

T · M · C · A S S E R P R E S S

Yearbook of International Humanitarian Law

2011



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Yearbook of International Humanitarian Law

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Michael N. Schmitt
General Editor

Louise Arimatsu
Managing Editor

Yearbook of International Humanitarian Law Volume 14, 2011

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Abbreviations

AALCO	Asian-African Legal Consultative Organization
Abl.	Amtsblatt
AC	Appeal Cases
ACTR	Australian Capital Territory Reports
AD	Annual Digest of Public International Law Cases
Adelaide LR	Adelaide Law Review
ADF	Australian Defence Force
AFDI	Annuairefrançais de droit international
AFRC	Armed Forces Revolutionary Council (Sierra Leone)
African HRLJ	African Human Rights Law Journal
African JI & CL	African Journal of International and Comparative Law
African YIHL	African Yearbook on International Humanitarian Law
Air Force LR	Air Force Law Review
Air LR	Air Law Review
Airpower J	Airpower Journal
Air Univ. Rev.	Air University Review
AJCL	American Journal of Comparative Law
AJIL	American Journal of International Law
AJLP	Australian Journal of Legal Philosophy
Albany LR	Albany Law Review
All ER	All England Law Reports
ALR	Australian Law Reports
Amer. Crim. LR	American Criminal Law Review
Amer. Univ. JIL & Pol.	American University Journal of International Law and Policy

Amer. Univ. ILJ	American University International Law Journal
Amer. Univ. ILR	American University International Law Review
Amer. Univ. LR	American University Law Review
AMISOM	African Union Mission to Somalia
ANA	Afghanistan National Army
AP	Additional Protocol
AP	Associated Press
APL(s)	Anti-personnel landmine(s)
ARABSAT	Arab Satellite Communications Organization
Arizona JI & CL	Arizona Journal of International and Comparative Law
Army Law.	The Army Lawyer
ASEAN	Association of South East Asian Nations
ASF	African Standby Force
ASIL Proc.	American Society of International Law Proceedings
ATCA	Alien Tort Claims Act (USA)
ATT	Arms Trade Treaty
AU	African Union
AMIB	African Union Mission in Burundi
AMIS	African Union Mission in Sudan
AMISOM	African Union Mission in Somalia
Australian YIL	Australian Yearbook of International Law
Austrian JPIL	Austrian Journal for Public International Law
Austrian Rev. Int. & Eur. L	Austrian Revue of International and European Law
AVM	Anti-vehicle landmine
Berkeley JIL	Berkeley Journal of International Law
B.O.	Boletín Oficial de la República Argentina
BGBI	Bundesgesetzblatt
BGH	Bundesgerichtshof
Boston Univ. ILJ	Boston University International Law Journal
Boston College Int. & Comp. LR	Boston College International and Comparative Law Review
Brooklyn JIL	Brooklyn Journal of International Law
BTF	Balkans Task Force
BverfGE	Bundesverfassungsgericht
BYIL	British Yearbook of International Law

California LR	California Law Review
Calif. Western ILJ	California Western International Law Journal
Can. JL & Jur.	Canadian Journal of Law and Jurisprudence
Canadian YIL	Canadian Yearbook of International Law
CardozoLR	Cardozo Law Review
Case Western Reserve JIL	Case Western Reserve Journal of International Law
Catholic Univ. LR	Catholic University Law Review
CCW	Convention on Certain Conventional Weapons
CD	Conference on Disarmament
CDF	Civil Defence Forces (Sierra Leone)
CENTCOM	Central Command
Chicago JIL	Chicago Journal of International Law
Chinese JIL	Chinese Journal of International Law
CHR (UN)	Centre for Human Rights
CIA	Central Intelligence Agency
CICC	Coalition for the International Criminal Court
CICR	Comité International de la Croix Rouge
CID	Criminal Investigation Division
CIS	Commonwealth of Independent States
CIVPOL	Civilian Police
CLA	Chief Legal Advisor
CLJ	Criminal Law Journal
CLR	Commonwealth Law Reports
CMAC	Court Martial Appeal Court
Cmnd.	Command Paper
Columbia HRLR	Columbia Human Rights Law Review
Columbia JTL	Columbia Journal of Transnational Law
Columbia LR	Columbia Law Review
Connecticut JIL	Connecticut Journal of International Law
Cornell ILJ	Cornell International Law Journal
Cr. App. R	Criminal Appeals Reports
CRC	Convention on the Rights of the Child
Criminal LF	Criminal Law Forum
Criminal LR	Criminal Law Review
CSP	Conference of States Parties
CTBT	Comprehensive Test Ban Treaty
CTED	Counter-Terrorism Committee Executive Directorate
CTS	Commonwealth Treaty Series
CWC	Chemical Weapons Convention

DalhousieLJ	Dalhousie Law Journal
Denver JIL & Pol.	Denver Journal of International Law and Policy
DLR	Dominion Law Reports
DMU	Detainee Management Unit
DoD	Department of Defense (USA)
Drake LR	Drake Law Review
DRC	Democratic Republic of Congo
Duke JCIL	Duke Journal of Comparative and International Law
ECCAS	Economic Community of Central African States
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECHR Rep.	European Convention on Human Rights Reports
ECHR	European Convention on Human Rights
ECOMOG	ECOWAS Cease-Fire Monitoring Group
ECOSOC	United Nations Economic and Social Council
ECOWAS	Economic Community of West African States
ECtHR	European Court on Human Rights
EECC	Eritrea-Ethiopia Claims Commission
EHRH	European Human Rights Reports
Emory ILR	Emory International Law Review
EJIL	European Journal of International Law
ERW	Explosive Remnants of War
EU	European Union
Eur. Ct. HR	European Court of Human Rights
EUFOR	European Union Force
Eur. Comm. HR	European Commission of Human Rights
Eur. J Crime, Crim. L & Crim. Jus.	European Journal of Crime, Criminal Law and Criminal Justice
Ex D	Exchequer Digest
F	Federal
F Supp.	Federal Supplement
FARDC	Armed Forces of the Democratic Republic of the Congo
FCJ	Federal Court of Justice (Canada)
FCR	Federal Court Reports
FDC	Force Detention Centre
FDTL	East Timorese Defence Force
Fed. Reg.	Federal Register (United States)

Fed. Rep.	Federal Reporter
Finnish YIL	Finnish Yearbook of International Law
FNI	Front des Nationalistes et Intégrationnistes (Congo)
Fordham ILJ	Fordham International Law Journal
Fordham LR	Fordham Law Review
FPLC	Forces Patriotiques pour la Libération du Congo
FRETILIN	Frente Revolucionaria Timor Lest Independence
FRPI	Force de Résistance Patriotique en Ituri (Congo)
FRY	Federal Republic of Yugoslavia
FYROM	Former Yugoslav Republic of Macedonia
GA	General Assembly (United Nations)
GAOR	General Assembly Official Records
GA Res.	General Assembly Resolution (United Nations)
GC	Geneva Conventions
Georgetown Int. Environ. LR	Georgetown International Environmental Law Review
Georgetown JIL	Georgetown Journal of International Law
Georgia JI & Comp. L	Georgia Journal of International and Comparative Law
German LJ	German Law Journal
GR2P	Global Responsibility to Protect
GWILR	The George Washington International Law Review
GWJIL and Econ.	The George Washington Journal of International Law and Economics
GU	Gazzetta Ufficiale (Italian Official Gazette)
GYIL	German Yearbook of International Law
Hague YIL	Hague Yearbook of International Law
Harvard ILJ	Harvard International Law Journal
Harvard JHR	Harvard Journal of Human Rights
Harvard JL & Pub. Pol.	Harvard Journal of Law & Public Policy
Harvard JOL	Harvard Journal on Legislation
Harvard LR	Harvard Law Review
Harvard NSJ	Harvard National Security Journal
HCJ	High Court of Justice
HRLJ	Human Rights Law Journal
HRLR	Human Rights Law Review
HRQ	Human Rights Quarterly

I/A Court HR	Inter-American Court of Human Rights
I/A Comm. HR	Inter-American Commission on Human Rights
I/A YBHR	Inter-American Yearbook on Human Rights
ICA	International Council on Archives
ICBL	International Campaign to Ban Landmines
ICBS	International Committee of the Blue Shield
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICCROM	International Centre for the Study of the Preservation and Restoration of Cultural Property
ICISS	International Commission on Intervention and State Sovereignty
ICJ	International Court of Justice
ICJ Rep.	International Court of Justice Reports
ICLR	International Criminal Law Review
ICLQ	International and Comparative Law Quarterly
ICOM	International Council of Museums
ICOMOS	International Council on Monuments and Sites
ICRC	International Committee of the Red Cross
ICRtoP	International Coalition for the Responsibility to Protect
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IDR	International Defense Review
IFLA	International Federation of Library Association and Institutions
IFOR	Implementation Force
IHL	International Humanitarian Law
IJLM	International Journal of Legal Medicine
IJRL	International Journal of Refugee Law
ILASJI & Comp. L	ILAS Journal of International and Comparative Law
ILC	International Law Commission
ILC Yearbook	Yearbook of the International Law Commission
ILM	International Legal Materials
ILR	International Law Reports

IMO	International Maritime Organization
IMT	International Military Tribunal (in Nuremberg)
IMTFE	International Military Tribunal for the Far East (in Tokyo)
Indian JIL	Indian Journal of International Law
Indiana I & Comp. LR	Indiana International & Comparative Law Review
INTELSAT	International Telecommunications Satel- lite Organization
Int. LF	International Law Forum
INTERFET	International Force in East Timor
IRA	Irish Republican Army
Iran-US CTR	Iran-United States Claims Tribunal Reports
IRRC	International Review of the Red Cross
ISAF	International Security Assistance Force
Israel LR	Israel Law Review
Israel YB	Israel Yearbook
Israel YB HR	Israel Yearbook on Human Rights
IYIL	Italian Yearbook of International Law
JAMA	Journal of the American Medical Association
J Armed Conflict L	Journal of Armed Conflict Law
JCSL	Journal of Conflict and Security Law
JICL	Journal of International and Comparative Law
JIL & Prac.	Journal of International Law and Practice
J Int. Criminal Justice	Journal of International Criminal Justice
JPI	Judicial Police Inspectors
J Trans. L & Pol.	Journal of Transnational Law & Policy
J Trauma	The Journal of Trauma
KFOR	Kosovo Force
KLA	Kosovo Liberation Army
LAS	League of Arab States
Leiden JIL	Leiden Journal of International Law
LNTS	League of Nations Treaty Series
LOAC	Law of Armed Conflict
Loy. LA I & CLJ	Loyola of Los Angeles International and Comparative Law Journal
Loyola I & CLJ	Loyola International and Comparative Law Journal
LQR	Law Quarterly Review

Maryland JIL & T	Maryland Journal of International Law and Trade
MCC	Military Criminal Code
Melbourne JIL	Melbourne Journal of International Law
Melbourne Univ. LR	Melbourne University Law Review
Michigan JIL	Michigan Journal of International Law
Michigan LR	Michigan Law Review
Mil. LR	Military Law Review
MINURCAT	United Nations Mission in the Central African Republic and Chad
MINURSO	United Nations Mission for the Referendum in Western Sahara
MINUSTAH	United Nations Stabilization Mission in Haiti
MLR	Modern Law Review
MNF	Multinational Force
MonashLR	Monash Law Review
MoniteurBelge	Belgian Official Parliamentary Journal
MONUC	United Nations Mission in the Democratic Republic of Congo
Moscow JIL	Moscow Journal of International Law
MPYBUNL	Max Planck Yearbook of United Nations Law
MPYIL	Max Planck Yearbook of International Law
MRT	Militair Rechtelijk Tijdschrift
NATO	North Atlantic Treaty Organisation
Naval LR	Naval Law Review
NCOs	Non-Commissioned Officers
Nebraska LR	Nebraska Law Review
New England LR	New England Law Review
NGO	Non-Governmental Organisation
NILR	Netherlands International Law Review
NJ	Nederlandse Jurisprudentie
NLA	Albanian National Liberation Army
NLR	Naval Law Review
Nordic JIL	Nordic Journal of International Law
North Carolina LR	North Carolina Law Review
Northwestern JIHR	Northwestern Journal of International Human Rights
Northwestern Univ. LR	Northwestern University Law Review
Notre Dame JL	Notre Dame Journal of Law
Notre Dame LR	Notre Dame Law Review
NPC	New Penal Code

NQHR	Netherlands Quarterly of Human Rights
NYIL	Netherlands Yearbook of International Law
NY Univ. JIL & Pol.	New York University Journal of International Law and Politics
NY Univ. LR	New York University Law Review
NZLR	New Zealand Law Review
ÖAD	Österreichische Außenpolitische Dokumentation
OAS	Organization of American States
OECS	Organization of Eastern Caribbean States
OEF	Operation Enduring Freedom (Afghanistan)
OIF	Operation Iraqi Freedom
ONU	Organisation des Nations Unies
ONUB	United Nations Operation in Burundi
ONUC	United Nations Operation in the Congo
OPCW	Organisation for the Prohibition of Chemical Weapons
OSA	Operational Support Arrangement
OTP	Office of the Prosecutor (of the ICTR and/or ICTY)
Palestine YIL	Palestine Yearbook of International Law
PCIJ	Permanent Court of Justice
PD	Probate Division, English Law Reports
Penn. State ILR	Pennsylvania State International Law Review
PKF	Peace Keeping Force
PMG	Peace Monitoring Group
POC	Protection of Civilians
POW	Prisoner of War
Proc. ASIL	Proceedings of the American Society of International Law
QB	Queen's Bench
RBDI	Revue Belgededroit international
RDI	Rivista di diritto internazionale
RDPC	Revue de droit pénal et decriminologie
Recueil des Cours	Collected Courses of the Hague Academy of International Law
RGDIP	Revue générale de droit international public
RIAA	Reports of International Arbitral Awards
RICR	Revue International de la Croix Rouge
RPF	Rwandan Patriotic Front

RQDI	Revue Québécoise de Droit International
RSC	Rules of the Supreme Court
RSCDPC	Revue de science criminelle et de droit pénal comparé
RSDIE	Revue Suissede droit international et de droit européen
RSK	Republic of Serbian Krajina
RUF	Revolutionary United Front (Sierra Leone)
Rutgers LR	Rutgers Law Review
R2P-RtoP	Responsibility to Protect
SADC	South African Development Community
San Diego LR	San Diego Law Review
SASC	South African Security Council
Saskatchewan LR	Saskatchewan Law Review
SC	Security Council
SC CTC	Security Council's Counter-Terrorism Committee
SCOR	Security Council Official Records
SC Res.	Security Council Resolution
SCR	Supreme Court Reports
S. Ct.	Supreme Court Reporter (United States)
SCU	Serious Crimes Unit
SFOR	Stabilization Force
SFRY	Socialist Federal Republic of Yugoslavia
SG	Secretary-General
SIPRI	Stockholm International Peace Research Institute
SOFA	Status of Force Agreement
South African YIL	South African Yearbook of International Law
South Texas LR	South Texas Law Review
Stanford JIL	Stanford Journal of International Law
Stanford JIR	Stanford Journal of International Relations
Stanford LR	Stanford Law Review
Syracuse JIL & Com.	Syracuse Journal of International Law & Commerce
SZIER	Schweizerische Zeitschrift für internationales und europäisches Recht
Tel Aviv Univ. LR	Tel Aviv University Law Review
Temple LR	Temple Law Review
Tennessee LR	Tennessee Law Review
Texas ILJ	Texas International Law Journal
Texas LR	Texas Law Review

TFG	Transitional Federal Government (Somalia)
TIAS	Treaties and other International Acts Series
Tilburg For. LR	Tilburg Foreign Law Review
TLPS	Timorese Police Force
Transn. L & Contemp. Probs.	Transnational Law and Contemporary Problems
TRC Report	Truth and Reconciliation Commission Report (South African)
Tulane JI & Comp. L	Tulane Journal of International & Comparative Law
Tulsa J Comp. & IL	Tulsa Journal of Comparative and International Law
TVF	Trust Fund for Victims
UCLALR	University of California Los Angeles Law Review
UN	United Nations
UNAKRT	United Nations Assistance to the Khmer Rouge Trial
UNAMA	United Nations Assistance Mission in Afghanistan
UNAMET	United Nations Mission in East Timor
UNAMI	United Nations Assistance Mission for Iraq
UNAMID	United Nations/ African Union Hybrid Operation in Darfur
UNAMIR	United Nations Assistance Mission for Rwanda
UNAMSIL	United Nations Mission in Sierra Leone
UNCHR	United Nations Commission on Human Rights
UNCHS	United Nations Centre for Human Settlements
UNCIVPOL	United Nations Civilian Police
UNCTAD	United Nations Conference on Trade and Development
UN Doc.	United Nations Documents Series
UNDOF	United Nations Disengagement Observer Force
UNDP	United Nations Development Programme
UNEF	United Nations Emergency Force (in the Sinai)
UNEP	United Nations Environment Programme

UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNFICYP	United Nations Force in Cyprus
UNGCI	United Nations Guards Contingent in Iraq
UNHCR	United Nations High Commissioner for Refugees
UNHFOR	United Nations Human Rights Field Office in Rwanda
UNICEF	United Nations (International) Children's (Emergency) Fund
UNIDIR	United Nations Institute for Disarmament Research
UNIFEM	United Nations Development Fund for Women
UNIFIL	United Nations Interim Force in Lebanon
UNIIMOG	United Nations Iran/Iraq Military Observer Group
UNIKOM	United Nations Iraq/Kuwait Observer Mission
UNIPSIL	United Nations Integrated Peacebuilding Office in Sierra Leone
UNITAF	United Nations Unified Task Force
UNITAF	United Nations Task Force (in Somalia)
UNMEE	United Nations Mission in Ethiopia and Eritrea
UNMIL	United Nations Mission in Liberia
UNMIN	United Nations Mission in Nepal
UNMIS	United Nations Mission in Sudan
UNMIT	United Nations Mission in Timor-Leste
UNOCI	United Nations Operations in Côte d'Ivoire
UNOMIG	United Nations Observer Mission in Georgia
UNOMSIL	United Nations Observer Mission in Sierra Leone
UNOSOM	United Nations Operation in Somalia
UNPF	United Nations Peacekeeping Force
UNPOS	United Nations Political Office for Somalia
UNPROFOR	United Nations Protection Force (in Bosnia and Herzegovina)
UNTAC	United Nations Transitional Authority in Cambodia
UNTAET	United Nations Transitional Authority in East Timor
UNTS	United Nations Treaty Series
UNWCC	United Nations War Crimes Commission

Univ. Calif. Davis LR	University of California Davis Law Review
Univ. Chicago LR	University of Chicago Law Review
Univ. Miami I & Comp. LR	University of Miami International & Comparative Law Review
Univ. Pa. J Const. L	University of Pennsylvania Journal of Constitutional Law
Univ. Pitt. LR	University of Pittsburgh Law Review
Univ. Richmond LR	University of Richmond Law Review
USAFJLS	United States Air Force Academy Journal of Legal Studies
Vanderbilt JTL	Vanderbilt Journal of Transnational Law
VCLT	Vienna Convention on the Law of Treaties
Vermont LR	Vermont Law Review
Virginia JIL	Virginia Journal of International Law
Virginia LR	Virginia Law Review
VWU	Victims and Witness Unit of the Registry (Congo)
Wake Forest LR	Wake Forest Law Review
WBR	Wound Ballistics Review
WCR	War Crimes Reports
WHO	World Health Organisation
Whittier LR	Whittier Law Review
Wisconsin ILJ	Wisconsin International Law Journal
WLR	Weekly Law Reports
Yale HR & Dev. LJ	Yale Human Rights & Development Law Journal
Yale JIL	Yale Journal of International Law
Yale LJ	Yale Law Journal
YbEur. Conv. HR	Yearbook of the European Convention of Human Rights
YbILC	Yearbook of the International Law Commission
YIHL	Yearbook of International Humanitarian Law
Yug. Rev. IL	Yugoslav Review of International Law
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht
ZöR	Zeitschrift für öffentliches Recht

Part I
Articles

Chapter 1

Evaluating the Use of Force During the Arab Spring

Annyssa Bellal and Louise Doswald-Beck

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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.

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.

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.

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 protesters¹⁴ 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.

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).

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 law²² 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

²² See, *Stankov and the United Macedonian Organisation Linden v Bulgaria*, nos. 29221/95 and 29225/95, ECHR 2001; and *United Macedonia Organization Linden 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.