

EXPANDING THE R2P TOOL-KIT: NEW POLITICAL POSSIBILITIES AND ATTENDANT LEGAL UNCERTAINTIES

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|------|--|-----|
| I. | APPLICABLE LAW | 533 |
| A. | <i>Non-intervention</i> | 533 |
| B. | <i>The Use of Force/Jus ad Bellum</i> | 533 |
| C. | <i>The Law of State Responsibility for Injury to Aliens</i> | 534 |
| D. | <i>The Law of Armed Conflict/Jus in Bello/International Humanitarian Law (IHL)</i> | 534 |
| E. | <i>International Criminal Law in the Strict Sense</i> | 535 |
| F. | <i>International Human Rights Law</i> | 535 |
| II. | PHASES OF THE CONFLICT, AND MODES OF INTERNATIONAL ENFORCEMENT | 537 |
| A. | <i>Prior to the February Unrest</i> | 537 |
| B. | <i>February Unrest</i> | 537 |
| C. | <i>February 25</i> | 538 |
| D. | <i>February 26</i> | 541 |
| E. | <i>March 1</i> | 543 |
| F. | <i>March 3</i> | 543 |
| G. | <i>Early March</i> | 544 |
| H. | <i>March 12</i> | 544 |
| I. | <i>March 17</i> | 545 |
| J. | <i>March 19</i> | 547 |
| K. | <i>March 25</i> | 548 |
| L. | <i>Mid-April</i> | 549 |
| M. | <i>May 4</i> | 549 |
| N. | <i>June 1</i> | 551 |
| O. | <i>June 27</i> | 552 |
| III. | UNRESOLVED LEGAL ISSUES..... | 552 |
| A. | <i>Derogation Under the ICCPR</i> | 552 |
| B. | <i>Application of International Human Rights Law during Armed Conflict</i> | 555 |
| C. | <i>Use of Force Issues</i> | 557 |
| D. | <i>ICC Referral Issues</i> | 560 |
| IV. | CONCLUSION | 563 |

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The international community has begun to live up to its name. Dramatic legal and political developments of the past fifty years have greatly expanded the array of tools available for responding to grave human rights situations internal to members of the community, and have manifested an increased willingness to deploy those tools to further the human rights values of the community. The results of these legal and political developments were demonstrated in the international community's response to the situation in Libya.

In 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.¹ The situation rapidly escalated as the government sought to forcibly suppress the demonstrations. By early March the situation had deteriorated into an armed conflict.²

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.³ The United Nations (U.N.) 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.⁴

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.

1. Middle East and North Africa in turmoil, *The Washington Post*, July 13, 2011; Ian Black & Owen Bowcott, *Libya Protests: Massacres Reported as Gaddafi Imposes Nes Blackout*, *THE GUARDIAN*, Feb. 18, 2011, available at <http://www.guardian.co.uk/world/2011/feb/18/libya-protests-massacres-reported> (last visited Mar. 18, 2012).

2. *Libya crisis: Rebellion or civil war?*, *BBC NEWS*, March 10, 2011; McGreal, Chris et al., *Allied Strikes Sweep Libya as West Intervenes in Conflict*, *THE GUARDIAN*, Mar. 19, 2011, available at <http://www.guardian.co.uk/world/2011/mar/19/libya-air-strikes-gaddafi-france> (last visited Mar. 18, 2011).

3. *Id.*

4. S.C. Res. 1973, U.N. Doc. S/RES/1973 (Mar. 17, 2011). See also Jordana Horn, *U.N. Security Council Authorizes Military Strikes on Libya*, *THE JERUSALEM POST*, Mar. 18, 2011, available at <http://www.jpost.com/VideoArticles/Video/Article.aspx?id=212699> (last visited Mar. 18, 2011).

I. APPLICABLE LAW

A. *Non-intervention*

One of the founding 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 U.N. Charter, in “matters which are essentially within the domestic jurisdiction” of other states.⁵ 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 U.N. Charter system.

In light of the human rights provisions of the U.N. Charter and the practice of Charter bodies, it is now generally accepted that serious human rights abuses, even if committed purely internally (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 within a state, 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.

B. *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 U.N. 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.”⁶ The two established exceptions to this prohibition are valid exercises of the right of self-defense and enforcement action taken in accordance with U.N. Security Council authorization.⁷ These international rules on the use of

5. U.N. Charter art. 2, para. 7.

6. *Id.*

7. *Id.* art. 42 & 51.

force apply only between states.⁸ Thus, the prohibition on the use of force does not apply internally to a state.⁹

C. *The Law of State Responsibility for Injury to Aliens*

The Law of State Responsibility for Injury to Aliens 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.¹⁰

D. *The Law of Armed Conflict/Jus in Bello/International Humanitarian Law (IHL)*

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.¹¹ Prior to World War II the *jus in bello*, in general, applied only to interstate armed conflicts.¹² Starting with the Geneva Conventions of 1949 it also began to regulate non-international armed conflicts, including purely internal armed conflicts.¹³ With the advent of international legal regulation of non-international armed conflict came the direct applicability of IHL to non-state, organized, and armed groups.¹⁴ While international law still provides more extensive regulation of interstate armed conflicts than of non-interstate armed conflicts, the extent of difference has diminished.¹⁵

8. *Id.*

9. *Id.* 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.

10. See the International Law Commission's Articles on Diplomatic Protection, commended to the attention of governments by the U.N. General Assembly in its resolution 65/27 of 6 December 2010.

11. See, e.g., art. 2 of the Fourth Hague Convention of 1907; common article 2 of the Geneva Conventions of 1949.

12. See art.2 of the Fourth Hague Convention of 1907.

13. See common art. 3 of the Geneva Conventions of 1949.

14. J. Cerone, *Much Ado About Non-State Actors: The Vanishing Relevance of State Affiliation in International Criminal Law*, 10 San Diego Int'l L.J. 335 (2009).

15. J. Cerone, *Holding Military and Paramilitary Forces Accountable, Human Rights and Conflict*, US Institute of Peace (2006) at 226.

*E. International Criminal Law in the Strict Sense*¹⁶

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. 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.¹⁷ 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.¹⁸

F. International Human Rights Law

International human rights law, in general,¹⁹ regulates the way a state treats individuals under its control by requiring states to respect and ensure certain fundamental rights of the human person. 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

16. International Criminal Law in the strict sense refers to rules of international law, the breach of which gives rise to individual criminal responsibility. The qualifier "in the strict sense" is used to distinguish this body of law from the rules of international law regulating interstate cooperation in criminal justice matters generally, such as suppression conventions and extradition treaties. Certain prohibitions, for example the prohibition of genocide, bind both the individual and the state, and also give rise to suppression obligations.

17. Article 5, ICC Statute.

18. Genocide and most war crimes and crimes against humanity are prohibited by customary international law. See generally ICTY, *Tadic Appeal Decision*, 2 October 1995, and subsequent ICTY jurisprudence.

19. The scope of application of human rights treaties varies. Article 2 of the International Covenant on Civil and Political Rights requires states parties 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, G.A. Res. 2200A (XXI), 21 U.N. GAOR, Supp. No. 16, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, 6 I.L.M. 368 (1967) [hereinafter ICCPR].

Rights (ICCPR)²⁰ and its first optional protocol; the International Covenant on Economic, Social, & Cultural Rights;²¹ the Convention on the Rights of the Child;²² the Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Elimination of All Forms of Discrimination Against Women;²³ and the African Charter on Human and Peoples' Rights (ACHPR or "African Charter").²⁴

The ICCPR is subject to derogation. Under Article 4 of the ICCPR, States' 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, freedom of movement, freedom from arbitrary detention, and the right to a fair trial.²⁵ States must officially proclaim a state of emergency and must notify other States through the intermediary of the U.N. Secretary General.²⁶ According to available U.N. records, at no time during the 2011 unrest did Libya lodge a notice of derogation with the Secretary General.

20. 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." Comment by Libyan Arab Jamahiriya to the U.N. Committee on Economic, Social and Cultural Rights, deposited with the U.N. Secretary-General at n.22, ch. IV.3, in *Multilateral Treaties (1976)*, available at http://www.bayefsky.com/pdf/libya_t2_cescr.pdf (last visited Mar. 7, 2012).

21. International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), (Dec. 16, 1966), available at <http://www2.ohchr.org/english/law/pdf/cescr.pdf> (last visited Mar. 12, 2012).

22. Convention on the Rights of the Child, G.A. Res. 44/25 (Sept. 2, 1980) available at <http://www2.ohchr.org/english/law/pdf/crc.pdf> (last visited Mar. 12, 2012).

23. Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. A/RES/54/4 (Oct. 15, 1999), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N99/774/73/PDF/N9977473.pdf?OpenElement> (last visited Mar. 12, 2012).

24. African Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (Oct. 21, 1986), available at <http://www1.umn.edu/humanrts/instrree/z1afchar.htm> (last visited Mar. 12, 2012).

25. 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 (HRC), CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001), available at <http://www.UNhcr.org/refworld/docid/453883fd1f.html> (last visited Mar. 12, 2012) [hereinafter HRC General Comment No. 29].

26. ICCPR, art. 4(3).

II. PHASES OF THE CONFLICT, AND MODES OF INTERNATIONAL ENFORCEMENT

A. *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. 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.²⁷ 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).²⁸ Libya and individuals within Libya were also under an obligation to refrain from committing the international crimes of genocide and crimes against humanity.²⁹ Other states, in their relations with Libya, were bound by the prohibition on the use of force and the principle of non-intervention.³⁰ 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.³¹

B. *February Unrest*

By mid-February a series of protests broke out across Libya.³² Once the unrest in Libya reached the point of a "public emergency which threaten[ed] the life of the nation," Libya was permitted to derogate from some of its obligations under the ICCPR to the extent "strictly required by the exigencies of the situation."³³ This would permit the Libyan government a freer hand in arrest and detention matters, as well as in

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

28. See generally, *supra*, notes 24–27.

29. See *supra* note 18.

30. U.N. Charter, art. 2.

31. 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 & Power Co., Ltd. (Belgium v. Spain)*, Judgment, I.C.J. Reports 1964 (July 24, 1964). See also the ILC's Articles on the Responsibility of States for Internationally Wrongful Acts, Int'l Law Comm'n, art. 48, adopted in G.A. Res. 56/83, U.N. Doc. A/RES/56/83 (Jan. 28, 2002).

32. *Middle East and North Africa in Turmoil*, WASHINGTON POST WORLD (updated July 13, 2011) available at <http://www.washingtonpost.com/wp-srv/special/world/middle-east-protests/> (last visited Mar. 12, 2012).

33. ICCPR, *supra* note 32, art. 4.

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.³⁴ Nonetheless, there is some authority to suggest that the failure to notify does not of itself preclude the lawfulness of derogation.³⁵ 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.³⁶

In any event, reports soon emerged of violations of even non-derogable rights, such as the right to life and freedom from torture.³⁷ 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.³⁸ Notwithstanding these violations, at this stage, recognition of any entity other than the Gaddafi regime as the government of Libya would likely still constitute a prohibited intervention in the internal affairs of Libya. 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 remains precluded absent Security Council authorization.³⁹ The use of force could not be justified on the basis of collective self-defense since the protesters, as non-state actors, have no international legal right of self-defense under the *jus ad bellum*.

C. February 25

U.N. Human Rights Council Special Session: One of the first organizations to adopt operative measures was the United Nations Human

34. See Status of Multilateral Treaties Deposited with the United Nations.

35. See *Consuelo Salgar de Montejo v. Colombia*, Comm'n No. R.15/64, ICCPR, U.N. Doc. Supp. No. 40 (A/37/40) at 168, ¶ 10.3 (Mar. 24, 1982).

36. See generally HRC General Comment No. 29, *supra* note 39.

37. See e.g. *U.N. Investigator Opens Libya Torture Probe*, CBCNEWS, Mar. 9, 2011, available at <http://www.cbc.ca/news/world/story/2011/03/09/libya-torture-030911.html> (last visited March 12, 2011).

38. See Hum. Rts.Council Res. S-15/1, ¶ 14; see also Report of the International Commission of Inquiry to investigate all alleged violations of international human rights law in the Libyan Arab Jamahiriya, June 1, 2011, available at http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.44_AUV.pdf (last visited May 14, 2012).

39. In 2005, the U.N. General Assembly affirmed the responsibility of states to protect their populations from core international crimes, and asserted that the international community shares in this responsibility. The General Assembly declared its readiness to take collective action where states fail in their responsibilities. See McCaffrey, Shelton, and Cerone, *Public International Law: Cases, Problems, and Texts*, Lexis-Nexis (2010) at 1294.

Rights Council. On February 25, 2011, the Council convened a Special Session on the “[s]ituation of human rights in the Libyan Arab Jamahiriya.”⁴⁰ This was the 15th Special Session of the Council since its creation in 2006. One of the advances of the Council over its predecessor, the U.N. 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.⁴¹

Several other factors contributed to the convening of this Special Session. Libya was at the time a member of the Human Rights Council.⁴² Furthermore, as noted above, Libya is a party to a number of international human rights treaties.⁴³ There was, thus, a clear legal basis for invoking Libya’s international responsibility. In addition, the Ambassador of Libya to the U.N. Human Rights Council had by this time ceased to support the Gaddafi government and supported the convening of the Special Session.⁴⁴

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.⁴⁵

After recalling official statements on the situation made by other U.N. 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.⁴⁶ It also “strongly call[ed] upon”

40. Report of the Human Rights Council on its Fifteenth Special Session, Doc. No. A/HRC/S-15/1 (Feb. 25, 2011), available at http://www2.ohchr.org/english/bodies/hrcouncil/docs/15session/HRC-S-15-1_AUV.pdf (last visited Mar. 12, 2011) [hereinafter *Report of the Human Rights Council*].

41. G.A. Res. 60/251, ¶ 10, U.N. Doc. A/RES/60/251 (Mar. 15, 2006).

42. See generally U.N. Human Rights Council, Membership of the Human Rights Council, available at <http://www2.ohchr.org/english/bodies/hrcouncil/membership.htm> (last visited Mar. 12, 2011).

43. See generally, *supra*, notes 24–27.

44. “Human Rights Council passes resolution on Libya in Special Session—Delegation of Libya addresses the Council, saying the will of the people is invincible,” U.N. Human Rights Council Press Meeting Summary, February 25, 2011.

45. Report of the Human Rights Council, *supra* note 42, at 3.

46. S.C. Res. 1973, U.N. Doc. S/RES/1973, at 1 (Mar. 17, 2011) [hereinafter *Resolution 1973*]. 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, U.N. Press Release SC/10200, ¶ 1 (Mar. 17, 2011), available at <http://www.UN.org/News/Press/docs/2011/sc10200.doc.htm> (last visited Mar. 6, 2012) [hereinafter U.N. Press Release]. 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

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,⁴⁷ and to stop any attacks against civilians.⁴⁸

The Human Rights Council urged the Libyan government to “respect the popular will, aspirations and demands of its people and to do their utmost efforts to prevent further deterioration of the crisis.”⁴⁹ The Council also stressed the need to hold accountable “those responsible for attacks in Libya, including by forces under government control, on civilians.”⁵⁰ 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.”⁵¹

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 identify those responsible.”⁵² Its express purpose was to ensure “that those individuals responsible are held accountable.”⁵³

Finally, the Council recommended to its parent body, the U.N. 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.”⁵⁴

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” art. 7, July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002) [hereinafter ICC Statute].

47. As noted above, under the ICCPR the obligation to respect these rights is derogable. At the same time, the Council points out that abuses are being committed against “peaceful” demonstrators. See U.N. Press Release, *supra* note 71, at 6.

48. *Id.*

49. G.A. Res. S-15/1, U.N. Doc. A/HRC/RES/S-15/1, ¶ 6 (Feb. 25, 2011) [hereinafter *Human Rights Council Resolution*].

50. *Id.* ¶ 7.

51. *Id.* ¶ 9.

52. *Id.* ¶ 11.

53. *Id.*

54. Human Rights Council Resolution, *supra* note 74, ¶ 14 (referencing OP 8 of the General Assembly resolution that created the Human Rights Council, G.A. Res. 60/251, ¶ 8, U.N. Doc. A/RES/60/251 (Mar. 15, 2006)). This OP 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.”

D. February 26

U.N. Security Council Emergency Meeting: On February 26, the day after the Special Session of the Human Rights Council, the U.N. Security Council convened an emergency meeting. The Security Council unanimously adopted Resolution 1970⁵⁵ under Chapter VII of the U.N. 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.⁵⁶ It also referred the situation in Libya to the International Criminal Court.⁵⁷ As with the Libyan ambassador to the Human Rights Council, the Ambassador of Libya to the U.N. in New York had ceased to support the Gaddafi government and spoke in support of the Security Council resolution.⁵⁸

The preambular paragraphs of the Security Council resolution refer to the “gross and systematic violations of human rights” taking place,⁵⁹ as well as serious violations of “international humanitarian law.”⁶⁰ The reference to “international humanitarian law” may indicate a perception that the situation in Libya had by this time evolved into an armed conflict.⁶¹ Mirroring language employed by the Human Rights Council, the Security Council also recalled “the Libyan authorities’ responsibility to protect its population,” evoking the “responsibility to protect” concept, and perhaps implying further consequences for continued failure to fulfill that responsibility.⁶²

The Security Council welcomed the work of the Human Rights Council and reiterated its call for accountability, emphasizing the

55. See generally S.C. Res. 1970, U.N. Doc. S/RES/1970 (Feb. 26, 2011) [hereinafter Resolution 1970].

56. *Id.*

57. As 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.

58. Swaine, Jon, *Libya’s U.N. Ambassador Denounces Gaddafi*, THE TELEGRAPH U.K., Feb. 25, 2011, available at <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/8349048/Libyas-UN-ambassador-denoUNCes-Gaddafi.html> (last visited Mar. 12, 2011).

59. Resolution 1970, *supra* note 57, at 1.

60. *Id.*

61. 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 peace time (or in situations otherwise not reaching the threshold of armed conflict).

62. Resolution 1970, *supra* note 57, at 2.

responsibility of superiors.⁶³ It then recalled the Security Council's own power to defer ICC prosecutions, perhaps telegraphing an incentive to cooperate.⁶⁴ Article 16 of the ICC Statute provides that the Security Council may defer an ICC prosecution for up to 12 months, with the possibility of renewal.⁶⁵

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.⁶⁶ It urges the Libyan authorities to comply with international human rights and humanitarian law,⁶⁷ to ensure the safety of foreign nationals, to ensure the safe passage of humanitarian supplies and workers, and to immediately lift restrictions on all forms of media.⁶⁸

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 had abstained in that vote.⁶⁹ China had also been a hold out for the Libya resolution, but was ultimately persuaded to vote in favor of the resolution.⁷⁰ The Chinese delegation indicated that it supported the resolution "taking into account the special circumstances in Libya."⁷¹

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

63. *Id.* at 1.

64. *Id.* at 2. Security Council deferral 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.

65. *Id.*

66. U.N. Press Release, *supra* note 71, ¶ 1.

67. 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 supra*, note 61.

68. *See generally* U.N. Press Release, *supra* note 71.

69. *See* voting record for S/RES/1593 (2005), available at <http://UNbisnet.UN.org:8080/ipac20/ipac.jsp?session=1D3670EJ33535.64569&profile=voting&uri=link=3100028~!165528~!3100029~!3100070&aspect=alpha&menu=search&ri=1&source=~!horizon&term=S%2FRES%2F1593%282005%29&index=Z791AZ> (last visited May 14, 2012).

70. Resolution 1973, *supra* note 48.

71. *See generally* 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> (last visited Mar. 7, 2012).

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.⁷²

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 expressed reservations about this provision.⁷³

The Resolution also provides that the ICC's expenses in this matter shall be borne by the ICC States and those states that wish to contribute voluntarily.⁷⁴ The Resolution also creates 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.⁷⁵

E. March 1

U.N. General Assembly suspends Libya's rights of membership in the Human Rights Council: Acting on the recommendation of the Human Rights Council, the U.N. General Assembly on March 1, 2011, in Resolution 65/265, suspended Libya's "rights of membership" in the Human Rights Council.⁷⁶ This was the first time the General Assembly had used its authority to do so.

F. 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 15.⁷⁷ In his

72. In Swift, Decisive Action, Security Council Imposes Tough Measures on Libyan Regime, Adopting Resolution 1970 in Wake of Crackdown on Protestors-Situation Referred to International Criminal Court: Security-General Expresses Hope Message 'Heard and Heeded' in Libya, U.N. Security Council (Feb. 26, 2011), <http://www.UN.org/News/Press/docs/2011/sc10187.doc.htm>.

73. "In Swift, Decisive Action, Security Council Imposes Tough Measures on Libyan Regime, Adopting Resolution 1970 in Wake of Crackdown on Protesters," U.N. DPI, February 26, 2011, SC/10187; *see also* "Chief Prosecutor of International Criminal Court Tells Security Council He Will Seek Arrest Warrants Soon against Three Individuals in First Libya Case," U.N. DPI, May 4, 2011, SC/10241.

74. Resolution 1970, *supra* note 57.

75. *Id.*

76. *Id.*

77. *See generally* International Criminal Court, Statement of the Prosecutor on the Opening of the Investigation into the Situation in Libya (Mar. 3, 2011), *available at* <http://www.icc->

March 3 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 commit crimes.⁷⁸ 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.⁷⁹ He also indicated that members of opposition groups would also be subject to investigation if they commit crimes.⁸⁰

He concludes by stating, “It is important to avoid an armed conflict in Libya.”⁸¹ 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.⁸² There is no mention of war crimes in the March 3 Statement.⁸³

G. Early March

The 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.⁸⁴ The application of the *jus in bello* also brings about the application of the relevant war crimes provisions of international criminal law.

H. 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

cpi.int/NR/rdonlyres/035C3801-5C8D-4ABC-876B-C7D946B51F22/283045/StatementLibya_03032011.pdf (last visited Mar. 7, 2012) [hereinafter *Statement of the Prosecutor*].

78. *Id.* at 2.

79. *Id.*

80. *See generally* Statement of the Prosecutor, *supra* note 106.

81. *Id.* at 3.

82. *Id.*

83. *See generally* Statement of the Prosecutor, *supra* note 106.

84. ICTY, *Tadic Appeal Decision*, 2 October 1995, paragraph 70.

implications of the events in Libya and the Arab position.⁸⁵ Most significantly, the Arab League called upon the U.N. Security Council to impose a no-fly zone and to create “safe areas.”⁸⁶ The Members of the Security Council had already been discussing the possibility of the use of armed force.⁸⁷ In this context, the political support of the Arab League was seen as a key factor.⁸⁸

In the preamble of the outcome document, the League called for compliance with international law and an end to the fighting.⁸⁹ 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.”⁹⁰

The 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.”⁹¹ 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. . . .”⁹²

I. March 17

Security Council authorizes the use of force: On March 17, 2011, the U.N. Security Council, again using its enforcement power under Chapter

85. 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> (last visited Mar. 7, 2012) [hereinafter Arab League Resolution].

86. *Id.*

87. *Libya Revolt: The West's Options*, BBC NEWS, March 9, 2011.

88. Christopher Blanchard, *Libya: Unrest and U.S. Policy*, Congressional Research Service (Mar. 29, 2011), <http://fpc.state.gov/documents/organization/159788.pdf>.

89. Arab League Resolution, *supra* note 116.

90. Arab League Resolution, *supra* note 116, ¶ 6.

91. *Id.*

92. The Outcome of the Council of the League of Arab States Meeting at the Ministerial Level in its Extraordinary Session 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%281%29.pdf> (last visited Mar. 17, 2012).

VII of the U.N. 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.”⁹³ Resolution 1973 also expanded the existing sanctions and established a panel of experts to assist the Sanctions Committee.⁹⁴

The resolution was adopted with a vote of ten in favor and five abstentions.⁹⁵ The abstentions came from the BRIC countries (Brazil, Russia, India, and China) and Germany.⁹⁶ The two permanent members that abstained—Russia and China—have traditionally espoused robust interpretations of the non-intervention principle.⁹⁷ 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.⁹⁸

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.”⁹⁹ The Council also demanded that Libya comply with its obligations under international human rights law, humanitarian law, and refugee law, and to “take all measures to protect civilians and meet their basic needs,” as well as to ensure the delivery of humanitarian aid.¹⁰⁰

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

93. S.C. Res. 1973, U.N. Doc. S/RES/1973 (Mar. 17, 2011).

94. Resolution 1973, *supra* note 48.

95. *Id.*

96. *Id.*

97. 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.

98. *See generally* S.C. Res. 1973, U.N. Doc. S/RES/1973 (Mar. 17, 2011).

99. *Id.* ¶ 1.

100. *Id.* ¶ 3.

Jamahiriya, including Benghazi, while excluding a foreign occupation force of any form on any part of Libyan territory.¹⁰¹

This broad grant of authority was narrowed by the requirements of “acting in cooperation with the Secretary-General,” the limitation to protection of “civilians”¹⁰² and areas “under threat of attack,” and the exclusion of occupation.¹⁰³

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.¹⁰⁴

In addition to strengthening enforcement of the arms embargo, the resolution also expanded the asset freeze.¹⁰⁵ Mindful that a new Libyan government will 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.”¹⁰⁶

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.¹⁰⁷ Operative paragraph 27 requires “all States”¹⁰⁸ 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 . . .”¹⁰⁹

J. March 19

Coalition airstrikes begin: On March 19, armed forces of France, the United States, the United Kingdom, and others initiated military strikes in

101. *Id.* ¶ 4.

102. Again, there is some ambiguity in the use of the term “civilian” and “civilian populated area.” Would this, for example, include civilians who directly participate in the hostilities? To what extent would individuals cease to become “civilians” for this purpose if they had a continuous combat function?

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

104. Resolution 1973, *supra* note 48.

105. *Id.*

106. Resolution 1973, *supra* note 71, ¶ 20. This issue has become acute as states have become divided over whether to recognize the rebel authorities as the legitimate government of Libya.

107. Resolution 1973, *supra* note 48.

108. Note that this provision is not limited to U.N. Member States.

109. Resolution 1973, *supra* note 48.

Libya pursuant to Security Council Resolution 1973.¹¹⁰ The intervention of other states' armed forces brought into application the law of international armed conflict.¹¹¹

On March 27, the North Atlantic Council decided that NATO would undertake enforcement action in Libya.¹¹² Control of the enforcement action in Libya was subsequently transferred to NATO under unified command.¹¹³

K. 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.¹¹⁴ 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.¹¹⁵

The Commission did not request the Court to order provisional measures.¹¹⁶ 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.'"¹¹⁷

After satisfying itself, *prima facie*, that it had jurisdiction, the Court reviewed statements and resolutions of relevant international organizations.¹¹⁸ In light of the condemnations of abuses contained therein,

110. Crisis in Libya: U.S. Bombs Qaddafi's Airfields, World Watch (Mar. 19, 2011), http://www.cbsnews.com/8301-503543_162-20044969-503543.html.

111. While some have suggested that the *jus in bello* does not apply to U.N.-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.

112. Letter Dated 29 March 2011 from the Secretary-General to the President of the Security Council, U.N. Security Council (Mar. 30, 2011), <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Libya%20S%202011%20203.pdf>.

113. *Id.*

114. *See generally* In the Matter of Afr. Comm'n on Hum. and Peoples' Rts. v. Great Socialist Peoples' Libyan Arab Jamahiriya, App. No. 004/2011, Order for Provisional Measures (Afr. Ct. H.R. Mar. 25, 2011) [hereinafter African Commission].

115. *Id.*

116. *Id.*

117. *Id.* ¶ 10.

118. *See generally* African Commission, *supra* note 145.

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.”¹¹⁹

The Court then found that the circumstances required it to order, “as a matter of great urgency and without any proceedings,”¹²⁰ 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.¹²¹

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.¹²²

L. Mid-April

Concern at 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.¹²³ In particular, they recalled that regime change was not authorized by Security Council Resolution 1973.¹²⁴

M. May 4

ICC Prosecutor presents report to the Security Council: Pursuant to operative paragraph 7 of U.N. Security Council Resolution 1970, the ICC Prosecutor on May 4 reported to the Security Council on actions taken

119. African Commission, *supra* note 145, ¶ 22.

120. *Id.* ¶ 23.

121. *Id.* ¶ 25.

122. *Id.*

123. Stephen Flanagan, *Libya Managing a Fragile Coalition*, Center for Strategic & International Studies (Mar. 24, 2011), available at <http://csis.org/publication/libya-managing-fragile-coalition>. See also *Fighting words between European allies overshadow Libyan mission* CNN, March 22, 2011.

124. *Id.*

pursuant to the referral of the situation in Libya to the ICC.¹²⁵ 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.¹²⁶

The Prosecutor found that available information provided “reasonable grounds to believe that crimes against humanity have been committed and continue being committed in Libya,” and he noted that there is also “relevant information concerning” war crimes “once the situation developed into an armed conflict.”¹²⁷

As to admissibility, 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.”¹²⁸ He also found that the situation “clearly meets the threshold of gravity required by the ICC Statute, taking into account all relevant criteria.”¹²⁹ He noted that there were no countervailing “reasons to believe that the investigation would not serve the interests of justice,” and thus opened an investigation on March 3.¹³⁰

In describing the ongoing investigation, he stated that his office was pursuing those who bore the greatest responsibility.¹³¹ He also referred to cooperation activities and reported receiving “outstanding support from States Parties and non-States Parties alike.”¹³²

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.”¹³³ He then surveyed specific factual allegations supporting the existence of these types of crimes, including

125. See generally International Criminal Court, *First Report of the Prosecutor of the International Criminal Court to the U.N. 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> (last visited Mar. 7, 2012) [hereinafter *Report of the Prosecutor*].

126. *Id.*

127. *Id.* at 2–3.

128. *Id.* at 3.

129. *Id.*

130. See generally *Report of the Prosecutor*, *supra* note 157.

131. See generally *id.*

132. *Id.* at 5.

133. *Id.* at 5–6.

excessive use of force by security forces; “systematic arrests, torture, killings, deportations, enforced disappearances and destruction of mosques”; rape; and “unlawful arrest, mistreatment and killings of sub-Saharan Africans perceived to be mercenaries.”¹³⁴

As to the anticipated judicial proceedings, the Prosecutor indicated that his office would soon be submitting its first application for an arrest warrant.¹³⁵ On May 16, the ICC Prosecutor requested a Pre-Trial Chamber to issue arrest warrants for three individuals, including Muammar Gaddafi.¹³⁶

N. 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.¹³⁷ The Commission opined that “a significant number of international human rights law violations have occurred, as well as war crimes and crimes against humanity.”¹³⁸ 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.”¹³⁹ In addition, the Report noted that “[t]here have also been violations by opponents to the regime.”¹⁴⁰

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

134. *Id.* at 6. The Report also refers to abuses committed against “prisoners of war.” 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.

135. *See generally* Report of the Prosecutor, *supra* note 157.

136. Statement ICC Prosecutor Press Conference on Libya 16 May 2011, International Criminal Court (May 16, 2011), <http://www.icc-cpi.int/menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/statement%20icc%20prosecutor%20press%20conference%20on%20libya%2016%20may%202011> (last visited Mar. 7, 2012).

137. *See generally* Human Rights Council, 17th Sess., 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 (last visited Mar. 7, 2012) [hereinafter Report of the International Commission].

138. *Id.* at 8.

139. *Id.*

140. *Id.*

proceedings, whether national or international.”¹⁴¹ 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.”¹⁴²

O. June 27

ICC Pre-Trial Chamber issues arrest warrants: On June 27, ICC Pre-Trial Chamber I issued arrest warrants for three senior Libyan officials, including Muammar Gaddafi.¹⁴³ This is 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.¹⁴⁴ As with the situation in Sudan, Libya is not a State Party to the ICC Statute.

III. UNRESOLVED LEGAL ISSUES

The international community employed a broad range of tools in responding to the situation in Libya—arms embargos, 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.¹⁴⁵ 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.

A. 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.¹⁴⁶ 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.

141. *Id.* at 2.

142. *Report of the International Commission, supra* note 169, at 8.

143. *ICC Issues Arrest Warrants Against Muammar Gaddafi, Safi Al-Islam Gaddafi, and Abdullah Al-Senussi: ICC and Coalition Press Statements*, Coalition for the International Criminal Court (June 27, 2011), <http://www.iccnw.org/?mod=newsdetail&news=4640> (last visited Mar. 18, 2012) [hereinafter *ICC Issues Warrants*].

144. *Id.*

145. *The Crisis in Libya*, International Coalition for the Responsibility to Protect, available at <http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-libya> (last visited Mar. 18, 2012).

146. Report of the Human Rights Council, *supra* note 42.

As noted above, States a part of 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.”¹⁴⁷ While no clear threshold has been established for determining when this standard has been met, the jurisprudence of the Human Rights Committee indicates that the possibility of derogation arises only in situations of the utmost gravity.¹⁴⁸ 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 a part of the ICCPR via the U.N. 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.¹⁴⁹ The notification nonetheless serves important purposes. It serves as an important procedural safeguard by putting other States on notice of the derogation, presenting them with an opportunity to assess the situation. More significantly, it also requires the State derogating from its obligations to specify “the provisions from which it has derogated and . . . the reasons by which it was actuated.”¹⁵⁰

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 Committee supports the view that the complete failure to provide this information in any form may be fatal to the lawfulness of such measures.¹⁵¹

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

147. ICCPR, *supra* note 32, art. 4, ¶ 1.

148. Hum. Rts. Com. General Comment 29, CCPR/C/21/Rev.1/Add.11, August 31, 2011.

149. *See* Consuelo Salgar de Montejo v. Colombia, Commc’n No. R.15/64, ICCPR, U.N. Doc. Supp. No. 40 (A/37/40) at 168, ¶ 10.3 (Mar. 24, 1982).

150. ICCPR, *supra* note 32, art. 4, ¶ 3.

151. *See* Adrien Mundy Buyso, Thomas Osthudi Wongodi, René Sibú Matubuka et al. v. Democratic Republic of the Congo, Commc’n No. 933/2000, ICCPR, U.N. Doc. No. CCPR/C/78/D/933/2000 (A/58/40 vol. II) at 224, ¶ 5.2 (July 31, 2003).

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*.¹⁵² 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.¹⁵³ 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.¹⁵⁴

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.¹⁵⁵ 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 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.¹⁵⁶

Another approach would be to proceed from the principle of “unclean hands.” This equitable principle, whereby actors are precluded from benefitting 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.¹⁵⁷ 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

152. McCaffrey, Shelton, and Cerone, *Public International Law: Cases, Problems, and Texts*, Lexis-Nexis (2010) at 1457.

153. *Id.*

154. ILC Articles on Responsibility of States for Internationally Wrongful Acts, International Law Comm’n, art. 31, *adopted in* G.A. Res. 56/83, U.N. Doc. A/RES/56/83 (Jan. 28, 2002).

155. ICCPR, *supra* note 32, art. 4, ¶ 1.

156. ILC Articles on Responsibility of States for Internationally Wrongful Acts, International Law Comm’n, art. 1, *adopted in* G.A. Res. 56/83, U.N. Doc. A/RES/56/83 (Jan. 28, 2002).

157. Statute of the International Court of Justice, July 17, 1998, 2187 U.N.T.S. 90.

the emergency situation by committing serious violations of human rights law (e.g. in the context of a brutal crackdown against protesters).¹⁵⁸

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.¹⁵⁹ 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.¹⁶⁰

B. 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, 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*.¹⁶¹

158. *Id.*

159. *See supra* note 153.

160. *See e.g.*, ICCPR, art. 28.

161. *See* J. Cerone, *Jurisdiction and Power: The Intersection of Human Rights Law & the Law of Non-International Armed Conflict in a Transnational Context*, 40 ISRAEL LAW REVIEW, 399 (2007); *see also* Second and Third Periodic Report of the United States of America to the U.N. Committee on

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.¹⁶² Even the United States, which has been vocal in its rejection of the application of human rights treaties 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.¹⁶³ 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.¹⁶⁴

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 a continuing controversy over the inter-operability 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 against 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.¹⁶⁵ 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*.

Human Rights Concerning the International Covenant on Civil and Political Rights, October 21, 2005, at para. 130.

162. *Id.*

163. 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.

164. *See e.g.*, the many reports of the US State Department applying international human rights law to situations of armed conflict, such as the 2003 report on Colombia. Country Reports on Human Rights Practices, Bureau of Democracy, Human Rights, and Labor, February 25, 2004, available at <http://www.state.gov/j/drl/rls/hrrpt/2003/27891.htm>.

165. *See Jurisdiction and Power, supra*, note 162 at 446.

C. 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.¹⁶⁶

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.¹⁶⁷ 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.¹⁶⁸ Thus, despite the breadth of the mandate, it would not seem to encompass regime change.¹⁶⁹

166. 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.

167. North Atlantic Treaty Organization, *Operation UNIFIED PROTECTOR Protection of Civilians and Civilian-Populated Areas*, ¶ 1 (June 2011), available at http://www.nato.int/nato_static/assets/pdf/pdf_2011_06/20110608_Factsheet-UP_Protection_Civilians.pdf (last visited Mar. 7, 2012) [hereinafter NATO Fact Sheet].

168. See generally *id.*

169. See generally Memorandum Opinion for Attorney General, *Authority to Use Military Force in Libya*, OPS. OF THE OFF. OF LEGAL COUNS. VOL. 35 (Apr. 1, 2011), available at <http://www.justice.gov/olc/2011/authority-military-use-in-libya.pdf> (last visited Mar. 7, 2012). In a footnote, the memo 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 President Obama's March 28, 2011 public address: "Of course, there is no

Key to assessing the scope of the mandate is the interpretation of the term “civilian.”¹⁷⁰ To interpret this term in light of existing rules of international law,¹⁷¹ 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.¹⁷² 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.¹⁷³ This would include Gaddafi’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.”¹⁷⁴ 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.

question that Libya—and the world—would be better off with Qaddafi out of power. . . . will actively pursue [that goal] through non-military means. But broadening our military mission to include regime change would be a mistake.”

170. NATO Fact Sheet, *supra* note 227, ¶ 1.

171. Vienna Convention on the Law of Treaties art. 31(3)(c), May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (1969) [hereinafter Vienna Convention].

172. See ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law, May 2009, at 27.

173. *Id.*

174. NATO Fact Sheet, *supra* note 227, ¶ 1.

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 is questionable. Particularly difficult to justify under the mandate would be the continuing NATO attacks after the Gaddafi regime was in full retreat.¹⁷⁵ 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 ICC? The aggression amendment adopted at the Review Conference defines aggression as the

[P]lanning, 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.¹⁷⁶

The phrase "act of aggression" is then defined by reference to U.N. General Assembly Resolution 3314.¹⁷⁷ That resolution does not expressly refer to uses of force in excess of Security Council authorization.¹⁷⁸ Nonetheless, it does provide an analogous category of conduct.¹⁷⁹ 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."¹⁸⁰ Thus, to the extent the definition of aggression includes *ultra vires* uses of force, it could be argued that certain

175. *Libya conflict: Nato jets hit Gaddafi Sirte bunker*, BBC NEWS, August 26, 2011; *Libya's NTC troops renew assault on pro-Gaddafi Sirte*, BBC NEWS, September 25, 2011; *NATO: It didn't know Gadhafi was in bombed convoy*, ASSOCIATED PRESS, October 21, 2011.

176. Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression, R.C. Res. 13/4, 13th Sess., Annex I, art. 8, ¶ 1, at 2 (June 11, 2010).

177. G.A. Res. 29/3314 (XXIX), at 142–143, U.N. Doc. A/RES/29/3314 (Dec. 14, 1974) [hereinafter G.A. Res. 29/3314, Definition of Aggression].

178. *See generally id.*

179. *Id.*

180. G.A. Res. 29/3314, Definition of Aggression, *supra* note 251, Annex art. 3(e).

offensive aspects of the NATO bombing campaign qualify as acts of aggression.¹⁸¹

The definition of the *crime* of aggression, 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.”¹⁸² Given the divergent interpretations of the mandate, it would be difficult to conclude that any violation was “manifest,” or objectively evident.¹⁸³

In any event, NATO’s broad interpretation of the mandate seems to have set back the Responsibility to Protect doctrine as a political matter.¹⁸⁴ 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.¹⁸⁵

D. 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 *nullem crimen sine lege*).¹⁸⁶

The Security Council referral was a necessary pre-condition to the exercise of ICC jurisdiction in this case, because Libya is not a party to the ICC Statute.¹⁸⁷ Libya’s non-party status is also relevant to the issues of Head of State immunity and the application of *nullem crimen*.

181. *Id.*

182. See generally Definition of Aggression, *supra* note 251.

183. Vienna Convention, *supra* note 231, art. 46(2).

184. See Article 46(2) of the Vienna Convention on the Law of Treaties for an indication of the meaning of the term “manifest.” Vienna Convention, *supra* note 231, art. 46(2).

185. Neil MacFarquhar, *U.N. Resolution on Syria Blocked by Russia and China*, THE NEW YORK TIMES (Oct. 4, 2011), available at http://www.nytimes.com/2011/10/05/world/middleeast/russia-and-china-block-united-nations-resolution-on-syria.html?_r=1&pagewanted=all (last visited Apr. 5, 2012).

186. 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.

187. ICC Statute, *supra* note 71, art. 12, ¶ 3. 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. 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 only the means by which the Court could exercise its jurisdiction.

As noted above, an ICC Pre-Trial Chamber issued an arrest warrant for Gaddafi in June 2011.¹⁸⁸ As an incumbent Head of State, Gaddafi was entitled to absolute immunity from foreign legal process under customary international law. Although Gaddafi's death has 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 satisfied 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.”¹⁸⁹ 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.¹⁹⁰ Nonetheless, in its decision authorizing the issuance of an arrest warrant for Sudanese President Omar Al Bashir, an ICC Pre-Trial 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.¹⁹¹ 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.¹⁹² 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 ICC 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 *nullem crimen sine lege*.

188. ICC Issues Warrants, *supra* note 146.

189. ICC Statute, *supra* note 71, art. 27, ¶ 2.

190. Vienna Convention, *supra* note 231, art. 34.

191. *See generally* Prosecutor v. Bashir, Case No. ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest Against Omar Hassan Ahmad Al Bashir (Mar. 4, 2009).

192. Resolution 1970, *supra* note 57.

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.¹⁹³ 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, many of those prohibitions were applicable as customary international law.

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.¹⁹⁴ 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.¹⁹⁵

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.¹⁹⁶ 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 2011.¹⁹⁷

193. ICC Statute, *supra* note 71, art. 22, ¶ 1. The ICC Statute incorporates a variation of this principle in its 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."

194. *See supra* note 18.

195. It was for this reason that Article 124 of the Statute was included as a transitional measure.

196. ICTY, *Tadic Appeal Decision*, 2 October 1995, paragraph 129.

197. 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 U.N. General Assembly. *See* G.A. Res. 95(I), U.N. GAOR, 1st Sess., pt. 2, at 1144, U.N. Doc. A/236 (Dec. 11, 1946). In addition, the ICC Statute sets a higher bar from crimes against humanity than customary international law, at least as formulated by the ad hoc Tribunals. 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."

IV. CONCLUSION

In responding to the situation in Libya, the international community employed virtually every legal tool at its disposal. In so doing, it demonstrated the expanding reach of international law and institutions with respect to materially internal situations, and reflected the growing political will that has enabled this expansion. However, as the contrasting response to the situation in Syria demonstrates, the selection of tools, and indeed whether to respond at all, remains a political choice.

The combination of these tools in the Libyan context also reveals the extent to which a number of important legal issues of human rights law, the *jus in bello*, the *jus ad bellum*, and international criminal law are unresolved. At the same time, 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.

ICC Statute, *supra* note 71, 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 *nullem crimen* principle is not offended, at least with respect to these contextual elements.