014, n. 71, para 2. The resolution was adopted unanimously.

[81] UNSC Res. 2014, n. 71, paras 3 and 4.

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for all parties to a non-international conflict, the status of parties is not the same. The government does have more obligations than rebels because it is also bound by international human rights law, whereas it is still controversial as to whether the same is true for rebels.[82] There is also no combatant immunity in non-international conflicts, as any insurgent can be put on trial in national courts for the mere fact of having participated in hostilities.[83] However, the same cannot be done by the rebels. In other words, the absence of combatant immunity (i.e. non-entitlement to prisoner-of-war status) in such conflicts undermines, in reality, the principle of equality.

The lack of rebel immunity from national prosecution appears unreasonable in cases where the government unlawfully started the conflict. It would also amount to an abuse of rights in that the State would benefit from a right on the basis of its own wrong. Is there any indication that international community responses to such unlawful violence have had any effect on the traditional right to prosecute any rebel? So far the answer does not seem to be in the affirmative. The resolutions condemning the violent suppression of the protests in Syria refer to human rights violations such as arbitrary executions, the excessive use of force, arbitrary detention, forced disappearances and torture,[84] but do not mention any requirement to avoid arresting protesters using force, even in self-defence. Indeed, the Security Council resolution on Yemen appears to positively condone the traditional rule by stating that "all those responsible for violence, human rights violations and abuses should be held accountable."[85] This reference was probably required to achieve unanimity, in particular in the light of Russia's complaint that the Human Rights Council's resolution on Syria did not take into account "serious crimes committed by anti-government forces."[86]

Nevertheless, it is worth considering whether the international community should call for an exception in cases of violence in the form of individual or even collective self-defence. The present situation in non-international conflicts is the equivalent of punishing a State for exercising its right to self-defence against the unlawful aggression of another State. This would be manifestly absurd in an inter-State context. Total freedom for a government to treat its citizens as it wishes has

[82] There have been an increasing number of UN General Assembly and Security Council resolutions calling on rebel groups to respect both IHL and human rights, see Doswald-Beck 2011, pp. 120–121. The International Commission of Inquiry on Libya also examined the alleged human rights violations committed by the NTC, see UN Human Rights Council Libya Report, n. 10, para 72.

[83] However, Protocol I recognizes self-determination struggles as international armed conflicts, where forces of the parties to these conflicts will be recognized as combatants. AP I, Article 1(4), Article 44 (3). So far, however, Article 1 (4) of API has remained theoretical.

[84] UN Human Rights Council, n. 70, operative para 2; UNGA Third Committee, n. 70, operative para 1.

[85] UNSC Res. 2014, n. 71, operative para 2.

[86] Explanation of negative vote by the representative of the Russian Federation after adoption of the Human Rights Council's resolution on 2 December 2011.

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long since disappeared and the reaction to the violence in Syria, even by the Arab League which imposed sanctions, shows that attitudes are changing.[87] In particular, the old refrain of "interfering in internal affairs" has been conspicuously absent in international discussions to the Arab Spring uprisings. When considering the applicable IHL rules, it might be objected that the positive entitlements in this body of law, e.g. to attack military objectives, etc. do have the effect of enabling an aggressor to benefit from its own wrong. To some degree this is true. However, in international armed conflicts, in addition to remaining responsible for the aggression, IHL does at least spare combatants from being tried for criminal offences associated with having taken part in hostilities,[88] i.e. through POW entitlement for both sides. Although there can be no hope of introducing the equivalent for all non-international conflicts, as there is such a strong objection to this idea, it should be remembered that the objection stems from the reasonable notion that no government wishes to automatically grant immunity from prosecution to people that start an armed rebellion.

1.7 Deprivation of Life During Hostilities: Does Human Rights Law Arrive at a Different Result from IHL?

This is not the place to go into the details of the complex question of the relationship between international human rights law and IHL in general terms. It is, however, worth reflecting briefly on the legal framework regarding the use of force and the holding of demonstrations when a situation in a country has attained that of an armed conflict, in particular with regard to the situation of the Arab Spring.

The International Court of Justice has confirmed on several occasions that human rights law continues to apply in armed conflict, alongside IHL.[89] In its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, it specified that an evaluation of what amounts to an arbitrary deprivation of life under human rights law during hostilities falls to be determined by IHL, as the relevant *lex specialis*.[90] In that case, of course, the ICJ was required to give an opinion *in abstracto* on the use of a certain weapon. In the case of *Congo v. Uganda*, however, it simply found violations of both IHL and the human right to

[87] See BBC News 2011b; See also The Arab League Resolution of 28 November 2011 that adopted sanctions against Syria: http://www.arableagueonline.org.

[88] For example, murder, assault, unlawful possession of weapons etc.

[89] *Legality of the Threat or Use of Nuclear Weapons,* Advisory Opinion (1996) ICJ Rep 226, para 25; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, (2004) ICJ Rep 136, para 106; *Armed Activities on the Territory of the* Congo (DRC v Uganda) Merits Judgment (2005) ICJ Rep 168, para 216.

[90] *Legality of the Threat or Use of Nuclear Weapons*, n. 89, para 25.

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life under Article 6 of the ICCPR as a result of murders in occupied territory, without specifying that it interpreted Article 6 in the light of IHL.[91]

As we have seen above, in cases where the government has control over persons or territory, the use of force is to be considered in the context of the law-enforcement model i.e. unless a person is a direct threat to life, and if he or she can be arrested, then the use of potentially lethal force will not be "absolutely necessary" and would therefore be arbitrary. The law-enforcement model also presupposes the use, by police or other security forces, of primarily non-lethal methods of restoring order. In a situation which has degenerated into a non-international armed conflict, as was the case in Libya, and now probably in Syria, it is evident that both IHL and human rights law apply.[92] A situation of armed hostilities is in most cases one where the government does not have sufficient control to be able to use the law-enforcement model.[93]

With the exception of defining when a civilian takes a direct part in hostilities, IHL rules are sufficiently clear and well-known as to not necessitate summarising them here. However, what is less obvious is how human rights law deals with the right to life during hostilities. The International Court of Justice has the ability to choose whether it wishes to apply IHL rules or human rights rules in any particular situation. However, this is not the case for human rights treaty bodies. Their mandate derives from the human rights treaties to which they are attached and they have no choice but to apply the rules within those treaties. In general terms, these treaty bodies have in practice applied their own treaty provisions and for the most part have not analysed what IHL would have said, unless it is to support the conclusion it would have arrived at in any event.[94]

The treaty body which has had to rule on active hostilities in a non-international armed conflict is the European Court of Human Rights. It has heard a number of cases relating to the conflicts in south-eastern Turkey and Chechnya. In both cases, the government had not accepted the existence of an armed conflict, but this is irrelevant to the application of human rights law. Although Arab countries are not party to the ECHR, the relevant provisions of the other applicable human rights treaties state that no one may be "arbitrarily deprived" of life,[95] and, in practice, the interpretation of the right to life by all the human rights treaty bodies is essentially the same.[96]

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[91] *Case concerning Armed Activities on the Territory of the Congo*, n. 87, para 219.

[92] As with all the other situations of non-international conflicts, the UNSC resolutions on Libya insisted that the authorities respect of both IHL and human rights law: UNSC Res. 1970, n.66, operative para 2(a); UNSC Res. 1973, n.68, operative para 3.

[93] The fact that the ICJ's dictum in *Nuclear Weapons* Advisory Opinion cannot be interpreted as applying to all deprivations of the right to life and that even in situations of armed conflict the law-enforcement model is more appropriate in certain circumstances is supported by Sassòli and Olson 2008, p. 613.

[94] See generally Doswald-Beck 2011, pp. 108–117; Abresch 2005.

[95] ICCPR, Article 6 para 1; AfChHPR, Article 4; ArCHR, Article 5 § 2.

[96] Doswald-Beck 2011, pp. 161–188.

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As explained above, Article 2 para 2 of the ECHR specifies that force may only be used by government authorities if it is "absolutely necessary" to achieve one or more of the aims listed. For our purposes, the most relevant aim would be "action lawfully taken for the purpose of quelling a riot or insurrection."[97] Another possibility could be "in defence of any person from unlawful violence."[98]

The applicants in the hostilities cases brought before the European Court were relatives of deceased persons that were themselves not actively using force. The version of events put forward by the applicants was contested by the government in each case and therefore the Court was forced to make a conclusion based on uncontested facts and whatever seemed the most plausible version of events. The cases also depended to some extent on the pleadings of the parties.

The first test in evaluating the lawful use of force by the government is whether it met one of the aims required under Article 2 para 2. In the cases concerning Chechnya, the Russian government argued that its use of force was necessary under sub-para 2 (a) i.e. in defence of a person from unlawful violence. In the case of *Isayeva, Yusopova and Bazayeva v. Russia,* the Court began with the claim that government fighter planes were shot at by a rebel truck. After analysis of the facts available to it, the Court discounted this version of events and went on as follows:

> In the absence of corroborated evidence that any unlawful violence was threatened or likely, the Court retains certain doubts as to whether the aim can at all be said to be applicable. However, given the context of the conflict in Chechnya at the relevant time, the Court will assume…that the military reasonably considered that there was an attack or a risk of attack from illegal insurgents, and that the air strike was a legitimate response to that attack.[99]

The second part of this statement implies that Article 2, sub-para 2 (a) does not require the pilots to have been acting in immediate and personal self-defence, but that it is enough that rebel violence was likely. This approach was confirmed, and indeed extended, in the other case decided on the same day, namely, that of *Isayeva v. Russia.* The government in that case argued on the more general basis that the situation in Katyr-Yurt at the time (i.e. the capture of the village by rebel fighters) rendered the use of force necessary:

> The Court accepts that the situation that existed in Chechnya at the relevant time called for exceptional measures by the State in order to regain control over the Republic and to suppress the illegal armed insurgency. Given the context of the conflict in Chechnya at the relevant time, those measures could presumably include the deployment of army units equipped with combat weapons, including military aviation and artillery. The presence of a very large group of armed fighters in Katyr-Yurt, and their active resistance to the law-enforcement bodies, which are not disputed by the parties, may have justified use of lethal force by the agents of the State, thus bringing the situation within paragraph 2 of Article 2.[100]

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[97] ECHR, Article 2 para 2 (c).

[98] ECHR, Article 2 para 2 (a).

[99] *Isayeva, Yusopova and Bazayeva v. Russia*, no. 57947-49/00 ECHR, 2005, para 181.

[100] *Isayeva v. Russia*, n. 99, § 180. Also, to the same effect, *Khatsiyeva and others v. Russia*, no. 5108/02 ECHR 2008, para 134.

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It would be interesting to see if the same approach would be taken by a human rights treaty body in a case similar to that of Libya or Syria, namely, where the government itself created the problem. In the Chechen cases, as well as those concerning south-eastern Turkey, the non-international conflicts originated with the rebel movements. It may be that in cases where the government began the conflict, the treaty body would be less ready to accept the general aim of suppressing an insurgency, but would consider the aim met in specific instances where its forces are being attacked.[101] Whatever the answer to this particular point, what is clear is that the law-enforcement model requiring non-lethal methods of control is not required by human rights law when evaluating a possible violation of the right to life during hostilities. In other words, active fighters are not protected during hostilities, unlike protesters during a demonstration.[102]

The next stage of analysis is whether the force used was not more than "absolutely necessary" to achieve the valid aim. The first significant case in this regard was that of *Ergi v. Turkey* which concerned the death of the applicant's sister during an operation by Turkish security forces near a village. The Court concentrated on the planning and the conduct of the operation and in so doing used language that is virtually identical to that of precautions in attack required by IHL:

> …[t]he responsibility of the State is not confined to circumstances where there is significant evidence that misdirected fire from agents of the State has killed a civilian. It may also be engaged where they fail to take all feasible precautions in the choice of means and methods of a security operation mounted against an opposing group with a view to avoiding and, in any event, minimising, incidental loss of civilian life.[103]

In the circumstances of the case, the villagers were put at considerable risk of being caught in cross-fire between the security forces, positioned south of the village, and the PKK "terrorists" who had approached from the north or north-

[101] As was the case, e.g. in *Özkan and others v. Turkey*, in which the European court accepted that security forces were fired on by PKK rebels so that the use of force met the valid aim of defence against lawful use of force: *Özkan and others v. Turkey*, no. 21689/93 ECHR 2004, para 298.

[102] The same conclusion is drawn from these cases by Melzer 2008, pp. 392, 393. Mention may also be made of an oral statement made by Wilder Tayler (presently Secretary-General of the International Commission of Jurists) during one of the ICRC's expert meetings on Direct Participation in Hostilities. Whilst he was working for Human Rights Watch in New York in the 1990s, a rebel fighter from Peru had tried to complain to the Inter-American Commission of Human Rights of a violation of the right to life of his comrades during a shoot-out between government forces and insurgents. He had asserted that the government forces should have waited after spotting the insurgents and offered that the insurgents surrender. The answer by both the Commission and Human Rights Watch was that there was no possibility of such a case being considered by a human rights body (this statement is not recorded in the ICRC's publication of the meetings, but is reproduced here with the express permission of its author).

[103] *Ergi v. Turkey,* no. 23818/94 ECHR 1998-IV, para 79. The second sentence is almost identical to Article 57 para 2 (a)(ii) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) (API) 1977.

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west. Given the lack of evidence of any precautions being taken by the government to protect the villagers, the Court found a violation of Article 2.

A lack of sufficient precautions before the attack was also the reason for finding a violation of the right to life in two Chechen cases. The case of *Isayeva, Yusopova and Bazayeva v. Russia* concerned the bombing of a convoy of civilians trying to leave Grozny via a "humanitarian corridor" in order to escape the fighting. Two planes circled over the convoy and fired several missiles at it, resulting in deaths and injuries. The government stated that the pilots were on a mission to prevent supplies and personnel of the rebel fighters being brought to Grozny by heavy transport. The government also argued that the civilian vehicles appeared on the road only after the rockets had been fired and that the fighters were deliberately using the convoy as a human shield. The applicants contested this version of events stating that only civilian vehicles were present.

The case of *Isayeva v. Russia* similarly involved deaths and injuries of civilians trying to escape fighting. Shortly after Chechen fighters entered the village of Katyr-Yurt bombing began by Russian forces. According to the applicant, a number of families, including her own, began to leave the village as soon as there was a lull in shelling because the military had apparently granted safe passage to the village's residents. While on the road, the vehicles were bombed. The government version was that their troops had offered safe exit routes to the civilians of the village but many were prevented from leaving by the fighters. Once the residents who were able to do so had left, the air force and artillery struck the village on the basis of incoming intelligence information on where the rebel fighters were placed.

In the case of *Isayeva, Yusopova and Bazayeva v. Russia,* the pilots in question had not been notified of the humanitarian corridor. They could only communicate with an air controller at a centre from which he could not see the road and could not be involved in any independent evaluation of the targets. The Court stressed that all this placed the civilians at a very high risk of been seen as suitable targets by the pilots.[104] Many witnesses also submitted that the attacks lasted for several hours and it had been established that the pilots circled the area several times at altitudes ranging from 2000 to only 200 metres. The European Court was able to make use of the conclusion of the domestic investigation which stated that each plane fired 12 S-24 non-guided air-to-ground missiles and that each missile created several thousand pieces of shrapnel and its impact exceeded 300 metres. The Court made its evaluation of "absolutely necessary" on the basis of whether the use of such weapons, as well as their timing and context, was proportional to the military aim being sought. The finding was in the negative:

> …the Court does not accept that the operation…was planned and executed with the requisite care for the lives of the civilian population.[105]

[104] *Isayeva v. Russia*, n. 99, paras 187–189.

[105] Ibid. para 199.

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The situation in the case of *Isayeva v. Russia* was somewhat different in that the authorities knew in advance that the rebel fighters were likely to enter the village of Katyr-Yurt and therefore the military operation was not spontaneous.[106] The main issue the Court considered was whether appropriate precautions had been taken:

> The Court regards it as evident that when the military considered the deployment of aviation equipped with heavy combat weapons within the boundaries of a populated area, they also should have considered the dangers that such methods invariably entail. There is however no evidence to conclude that such considerations played a significant part in the planning…there is no evidence that at the planning stage of the operation any serious calculations were made about the evacuation of civilians, such as ensuring that they were informed of the attack beforehand, how long such an evacuation would take, what routes evacuees were supposed to take, what kind of precautions were in place to ensure safety, what steps were to be taken to assist the vulnerable and infirm etc.
>
> …The planes…carried heavy free-falling high-explosion aviation bombs…with a damage radius exceeding 1,000 metres [which were] used against targets both in the centre and on the edges of the village.[107]

Not surprisingly, the Court came to the same conclusion as the previous case, i.e. the operation had been carried out without the requisite care for the civilian population and that therefore it failed the proportionality test of Article 2 para 2. The Court concluded as follows:

> Even when faced with a situation where, as the Government submit, the population of the village had been held hostage by a large group of well-equipped and well-trained fighters, the primary aim of the operation should be to protect lives from unlawful violence. The massive use of indiscriminate weapons stands in flagrant contrast with this aim and cannot be considered compatible with the standard of care prerequisite to an operation of this kind involving the use of lethal force by State agents.[108]

These cases indicate that the Court in practice uses IHL required precautions in attack for its evaluation of "absolutely necessary", without direct reference to IHL as such. These cases also show that not taking the required precautions to avoid or at least minimize civilian losses amounts to a violation of the right to life.

It could be asserted, as does Melzer,[109] that these cases show that the result is identical with that if the IHL hostilities paradigm were used. This would be the case if IHL were interpreted strictly, namely, that an attack would be unlawful if precautions were not taken to avoid or minimize damage. The extent to which IHL

[106] Rebel fighters had been lured out of Grozny with information of a safe passage and when moving south were attacked by Russian government forces. Those entering the village were part of this rebel group: *Isayeva v. Russia*, n. 99, paras 12–15.

[107] *Isayeva v. Russia*, n. 99, paras 189–190.

[108] *Isayeva v. Russia*, n. 99, para 191.

[109] Melzer 2008, pp. 392, 393.

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tolerates collateral deaths and injuries, however, remains problematic.[110] In this regard, only an attack that violates the rule that such casualties must not be excessive in relation to the value of the military objective attacked is defined as 'indiscriminate.'[111] IHL requires "feasible precautions" to avoid or minimise incidental civilian casualties and damage, but the question is whether this is necessary to ensure that such incidental effects are not excessive (i.e. disproportionate to the military advantage), or whether the precautions are an additional independent requirement. In other words, even if there is no excessive incidental damage, will there still be a violation of IHL if such damage could have been minimised further by a better respect of the required precautions in attack? A discussion during an expert meeting on this subject did not reach an agreement to this effect.[112] A less protective interpretation may be understandable where a war crime needs to be proved, but in other cases the stricter IHL interpretation, which would be in keeping with the human rights approach would be more protective of the civilian population. The IHL rule that allows a certain amount of collateral damage is non-existent as such in human rights law. The case of *Ahmet Özkan and Others v. Turkey*, in which a violation was not found because "only" one civilian injury occurred during a military operation, should not be taken to mean that "non-excessive" incidental injuries are therefore lawful in human rights law. Rather, this fact was used as evidence by the European Court to arrive at the conclusion that the use of force by the security forces was not more than "absolutely necessary" for repelling an attack against them, i.e. that the security forces must have taken the necessary care.[113]

Another very important point in a non-international armed conflict is the need to ensure that only armed fighters are targeted. This point arose in the case of *Khatsiyeva and Others v. Russia*. The case concerned the attack on six men by a Russian military helicopter in Ingushetia, near the border with Chechnya. The Russian government was carrying out a "counter-terrorism" operation in that area to catch insurgents and "prevent further criminal activity",[114] because a government helicopter had been earlier shot down near there. The government argued that the pilots saw the men carrying light machine guns who "could have belonged to illegal armed groups,"[115] whereas the applicants insisted that they were unarmed

[110] The two provisions are to be found in Additional Protocol I, Article 57(2) (ii) and (iii), respectively. They are also reflected in Rules 17 and 18 of the ICRC *Customary Law Study*—Henckaerts and Doswald-Beck 2005.

[111] API, Article 51(5) (b).

[112] Expert meeting held by the then University Centre for International Humanitarian Law (now the Geneva Academy of International Humanitarian Law and Human Rights) on "Targeting Military Objectives" 12 May 2005, Report, pp. 13, 14, www.adh-geneva.ch/docs/expert-meetings/2005/1rapport_objectif_militaire.pdf.

[113] *Ahmet Özkan and Others v. Turkey*, no. 21689/93 ECHR 2004, paras 305, 306.

[114] *Khatsiyeva and Others v. Russia*, n. 100.

[115] Ibid. § 126.

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and were in fact cutting grass.[116] The European Court found that in the 15 minutes between the time that the pilots reported to the command centre the existence of these men and the order to fire on them, it was "highly doubtful that the authorities in command established the identity of the [men]" in particular as no further details had been requested from the pilots.[117] There was no indication that even if the men were carrying such arms, they could have posed a threat to the helicopter.[118] In these circumstances the Court found that there had been insufficient care in assessing the situation so that, even if they had been carrying arms, the use of force was not absolutely necessary for the aims stated in Article 2 para 2 (a) or (b).[119] The question remains whether it would have made sense if the Russian government had argued the aim provided by Article 2 para 2 (c), i.e. to suppress an insurrection. Even if it had expressly done so, the lack of proper identification should still have been a major problem.

One IHL approach would allow the attack on sight of any suspected members of a rebel group in non-international armed conflicts, and this would be at odds with the judgment of the European Court in this case. Another interpretation by IHL specialists is that such an attack is not possible unless people are actually using force at the time.[120] This approach is more protective and more in keeping with the judgment in the *Khatsiyeva* case. When considering the situation in Syria, this issue is particularly significant. The government has argued that the protesters are in fact armed groups illegally using force, whereas this is contested. On the other hand, some military personnel that defected to the protesters' side have admitted to using force, but supposedly to protect the protesters. Whatever the real facts may be, the issue of correct identification becomes crucial if the unrest in Syria does become a non-international armed conflict. The ICRC's Interpretative Guidance on the Notion of Direct Participation in Hostilities specifies that only fighters of armed groups lose their protection from attack, as well as those actively involved in hostilities at any particular time.[121] The danger of simplistically applying the same distinction in non-international conflicts, between armed forces and civilians which applies to international conflicts, has been well explained by Sassòli and Olson:

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[116] Ibid. § 116.

[117] Ibid. § 136.

[118] Ibid. § 126.

[119] Ibid. §§ 137, 138. It may be noted that, in keeping with its approach in earlier cases, the violation of the right to life was found with regard to the use of lethal force against all six men, even though only two died.

[120] This is usually interpreted as including persons manifestly about to use force or having just done so. The ICRC Interpretative Guidance, Recommendation VI, describes it as "measures preparatory to the execution of a specific act of direct participation in hostilities, as well as the deployment to and return from the location of its execution."

[121] ICRC Interpretative Guidance, Recommendations II, IV and V. Fighters in armed groups are referred to as those having a continuous combat function.

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> Many non-international armed conflicts are fought against or between groups that are not well structured. It is much more difficult to determine who belongs to an armed group then who belongs to government armed forces. The positive humanitarian law of armed conflicts does not even explicitly prescribe…that fighters must distinguish themselves from the civilian population. Individuals join and quit armed groups in an informal way…Claiming that fighters may be shot at on sight may therefore put many civilians in danger, whether they are sympathisers of the group, members of the 'political wing', belong to the same ethnic group or simply happen to be in the wrong place at the wrong time.[122]

It would be particularly inappropriate to interpret IHL in a way that would allow attacks to all persons associated with an armed group when many such persons in Syria have not themselves been fighters but rather protesters who were illegally shot at by the government, thereby provoking the need for fighters to come to their defence. Recommendation IX of the ICRC's Interpretative Guidance, which specifies that lethal force must not be used if in a particular circumstance this is not militarily necessary is particularly apposite here. This recommendation remains controversial among IHL specialists,[123] which is, in these authors' view, unfortunate. The recommendation was influenced by human rights law that prohibits the killing of rebels in circumstances where they can be easily captured (or arrested to use human rights language).[124] However, this is not contrary to the spirit or even letter of IHL which provides, for example, in Article 41 of Additional Protocol I that a person may not be attacked if "he is in the power of an adverse Party."[125] The situation of unrest in the Arab Spring, in particular Yemen and Syria, is likely to remain a mixed one of protest, force in self-defence and fighting. Given that much of the fighting has been illegally provoked by the government, it is suggested that IHL be interpreted in a way that is the most protective of the civilian population, which is the way that human rights law has been applied to hostilities during armed conflict.

Finally, an important issue is that of investigation into killings that may amount to a violation. Like human rights treaties, a duty of investigation for deaths caused by security forces is not spelled out in IHL treaties, but as the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions has observed, a *bona*

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[122] Sassòli and Olson 2008, p. 609.

[123] ICRC Intepretative Guidance, Footnote 212.

[124] See, e.g. UNHRCte, *Guerrero v. Columbia*, Com. 45/1979, 31 March 1982. The case concerned the killing of suspected Colombian rebels at point-blank range whilst they were arriving, unarmed, at a house in which the authorities thought they were holding a hostage (which was not the case). No attempt at arrest had been made.

[125] Article 41 of Protocol I additional to the Geneva Conventions describes when a person is considered to be *hors de combat*. The provision quoted is in para 2(a) of Article 41. The other two subparagraphs of this provision include a person who has surrendered or has been rendered unconscious, or is incapacitated by wounds or sickness. The phrase in sub-para (a) must therefore refer to something else. This is supported in the case of non-international conflicts by Article 3 common to the 1949 Geneva Conventions which prohibits attacks on members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or *any other cause* (emphasis added).

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fide interpretation of IHL must come to the same conclusion, i.e. any suspected violation of IHL needs to be properly investigated for the same reasons as those stated by the human rights treaty bodies. Otherwise, as he pointed out, how can war crimes be prosecuted if suspected violations are not investigated using the same transparency and impartiality criteria as that spelled out by human rights treaty bodies?[126]

1.8 Conclusion in the Context of the Arab Spring

The right to protest through peaceful assembly is a fundamental human right. The events that have and still are taking place in several Arab countries bring both hope and despair at the same time. Hope that the people are sovereign and can decide their political destiny; despair that the price for liberty has been so high.

This brief overview of the applicable law to the use of force in those situations, and the international community's reaction to the events in the Arab Spring, show that irrespective of the degree of violence used by the government to oppress its people, the traditional rule remains that there is no legal right to rebel. The reaction to Libya's rebellion seems to remain an exception. On the other hand, there is insufficient evidence to assert that rebellion is actively prohibited in *international* law, as opposed to national law.

International law does impose strict conditions to the use of force when dealing with protest or riots. The conditions of necessity and proportionality and the requirement to take all preventive measures in order to avoid using lethal force makes it almost impossible for a State to legally justify the use of live ammunition or deadly force during protest. If it does so, not only will law enforcement agents commit serious violations of the human right to life, but if the use of firearms against protesters is massive and systematic, they and their leaders may face international criminal responsibility for crimes against humanity. All of this means that a government is prohibited from creating a non-international armed conflict.

If, as a response to the use of lethal force by the government, protesters have organised themselves as an armed group and if the level of violence is sufficiently intensive, IHL will apply, irrespective of which party started the conflict. As is the case with international armed conflict, *jus in bello* is not dependent on *jus ad bellum* in a non-international armed conflict and it seems both reaffirmed and reasonable that this legal situation should remain in place. Human rights law has in practice been applied to active hostilities during non-international armed conflict. Notions of IHL have been borrowed when interpreting what is justified and "absolutely necessary" in these contexts, but the interpretation corresponds to what would be quite a strict interpretation of IHL i.e. one that would be most protective of the civilian population. However, even in armed conflict situations, it

[126] Alston 2006, paras 33–43.

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is the law-enforcement model that is required both by human rights law and by IHL when the actual situation being regulated is not one of armed hostilities. It is also crucial that notions of direct participation in hostilities do not in practice affect peaceful protesters and others that are not a threat to life.

In particular it is submitted that further thought should be given to the traditional rule allowing governments to prosecute insurrectionists. Although any idea of POW status in non-international armed conflicts is at present a non-starter, as there is firm opposition to the idea by most, if not all, governments, an exception should be considered in the case of people that use force in self-defence when governments use excessive violence against protesters. Saul would go one step further:

> There is a powerful argument that rebel violence against oppressive states, while respecting IHL constraints, should be lawfully justified in international law—by conferring combatant immunity.[127]

Even if this is impracticable at the moment, it would at least seem reasonable that in cases where the government began the conflict, the international community should prevent it from abusing its right to prosecute those that reacted to the government's unlawful violence. It is all very well for the international community to insist that disputes between a government and its people be limited to peaceful means, but when it is the government that flatly refuses to do this, then what is a people realistically expected to do?

Whatever the future direction of the law, it remains crucial, as a lesson learned from the civil protest movement in the Arab countries, that the responsibility of State agents who unlawfully repress peaceful protest is clearly established and that victims and their families receive adequate reparation.[128] Perhaps only then can the message be heard that lawful acts of protest do not have to be exercised at the price of one's life under modern international human rights law.

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[127] Saul 2008, p. 26.

[128] Such a call was made by Human Rights Watch in Tunisia, but it does not seem to have been listened to by the transitional authorities at that time nor by the elected government today. HRW, Tunisia: Hold Police Accountable for shootings, http://www.hrw.org, January 29, 2011.

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