

THE LEGAL STATUS OF FIGHTERS IN THE ARMED CONFLICT IN LIBYA

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ABSTRACT

The dilemma of the legal statute of the fighter in armed conflicts is one of the topics that occupied legal jurisprudence and wrote several studies in it. The fighters were classified into legal fighters and illegal fighters, and then a special legal system was established for each of them, and in the context of modern armed conflicts, the phenomenon of mercenaries emerged in a complex and intertwined with terminology. The armed conflict in Libya is one of the most prominent contemporary armed conflicts in which this interference appeared in a striking way, which requires a legal view that determines the legal statues of the fighters in this conflict and defines a legal framework governing each classification of them and dismantling this interference.

Keywords: Legal Statute, Fighters, Armed Conflict, Criminal Responsibility, International Humanitarian Law

INTRODUCTION

Libya was affected by the movement of protests that engulfed the Arab regions after the Tunisia Revolution. However, the course of the protests quickly turned to the use of armed violence between the two sides of the equation, which led to the demonstrations turning into an armed conflict between the previous government and the revolutionaries, in which both sides used excessive force and were accused of human rights abuses and grave violations of international humanitarian law that in some forms amount to war crimes. The tragic situation did not change much after the overthrow of the Gaddafi regime, as the path of a peaceful political transition failed, the state authorities in Libya were divided into two sides. The former security forces splintered into competing armed groups, sometimes cooperating, at other times, amid Libya's transformation into a failed state, in which massive violations of international humanitarian law and international human rights law, and there are many actors from local groups to groups not linked to a state to regular forces of foreign countries interfering in the equation of the armed conflict in Libya forcefully as well as mercenaries who infiltrate between these or other groups, and amid the multiplicity of fighters in the armed conflict in Libya, several problems arise, including how is the classification of the armed groups fighting in Libya? Then, how do we determine the legal status of these armed groups? What are the obligations and rights of these groups? Who bears responsibility for serious violations of international humanitarian law? Who is the body capable of prosecuting these accused? This is what we are working to discuss in this research.

The Legal Adaptation of the Armed Conflict in Libya

A conflict is defined as a rivalry between two parties, one of which attempts to prevail over the other, and the subject of the competition is for material or moral values the two parties

to the dispute differ on the interpretation of their ownership or the way they are used. Under international law and international relations, an international conflict between two or more States is caused by a rivalry, conflict of interest, or understanding and application of the rules of international law, convention, or customary. The jurisprudence of international law divides international conflicts into legal conflicts in which the difference in interpretation or application of the law is based while the conflicts are of a political nature if there is a conflict political interests¹, The Hague Conventions of 1899 distinguished between legal and political disputes in Article 16, and reiterated the text of them in 1907 in Article 38. Legal and political disputes are resolved by various peaceful means, including diplomatic means, political means, and judicial ones, but these means may fail to reach a settlement that satisfies the two parties or one of them, and here the conflict turns from a conflict of visions to an armed clash. We are here about an armed conflict in which military force is used directly, and we believe that it is difficult to formulate an academic definition of armed conflict because of the ambiguity of the term and its overlap with other terms such as war, aggression, and hostilities, as well as the multiplicity of parties to the conflict. The armed conflict may be between a state and a state or between a state and armed groups linked or not linked to a state, making the armed conflict a physical fact that is adapted according to the measurement of each case separately². Here we are trying to identify the roots of the armed conflict in Libya and determine its legal nature. To know the truth of this conflict and the actors involved in it, we must study the dialectic of the legitimacy of governance in Libya, then study the roots of the conflict and its parties, and the position of international law on the dialectic of the legitimacy of power in Libya, which will help in adapting the armed conflict in Libya more clearly.

The Controversy of the Legitimacy of the Political System in Libya

Before World War I, Libya was a country under the Ottoman rule and then transferred to Italian control from 1911 until 1943. Libya was then subjected to the victorious countries of the war. In 1951, Libya became an independent constitutional monarchy state. The monarchy continued there until 1969, in which the monarchy in Libya was overthrown by a group of military officers, turning Libya into a republic in which the rule of Colonel Muammar Gaddafi continued until 2011, and then he was overthrown by a military revolution that came in the context of what is known as the Arab Spring.³

After the end of Colonel Gaddafi's rule, a transitional government was formed on 27/2/2011, and its duties ended on 7/7/2012, after the election of a national conference and an interim government, according to a constitutional declaration issued in 2011. Here, the political divisions began in Libya between Islamist and nationalist currents, each with a mass extension and a military arm, with the chaotic spread of armed groups of a tribal or regional nature and a struggle over oil wealth, which prompted the head of the interim government, Ali Zaidan, to leave the country, and take power as a replacement for him, Abdullah al-Thani, after obtaining a vote from the General Conference, which soon sacked Abdullah al-Thani and appointed a new prime minister, Ahmed Maitiq. With Abdullah Al-Thani's refusal and his challenge to the legality of the dismissal decision and his obtaining a decision from the Constitutional Chamber of the Supreme Court of Libya, the General National Congress moved from Tripoli to Tobruk to get rid of the influence of the Muslim Brotherhood and the armed factions associated with it and their control over the Supreme Court, in which the Constitutional Chamber, under the imposition of an armed siege by the Libya Dawn military forces on December 6, 2014, ruled that "the eleventh paragraph of the seventh constitutional amendment issued in April 2014 is unconstitutional and its consequences." Which was interpreted as a solution to the General

National Congress against the background of the “nullity” of the amendment of a temporary constitutional declaration, according to which the Council elected a new prime minister supported by military leaders who are among the main actors in the Libyan crisis as well as the support of regional and international actors, this conflict and controversy resulted in the presence of two governments, the first in Tobruk, which derives its legitimacy from the General National Congress, and the second in Tripoli, which derives its legitimacy from the decisions of the Supreme Court and the State Council, which transformed itself into a legislative authority competing with the General National Congress in Tobruk⁴, and each party challenges the legitimacy of the other. In light of this division, the search for the legitimacy of the political system in Libya leads us to ask about who has the de facto authority on the ground, and where are the executive, legislative and judicial powers of the state? The basic principle of public international law says (change of governments and the continuity of states) and here we do not discuss the presence or absence of the legal personality of the state in Libya, rather we are looking for state authorities and the extent of their effectiveness. It is clear that the collapse of the Gaddafi regime left the country without any constitutional reference, and the conflicting parties were unable to establish a permanent constitution, nor to fulfill the steps required to build a unified state, so that the constitutional declaration issued in 2011 remains the only constitutional document on which it can be based. When examining the effectiveness of the executive authority, we find a clear division between two governments, the first of which is the Tripoli government, which derives its legitimacy from the Libyan judiciary, and the second, the Tobruk government, which derives its legitimacy from the legislative authority represented by the General National Congress. Every authority exercises efficacy over a part of the state’s territory and loses it in another place. This division of effectiveness is in which other groups from regional and tribal military militias compete with non-State armed groups. The loyalty of the army and security forces in the Gaddafi government is divided between competing governments or even militias and armed groups not linked to a state. To estimate the effectiveness of the legislative authority, we find that the General National Congress, which was formed on July 7, 2012, still adheres to legal legitimacy, in contrast to the judiciary of the Supreme Court, which decided to dissolve it and transfer its competencies to the Supreme Council of State. Then the venue of the sessions was changed from Tripoli to Tobruk, and the Legislative Council enjoys strong support from the National Army group led by Khalifa Haftar, who represents a major player on the ground. The judicial authority remains the only authority whose legitimacy is not affected in terms of form, at least, with the presence of many doubts and facts that confirm its subordination and influence to one of the parties to the conflict without the other, according to the workplaces of the judicial authority and the armed group in control of the land.⁵

International Law and the Crisis of the Legitimacy of Power

The facts accompanying the Libyan revolution against the former regime of Colonel Gaddafi and the regime’s resorting to violent means to confront the rebels, which led to the complexity of the crisis and its transformation into an armed conflict, highlighted the immediate position of the United Nations, through the Human Rights Council and the fact-finding committee that is formed to verify the level of armed violence used by the regime which indicated serious violations of international humanitarian law and international human rights law from both sides of the conflict, with the regime at the time being held responsible for these violations⁶. In light of the report of the fact-finding commission, the UN Security Council moved and issued its resolution No. (1970) on 226/2/2011, which referred to the file of grave violations

of international humanitarian law to the Public Prosecution at the International Criminal Court. With the continued escalation of armed violence, the Security Council issued its Resolution No. (1973) on March 17, 2011, in which it granted permission to countries that had submitted requests to act militarily against the Gaddafi regime, and that this act is under regional organizations or arrangements and in cooperation with the Secretary-General of the United Nations. The Council expressed its concern over the continued flow of mercenaries into Libyan territory⁷. In light of the division between the parties to the political process in Libya, the United Nations intervened to bring the parties to a single dialogue table, and the Libyan political agreement, known as the Skhirat Agreement, was held on 12/17/2015, which provided for the unification of the executive authorities and to be based in Tripoli, the capital. It established a transitional presidential council that ends with legislative elections and the establishment of a permanent constitution. The agreement did not clarify the executive mechanisms and how the executive authorities, which each follow a separate legislative authority, will merge. It seems that this agreement was based on intentions and the necessity of political consensus between the conflicting parties, but the most dangerous thing about the Skhirat Agreement is to make this agreement parallel to the Constitutional Declaration, which is the only constitutional document ruling in the country after 2011. The Government of National Accord emerged from the Skhirat Agreement, but this government soon entered into a legal debate and armed conflict with the same former parties until the pivotal point came in the cancellation of the Skhirat Agreement by the commander of the Libyan National Army Group (Khalifa Haftar) to the Skhirat Agreement, freeing it from all the obligations contained therein, and declaring the direction of his forces towards Tripoli to "restore legitimacy"

In light of the apparent weakness of the United Nations in dealing with the political divisions that have resulted in armed conflicts between the conflicting parties for power, multiple international attempts have been made to find a political solution that will spare the country chaos and external interference. Regional and major countries such as Italy, Egypt, Turkey, Sudan, and some Arab Gulf states, as well as France, Russia, and the United States of America are divided between supporters of the Tobruk government and those who support the Tripoli government with real indications of direct Turkish intervention on the side of the Tripoli government, it was met by an Egyptian announcement of direct military intervention on the side of the Tobruk government⁸ and indirect interventions from the Arab Gulf states, and attempts to reach a political solution are still reaching a dead end.

From the point of view of international law, we do not find any real authority that exercises sovereignty over the territory of the state, as parts of the territory are divided between two competing governments mainly, in addition to the presence of less effective groups that control other parts of the territory of the state. This division was accompanied by the fragmentation of state institutions between the parties of the conflict as well as the fragmentation of the population of the state between the parties to the conflict. In light of this division, we find a competing recognition among states of the legitimacy of the political system, as each of the parties to the conflict receives political and material support from several international bodies. What we can say, in short, is that this crisis has turned post-Gaddafi Libya into a failed state and incapable of effectively exercising the state's functions.

The Nature of the Armed Conflict in Libya

International armed conflict is defined as a conflict between two or more countries, even if the war is not officially declared, in which the regular armies of their various types are used, as well as even volunteer units that fight on the side of the regular forces. The basic criterion for the

adaptation of the international armed conflict is due to the parties to the conflict in that they are international units, while the conflict may take place on the territory of both countries or the territory of one state, and the conflict may take place even outside the territory of the two conflicting states. In contrast to the international armed conflict, we find the non-international armed conflict, which takes place between the regular forces and regular armed groups or dissidents from the official armed forces. This fighting may be accompanied by the loss of the state's control and its effectiveness over parts of the state's territory in favor of the anti-groups, with an explicit or implicit acknowledgment of the fighters' description of these anti-groups to apply the rules of international humanitarian law. The authority of states may collapse and their effectiveness will be greatly weakened with the loss of control over the region and its public utilities. International jurisprudence has recently begun looking for conflicts in which the international character is mixed with the non-international, as the nature of the conflict is in terms of non-international origin, but foreign countries are directly involved in this conflict in favor of one of the parties to the conflict without the other⁹. This description seems more common, especially in contemporary armed conflicts, which can be monitored more clearly after the events of September 11, 2001. Besides, when placing the armed conflict in Libya in the balance of legal adaptation, we find that this conflict began with a description of a non-international armed conflict between the government and rebel groups and dissidents from the regime. This conflict continued until the fall of the Gaddafi regime and the collapse of the state system and its institutions in Libya, then the description of the conflict changed to a non-international armed conflict between conflicting and competing parties for control of state institutions and the management of public utilities. International efforts to find a transitional or lasting solution could not stop this conflict, which was further complicated by Turkey's declaration of direct intervention with one party to the conflict (the Government of National Accord) and not the other, the declaration of Turkish intervention was followed by the declaration of Egypt's direct intervention with the other party to the conflict (the Government of Tobruk). The conflict has entered the stage of the internationalized armed conflict, which is outside the framework of the four Geneva Conventions and their protocols but remains within under article III common to the four Conventions.

Fighters in the Armed Conflict in Libya

With the absence of official authorities and the conflict of institutional legitimacy in Libya and the loss of control and effectiveness of specific regular forces, the problem of the legal adaptation of fighters in the armed conflict in Libya has emerged. This requires access to the definition of combatants in international humanitarian law and then reviewing the classification of the fighting groups in Libya and their legally correct adaptation.

Who is the combatant in international humanitarian law?

The definition of the combatant in international humanitarian law is based on the premise of distinguishing the civilian from the armed and the observance of the armed and his commitment to the rules and norms of international humanitarian law in international armed conflicts. The Hague Conventions of 1907 referred to this concept, as they did not specify a description of the fighter as members of the regular forces only, but also included all militia and volunteer members, provided that they adhere to the rules of international humanitarian law¹⁰. The Geneva Conventions followed the same approach, specifically the Third Convention relating to the Protection of Prisoners of War, and the Third Geneva Convention defined regular

combatants as members of the regular armed forces of their various types, whether they are operating permanently or as reserve forces, or even if they are semi-regular forces and takes the classification of volunteer groups or volunteer militia working with the regular forces. The internal security forces may even be included in the description of the combatant if they are included in the fighting armed forces, with the parties to the armed conflict informed of this. On the other hand, there is another classification for the combatant not associated with the regular forces, which includes fighters from the volunteer forces and irregular militias, in which it is required to submit to a gradual chain of command, to wear a military uniform or distinctive insignia, to carry arms openly, as well as to declare commitment to the rules of international humanitarian law. The Third Convention of the Geneva Conventions expanded the definition of the combatant to include the combatants participating in the mass agitation¹¹. The origins of protecting combatants go back to the Liber Code, which described spontaneous acts of resistance as legitimate, which is due to the people's right to defend the land and not limit this right to regular forces¹². This protection was transferred to international conventions in the draft Brussels Agreement of 1874 through a proposal submitted by Russia to the assembled countries, and then this proposal was approved in the Hague Conventions of 1899 first, and 1907 second. Hence, the Third Convention on Prisoners of War, which requires the mass uprising to be spontaneous and openly armed and thus the obligation of its members to respect international humanitarian law. In returning to the classification of a fighter in non-international armed conflicts and even though the term "fighter" appears more than once in the articles of Protocol II, Protocol II to the Geneva Conventions of 1949 has avoided the definition of armed groups fighting the regular forces of the Government, which is a recognition of non-State actors and maybe an encouragement to revolt against the political regimes in states. This necessitates a re-reading of the term and its definition in the light of Article 3 common to the Geneva Conventions and the Martinez clause, which states that the rules of customary international law remain governed in an event that is not regulated by a written international treaty. Also, when these fighting groups are examined in non-international armed conflict, they are either dissident regular forces or newly formed militia or volunteer forces that control parts of the territory of the State and have the capacity to conduct continuous military operations, requiring the same conditions as the Third Convention, even though they operate against regular government forces¹³. The armed conflict may turn into a conflict between the armed groups themselves without the regular forces being involved, such as the situation in Syria, or there is a complete breakdown and loss of effectiveness of the regular forces and their loss of effectiveness, and the conflict turns into a conflict between competing forces and groups. Also, neither the Geneva Conventions nor the protocols attached to them dealt with this situation, which is widely spread after 1991, and the transformation of armed conflicts from international conflicts to non-international ones. However, Article 3 common to the Geneva Conventions remain a reference to be adhered to by all parties to non-international armed conflicts. Outside the description of the fighter, there remains the description of the civilian and the mercenary, and the civilian is the one who does not meet the conditions of the fighter. As for a mercenary, he is someone who does not possess the nationality of one of the parties to the conflict, nor is he settled or residing in the region in which the conflict is taking place, and therefore is completely foreign to the conflict, and the material motive is the main motive for his participation in armed actions¹⁴. Article 47, paragraph 2, of Protocol II to the Geneva Conventions of 1949 refers to this definition. International humanitarian law distinguishes between a combatant and a mercenary by wasting all legal guarantees granted to a combatant and not to the mercenary, who does not enjoy captive status and is treated as a criminal upon arrest.¹⁵

The Legal Classification of Fighters in Libya

With the collapse of state institutions with the fall of the Gaddafi regime and the scattering of security and military institutions in the state, multiple armed military groups were formed in Libya that differ into groups with a national, regional, religious, or tribal dimension. In reviewing the map of armed conflict in Libya, combatants in armed conflict in Libya are divided into three categories, with mercenary groups working with each classification of fighting forces on the ground. The first category includes local combatants. This description includes semi-regular armed groups, which attempt to gain legal legitimacy by joining under the government banner, these armed groups, mainly formed by Libya's dawn forces, formed with the outbreak of the Libyan Revolution in 2011 and under the Tripoli Government as part of the regular armed forces. There is also the Libyan National Army group, led by Khalifa Haftar, who is loyal to the government of Tobruk. The problem is mainly with professional military officers, a large part of whom are ex-regime troops. These two forces are the most effective in the map of the Libyan conflict, as well as government forces established after 2011, represented by the Presidential Guard Forces, which the Tripoli government announced in 2016. These forces include volunteers from armed groups that fought the former regime or groups loyal to the Tripoli government only. There is also the oil facility guard forces, whose tasks seem closer to those of the police and was established in 1999. Its financial organization is under the Ministry of Oil, while its administrative organization is under the Ministry of Defense. This force is very important as it is charged with protecting oil wells and refineries, as well as its export ports¹⁶. In the same classification, there are local fighters who belong to armed groups with a regional or tribal dimension that are not completely follow any of the conflicting parties to the power. These groups were established for the purposes of self-protection, providing services and filling the gap created by the absence of State institutions and are made up of local volunteer and professional combatants from the forces of the former regime. There are local armed militias founded during the revolution, such as the Zintan rebels, which were a significant force at the start of the revolution and are made up of Al-Sawa'iq, Al-Qa'qa' and Al-Madani brigades¹⁷, and the Benghazi Revolutionaries Shura Council, whose strength and political position diminished greatly after its defeat against the Libyan National Army forces led by Haftar. There is also the Shield Forces militia, which controlled many of the weapons of the former Libyan army, as well as the Tribal Army Forces militia, which are basically loyal to the former regime, but receive support from General Haftar. Under this classification, the Tuareg tribesmen forces that are allied with the Libyan government in Tripoli and spread within the areas of tribal influence and work to guard the borders within the areas of their geographical presence¹⁸. We can attribute the description of the legitimate fighter to the members of the armed groups in the first category, as the basic conditions of leadership, carrying arms openly and the distinctive emblem, as well as a declaration of desire to abide by the rules of international humanitarian law. In the second classification, we find the foreign fighters, and these are either members of regular forces affiliated with a foreign country to the conflict, such as the fighters of the Turkish armed forces that are fighting on the side of the Government of National Accord, which has spread near the city of Sirte, where Haftar's forces are stationed as well as the presence of French, American and British regular fighters in Benghazi under the pretext of monitoring extremist Islamic groups, training and logistical support for armed groups affiliated with the Tobruk government, and there is also an Emirati air base in eastern Libya that supports the forces of the Libyan National Army (LNA)¹⁹. The presence of forces belonging to foreign countries is completely inconsistent with the relevant United Nations resolutions, which forbid interference in the interests of one party to the political conflict over the other. The Secretary-General of the United Nations, Antonio Guterres, stated before the Security Council that this external interference has reached

unprecedented levels and threatens a dangerous escalation, the issue of the legality of the presence of foreign forces depends on the legitimacy of the political system in Libya, which is the subject of constant controversy, and any foreign intervention is illegal and indulging in contravention of the rules of international law and relevant Security Council resolutions. However, the presence of these fighting forces on the ground changes the description of the armed conflict in Libya from an armed conflict of a non-international nature to an armed conflict of an internationalized nature, even if this description takes the conflict out of the provisions of the four Geneva Conventions and the protocols attached to them, because it does not exempt these forces from the application of the rules of law international humanitarian law in accordance with Common Article 3 of the Geneva Conventions as well as the obligation inherited from the customary rules of international humanitarian law²⁰. In the third and final classification, we find armed groups that are in themselves a mixture of local fighters and foreign fighters. These armed groups are not associated with any state and take religious identity as their starting point. They reject the idea of building the state on a legal basis and acknowledges the rule of Islamic Sharia, but it does not meet and does not fight under one banner, even if it participates in principle in the issues of rejecting democracy, the civil state, legislative laws, dissenting from the two sides of the political conflict and ruling their apostasy and their departure from the constants of the Islamic religion according to its own reading of Islamic law. We can classify these groups as non-state armed bands, and these groups do not recognize general international law or the rules of international humanitarian law and have their own methodology of fighting and dealing with prisoners of war or the areas they control and do not receive instructions directly from any country, and it has external and ideological links with similar groups in terms of organization outside the borders of the state's territory²¹. This category includes groups such as Al-Qaeda and the Islamic State (ISIS), which controlled the city of Sirte until 2016, the Derna Revolutionaries Council and Ansar al-Sharia in Derna and Benghazi, which is accused of launching the attack on the US consulate in Benghazi in 2012²². We note the presence of mercenary foreign fighters spread among the local fighters, whether loyal to the Tobruk government or the Tripoli government, or even working with regular foreign forces, specifically the Turkish forces, which brought with them many Syrian fighters in exchange for making money. The United Nations Working Group on the Use of Mercenaries, in a statement issued on June 17, 2020, expressed its alarm at the widespread reports about the use of mercenaries by actors related to the conflict in Libya as we find foreign fighters in most of the armed groups in Libya, we can also realize the presence of foreign fighters and mercenaries from African and non-African countries fighting under the command of one of the parties to the conflict²³. As for measuring the three categories previously mentioned by the standards of international humanitarian law, we find the applicability of the law to the first and second classifications, while the members of the third classification does not describe a legitimate fighter until the conditions of the chain of command and the public bearing of arms, as well as the distinctive dress, are met, as the most important condition remains, which is respect for the rules of international humanitarian law and the behavior of fighters consistent with these rules, and this is what is not available in these groups that are absolutely not affiliated with a state. Mercenaries fighting with any category of armed conflict remain outside the protection of international humanitarian law, while retaining the right to a fair trial before a competent judiciary with full guarantees of international human rights law.²⁴

Rights and Duties of Combatants in the Armed Conflict in Libya

The Geneva Conventions require indulgence for combat work, often referred to as aggressive acts. Since all hostilities are only directly linked to armed action, which is the concept of a violation of common article III of the four Geneva Conventions, which requires direct participation in hostilities, etc., everyone who is not directly involved in hostilities is not considered a combatant and therefore remains a civilian. Direct immersion is not limited to physical activity participation in hostile action in the sense of actual bearing of arms, but goes beyond it to an act that harms a party to an armed conflict and affects its military capabilities, and that the combatant causes such damage and is directly causal with the intention to engage in hostilities directly. The acquisition of the status of a fighter entails several rights and duties that the fighter should enjoy and acquire, which we will elaborate on the categories of armed conflict in Libya in the following paragraphs.

The Commitment to Legitimate Fighting Methods

The main idea on which international humanitarian law is based in the equation that as long as we are unable to avoid armed conflict, we must at least alleviate its suffering. Thus, combatants in armed conflict are by chance enemies once they stop using weapons to return to their civilian nature. International humanitarian law is an attempt to enact armed conflicts and reduce their suffering. One of the first duties of the parties to the conflict is to abide by legitimate means and methods of combat since the aim is to achieve military superiority and not to cause unnecessary or excessive suffering to the other party to the conflict. Attempts to restrict means and methods of combat began early and established the rule that parties to a conflict are not free to use such means and methods, originally because of the Martinez clause already mentioned since any weapon or means used in an armed conflict must remain compatible with the requirements of international humanitarian law, both contractual and customary²⁵. This is noted by the International Court of Justice in its consultative Ray on the legitimacy of nuclear weapons in 1996, and then preventing the use of any weapons that may cause unjustified and not entered into the concept of military necessity and its requirements. It is then preventing the killing or hacking of the largest number of fighters or directing random and targeted weapons, and also avoids the use of any random or determined weapon that may cause unnecessary diseases and suffering or long-term damage to the constructed environment or natural environment²⁶. This means the distinction between military and civilian goals and thus discrimination between civilians and military, and this is reiterated by the International Court of Justice in its above-mentioned consultative opinion, that the prevention of random weapons is rooted in humanitarian international law. In addition to this public principle, there are specific legal conventions of many weapons and preventing their use in armed conflict, whether traditional weapons or weapons of mass destruction, such as prohibiting the use of specific types of explosive bullets, booby traps, landmines, or incendiary weapons, blinding lasers, and conventions prohibiting the use of biological or chemical weapons labeled as weapons of mass destruction²⁷. Nuclear weapons remain the virtue of the rules of international humanitarian law with martial nature, which prevents the use of random weapons, which causes unjustified pain and suffering and unnecessary and widespread damage. As far as methods of combat are concerned, the foundations of international humanitarian law call for the use of legitimate and specific means to reduce, limit, and eliminating enemy capabilities in whole or in part, assuming that armed force is directed only to objectives of a military nature without targeting any civilian objects and thus distinguishing between civilians and military personnel. All of this is also related to the achievement of military advantage, the observance of military necessity, and the obligation of legal precautions in the conduct of any military attacks, such as the obligation of proportionality

or warning in cases of civilian presence near targeted objects. Parties to the conflict are also supposed to evacuate civilians from areas of hostilities. It is also prohibited to attack legally protected objects such as houses of worship and cultural property, to prohibit starving civilians or attacking objects necessary for their lives, to attack urban and engineering installations of a civilian nature or institutions containing dangerous force, or to attack the natural or constructed environment. International humanitarian law also prohibits the use of methods of combat involving fraud and treachery to entice the trust of the opponent and then to attack him. Such methods include the misuse of rules of international humanitarian law that protect the fighter, such as pretending to surrender or using the distinctive badges of international organizations to betray the opponent.²⁸

As the armed conflict that overthrew Gaddafi and his Government witnessed serious violations of international humanitarian law, the United Nations was forced to set up a fact-finding commission and then file the serious violations with the Prosecutor's Office of the International Criminal Court with convictions of both parties to the conflict. The Commission diagnosed cases of torture, enforced disappearances, and unlawful killings, as well as the fact that civilians were trapped and starved, as well as the siege of the city of Zintan or the targeting of a particular group, as well as the direct targeting and displacement of the people of Tawergha²⁹, targeting for civilians and mercenaries and children in armed conflict. The period following the fall of the Qadhafi regime was not without violations of humanitarian international law and international human rights law. A serious series of violations were monitored, particularly in the conflict between the Libyan National Army and groups supporting the Government of Concord. Indiscriminate and non-discriminatory attacks on civilians and combatants were observed in January and December 2019 during the attack on Sebha and Tripoli in which artillery weapons and cluster munitions were used³⁰ as well as accusations of using human shielding of the population and use of civilian objects for military action, thus losing civilian status and removing protection as well as monitoring illegal killings and targeting of protected buildings such as civilian hospitals and schools, and targeting of medical personnel. Since the beginning of 2020, WHO has documented at least 21 attacks on medical facilities, ambulances, and medical personnel in addition to attacks on places of detention and shelters for migrants and displaced persons from military operations, as happened in targeting the migrant shelter center in Tajura³¹. In her address to the Human Rights Council, Ms. Stephanie Williams reported that migrants and asylum-seekers in Libya continued to be subjected to arbitrary detention and torture, including sexual violence, kidnapping for ransom, extortion, forced labor, and unlawful killings. These facts are not separate and are attributed to both parties to the conflict as well as arbitrary detentions without legal proceedings, enforced disappearances, hostage-taking, torture, and degrading and humiliating treatment of prisoners. The Special Representative of the Secretary-General, in its report, which was presented to the Human Rights Council in January 2019, said the serious violations of human rights and international humanitarian law continued in Libya amid complete impunity.³²

Acquisition of the Legal Protection of the Fighter

The status of a fighter imposes a dual obligation on an individual, requiring the fighter to abide by legitimate methods and means of combat and thus also requiring him or her to protect the rights of civilians and combatants. In particular, the combatant imposes a set of rights on him if he loses the ability to fight or even if he does not want to continue fighting. International humanitarian law deals with the loss of the ability to continue fighting by imposing an obligation to provide legal protection to the wounded or sick fighters in need of assistance or medical care

and try to improve their health, to treat them humanely, and to prohibit any attack on their lives. Protocol I to the Geneva Conventions also requires the provision of assistance and medical care to combatants in danger at sea³³. The concept of this protection is based on the loss of ability to continue fighting and refrain from any hostile work and then turns the center of these fighters into protective prisoners according to the third agreement of the Geneva Conventions. Captivity represents temporary detain to prevent the fighter from continuing fighting. The captivity is applied to those in the hands of the enemy or who directly surrender to the enemy and refrain from engaging in any hostilities³⁴. The Third Convention imposes the obligation to respect the prisoner, preserve his dignity and preserve his life, as well as medical care and appropriate conditions of detention, and to provide guarantees of a fair trial if he committed any crime during the period of detention. The trial must be for crimes unrelated to the conflict in which he was involved. As for the charges brought against him for crimes during the conflict, they must be considered by an impartial court, as the captivity does not represent any punitive criminal nature.³⁵ The period of captivity must end with the end of the armed conflict, and there are usually prisoner exchange agreements between the conflicting parties³⁶. It should be noted that the description of captivity is only in international conflicts, and unfortunately, neither the Second Protocol related to conflicts of a non-international character nor even Article 3 common to the Geneva Conventions carries with it any reference to the protection of prisoners. Returning to the adaptation of the armed conflict in Libya, it falls completely outside the framework of the four Geneva Conventions and their protocols, but it remains under the rule of customary international humanitarian law and Common Article 3, as well as the protection of detained fighters under the rules of international human rights law. The minimum level of protection must be provided during the course of hostilities, and protection should be given to those who are unable to fight or who have lost the will to continue fighting. The dignity of the detained fighter must be protected from any degrading treatment and the safety of his body must be guaranteed from any torture or cruel treatment, in addition to providing judicial guarantees when trying detainees, and this is done in accordance with the standards of international human rights law, especially the prevention of enforced disappearance or the prevention of death sentences and enabling the detainee to communicate with his outside surroundings and his family. If the State is characterized by an institutional element that facilitates the prosecution of its detainees who are in its custody, what about the situation where combatants fall into the hands of rebels, the State system collapses and disintegrates, or even in cases where there is a dialectic about the legitimacy of power with external interference, as in the case of the conflict in Libya and the perception that Turkish or other national soldiers are in the hands of one of the parties to the conflict? The guarantee represented by customary international humanitarian law, Common Article 3, and international human rights law standards remains the weak thread that must be adhered to in the absence of any binding international treaty that works to protect the combatant in armed conflicts of a non-international character, whether it takes the form of a non-international conflict as the traditional one or an internationalized conflict. As for the behavior of foreign state fighters in armed conflict, its behavior remains governed by the rules of international humanitarian law stipulated in the four Geneva Conventions and their protocols, especially the first protocol, as the state's commitment is not a reciprocal obligation, but rather an objective obligation with which to respect international humanitarian law everywhere and under any circumstances. This approach was formulated by international criminal law, specifically international criminal justice, starting with the Special Criminal Tribunal for the former Yugoslavia, as the court held that the parties to the conflict are obligated to apply international humanitarian law in any armed conflict, regardless of its nature, whether international or non-international.³⁷

Criminal Responsibility for Violations of International Humanitarian Law

Criminal responsibility for violations of international humanitarian law is established if these violations are grave and no international convention has indicated criteria by which the violation can be qualified as a grave violation. Legal jurisprudence made valuable efforts in defining the grave violation and setting criteria such as “brutality of the act” or “departure from the requirements of military necessity,” “ill-treatment” and “sabotage of public and private property.” The international criminal justice provided more objective criteria to describe the violation as the grave, including that the violation represented a violation of an “international norm” and had “serious and dangerous consequences.”³⁸ The Statute of the International Criminal Court decided that violations of international humanitarian law are war crimes, whether they are committed in an international or non-international armed conflict, and this is in accordance with the legality rule in international criminal law, which includes the legal rules of convention or customary. In the event of any serious violations of international humanitarian law, the original jurisdiction of the state’s courts is held in hearing the case, and the jurisdiction is reserve for the International Criminal Court in the event that the state is one of the parties to the statute of the International Criminal Court. The UN Security Council also has the competence to refer to the Public Prosecution in cases of monitoring grave violations affecting international peace and security, and the case is permissible even if the state is not a party to the Statute of the Court.³⁹

In the context of the armed conflict in Libya, the Security Council intervened early and referred the file of grave violations of international humanitarian law to the International Criminal Court in accordance with Resolution 1970 in 2011, which requested the Libyan authorities to cooperate fully with the Court. At the same time, he pointed out that the fighters of any country undertaking military activities according to the permission of the Security Council inside Libya remain subject to the jurisdiction of their countries and are not subject to the jurisdiction of the International Criminal Court unless their country is a party to the statute of the court or expressly accepted the jurisdiction of the court⁴⁰. The transitional government in Libya announced its acceptance of full cooperation with the International Criminal Court, and the court's jurisdiction includes crimes committed by the previous government as well as violations attributed to opposition forces. In its briefing to the Security Council in 2013, the Office of the Prosecutor of the Court, Fatou Bensouda, announced that the Public Prosecution had collected evidence about violations and crimes that occurred in the city of Tawergha. The court issued arrest warrants for Colonel Gaddafi, his son Saif al-Islam, and former intelligence chief Abdullah al-Senussi⁴¹. Later, other arrest warrants were issued against Al-Ahami Khalid, a symbol of the former regime, and Mahmoud Al-Urfli, Commander of the Lightning Force of the Libyan National Army⁴². In its most recent briefing, on 5 May 2020, the Security Council reported that the Office of the Prosecutor-General had compiled and analyzed information on violations of international humanitarian law that might amount to war crimes, and had spoken of violations against detainees in the conflict that amounted to torture, rape and enforced disappearance⁴³. On July 7, 2020, the court approved the Al-Wefaq government’s request to investigate crimes attributed to Field Marshal Haftar’s forces in the city of Tarhuna⁴⁴. Given the political divide, it appears that impunity persists in Libya, where the Libyan national judiciary has not been able to extend its competence and exercise a role in prosecuting human rights and international humanitarian law violators in the armed conflict in Libya. The Libyan criminal justice system suffers from a clear lack of effectiveness under the control, power, and influence of armed groups and their protection of those wanted for international or national criminal justice. Besides,

with the collapse of the official security services and their disappearance in the post-revolution period, armed groups are the ones who play the security role, which they use to impose their influence and prestige and punish their opponents, as well as using means of intimidation and threats to the judiciary to submit to the influence of these groups, and the national judiciary has not been able to impose its prestige to this day. On May 31 to 2013, the International Criminal Court indicated the weakness of the Libyan judicial means in the possibility of trying Saif al-Islam Gaddafi⁴⁵. The court also rejected the admissibility lawsuit in the Senussi case, due to the inability of the Libyan national judiciary to grant fair trial guarantees to the accused⁴⁶. The criminal judiciary in Libya, in light of the political division that will prevail in Libya, appears unable to achieve a fair trial for those accused in cases of violations of international humanitarian law and is unable to protect individuals from violations by armed groups and their violation of basic human rights. We affirm that the jurisdiction of the International Criminal Court remains the most capable and effective in achieving redress for victims and granting fair trial guarantees to the accused, with the need to cooperate with the court from the authorities on the ground.

CONCLUSIONS

The spread of armed groups in Libya and the chaos of arms led to real divisions in the Libyan society, which turned the state into armed, competing, and cooperative political fiefdoms. We can observe the following: -

- The presence of local fighters affiliated with the parties to the political division, operating above the law and according to the principle of impunity and responsibility.
- The presence of foreign fighters belonging to countries involved in the armed conflict in Libya operating outside the framework of legal responsibility and are not subject to either Libyan national law or the jurisdiction of the International Criminal Court.
- The existence of combatants not associated with a State that does not operate in accordance with the rules of international humanitarian law or within the International Bill of Human Rights and is not subject to any domestic or foreign authority or jurisdiction.
- The presence of mercenaries of foreign nationality serving within local and non-state armed groups as well as Syrian mercenaries within the Turkish forces in Libya enjoy political and legal protection from the groups with which they work and are not subject to national jurisdiction.
- The clear political division over Libya after the collapse of the Gaddafi regime into a failed state and a state unable to stop violations of international humanitarian law and international human rights law in light of the ineffectiveness of the national judiciary and its loss of the ability to hold accountable those accused of violations of international humanitarian law and international human rights law.
- Recognizing the difficulties of making the ICC's jurisdiction truly operational, but remaining the most specialized body and capable of prosecuting those accused of crimes within the criminal jurisdiction of the ICC in accordance with the Security Council Referral Decision of 2011.

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