

## XVII

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### **International Enforcement in Non- International Armed Conflict: Searching for Synergy among Legal Regimes in the Case of Libya**

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**I**n mid-February 2011, in the wake of popular uprisings in Tunisia and Egypt, members of the Libyan public began protesting against the decades-old regime of Libyan leader Muammar Gaddafi. The situation rapidly escalated as the government sought to forcibly suppress the demonstrations. By early March the situation had deteriorated into an armed conflict.

A number of international organizations responded to the crisis in Libya as it evolved. They utilized a variety of different tools, ranging from official statements and press communiqués to the adoption of sanctions and other legal measures. On March 19, 2011, a coalition of States initiated a bombing campaign in Libya. The United Nations Security Council authorized this enforcement action in response to reports of serious violations of international human rights law and the international law of armed conflict committed in Libya by persons acting on behalf of the Gaddafi regime.

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This article provides an overview of applicable rules of international law through different phases of the situation in Libya and sketches out various modes of enforcement action employed by international organizations to respond to the crisis, analyzing several of the controversial legal issues that arise in that context. The article concludes with an analysis of the unresolved legal issues implicated by the evolving situation in Libya and by the international community's responses to it.

### *Applicable Law*

#### **Non-intervention**

One of the foundational principles of the international legal order, and a corollary to the equally fundamental principle of the sovereign equality of States, the principle of non-intervention requires all States to refrain from interfering in the internal affairs of other States, or, in the words of the UN Charter, in "matters which are essentially within the domestic jurisdiction" of other States.<sup>1</sup> While the scope of this principle was traditionally understood to preclude international regulation of the way in which a State treated its own people, that understanding has evolved considerably since, at the latest, the advent of the UN Charter system.

In light of the human rights provisions of the UN Charter and the practice of Charter bodies, it is now generally accepted that serious human rights abuses, even if committed purely within a State (i.e., not involving aliens, foreign territory or any other material interests of other States), are no longer regarded as internal matters shielded by the principle of non-intervention. Most States are also parties to specific human rights treaties, further internationalizing the issue of how they treat their own people and correspondingly diminishing the scope of the principle of non-intervention. Nonetheless, mere political wrangling, even if it involves the failure to meet international expectations of good governance, remains a purely internal matter so long as it does not entail violations of international legal obligations.

#### **The Use of Force/*Jus ad Bellum***

Another fundamental rule of international law is the prohibition on the use of force. Article 2(4) of the UN Charter provides that "[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations." The two established exceptions to this prohibition are valid exercises of the right of self-defense and enforcement action taken in accordance with UN Security Council authorization.<sup>2</sup> These international rules on the use of force apply only between States. Thus, the prohibition on the use of force does not apply internally to a State.<sup>3</sup>



### **The Law of State Responsibility for Injury to Aliens**

This body of international law regulates the way States treat foreigners. It provides for a baseline of humane treatment, essentially protecting foreigners against serious human rights abuses, denials of justice and other unjustified deprivations of liberty or property. Embedded in the traditional State-centric international legal system, the responsibility of the wrongdoing State, in general, may be invoked only by the State of nationality of the victim.<sup>4</sup>

### **The Law of Armed Conflict/*Jus in Bello*/International Humanitarian Law**

The international law of armed conflict regulates the conduct of hostilities and provides legal protections for individuals not—or no longer—taking part in the hostilities. As such, the vast majority of its provisions apply only in times of armed conflict or occupation. Prior to World War II, the *jus in bello* generally applied to inter-State armed conflicts. Starting with the Geneva Conventions of 1949<sup>5</sup> it also began to regulate non-international armed conflicts, including purely internal armed conflicts. With the advent of international regulation of non-international armed conflict came the direct applicability of international humanitarian law to non-State, organized armed groups.<sup>6</sup> While international law still provides more extensive regulation of inter-State armed conflicts than of non-inter-State armed conflicts, the extent of difference has diminished.

### **International Criminal Law in the Strict Sense**

International criminal law in the strict sense refers to those rules of international law the breach of which gives rise to individual criminal responsibility in international law.<sup>7</sup> These rules of international law directly bind individuals, as opposed to operating through the vehicle of domestic law (e.g., suppression treaties). The core crimes in international criminal law are war crimes, genocide, crimes against humanity and aggression. As Libya is not a party to the Statute of the International Criminal Court (ICC), Libyan nationals committing acts entirely within Libya are bound only by those international criminal prohibitions that have acquired the status of customary international law. Most, but not all, of the crimes prohibited by the ICC Statute were prohibited by customary international law during the relevant period.

### **International Human Rights Law**

International human rights law, in general, regulates the way a State treats individuals under its control by requiring States to respect and ensure certain fundamental rights of the human person.<sup>8</sup> As noted above, the evolution of this

relatively modern body of international law has greatly reduced the scope of the non-intervention principle in relation to a State's conduct toward its own people.

Unlike the areas of international law identified above, human rights law is principally treaty-based. Libya has been a party to several universal and regional human rights treaties since well before the 2011 unrest. Libya is a party to, *inter alia*, the International Covenant on Civil and Political Rights (ICCPR)<sup>9</sup> and its first Optional Protocol,<sup>10</sup> the International Covenant on Economic, Social and Cultural Rights,<sup>11</sup> the Convention on the Rights of the Child,<sup>12</sup> the Convention on the Elimination of All Forms of Racial Discrimination,<sup>13</sup> the Convention on the Elimination of All Forms of Discrimination Against Women<sup>14</sup> and the African Charter on Human and Peoples' Rights.<sup>15</sup>

The ICCPR is subject to derogation. Under Article 4 of the ICCPR, States parties may take measures derogating from certain obligations under the Covenant to the extent strictly necessary to respond to a "public emergency which threatens the life of the nation." Among the derogable rights are the rights to freedom of expression, to freedom of movement, to freedom from arbitrary detention and to a fair trial.<sup>16</sup> States parties must officially proclaim a state of emergency and must notify other States parties through the intermediary of the UN Secretary-General.<sup>17</sup> According to available UN records, at no time during the 2011 unrest did Libya lodge a notice of derogation with the Secretary-General.

### *Phases of the Conflict and Modes of International Enforcement*

#### **Prior to the February Unrest**

Prior to the unrest, the applicable law included all of the above bodies of international law, except for the law of armed conflict, and those rules of international criminal law derived from the law of armed conflict since there was no armed conflict in existence. Libya was fully bound by its obligations under all of the human rights treaties to which it was a party and also by norms of customary human rights law.<sup>18</sup> Similarly, Libya was bound by the requirements of the law of State responsibility for injury to aliens in its relations with foreigners (particularly those within its territory). Libya and individuals within Libya were also under an obligation to refrain from committing the international crimes of genocide and crimes against humanity. Other States, in their relations with Libya, were bound by the prohibition on the use of force and the principle of non-intervention. States were obliged to refrain from interfering in the internal functioning of the Libyan political system, at least to the extent that its functioning did not contravene Libya's international obligations owed to those States.<sup>19</sup>



### February Unrest

By mid-February a series of protests broke out across Libya. Once the unrest in Libya reached the point of a “public emergency which threaten[ed] the life of the nation,” Libya could have claimed an authority to derogate from some of its obligations under the ICCPR to the extent “strictly required by the exigencies of the situation.”<sup>20</sup> This would have permitted the Libyan government a freer hand in arrest and detention matters, as well as in restricting the freedom of expression, the freedom of movement and the freedom of association. As noted above, Libya did not provide notice of derogation to the treaty depositary. Nonetheless, there is some authority to suggest that the failure to notify does not of itself preclude the lawfulness of derogation.<sup>21</sup> While in principle most of the rights in the ICCPR are derogable, the burden would be on Libya to demonstrate the necessity for each restriction imposed.<sup>22</sup>

In any event, reports soon emerged of violations of non-derogable rights, such as the right to life and to freedom from torture. The gravity of the reported violations brought the matter beyond the internal sphere, and gave standing to other States and international organizations to invoke the international responsibility of Libya. Notwithstanding these violations, at this stage recognition of any entity other than the Gaddafi regime as the government of Libya would likely still have constituted a prohibited intervention in Libyan internal affairs. The use of force against Libya remained prohibited. Notwithstanding the emerging notion of the responsibility to protect, which may provide enhanced standing to take diplomatic measures or economic sanctions, the use of force remained precluded absent Security Council authorization.<sup>23</sup> The use of force could not be justified on the basis of collective self-defense since the protesters, as non-State actors, had no international legal right of self-defense under the *jus ad bellum*.

### February 25: UN Human Rights Council Special Session

One of the first organizations to adopt operative measures was the UN Human Rights Council. On February 25, 2011, the Council convened a special session on the “situation of human rights in the Libyan Arab Jamahiriya.” This was the fifteenth special session of the Council since its creation in 2006. One of the advances of the Council over its predecessor, the UN Commission on Human Rights, is the relative ease of convening special sessions. While the Commission required the support of a majority of members, the Council can convene a special session with the support of only one-third of its members.

Several others factors contributed to the convening of this special session. Libya was at the time a member of the Human Rights Council. In addition, as noted above, Libya is a party to a number of international human rights treaties. There

was thus a clear legal basis for invoking Libya's international responsibility. Lastly, the Libyan ambassador to the Human Rights Council had by this time ceased to support the Gaddafi government and supported the convening of the special session.

In its Resolution S-15/1 of February 25, 2011, the Human Rights Council decided to establish an international commission of inquiry and to recommend that Libya be suspended from the Council.

After recalling official statements on the situation made by other UN bodies, the Arab League, the Organization of the Islamic Conference, the African Union and the European Union, the Human Rights Council strongly condemned the "gross and systematic" human rights violations being committed in Libya, and suggested that some of the abuses might rise to the level of crimes against humanity.<sup>24</sup> It also "strongly call[ed] upon" the government of Libya to fulfill its "responsibility to protect" its population; to comply with its human rights obligations, placing particular emphasis on the freedoms of expression, assembly and information;<sup>25</sup> and to "stop any attacks against civilians."<sup>26</sup>

The Human Rights Council urged the Libyan government to "respect the popular will, aspirations and demands of its people and to make [its] utmost efforts to prevent further deterioration of the crisis."<sup>27</sup> The Council also stressed the need to hold accountable "those responsible for attacks in [Libya], including by forces under Government control, on civilians."<sup>28</sup> In addition, it reminded Libya of its commitment, as a member of the Council, "to uphold the highest standards in the promotion and protection of human rights and to cooperate fully with the Council and its special procedures."<sup>29</sup>

The Council then decided to "urgently dispatch an independent, international commission of inquiry . . . to investigate all alleged violations of international human rights law in [Libya], to establish the facts and circumstances of such violations and of the crimes perpetrated and, where possible, to identify those responsible." Its express purpose was to ensure "that those individuals responsible are held accountable."<sup>30</sup>

Finally, the Council recommended to its parent body, the UN General Assembly, that Libya's "rights of membership" in the Council be suspended, "in view of the gross and systematic violations of human rights by the Libyan authorities."<sup>31</sup>

#### **February 26: UN Security Council Emergency Meeting**

On February 26, the day after the special session of the Human Rights Council, the UN Security Council convened an emergency meeting. The Security Council unanimously adopted Resolution 1970<sup>32</sup> under Chapter VII of the UN Charter and took binding measures under Article 41 of the Charter, including the imposition of



an arms embargo, a travel ban and an asset freeze. It also referred the situation in Libya to the ICC.<sup>33</sup> As with the Libyan ambassador to the Human Rights Council, the ambassador of Libya to the United Nations had ceased to support the Gaddafi government and spoke in support of the Security Council resolution.

The preambular paragraphs of the Security Council resolution refer to the “gross and systematic violations of human rights” taking place,<sup>34</sup> as well as serious violations of “international humanitarian law.”<sup>35</sup> The reference to “international humanitarian law” may indicate a perception that the situation in Libya had by this time evolved into an armed conflict.<sup>36</sup> Mirroring language employed by the Human Rights Council, the Security Council also recalled “the Libyan authorities’ responsibility to protect its population,”<sup>37</sup> evoking the “responsibility to protect” concept and perhaps implying further consequences for continued failure to fulfill that responsibility.

The Security Council welcomed the work of the Human Rights Council and reiterated its call for accountability, emphasizing the responsibility of superiors.<sup>38</sup> It then recalled the Security Council’s own power to defer ICC prosecutions, perhaps telegraphing an incentive to cooperate.<sup>39</sup> In this respect, Article 16 of the ICC Statute provides that the Security Council may defer an ICC prosecution for up to twelve months, with the possibility of renewal.

The resolution’s operative language begins with the Council’s demand for an immediate end to the violence and its call for steps to fulfill the “legitimate demands of the population.”<sup>40</sup> It urges the Libyan authorities to comply with international human rights and humanitarian law,<sup>41</sup> to ensure the safety of foreign nationals, to ensure the safe passage of humanitarian supplies and workers, and to “[i]mmediately lift restrictions on all forms of media.”<sup>42</sup>

The Security Council’s referral of the situation to the ICC marks the first time that the referral power has been used with the unanimous support of Council members. The only other Security Council referral to date, that of the situation in Darfur, was not unanimously supported. Both China and the United States abstained in that vote. China had also been a holdout for the Libya resolution, but was ultimately persuaded to vote in favor of the resolution. The Chinese delegation indicated that it supported the resolution “taking into account the special circumstances in Libya.”<sup>43</sup>

The ICC referral is followed by a jurisdictional exclusion similar to that included in the Darfur referral. It provides that

nationals, current or former officials or personnel from a State outside the Libyan Arab Jamahiriya which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that State for all alleged acts or

omissions arising out of or related to operations in the Libyan Arab Jamahiriya established or authorized by the Council, unless such exclusive jurisdiction has been expressly waived by the State.<sup>44</sup>

By its terms this provision would seem to exclude not only ICC jurisdiction, but any jurisdiction other than that of the non-State party. Some delegations have disagreed with this interpretation, opining instead that it only excludes ICC jurisdiction.

The resolution also provided that the ICC's expenses in this matter shall be borne by the ICC States parties and those States that wish to contribute voluntarily. The resolution created a new Sanctions Committee to, *inter alia*, monitor implementation of the sanctions, designate individuals subject to the measures, consider requests for exemptions and report back to the Council.

#### **March 1: UN General Assembly Suspends Libya's Rights of Membership in the Human Rights Council**

Acting on the recommendation of the Human Rights Council, the UN General Assembly on March 1, 2011, in Resolution 65/265, suspended Libya's "rights of membership" in the Human Rights Council.<sup>45</sup> This was the first time the General Assembly had used its authority to suspend a State.

#### **March 3: ICC Prosecutor Opens Investigation**

On March 3, 2011, the ICC Prosecutor announced his decision to open an investigation into alleged crimes against humanity committed in Libya since February 15.<sup>46</sup> In his statement, he also identified certain individuals with "formal or de facto authority, who commanded and had control over the forces that allegedly committed the crimes," and thus "put them on notice" that they could be held criminally responsible if forces under their command committed crimes. In particular, he singled out Muammar Gaddafi, the Minister of Foreign Affairs, the head of Regime Security and Military Intelligence, the head of Gaddafi's Personal Security and the head of the Libyan External Security Organization. He further indicated that members of opposition groups would also be subject to investigation if they committed crimes.

He concludes by stating, "It is important to avoid an armed conflict in Libya." One could read this statement to mean that the ICC Prosecutor's position at that time was that the situation in Libya had not yet reached the necessary levels of violence, organization and duration to constitute an armed conflict. There is no mention of war crimes in the March 3 statement.



### **Early March: Emergence of Armed Conflict**

By early March, at the latest, at least some of the forces opposing the Gaddafi regime had constituted themselves as organized armed groups. In addition, the violence between the government and these groups became sufficiently protracted and intense to constitute armed conflict, leading to the application of the law of non-international armed conflict.<sup>47</sup> The application of the *jus in bello* also brings about the application of the relevant war crimes provisions of international criminal law.

### **March 12: Arab League Calls for the Use of Force**

At its meeting in Cairo on March 12, 2011, the Council of the Arab League issued a statement on the implications of the events in Libya and the Arab position.<sup>48</sup> Most significantly, the Arab League called upon the UN Security Council to impose a no-fly zone and to create “safe areas.” The members of the Security Council had already been discussing the possibility of the use of armed force. In this context, the political support of the Arab League was seen as a key factor.

In the preamble the League called for compliance with international law and an end to the fighting. It also called on the Libyan authorities to withdraw from the areas they “entered forcibly” and to ensure “the right of the Libyan people to fulfill their demands and build their own future and institutions in a democratic framework.”<sup>49</sup>

The League Council then recalled its commitment “to reject all forms of foreign intervention in Libya,” but emphasized “that the failure to take necessary actions to end this crisis will lead to foreign intervention in internal Libyan affairs.”<sup>50</sup> It then decided to call upon the Security Council “to take the necessary measures to impose immediately a no-fly zone on Libyan military aviation, and to establish safe areas in places exposed to shelling as a precautionary measure that allows the protection of the Libyan people and foreign nationals residing in Libya . . . .”<sup>51</sup>

### **March 17: Security Council Authorizes the Use of Force**

On March 17, 2011, the UN Security Council, again using its enforcement power under Chapter VII of the UN Charter, responded to the call by imposing a no-fly zone and authorizing the use of armed force to protect civilians and “civilian populated areas under threat of attack.”<sup>52</sup> Resolution 1973 also expanded the existing sanctions and established a Panel of Experts to assist the Sanctions Committee.

The resolution was adopted with a vote of ten in favor and five abstentions. The abstentions came from the BRIC countries (Brazil, Russia, India and China) and Germany. The two permanent members that abstained—Russia and China—have

traditionally espoused robust interpretations of the non-intervention principle.<sup>53</sup> The abstaining delegations cited a lack of information, the failure to exhaust diplomatic means, ambiguity as to how force would be used and by whom, and doubts as to whether the use of force would effectively achieve the Council's purposes.<sup>54</sup>

The operative text of the resolution begins with the Council's demand for the immediate establishment of a ceasefire and a "complete end to violence and all attacks against, and abuses of, civilians."<sup>55</sup> The Council also demanded that Libya comply with its obligations under international human rights law, humanitarian law and refugee law, and "take all measures to protect civilians and meet their basic needs," as well as to ensure the delivery of humanitarian aid.<sup>56</sup>

In operative paragraph 4, the Council authorized the use of armed force to protect civilians and civilian populated areas, while excluding military occupation. Specifically, it authorized

Member States that have notified the Secretary-General, acting nationally or through regional organizations or arrangements, and acting in cooperation with the Secretary-General, to take all necessary measures . . . to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya, including Benghazi, while excluding a foreign occupation force of any form on any part of Libyan territory.

This broad grant of authority was narrowed by the requirements of "acting in cooperation with the Secretary-General," the limitation to protection of "civilians"<sup>57</sup> and areas "under threat of attack,"<sup>58</sup> and the exclusion of occupation.<sup>59</sup>

The resolution also established a no-fly zone in Libyan airspace "in order to protect civilians," providing exemptions for humanitarian flights and authorizing member States to use armed force to enforce it.<sup>60</sup>

In addition to strengthening enforcement of the arms embargo, the resolution also expanded the asset freeze. Mindful that a new Libyan government would need these assets, the Council "[a]ffirm[ed] its determination to ensure that assets frozen . . . shall, at a later stage, as soon as possible be made available to and for the benefit of the people of the Libyan Arab Jamahiriya."<sup>61</sup>

Finally, the Security Council used its power to bind States to deprive the Libyan government, and those acting on its behalf, of legal remedies that might otherwise be available for breach of contract under domestic law. Operative paragraph 27 requires "all States"<sup>62</sup> to take "the necessary measures to ensure that no claim shall lie at the instance of the Libyan authorities . . . in connection with any contract or other transaction where its performance was affected by reason of the measures taken by the Security Council . . . ."



### **March 19: Coalition Airstrikes Begin**

On March 19, armed forces of France, the United States, the United Kingdom and others initiated military strikes in Libya pursuant to Security Council Resolution 1973. The intervention of other States' armed forces brought into application the law of international armed conflict.<sup>63</sup>

On March 27, the North Atlantic Council decided that NATO would undertake enforcement action in Libya.<sup>64</sup> Control of the enforcement action in Libya was subsequently transferred to NATO under unified command.

### **March 25: African Court of Human and Peoples' Rights Orders Provisional Measures**

On March 25, 2011, the African Court of Human and Peoples' Rights unanimously ordered provisional measures against Libya.<sup>65</sup> The proceedings were instituted by the African Commission on Human and Peoples' Rights, which lodged an application with the Court after receiving a number of complaints alleging violations of the African Charter on Human and Peoples' Rights by Libya, a State party.

The Commission did not request the Court to order provisional measures. Nonetheless, the Court recalled that it is "empowered to order provisional measures *proprio motu* 'in cases of extreme gravity and urgency and when necessary to avoid irreparable harm to persons' and 'which it deems necessary to adopt in the interest of the parties or of justice.'"<sup>66</sup>

After satisfying itself, *prima facie*, that it had jurisdiction, the Court reviewed statements and resolutions of relevant international organizations. In light of the condemnations of abuses contained therein, the Court concluded that "there is therefore a situation of extreme gravity and urgency, as well as a risk of irreparable harm to persons who are the subject of the application, in particular, in relation to the rights to life and to physical integrity of persons as guaranteed in the [African] Charter."<sup>67</sup>

The Court then found that the circumstances required it to order, "as a matter of great urgency and without any proceedings,"<sup>68</sup> the following provisional measures: (1) that Libya refrain from "any action that would result in loss of life or violation of physical integrity of persons, which could be a breach of the provisions of the Charter or of other international human rights instruments to which it is a party"; and (2) that Libya report to the Court within fifteen days on measures taken to implement the order.<sup>69</sup>

The first provisional measure ordered is somewhat unclear. Use of the term "could" introduces a degree of ambiguity. Further, it is unclear whether the dependent clause beginning with "which" describes or qualifies the preceding clause. It is likely that it qualifies the preceding clause, so that only those actions that

constitute a breach (or “could” constitute a breach) of human rights law are encompassed by the order.

**Mid-April: Concern about NATO Interpretation of Mandate**

By mid-April, some States, including Security Council permanent members Russia and China, began to claim that the multinational force was exceeding the scope of its mandate.<sup>70</sup> In particular, they recalled that regime change was not authorized by Security Council Resolution 1973. According to some observers, NATO’s airstrikes went beyond protection of civilians and potentially constituted a violation of the prohibition on the use of force.

**May 4: ICC Prosecutor Presents Report to the Security Council**

Pursuant to operative paragraph 7 of Security Council Resolution 1970, the ICC Prosecutor on May 4 reported to the Security Council on actions taken pursuant to the referral of the situation in Libya to the ICC.<sup>71</sup> In his report, the Prosecutor provided an overview of the preliminary examination of jurisdictional issues conducted by his office, the ongoing investigation and anticipated judicial activities.

The Prosecutor found that available information provided “reasonable grounds to believe that crimes against humanity have been committed and continue being committed in Libya,”<sup>72</sup> and he noted that there is also “relevant information concerning” war crimes “once the situation developed into an armed conflict.”<sup>73</sup>

As to admissibility of the complaint, the Prosecutor indicated that his office had “not found any genuine national investigation or prosecution of the persons or conduct that would form the subject matter of the cases it will investigate.”<sup>74</sup> He also found that the situation “clearly meets the threshold of gravity required by the ICC Statute, taking into account all relevant criteria.”<sup>75</sup> He noted that there were no countervailing “reasons to believe that the investigation would not serve the interests of justice,”<sup>76</sup> and thus opened an investigation on March 3.

In describing the ongoing investigation, the Prosecutor stated that his office was pursuing those who bore the greatest responsibility. He also referred to cooperation activities and reported receiving “outstanding support from States Parties and non-States Parties alike.”

After enumerating the type and quantity of evidence collected, he indicated that this evidence revealed two main types of “incidents”: (1) “[s]ecurity forces allegedly attacking unarmed civilians constituting crimes against humanity,” and (2) “[t]he existence of an armed conflict with alleged war crimes as well as other crimes against humanity that appear to have been committed by different Parties.”<sup>77</sup> He then surveyed specific factual allegations supporting the existence of these types of crimes, including excessive use of force by security forces; “[s]ystematic



arrests, torture, killings, deportations, enforced disappearances and destruction of mosques”;<sup>78</sup> rape; and “unlawful arrest, mistreatment and killings of sub-Saharan Africans perceived to be mercenaries.”<sup>79</sup>

As to the anticipated judicial proceedings, the Prosecutor indicated that his office would soon be submitting its first application for an arrest warrant. On May 16, the ICC Prosecutor requested a pretrial chamber to issue arrest warrants for three individuals, including Muammar Gaddafi.

#### **June 1: Commission of Inquiry Issues Report**

On June 1, 2011, the Commission of Inquiry, established pursuant to Human Rights Council Resolution S-15/1, issued its report.<sup>80</sup> The Commission opined that “a significant number of international human rights law violations have occurred, as well as war crimes and crimes against humanity.” According to the Commission, the large majority of violations were committed by those acting on behalf of the Gaddafi regime “in the pursuit of a systematic and widespread policy of repression against opponents to his regime and his leadership.” In addition, the report noted that “[t]here have also been violations by opponents to the regime.”

As to methodology, the Commission “opted for a cautious approach in the present report by consistently referring to the information obtained as being distinguishable from evidence that could be used in criminal proceedings, whether national or international.” Despite its findings of numerous violations of human rights, humanitarian and international criminal law, the “commission feels that, at this stage, it is not in a position to identify those responsible, as requested by the Human Rights Council in the resolution establishing its mandate.”

#### **June 27: ICC Pretrial Chamber Issues Arrest Warrants**

On June 27, ICC Pre-Trial Chamber I issued arrest warrants for three senior Libyan officials, including Muammar Gaddafi. This was the second time that the ICC has issued an arrest warrant for a sitting head of State. The first was for Omar Al Bashir, the President of Sudan. As with the situation in Sudan, Libya is not a State party to the ICC Statute.

#### ***Unresolved Legal Issues***

The international community employed a broad range of tools in responding to the situation in Libya: arms embargoes, economic sanctions, recognition/de-recognition, suspension of rights of membership, regional human rights mechanisms, a commission of inquiry, an ICC referral and, ultimately, the use of force. The unprecedented combination of these tools and the intersections of the various

bodies of international law identified above have given rise to a number of unresolved legal issues.

#### **Derogation under the ICCPR**

The Human Rights Council and the Security Council both condemned Libya for violations of provisions of human rights law and humanitarian law. Among the rights invoked by both bodies were the rights to freedom of expression and freedom of assembly, both of which are subject to limitation and derogation.

As noted above, States parties to the ICCPR may take measures derogating from some of their obligations in the event of a “public emergency which threatens the life of the nation.” While no clear threshold has been established for determining when this standard has been met, the jurisprudence of the Human Rights Council indicates that the possibility of derogation arises only in situations of the utmost gravity. In any event, this standard was clearly met by the time the situation in Libya erupted into armed conflict.

In this context, two derogation-related issues arise. The first is the significance of Libya’s failure to notify the other States parties to the ICCPR via the UN Secretary-General of any derogation. The second is whether Libya’s legal ability to derogate is impeded by the Libyan government’s role in creating the emergency situation.

As noted above, the failure to notify the Secretary-General does not necessarily preclude the lawfulness of derogation.<sup>81</sup> The notification nonetheless serves important purposes. It is an important procedural safeguard in that it puts other States parties on notice of the derogation and presents them with an opportunity to assess the situation. More significantly, it also requires the State party derogating from its obligations to specify “the provisions from which it has derogated and . . . the reasons by which it was actuated.”<sup>82</sup>

Apart from its failure to notify the Secretary-General, Libya also failed to provide any public statement concerning derogation. There was thus no indication that Libya intended to avail itself of the capacity to derogate. Nor was there any indication of what measures would be taken in derogation of its obligations, the degree of derogation or the extent to which such measures were necessary. More recent jurisprudence of the Human Rights Council supports the view that the complete failure to provide this information in any form may be fatal to the lawfulness of such measures.<sup>83</sup>

The second derogation-related issue is whether and to what extent a State’s participation in creating a situation of public emergency might undercut its ability to derogate. There are at least two conceptual models for thinking about this issue.



The first is by analogy to the relationship between the *jus ad bellum* and the *jus in bello*.

It is a basic principle of the *jus in bello* that its application is independent of the *jus ad bellum*. The issue of which State violated the *jus ad bellum* in bringing about a situation of armed conflict is generally irrelevant to the application of the *jus in bello*. Once an international armed conflict has begun, the law of armed conflict applies equally to all parties, regulating the conduct of hostilities and providing protections for individuals not—or no longer—taking part in the hostilities. Nonetheless, a State that violates the *jus ad bellum* would still bear international responsibility for that violation, and would be obliged to make reparation for all of its harmful consequences.

Applying this model to the issue of derogation, one could argue that the cause of an emergency situation should not affect the ability to derogate once that situation has arisen. Thus, once the threshold of “public emergency which threatens the life of the nation” has been met and the State has announced measures derogating from its obligations in conformity with Article 4, the applicable legal framework has been altered. Under this approach, international law would not look “behind” the then-prevailing facts on the ground. The issue of who caused the state of emergency would be irrelevant to the issue of derogation. At the same time, the State party would still bear responsibility for any human rights violations, including those in violation of derogable obligations, committed in the lead-up to the emergency situation.

Another approach would be to proceed from the principle of “unclean hands.” This equitable principle, whereby actors are precluded from benefiting from their own wrongdoing, is arguably a general principle of law within the meaning of Article 38 of the Statute of the International Court of Justice,<sup>84</sup> and variations of it are reflected in several fields of international law, including the law of State responsibility and the law of treaties. Under this approach, a State party should not be able to avail itself of the possibility of derogation if the government of that State party created the emergency situation by committing serious violations of human rights law (e.g., in the context of a brutal crackdown against protesters).

There are strong arguments in favor of both approaches. The advantage of employing the former approach is that it avoids having to determine who was at fault in bringing about the new state of affairs. The importance of this principle in the context of the *jus ad bellum/jus in bello* dichotomy is particularly clear. States generally claim that their uses of force are lawful, and there is no standing judicial body with jurisdiction to determine otherwise. One could argue that the wisdom of remaining agnostic as to which party wrongfully caused a conflict would apply *a fortiori* in an internal context.

Moreover, States have agreed that irrespective of who started the armed conflict, certain rules must be followed by all parties in order to mitigate some of its effects. This raises, however, an important distinction with respect to the issue of derogation. In international law, the principle of the independence of the *jus ad bellum* and *jus in bello* ensures that the restrictions of the *jus in bello* will apply to any armed conflict. Derogation is in a sense the inverse. The consequence of a valid derogation is the removal of restrictions that would otherwise apply to the conduct of the State party. Another basis of distinction may be found in the nature and function of international human rights law. This body of law principally regulates the way a State treats its own people, formerly regarded as a purely internal matter. International human rights treaties also establish compliance bodies to monitor implementation of the obligations under those treaties, including in times of public emergency.

#### **Application of International Human Rights Law during Armed Conflict**

The issue of whether and to what extent international human rights law applies in situations of international armed conflict and occupation remains controversial. While international judicial bodies have found that international human rights law continues to apply in times of armed conflict,<sup>85</sup> some States consistently reject this position and instead argue that international human rights law ceases to apply or is otherwise entirely abrogated by the application of the *lex specialis* of the *jus in bello*.<sup>86</sup>

Despite this continuing controversy over the application of human rights law to international armed conflict, there now appears to be consensus that human rights law *does apply* in *internal* armed conflicts. Even the United States, which has been vocal in its rejection of the application of human rights treaty law to international armed conflicts and to transnational, non-international armed conflicts, has never objected to the application of human rights law to internal armed conflicts.<sup>87</sup> Indeed, the United States consistently exerts pressure bilaterally on States dealing with situations of internal armed conflict to comply with their obligations under international human rights law.

Thus, to the extent the conflict in Libya remained internal, the application of international human rights law to it was uncontroversial. This does not mean, however, that there is not continuing controversy over the interoperability of particular rules of human rights law and humanitarian law in this context. There are still divergent views on this subject.

As noted above, once other States began to use armed force in Libya, the law of international armed conflict began to apply to the conflict between those States and Libya. The applicability of international human rights law to international



armed conflicts remains unsettled, though a consensus appears to be emerging in favor of application at least where the relevant party to the conflict is exercising a degree of control over territory or individuals.<sup>88</sup> In any event, if the role of the intervening States is limited to aerial bombing campaigns (i.e., in the absence of any direct control of individuals or territory), then most questions arising under international human rights law, even if applicable, would likely be resolved by reference to the rules of the *jus in bello* as *lex specialis*.<sup>89</sup>

### Use of Force Issues

A number of controversial legal issues are implicated by the Security Council's authorization to use force in this context.

Some have suggested that the Security Council's authorization to use force to protect civilians was a manifestation of the responsibility-to-protect doctrine. To the extent this assessment is accurate, it underscores the political nature of the doctrine. The use of force was authorized by a vote of the Security Council, a vote that was enabled through a careful alignment of political factors, including Gaddafi's lack of allies in the Arab world. There is little indication that the response by the international community gave legal content to the responsibility-to-protect concept, except perhaps as a conceptual umbrella for independently existing obligations under human rights and humanitarian law.<sup>90</sup>

More controversial has been the way in which force was used by the intervening States and regional organizations. In particular, the international community's support for the mandate began to erode in the wake of concerns that NATO was exceeding the authorization granted by the Security Council in Resolution 1973.

The Security Council's grant of authority to use force to "protect civilians and civilian populated areas" seemed to sweep more broadly than the more limited establishment of "safe areas" called for by the Arab League. Presumably, the United Kingdom, France and the United States preferred not to have to go back to the Security Council again if an initial grant of authority proved inadequate. Nonetheless, the Security Council imposed limits on the authorization to use force, clearly envisioning a protective use of force. Thus, despite the breadth of the mandate, it would not seem to encompass regime change.<sup>91</sup>

Key to assessing the scope of the mandate is the interpretation of the term "civilian." To interpret this term in light of existing rules of international law,<sup>92</sup> one would naturally turn to the law of armed conflict. As the mandate was formulated against the backdrop of the internal armed conflict in Libya, the relevant body of law would be the law of non-international armed conflict.

There are divergent opinions as to the meaning of the term "civilian" in non-international armed conflict. Some authorities take the position that as civilians

are traditionally defined as those who are not combatants, and as there are, strictly speaking, no combatants in non-international armed conflict, then all individuals in a non-international armed conflict are civilians. This would arguably even include Gaddafi himself, as well as the members of his security forces. On this interpretation, only purely defensive uses of force would be permissible, as any offensive use of force would necessarily target those who are to be protected.

Others reject such a broad application of the term “civilian,” contending that those who take part in the hostilities are effectively combatants, styling them as unlawful combatants or unprivileged belligerents. This would include Qaddafi’s security forces, rebel soldiers and, depending upon the breadth of interpretation, any other individual taking part in the hostilities. On this interpretation, protection of these individuals would fall outside the mandate. Noteworthy in this context is that the United States government over the past decade has advanced a relatively narrow conception of civilian status, excluding those taking part in the hostilities or even providing material support to the belligerents. In the present context, such interpretations narrow its authority to use force.

A further wrinkle is introduced by use of the term “civilian populated areas under threat of attack.” Use of this phrase could expand the mandate to include protection of all places where civilians reside. In particular, it could be read to include within the mandate the use of force to protect all parts of Libya. Of course, it would also then apply to towns where Gaddafi loyalists resided.

Once the tide turned against Gaddafi and the rebels began to launch offensives against loyalist strongholds, the legality of continued NATO bombing in support of the rebels became questionable. Particularly difficult to justify under the mandate would be the NATO attacks against retreating convoys. While some have reasoned that protection of civilians in Libya necessitated regime change, and that dislodging Gaddafi from power was a justified means of fulfilling the mandate, such reasoning renders the limitations expressly set forth in Resolution 1973 almost meaningless.

If NATO’s use of force exceeded the scope of the 1973 authorization, would that then constitute the crime of aggression within the definition for that crime adopted at the 2010 Review Conference of the International Criminal Court? The aggression amendment adopted at the Review Conference defines aggression as

the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.<sup>93</sup>



The phrase “act of aggression” is then defined by reference to General Assembly Resolution 3314.<sup>94</sup> That resolution does not expressly refer to uses of force in excess of Security Council authorization. Nonetheless, it does provide an analogous category of conduct. It includes as an act of aggression “[t]he use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement.”<sup>95</sup> Thus, to the extent the definition of aggression includes *ultra vires* uses of force, it could be argued that certain offensive aspects of the NATO bombing campaign qualify as acts of aggression.

The definition of the *crime* of aggression under the ICC Statute, however, is somewhat narrower. In particular, the act of aggression would have to “by its character, gravity and scale, constitute[] a manifest violation of the Charter of the United Nations.” Given the divergent interpretations of the mandate, it would be difficult to conclude that any violation was “manifest,” or objectively evident.<sup>96</sup>

In any event, NATO’s broad interpretation of the mandate seems to have set back the responsibility-to-protect doctrine as a political matter. Russia and China, States that have traditionally advocated robust interpretations of the non-intervention principle but were persuaded to acquiesce in the 1973 mandate, have since voted against even the mildest measures in relation to the situation in Syria.<sup>97</sup>

### ICC Referral Issues

The ICC referral also raises a number of significant legal issues, including the applicability of head of State immunity and the principle of non-retroactive application of criminal law (or *nullum crimen sine lege*).

The Security Council referral was a necessary precondition to the exercise of ICC jurisdiction in this case because Libya is not a party to the ICC Statute.<sup>98</sup> Libya’s non-party status is also relevant to the issues of head of State immunity and the application of *nullum crimen sine lege*.

As noted above, an ICC pretrial chamber issued an arrest warrant for Gaddafi in June 2011. As an incumbent head of State, Gaddafi was entitled to absolute immunity from foreign legal process under customary international law. Although Gaddafi’s death rendered the issue moot, the question remains whether the issuance of the arrest warrant was a violation of international law, and if so, which entity, if any, bore responsibility for the violation.

The ICC has established for itself the lawfulness of issuing arrest warrants for sitting heads of State by reference to its own Statute. The Statute provides that “[i]mmunities or special procedural rules which may attach to the official capacity

of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.”<sup>99</sup> Thus, those States that are parties to the treaty have effectively waived immunity claims. This is not true for States that are not parties to the treaty.<sup>100</sup> Nonetheless, in its decision authorizing the issuance of an arrest warrant for Sudanese President Omar Al Bashir, an ICC pretrial chamber found that the abrogation of immunity provided in the ICC Statute applied equally vis-à-vis the territorial States of situations referred to the Court by the Security Council irrespective of whether or not that State is a party to the ICC Statute.<sup>101</sup> It remains unresolved whether this decision is consistent with customary international law.

It may be argued that Security Council Resolution 1970, in deciding that “the Libyan authorities shall cooperate fully” with the Court, effectively abrogated any immunities. However, it is also arguable that any derogation of existing customary international law would have to be expressly stipulated.

In any event, even if the issuance of the arrest warrant conflicted with international law, it is unclear who would bear responsibility for the violation. Is the International Criminal Court a legal person bound by customary international law? Even if it is a legal person, and even if it violated customary international law, it remains unclear what remedy would be available to injured States or individuals.

Another issue related to Libya’s status as a non-State party to the Rome Statute revolves around the principle of *nullum crimen sine lege*. According to this principle, an individual may not be prosecuted for conduct that was not proscribed by applicable law at the time the conduct took place.<sup>102</sup> As Libya is not a party to the Rome Statute, the criminal prohibitions set forth therein did not form part of the law applicable to Libyan nationals acting on the territory of Libya. Nonetheless, at the time the Rome Statute was adopted, there was broad agreement that most of the crimes included in the Court’s subject matter jurisdiction had already acquired the status of customary law. It was also understood, however, that there was an element of progressive development in the Statute, particularly in relation to the war crimes provisions applicable in situations of non-international armed conflict.

Hardly a decade earlier, it was far from clear whether even the most serious violations of the law of non-international armed conflict would give rise to the individual criminal responsibility of the perpetrator in international law. By the mid-1990s, the International Criminal Tribunal for the former Yugoslavia had determined that serious violations of Common Article 3 of the 1949 Geneva Conventions were war crimes giving rise to individual criminal responsibility.<sup>103</sup> The Tribunal’s pronouncements were not met with any significant opposition from States. By the time of the Rome Statute’s adoption in the summer of 1998, it was



already well accepted among States that serious violations of Common Article 3 constituted war crimes. The Rome Statute, however, provides a much more extensive elaboration of war crimes in non-international armed conflict, going well beyond the provisions of Common Article 3. Thus, in considering war crimes charges against the suspects, the Court will have to carefully examine whether the crimes were well established in customary international law in early 2011.<sup>104</sup>

### Conclusion

In responding to the situation in Libya, the international community employed virtually every tool at its disposal, creating an unprecedented combination of force, embargoes, sanctions, and other legal and political mechanisms. The Human Rights Council convened a special session, issued a condemnation, established a commission of inquiry and ultimately sought the suspension of Libya's membership, which was effected by the General Assembly in a seminal exercise of its authority to do so. The UN Security Council, acting under Chapter VII of the UN Charter, imposed an arms embargo, a travel ban and an asset freeze. It also referred the situation to the ICC, which issued an arrest warrant for Muammar Gaddafi and two others for alleged crimes against humanity. Following the emergence of armed conflict in Libya, the Security Council authorized the use of force, which was initially carried out by a coalition of States, then taken over by NATO.

The combination of these tools in the Libyan context reveals the extent to which a number of important legal issues of human rights law, *jus in bello*, *jus ad bellum* and international criminal law are unresolved. Specifically, the availability and applicability of derogation from ICCPR obligations, absent notification to the Secretary-General, and in the context of a State-generated emergency situation need to be addressed, as does the application of international human rights law during times of international armed conflict, particularly in the context of aerial bombing campaigns. Also unresolved is the extent to which, if at all, NATO exceeded the scope of the Security Council's authorization of the use of force, and if so, whether the crime of aggression is thereby implicated. Additionally, it is uncertain if the ICC violated customary international law by issuing an arrest warrant for the head of State of a non-State party to the Rome Statute, who would be accountable if so, and whether the application of certain war crimes charges in this context would transgress the principle of *nullum crimen sine lege*.

Despite the significance of these questions, the political, ad hoc nature of the international community's response to the situation in Libya portends that many of these issues will likely remain unresolved for the foreseeable future.

*Notes*

1. U.N. Charter art. 2, para. 7.
2. *Id.*, arts. 51, 42, respectively.
3. The way in which force is employed within a State is regulated by other rules of international law that have evolved in the post-World War II era, including international human rights law and the law of non-international armed conflict.
4. See the ILC Articles on Diplomatic Protection, G.A. Res. 62/67, Annex, U.N. Doc. A/RES/62/67 (Dec. 6, 2007), which were commended to the attention of governments by the UN General Assembly in Resolution 65/27. G.A. Res. 65/27, U.N. Doc. A/RES/65/27 (Dec. 6, 2010).
5. Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.
6. John Cerone, *Much Ado about Non-State Actors*, 10 SAN DIEGO INTERNATIONAL LAW JOURNAL 335 (2009).
7. The qualifier “in the strict sense” is used to distinguish this body of law from the rules of international law regulating inter-State cooperation in criminal justice matters generally, such as suppression conventions and extradition treaties. Certain prohibitions, e.g., the prohibition of genocide, bind both the individual and the State, and also give rise to suppression obligations.
8. The scope of application of human rights treaties varies.
9. Article 2 of the International Covenant on Civil and Political Rights requires each State party to “respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant . . . .” International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, reprinted in 6 INTERNATIONAL LEGAL MATERIALS 368 (1967) [hereinafter ICCPR]. Libya did not enter any substantive reservations upon acceding to the ICCPR. It did, however, state that “[t]he acceptance and the accession to this Covenant by the Libyan Arab Republic shall in no way signify a recognition of Israel or be conducive to entry by the Libyan Arab Republic into such dealings with Israel as are regulated by the Covenant.” International Covenant on Civil and Political Rights, United Nations Treaty Collection, [http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&lang=en](http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en) (then follow Libya hyperlink) (last visited Jan. 31, 2012).
10. Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 302.
11. International Covenant on Economic, Social and Cultural Rights, Jan. 3, 1976, 993 U.N.T.S. 3.
12. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.
13. International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195.
14. Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13.
15. African Charter on Human and Peoples’ Rights, June 27, 1981, O.A.U. Doc. CAB/LEG/67/3 Rev.5, 1520 U.N.T.S. 217.
16. The Human Rights Committee has opined that certain of these rights may become non-derogable when linked to a non-derogable right, such as the right to life. See U.N. Human Rights



Committee, General Comment No. 29, States of Emergency (Article 4), U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001) [hereinafter General Comment No. 29].

17. ICCPR, *supra* note 9, art. 4(3).

18. Libya entered very few reservations when expressing consent to be bound by the human rights treaties to which it is a party.

19. In this context, it is important to recall the *erga omnes* nature of at least the most fundamental obligations under international human rights law. See Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain), 1970 I.C.J. 3 (Feb. 5). See also Articles on the Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83, art. 48, U.N. Doc. A/RES/56/83 (Jan. 28, 2002).

20. ICCPR, *supra* note 9, art. 4.

21. See Salgar de Montejó v. Colombia, Communication No. 64/79, ¶ 10.3, U.N. Doc. CCPR/C/15/D/64/1979 (1982).

22. General Comment No. 29, *supra* note 14.

23. In 2005 the UN General Assembly declared its readiness to take collective action when States fail in their responsibilities. See STEPHEN MCCAFFREY, DINAH SHELTON & JOHN CERONE, PUBLIC INTERNATIONAL LAW: CASES, PROBLEMS, AND TEXTS 1294 (2010).

24. Human Rights Council Res. S-15/1, ¶ 1, U.N. Doc. A/HRC/S-15-1 (Feb. 25, 2011) [hereinafter Resolution S-15/1]. Under the Rome Statute of the International Criminal Court, a crime against humanity is defined as one of a list of enumerated inhumane acts “committed as part of a widespread or systematic attack directed against any civilian population,” where the attack is “pursuant to or in furtherance of a State or organizational policy to commit such attack.” Rome Statute of the International Criminal Court art. 7, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter ICC Statute].

25. Resolution S-15/1, *supra* note 24, ¶ 2. As noted above, under the ICCPR the obligation to respect these rights is derogable. However, the Council points out that abuses are being committed against “peaceful” demonstrators.

26. *Id.*

27. *Id.*, ¶ 6.

28. *Id.*, ¶ 7.

29. *Id.*, ¶ 9.

30. *Id.*, ¶ 11.

31. *Id.*, ¶ 14. The resolution references the General Assembly resolution that created the Human Rights Council. G.A. Res. 60/251, ¶ 8, U.N. Doc. A/RES/60/251 (Apr. 3, 2006). Paragraph 8 provides that “the General Assembly, by a two-thirds majority of the members present and voting, may suspend the rights of membership in the Council of a member of the Council that commits gross and systematic violations of human rights.”

32. S.C. Res. 1970, U.N. Doc. S/RES/1970 (Feb. 26, 2011).

33. Because Libya is not a State party to the ICC Statute and has not otherwise consented to ICC jurisdiction, the Security Council referral was necessary to satisfy the legal preconditions to the exercise of the Court’s jurisdiction over the situation in Libya.

34. S.C. Res. 1970, *supra* note 32, pmbl. para. 2.

35. *Id.*, pmbl. para. 3.

36. International humanitarian law is the international law of armed conflict. However, it is possible that “international humanitarian law” is being used in a broader sense. This phrase is sometimes used to include the prohibitions of genocide and crimes against humanity, both of which may be committed in peacetime.

37. S.C. Res. 1970, *supra* note 32, pmbl. para. 9.

38. *Id.*, pmbl. para. 11.
39. *Id.*, pmbl. para. 12. Security Council referral of an ICC prosecution could be stopped by the veto of any permanent member. A continuing deferral would require the continued support of all five permanent members.
40. *Id.*, ¶ 1.
41. *Id.*, ¶ 2(a). The reference to both international human rights law and international humanitarian law may indicate the Security Council's position that these two bodies of law apply simultaneously to situations of internal armed conflict. But see note 36 *supra*.
42. *Id.*, ¶ 2(d).
43. Press Release, U.N. Security Council, In Swift, Decisive Action, Security Council Imposes Tough Measures on Libyan Regime, Adopting Resolution 1970 in Wake of Crackdown on Protesters (Feb. 26, 2011), *available at* <http://www.un.org/News/Press/docs/2011/sc10187.doc.htm>.
44. S.C. Res. 1970, *supra* note 32, ¶ 6.
45. G.A. Res. 65/265, U.N. Doc. A/RES/65/265 (Mar. 1, 2011).
46. Statement, Prosecutor of the International Criminal Court, Opening of the Investigation into the Situation in Libya (Mar. 3, 2011), [http://www.icc-cpi.int/NR/rdonlyres/035C3801-5C8D-4ABC-876B-C7D946B51F22/283045/StatementLibya\\_03032011.pdf](http://www.icc-cpi.int/NR/rdonlyres/035C3801-5C8D-4ABC-876B-C7D946B51F22/283045/StatementLibya_03032011.pdf).
47. The standard for determination that the violence had reached a level such that it could be labeled "armed conflict" was addressed in *Prosecutor v. Tadić*, Case No. IT-94-1, Appeals Chamber Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) [hereinafter *Tadić*] ("we find that an armed conflict exists whenever there is . . . protracted armed violence between governmental authorities and organized armed groups").
48. Arab League, Res. No. 7360, The Outcome of the Council of the League of Arab States Meeting at the Ministerial Level on the Implications of the Current Events in Libya and the Arab Position (Mar. 12, 2011), *available at* <http://responsibilitytoprotect.org/Arab%20League%20Ministerial%20level%20statement%2012%20march%202011%20-%20english.pdf>.
49. *Id.*, pmbl. para. 6.
50. *Id.*, pmbl. para. 7.
51. *Id.*, ¶ 1.
52. S.C. Res. 1973, ¶ 4, U.N. Doc. S/RES/1973 (Mar. 17, 2011).
53. This attitude is further reflected in the votes of China and Russia during the subsequent special session of the Human Rights Council (HRC) on Syria. Both of these HRC members voted against the resolution adopted at that special session. In October 2011, they vetoed a draft Security Council resolution that would have contemplated measures being taken against Syria if it continued its heavy-handed response to protest movements.
54. Press Release, U.N. Security Council, Security Council Approves "No-Fly Zone" over Libya, Authorizing "All Necessary Measures" to Protect Civilians, by Vote of 10 in Favour with 5 Abstentions (Mar. 17, 2011), *available at* <http://www.un.org/News/Press/docs/2011/sc10200.doc.htm>.
55. S.C. Res. 1973, *supra* note 52, ¶ 1.
56. *Id.*, ¶ 3.
57. *Id.*, ¶ 4. Again, there is some ambiguity in the use of the terms "civilian" and "civilian populated area." Would this, for example, include civilians who directly participate in the hostilities? To what extent would individuals cease to be "civilians" for this purpose if they had a continuous combat function?
58. *Id.*



59. *Id.* This exclusion of military occupation, however, would not preclude the use of ground troops. It would preclude their establishment of authority over territory.

60. *Id.*, ¶¶ 6–8.

61. *Id.*, ¶ 20. This issue had become acute as States had become divided over whether to recognize the rebel authorities as the legitimate government of Libya.

62. Note that this provision is not limited to UN member States.

63. While some have suggested that the *jus in bello* does not apply to UN-authorized uses of armed force, this would contravene the basic principle that application of the *jus in bello* is independent of the *jus ad bellum* and does not reflect the majority position.

64. Ian Traynor & Julian Borger, *Military Mission: Nato Agrees to Take Over Air Campaign against Gaddafi*, THE GUARDIAN (London), Mar. 28, 2011, at 5.

65. In the Matter of African Commission on Human and Peoples' Rights v. Great Socialist People's Libyan Arab Jamahiriya, App. No. 004/2011, Provisional Measures, Afr. Ct. Hum. & Peoples' Rts. (Mar. 25, 2011), available at <http://www.unhcr.org/refworld/pdfid/4da59c082.pdf>.

66. *Id.*, ¶ 10.

67. *Id.*, ¶ 22.

68. *Id.*, ¶ 23.

69. *Id.*, ¶ 25.

70. See, e.g., Yevgeny Shestakov, *Play by the Rules, Says Lavrov*, DAILY TELEGRAPH (London), Apr. 19, 2011, at 1 (“Russia reiterated its stance that the western alliance’s Libya campaign has overstepped its UN mandate through use of excessive force.”).

71. Office of the Prosecutor, International Criminal Court, First Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1970 (2011) (May 4, 2011), available at <http://www.icc-cpi.int/NR/rdonlyres/A077E5F8-29B6-4A78-9EAB-A179A105738E/0/UNSCLibyaReportEng04052011.pdf>.

72. *Id.*, ¶ 11.

73. *Id.*, ¶ 12.

74. *Id.*, ¶ 14.

75. *Id.*, ¶ 16.

76. *Id.*, ¶ 21.

77. *Id.*, ¶ 31.

78. *Id.*, ¶ 34.

79. *Id.*, ¶ 36. The report also refers to abuses committed against “prisoners of war.” *Id.*, ¶¶ 36, 38. To the extent this refers to Libyan detainees, or nationals of States not parties to the armed conflict in Libya, in the hands of the then Libyan government or rebels, the term “prisoners of war” is presumably used in a non-technical sense (e.g., as a way to refer to detained individuals who had been engaged in the hostilities), as this status does not exist in non-international armed conflict.

80. Report of the International Commission of Inquiry to Investigate All Alleged Violations of International Human Rights Law in the Libyan Arab Jamahiriya, U.N. Doc. A/HRC/17/44 (June 1, 2011), available at [http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.44\\_AUV.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.44_AUV.pdf).

81. See *supra* text accompanying note 21.

82. ICCPR, *supra* note 9, art. 4(3).

83. See Adrien Mundy Buyso et al. v. Democratic Republic of the Congo, Communication No. 933/2000, ¶ 5.2, U.N. Doc. CCPR/C/78/D/933/2000 (2003).

84. Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993.

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85. See, e.g., *Armed Activities on the Territory of the Congo* (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 116, ¶ 216 (Dec. 19); see also John Cerone, *Jurisdiction and Power: The Intersection of Human Rights Law & the Law of Non-international Armed Conflict in an Extraterritorial Context*, 40 ISRAEL LAW REVIEW 396 (2007).

86. Françoise J. Hampson, *Direct Participation in Hostilities and the Interoperability of the Law of Armed Conflict and Human Rights Law*, in *INTERNATIONAL LAW AND THE CHANGING CHARACTER OF WAR* 187, 188 (Raul A. “Pete” Pedrozo & Daria P. Wollschlaeger eds., 2011) (Vol. 87, U.S. Naval War College International Law Studies) (citing the United States and Israel); see also U.S. Department of State, Second and Third Periodic Report of the United States of America to the UN Committee on Human Rights Concerning the International Covenant on Civil and Political Rights ¶ 130 (Oct. 21, 2005), available at <http://www.state.gov/j/drl/rls/55504.htm>.

87. It may be that this position simply reduces to rejection of extraterritorial application of human rights treaties, though the United States maintains that that is a separate and independent ground for non-application of human rights treaties.

88. Cerone, *supra* note 85, at 446.

89. *Id.*

90. While Security Council Resolutions 1970 and 1973 both refer to the “responsibility to protect,” this phrase is used to refer to Libya’s responsibility to protect its own population. This obligation clearly exists under the very broad spectrum of obligations under human rights and humanitarian law applicable to Libya.

91. See also *Authority to Use Military Force in Libya*, 35 Opinions of the Office of Legal Counsel of the Department of Justice (Apr. 1, 2011), available at <http://www.justice.gov/olc/2011/authority-military-use-in-libya.pdf>. In a footnote, the opinion states, “Although President Obama has expressed opposition to Qadhafi’s continued leadership of Libya, we understand that regime change is not an objective of the coalition’s military operations.” It then quotes Obama’s March 28, 2011 public address: “Of course, there is no question that Libya—and the world—would be better off with Qaddafi out of power. I . . . will actively pursue [that goal] through non-military means. But broadening our military mission to include regime change would be a mistake.” *Id.* at 10 n.3.

92. Vienna Convention on the Law of Treaties art. 31(3)(c), May 23, 1969, 1155 U.N.T.S. 331 [hereinafter *Vienna Convention*].

93. Review Conference of the Rome Statute, 13th plenary meeting, June 11, 2010, I.C.C. Doc. RC/Res.6, Annex I, art. 8bis(1). The Court’s jurisdiction over the crime of aggression is not yet operative.

94. G.A. Res. 3314, U.N. Doc. A/RES/3314 (Dec. 14, 1974).

95. *Id.*, art. 3(e).

96. See Article 46(2) of the Vienna Convention, *supra* note 92, for an indication of the meaning of the term “manifest.”

97. Russia and China voted against the resolutions at both of the Human Rights Council’s special sessions on Syria. They also vetoed a draft Security Council resolution that merely suggested the possibility of future sanctions.

98. The Court may also exercise jurisdiction over a case if it has the consent of the State of nationality of the alleged perpetrator or of the territory in which the crime occurred, even if these States are not parties to the Rome Statute. See ICC Statute, *supra* note 24, art. 12(3). As the crimes concerned were allegedly perpetrated by Libyans on Libyan territory, and as the consent of the Libyan government was not forthcoming at the relevant time, Security Council referral was the only means by which the Court could exercise its jurisdiction.



99. *Id.*, art. 27.

100. Vienna Convention, *supra* note 92, art. 34.

101. Prosecutor v. Al Bashir, No. ICC-02/05-01/09-3, Decision on the Prosecutor's Application for a Warrant of Arrest Against Omar Hassan Ahmed Al Bashir (Mar. 4, 2009).

102. The ICC Statute, *supra* note 24, incorporates a variation of this principle in Article 22, which states, "A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court."

103. *Tadić*, *supra* note 47, ¶¶ 131–34.

104. Crimes against humanity charges are less controversial. Crimes against humanity have been established rules of customary international law at least since 1946, when the Nuremberg Principles were unanimously affirmed by the UN General Assembly. See G.A. Res. 95(I), U.N. Doc. A/RES/95(I) (Dec. 11, 1946). In addition, the ICC Statute sets a higher bar for crimes against humanity than customary international law, at least as formulated by the ad hoc tribunals for the former Yugoslavia and Rwanda. The ICC Statute requires as a contextual element for crimes against humanity that the attack be "pursuant to or in furtherance of a State or organizational policy to commit such attack." ICC Statute, *supra* note 24, art. 7(2)(a). The Appeals Chamber of the International Criminal Tribunals for the former Yugoslavia and Rwanda has held that there is no such policy requirement under customary law. As the Rome Statute definition sets a higher bar than customary law, thus capturing a narrower category of conduct, the *nullum crimen* principle is not offended, at least with respect to these contextual elements.