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The Report of the International Commission of Inquiry on Libya – An Assessment

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The conflict in Libya 2011 has been closely monitored by an International Commission of Inquiry. As mandated by the United Nations Human Rights Council, the International Commission of Inquiry on Libya presented its report on violations of human rights law in Libya's civil war. Allthough the report is very thourough, some remarks must be made. This analysis assesses the achievements and flaws of the report.

I Introduction

1 The conflict in Libya 2011 was overshadowed by violations of international law. In March 2011 the United Nations Human Rights Council established an International Commission of Inquiry on Libya (ICIL). It was mandated

> "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 to make recommendations, in particular, on accountability measures, all with a view to ensuring that those individuals responsible are held accountable, and to report to the Council at its seventeenth session, and calls upon the Libyan authorities to fully cooperate with the Commission."[1]

2 The Human Rights Council appointed three renowned jurists to the Commission, including one former president of the International Criminal Court (ICC). A first report was submitted in June 2011,[2] but due to the ongoing conflict in Libya the Commission's mandate was subsequently extended until March 2012. In March 2012 the final report was presented in March 2012, it will be addressed here.[3]

[1] Report of the Human Rights Council on its fifteenth special session, 25 February 2011, UN Doc. No. A/HRC/S-15/1, at para. 11.
[2] United Nations Human Rights Council, Report of the International Commission of Inquiry to investigate all alleged violations of international human rights law in the Libyan Arab Jamahiriya, 1 June 2011, UN Doc. No. A/HRC/17/44, subsequently referred to as ICIL First Report.
[3] United Nations Human Rights Council, Report of the International Commission of Inquiry on Libya, 2 March 2012, UN Doc. No. A/HRC/19/68, subsequently referred to as ICIL-Report.

II Mandate

3 The Commission's mandate included alleged violations of international human rights law. The ICIL was not asked to support any criminal investigation, yet convinction. Thus the evidence before the Commission was not subject to the burden of proof required in criminal proceedings.

4 The ICIL investigated several aspects of the conflict. It focused on excessive use of force, unlawful killings, arbitrary detentions and enforced disappearances, torture and other forms of ill-treatment, targeted communities, sexual violence, attacks on the civilian population, NATO's action and accountability for violations.

5 At the outset the Commission noted that it

> "is not possible to understand the current conditions in Libya without understanding the damage caused to the fabric of the society by decades of corruption, serious human rights violations and sustained repression of any opposition."[4]

Given this approach, the ICIL could have focussed on violations perpetrated by Gaddafi forces. Despite this starting point, the Commission investigated violations committed by all parties to the conflict. As well be seen, the Commission was mandated to do so.

1) The Mandate *ratione materiae* and the Applicable Legal Framework

a) The Mandate *ratione materiae*

6 As noted the ICIL was mandated "to investigate all alleged violations of international human rights law in Libya".[5] However, this mandate determines only the *ratione materiae*, meaning that only violations of international human rights law were under scrutiny. Libyan national law as well as any other international legal regime were not subject to the investigation; the mandate is also silent in personal and temporal regard.

7 At a first glance this seems to exclude international humanitarian law and international criminal law. Other regimes of law seem not to apply. Meanwhile, the ICIL took these two regimes as another subject to focus on and evaluated the events

[4] ICIL-Report, at para. 10.
[5] Report of the Human Rights Council on its fifteenth special session, 25 February 2011, UN Doc. No. A/HRC/S-15/1, at para. 11.

in Libya along those lines as well.[6] Hence, is the ICIL's investigation into other areas of law lawful? It is, as well be shown next.

8 With regard to international humanitarian law one must keep in mind the once disputed relationship between human rights law and international humanitarian law. Until not long ago the predominant view held that the two regimes were mutually exclusive. Under these circumstances, an evaluation of international humanitarian law by the ICIL would have been against the mandate. Today, however, most states, institutions, courts and scholars agree that both regimes are not mutually exclusive anymore, but that human rights law does not cease to apply in times of armed conflict. Furthermore, it is subject to debate how both regulations can be brought in conformity.

9 Several jurisprudential ways may be maintained. Some authors argue for a merging of the regimes,[7] while others describe the relationship with the concept of international humanitarian law as the *lex specialis* to the *lex generalis* of human rights law[8] or with the related concept of '*renvoi*', meaning international humanitarian law making references to human rights law and *vice versa*.[9] However, this dispute is of importance only in the field of basic research in the theory of international law, for the practical effects remain the same, regardless of the line of arguments. Therefore, the lawyer is responsible for working out

> "with precision areas and questions where the co-ordinated application of provisions of both branches of the law leads to satisfactory — if not innovative — solutions, securing progress of the law or filling its gaps. [...] The point is not one of derogation by priority [...] but rather one of complex case-by-case mutual

[6] ICIL-Report, at para. 3.
[7] Further reference provided in *R. Kolb,* Human Rights and Humanitarian Law, in: R. Wolfrum (Ed.), *The Max Planck Encyclopedia of Public International Law*, Oxford 2008, online edition, (www.mpepil.com), at para. 30; and in *S. Sivakumaran*, International Humanitarian Law, in: D. Moeckli / S. Shah / S. Sivakumaran (eds), International Human Rights Law, Oxford 2010, at p. 530 et seq.
[8] ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Rep. 1996, at para. 25; *Y. Dinstein*, The Conduct of Hostilities under the International Law of Armed Conflict, Cambridge 2010, at para. 44 et seq.; *Y. Dinstein*, The International Law of Belligerent Occupation, Cambridge 2009, at para. 195 et seq.; *J. Kleffner*, Human Rights and International Humanitarian Law: General Issues, in: T. Gill / D. Fleck, The Handbook of the International Law of Military Operations, Oxford 2010, at para. 4.02; *E.-C. Gillard*, International Humanitarian Law and Extraterritorial State Conduct, in: F. Coomans/M. Kamminga (eds.), Extraterritorial Application of Human Rights Treaties, Antwerp 2004, p. 25 et seq, at p. 36 et seq.
[9] *R. Kolb,* Human Rights and Humanitarian Law, in: R. Wolfrum (Ed.), *The Max Planck Encyclopedia of Public International Law*, Oxford 2008, online edition, (www.mpepil.com), at paras. 35 et seq.

> reinforcement and complement always on concrete issues. Thus, rather than stressing mutual exclusiveness, be it speciality or priority, it would be better to focus on two aspects: a) gap filling and development of the law by co-ordinated application of norms of human rights law in order to strengthen international humanitarian law and vice versa; b) interpretation allowing an understanding of one branch in the light of the other normative corpus in all situations where this is necessary, i. e. in armed conflict or occupation."[10]

Thus, it was precisely the task of the ICIL to take a look at international humanitarian law. Without this legal regime, the final report would have been flawed in the truest sense, meaning there would have been missing aspects from the very beginning. This was also recognized by the ICIL in its first report when in noted that it

> "looked into both violations of international human rights law and relevant provisions of international humanitarian law, the lex specialis which applies during armed conflict."[11]

10 The Commission was also able to evualuate along the lines of international criminal law. This can be based on the following reasoning. International criminal law is of secondary nature: It complements human rights law, ensures its effectiveness, and improves compliance with human rights law and international humanitarian law by criminally sanctioning the most serious breaches of both regimes as crimes against humanity or war crimes.

11 One can also draw from the doctrine of implied powers to extend the mandate of the ICIL to these regimes. Implied powers are powers that "are not mentioned explicitly in constituent instruments, but that are considered to come with explicit powers or, in a broader definition, with the functions given to the organization."[12] It means that "a term is being read into the organization's statute not in order to modify it or add to the members' burdens, but in order to give effect to what they agreed by

[10] *R. Kolb,* Human Rights and Humanitarian Law, in: R. Wolfrum (Ed.), *The Max Planck Encyclopedia of Public International Law*, Oxford 2008, online edition, (www.mpepil.com), at para. 44. *Y. Dinstein*, The Conduct of Hostilities under the International Law of Armed Conflict, Cambridge 2010, at para. 60, seems to subscribe to this view.
[11] ICIL First Report, at para. 4.
[12] *N. Blokker*, International Organizations or Institutions, Implied Powers, in: R. Wolfrum (Ed.), *The Max Planck Encyclopedia of Public International Law*, Oxford 2008, online edition, (www.mpepil.com), at para. 3.

becoming parties to the constitutional treaty."[13] To limit the analysis of the ICIL to human rights law would run counter to the objective of the ICIL. As seen above, to look only at human rights law would have provided a flawed assessment.

12 This is also within the overall mandate of the Human Rights Council (HRC). The HRC was established by General Assemby Resolution 60/251 in 2006.[14] Accordingly, the Council is "responsible for promoting universal respect for the protection of all human rights and fundamental freedoms for all".[15] Therefore, it is tasked to "address situations of violations of human rights, including gross and systematic violations"[16] and to "respond promptly to human rights emergencies".[17] One may argue that the right to address times of armed conflict is not explicitly conferred to the Council. Diametrically opposed, the resolution does not exclude times of armed conflict. Furthermore, an armed conflict may always be considered as a "human rights emergency" within the Council's mandate.

13 This shows that the Human Rights Council may be used to ensure compliance not only with human rights law but also with international humanitarian law. Of course the Council has no criminal jurisdiction. Thus, if the Council addresses questions of international criminal law, which it may, the Council should bear in mind the presumption of innocence. This is an integral part of the fair trial principle and an integral part of the rule of law. To follow this presumption means to refrain from naming the alleged perpetrators publicly. The Council may, however, bring those names to the attention of competent authorities, e. g. the ICC or national criminal courts.[18]

b) The Applicable Legal Framework

14 Having established the mandate, one must turn to the legal framework for the Commission's report. Regarding human rights law, Libya acceded to the International Covenant on Civil and Political Rights[19] in May 1970.[20] Libya ratified

[13] *K. Skubiszewski*, Implied Powers of International Organizations, in: Y. Dinstein (Ed.), International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne, Dordrecht 1989, p. 855 et seq., at p. 860.
[14] UN Doc. A/Res./60/251 of 3 April 2006.
[15] General Assembly Res. 60/251, at para. 2.
[16] General Assembly Res. 60/251, at para. 3.
[17] General Assembly Res. 60/251, at para. 5 (f).
[18] The ICIL noted that it intended to refer the names to competent national and international authorities, cf. ICIL-Report, at para. 760.
[19] International Covenant on Civil and Political Rights of 19 December 1966, 999 UNTS 171, subsequently referred to as ICCPR.
[20] References to Libya being a state party to the respective instruments are taken from http://treaties.un.org/.

the African Charter on Human and Peoples' Rights[21] with effect of June 1987 and it ratified the Convention against Torture[22] in May 1989.

15 Libya is state party to the Geneva Conventions of 1949 as well as to the first two additional protocols of 1977. It ratified the Convention on the Rights of the Child of 20 November 1989[23] as well as the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict of 25 May 2000.[24]

16 This legal framework may be modified. Human rights law provides for an derogation from the obligations in "time of public emergency which threatens the life of the nation". However, such a state of emergency must be officially proclaimed. Libya has neither under Gaddafi nor under NTC-rule made any such proclamation.[25] Thus, human rights law applies in its entirety, safe for the lex specialis of international humanitarian law.

17 Libya has neither signed nor ratified the Rome Statute of the International Criminal Court. Thus, only customary international criminal law is applicable. Since the Security Council's referral of the situation in Libya to the ICC, the Rome State applies entirely since 26 February 2011 and in its customay law nature from 17 February to 26 February 2011.[26]

18 The resolution establishing the ICIL speaks about the mandate *ratione materiae*, but remains silent on the mandate in its temporal, local and personal regards. This, however, does not mean that the mandate is unlimited. By interpreting the resolution "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose" as required by art. 31 (1) Vienna Convention on the Law of Treaties one can limit the mandate of the ICIL in those regards.

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[21] African Charter on Human and Peoples' Rights of 27 June 1981, 1520 UNTS 217, subsequently referred to as Banjul-Charter.
[22] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984, 1465 UNTS 85, subsequently referred to as CAT.
[23] 1577 UNTS 3.
[24] 2173 UNTS 222.
[25] ICIL-Report, at para. 16.
[26] *M. Milanovic*, Is the Rome Statute Binding on Individuals? (And Why We Should Care), Journal of International Criminal Justice 9 (2011), p. 25 et seq. Cf. *R. Frau*, Die Überweisung der Lage in Libyen an den Internationalen Strafgerichtshof durch den Sicherheitsrat der Vereinten Nationen, in: Archiv für Völkerrecht 49 (2011), p. 276-309, at p. 295-302, for a more detailed analysis of the issue.

2) The Mandate *ratione personae*

19 At the outset the Commission noted that one must keep in mind the "damage caused to the fabric of the society by decades of corruption, serious human rights violations and sustained repression of any opposition" by the Gaddafi regime.[27]

However, the Commission was not restricted to only investigate violations by the Gaddafi regime. It was also tasked to take a look at the rebel's (subsequently becoming the National Transitional Council's [NTC] and new Libyan government) actions, for the mandate did not include any restrictions regarding the parties to the conflict. This is particular important since the ICIL has noted that "few officials spoken to by the Commission have demonstrated a real understanding of basic legal and human rights standards"[28] – entailing both old an new officials.

20 The jurisdiction *rationae personae* is not restricted in regard to parties to the conflict. By the nature of human rights law however, the mandate of the Commission is restricted to those persons who can actually violate human rights law. And only those are able to violate human rights law who are bound by human rights law. As well be seen *infra*, this is not easy to determine.[29]

3) The Mandate *ratione tempore*

21 More troubling is that no temporal restriction was taken. Keeping in mind the vantage point of the ICIL's investigation, meaning one must remember that "decades of corruption, serious human rights violations and sustained repression of any opposition" damaged the "fabric of the society",[30] what stops the Commission from coming to terms with the past and Gaddafi's rule over Libya?

22 The context matters, and that is what stops the commission. Para. 11 needs to be read in context with the entire resolution. The draft-resolution strongly comdemns "the recent extremely grave human rights violations committed in Libya",[31] while the adopted resolution strongly condemns "the recent gross and systematic human rights violations committed in Libya."[32] As can be clearly seen, common denominator to both texts is the special emphasis on *recent* violations.

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[27] ICIL-Report, at para. 10.
[28] ICIL-Report, at para. 12.
[29] Cf. infra IV2) Obligations on Non-State-Actors.
[30] ICIL-Report, at para. 10.
[31] UN Doc. No. A/HRC/69/S-15/1 of 24 February 2011, at para. 1.
[32] UN Doc. No. A/HRC/S-15/1, at para. 1.

23 This is supported by recourse to the circumstances of the resolution's conclusion, as envisaged by art. 32 Vienna Convention on the Law of Treaties. The Human Rights Council established the ICIL during its fifthteenth special session. This session convened at the request of Hungary on behalf of the member states of the European Union as well as several other states. The request was filed on 23 February 2011,[33] just days after the beginning of widespread protests against the Gaddafi-regime in Libya which marked the beginning of the civil war. And while the exact date on which the civil war in Libya broke out is yet to be determined, one may safely asssume that this non-international armed conflict in the sense of international humanitarian law started between 20 and 25 February 2011.[34]

24 The ICIL organizes the conflict in Libya into three phases. The beginning of the conflict on 15 February 2011 is considered the start of the first phase. It includes the peaceful protests and demonstration against the Gaddafi-government. The second phase covers the four armed conflicts beginning in the end of February 2011. In more detail, these conflicts are in chronological order the non-international armed conflict between the Gaddafi government and rebel forces (also called *thuwar* forces), the international armed conflict between the Gaddafi government and NATO forces, the international armed conflict between the Gaddafi government on one side and rebel forces fighting alongside NATO forces on the other side, and, after the recognition of the NTC as the representaton of the Libyan people by the United Nations,[35] the non-international armed conflict between the new Libyan government and NATO forces against forces loyal to the old Gaddafi government. The third phase covers the events from the end of the conflicts in October 2011 until the submission of the final report in March 2012.

25 In this article, all three phases are mentioned as the 'conflict', while phase two will be referred to as 'armed conflict(s)'.

4) The Mandate *ratione loci*

26 In local regard, the mandate is limited to the territory of Libya. This is clear from the wording of the resolution. If one interprets the resolution in good faith with an emphasis on the object and purpose of the resolution, one comes to the conclusion that it is of no relevance where an act was committed as long as the violation of a

[33] UN Doc. No. A/HRC/69/S-15/1 of 24 February 2011.
[34] ICIL First Report, at para. 37 et seq.; *M. Brunner/R. Frau*, Die Maßnahmen des Sicherheitsrates der Vereinten Nationen in Bezug auf Libyen 2011, in: Humanitäres Völkerrecht - Informationsschriften 2011, p. 192 et seq., at p. 195.
[35] UN Doc. A/RES/66/1, Meeting Record UN Doc. A/66/PV.2, Press Release GA/11137, both of 16 September 2011.

human right took place in Libya. It would be ineffective if the Commission had to first establish whether or not an violation was the result of a suitable act. Thus, the mandate includes violations of human rights by air forces conducting strikes on Libyan territory as well as rockets launched from warships well off the Libyan coast.

27 Having established a broad mandate of the ICIL, this analysis will summarize the findings of the Commission before these findings will be commented.

III The Commission's Findings

28 First, the ICIL noted that Gaddafi forces used excessive force against demonstrators within the first phase of the conflict. It found that firing on protesters was excessive in relation to the threat posed, that it violated art. 6, 9, 19, 21 ICCPR, and that the crime of murder was committed during these days.[36] Although the the Commission found "sufficient evidence of an attack on civilians that was both widdespread and systematic",[37] it refrains from calling the violence by its name: These actions are crimes against humanity.[38]

29 In a second point, the ICIL reports that unlawful killings were commited, by Gaddafi forces as well as rebel forces. These killings were committed against suspected enemies, detainees or persons who fell victims to armed robberies.[39] It is noteworthy that the rebels committed unlawful killings just days after the start of the protests, still before the start of the non-international armed conflict.[40] the Commission is alarmed by the fact that "the scale of executions by Qadhafi security forces increased as their defeat neared."[41]

30 Both domestic parties to the conflict detaineed several hundred or thousand persons arbitrarly during the armed conflict between the two.[42] This was done in violation of the human rights obligations of both actors.[43] The ICIL emphasized that *thuwar* forces applied a "presumption of guilt".[44] In addition, numerous incidents of enforced disappearances have occurred.[45] A disquieting picture of today's Libya is

[36] ICIL-Report, at para. 130 et seq.
[37] ICIL-Report, at para. 131.
[38] The ICIL only speaks of crimes against humanity in phase 2 of the crisis in Libya, entailing the armed conflicts that took place.
[39] ICIL-Report, at para. 223, 234.
[40] ICIL-Report, at para. 204 et seq.
[41] ICIL-Report, at para. 252.
[42] ICIL-Report, at para. 255 et seq.
[43] Cf. infra IV2) Obligations of Non-State Actors.
[44] ICIL-Report, at para. 288.
[45] ICIL-Report, at para. 273; 313 et seq.

drawn by the Commission when it observes that around eight detention facilities out of 60 known locations are under the control of the current government.[46]

31 Detainees were subjected to torture and other forms of ill-treatment, both from Gaddafi forces as well as rebel forces. The situation of the still detained persons worsens as of today.[47] The ICIL notes, moreover, that torture and other forms of ill-treatment that have occurred may consitute war crimes or crimes against humanity.[48]

32 Some particular groups were targeted during all phases of the crisis by *thuwar* forces. This includes unlawful killings, attacks on civilians and other protected persons and objects, pillage, persecution as defined in art. 7 (2) ICC-Statute, and forcible transfer of the population.[49] One example of this practice by *thuwar* forces is analyzed *infra* (IV4).

33 Two primary patterns of sexual violence occurred during the crisis in Libya, the ICIL affirmed. Victims of Gaddafi forces were either assaulted because of their alleged allegience to the *thuwar* or while being in detention.[50] While this is true, the ICIL blames the "prevailing culture of silence, the lack of reliable statistics, the evident use of torture to extract confessions, and the political sensitivity of the issue" for making sexual violence the "most difficult one for the Commission to investigate and on which to formulate conclusions."[51]. Nevertheless, it did not find evidence to substantiate claims of "widespread sexual violence or a systematic attack or overall policy against a civilian population such as to amount to crimes against humanity."[52] The alleged order of *Muammar al-Gaddafi* to distribute Viagra in order to facilitate rape and sexual violence by his forces could not be affirmed by the ICIL.[53]

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[46] ICIL-Report, at para. 318. The Libyan government claims that it controls 31 facilities, UN Doc. S/PV.6768 at p. 4 et seq.
[47] ICIL-Report, at para. 348.
[48] ICIL-Report, at para. 321 et seq.
[49] ICIL-Report, at para. 383 et seq.
[50] ICIL-Report, at para. 503 et seq.
[51] ICIL-Report, at para. 535.
[52] ICIL-Report, at para. 536.
[53] ICIL-Report, at para. 518; The Guardian Online, Gaddafi faces new ICC charges for using rape as weapon in conflict, 9 June 2011, http://www.guardian.co.uk/world/2011/jun/08/gaddafi-forces-libya-britain-nato; Spiegel Online, Krieg in Libyen: Chefankläger wirft Gaddafi Anstiftung zu Massenvergewaltigungen vor, 9 June 2011, http://www.spiegel.de/politik/ausland/krieg-in-libyen-chefanklaeger-wirft-gaddafi-anstiftung-zu-massenvergewaltigungen-vor-a-767501.html.

34 In another aspect the ICIL established that both domestic parties to the conflict committed attacks on civilians and other protected persons and objects in violation of international humanitarian law.[54]

35 This, in contrast, is not true in respect to NATO's operation 'Unified Protector'. The ICIL recognized the "large numbers of sorties and the proportionally low number of civilian casualties in comparison to other campaigns" and determined that the campaign was "conducted with precision weapons" and that it "demonstrated concern to avoid civilian casualties. The vast majority of airstrikes hit military targets outside of population centres and did not endanger civilians." Only in respect to some incidents the ICIL could not determine "whether NATO took all feasible precautions to protect civilians at these sites."[55]

36 Keeping in mind the different treaty obligations of states prohibiting certain weapons, the ICIL did not find any evidence giving proof of the use of prohibited weapons by any party to the conflict. The ICIL did not assess whether or not weapons such as cluster munitions and landmines were used according to international humanitarian law in every instance.

37 While no party to the conflict used mercenaries in the sense of the UN International Convention against the Recruitment, Use, Financing and Training of Mercenaries,[56] there is strong evidence to suggest that Gaddafi forces recruited and uses soldiers under the age of 18, thus violating Libya's obligations under the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict.

38 In the last section, the ICIL addressed questions of accountability for violations of international law. The report includes a very comprehensive assessment of the Libyan legal system. According to the ICIL, neither are the institutions (lack of independence, lack of confidence by the people)[57] nor is the substantial law (no implementation of international crimes)[58] fit to process the conflict. In addition, if applied at all, the law is not applied equally to both parties to the conflict. It needs to be highlighted that almost no *thuwar* troops have been held responsible. There is no evidence suggesting that the current government of Libya is eager to hold these forces

[54] ICIL-Report, at para. 599 et seq.
[55] ICIL-Report, at paras. 649 et seq.
[56] UN International Convention against the Recruitment, Use, Financing and Training of Mercenaries, 4 December 1989, 2163 UNTS 75.
[57] ICIL-Report, at para. 770.
[58] ICIL-Report, at para. 771 et seq.

accountable.[59] In contrast, there are more than 8.000 detainees (alleged Gaddafi troops) who await trial or release. The Libyan legal system, void of the rule of law for decades, has no ressources to deal with this amount of people.[60]

39 The Commission closes its report with several recommendations for all actors in the crisis. Most importantly, the ICIL demands better compliance by Libya with its international legal obligations, especially in regard to detainees. The Commission demands timely improvements in regard to the legal system in general and to the accountability mechanisms in particular. It also calls on the international community as well as the United Nations to support Libya wherever possible.[61]

IV Assessment of the Commission's Findings

40 In conclusion, one can agree with most of the report. The ICIL has provided a comprehensive review that addresses most of the important aspects. However, some crucial points remain unresolved by the report. Thus, these points wil be addressed and commented in the following section.

1) The Three-Phased-Approach of the Conflict

41 As stated above the ICIL used a three-phased-approached to structure the conflict and to identify the applicable law.[62] This is of mayor importance, because international humanitarian law only applies in times of armed conflict.

42 While the academic scholar has to rely on public documents and news reports, the ICIL had wider resources to exactly determine the point in time when a conflict commenced or closed. However, it missed the opportunity to give precise dates for the beginning and the end of the armed conflicts that took place. It almost sounds as if the ICIL excused this lapse with recourse to other authorities who also declined to answer this question. Most importantly, even the prosecutor of the ICC has yet to specify his claim that "since the end of February there has been an armed conflict in Libya.".[63]

[59] ICIL-Report, at paras. 775 et seq., especially at para. 784-
[60] ICIL-Report, at para. 783.
[61] ICIL-Report, at paras. 132 et seq.
[62] Cf. supra at para. 24.
[63] First Report of the Prosecutor of the International Criminal Court to the United Nations Security Council, 4 May 2011, at para. 37.

43 Nevertheless, the ICIL tries to narrow down the exact date and concludes that this is to be found close to the end of February 2011. This reasoning can be followed without further ado.[64]

2) Obligations of Non-State-Actors

44 The ICIL claims that international humanitarian law binds all parties to a non-international armed conflict and that non-state actors must "respect the fundamental human rights of persons in areas where such actors exercise de facto control."[65] Neither in its first nor in the final report is a sufficient legal explanation for this rather bold statement given. This is troubling, for major parts of the report are based on human rights obligations by non-state actors, particularly because during the course of the conflict two non-state-actors were involved. And while the Commission's findings in the substantial parts can be shared almost without comment, the reasoning merits attention and needs more detail.

45 In principle, international law only binds those who enjoy legal personality under international law. Many examples of legal subjects have been developed by state pratice.

a) International Humanitarian Law

46 State practice of the law of non-international armed conflict obliges the non-state actor to adhere to the rules. This is clear from common art. 3 Geneva Conventions and identical customary international law. A non-state actor receives legal personality *uno actu* with the commencement of an armed conflict. As soon as the respective criteria are fulfilled, international humanitarian law applies.[66] And this law not only recognizes a non-state actor as a legal person but also as bound by international humanitarian law. There is no mere legal personality without any rights or obligations, the cup of legal personality is always filled with some rights and duties under international law.

47 This is no violation of the *pacta tertiis nec nocent nec prosunt* principle as enshrined in art. 34 Vienna Convention on the Law of Treaties. This principle does not sapply. First, states and non-state actors are not equal. States are original subjects of international law, while non-state actors derive their legal personality from the will of the states. Second, without the treaty conferring the duty to a non-

[64] *M. Brunner/R. Frau*, Die Maßnahmen des Sicherheitsrates der Vereinten Nationen in Bezug auf Libyen 2011, in: Humanitäres Völkerrecht - Informationsschriften 2011, p. 192 et seq., at p. 195.
[65] ICIL-Report, at para. 18.
[66] Art. 3 Geneva Conventions or Art. 1 (2) AP 2.

state actor, there would not be a subject of international law. In other words, if the principle was applied to its full extent, it could almost never be applied in practice because states would have to create a legal person without any duty. This is neither practicable nor is it done. Moreover, there is no doubt that *ius cogens* applies to every actor in international law. Otherwise the concept would not make any sense.

48 Thus, the non-state actor in an armed conflict is bound by international humanitarian law. In addition, it is bound by *ius cogens*.

b) Human Rights Law

49 Part of *ius cogens* are also some fundamental human rights, namely the prohibitions of slavery, racial discrimination and torture[67] and probably also the right to a fair trial.[68] But are non-state actors bound by human rights that do not constitute *ius cogens*?

50 Human rights are inalienable rights of all human beings that derive from human dignity.[69] Thus, human rights treaties are not merely regular treaties between states regarding their own rights and obligations. These treaties do not only oblige states in respect to each other, but in regard to human beings. In addition to this human dignity approach, non-state actors are bound by other reasoning as well.

51 Human rights protect the individual in respect to actions of a state. Their main aim and historical first function was to provide a shield against a powerful Leviathan. But this protection is limited to those individuals "subject to (a State Party's) jurisdiction" (art. 2 [1] ICCPR) – 'jurisdiction' being the decisive element.

52 This concept, based on the sovereign equality of states,[70] is primarily territorial.[71] Everyone on the territory of a state party is entitled to protection according to the respective treaties. However, this territorial approach does not mean that human rights law is only applicable to the national territory of a state party. In the words of

[67] ICJ, *Case concerning the Barcelona Traction, Light and Power Company, Ltd., Second Phase (Belgium v. Spain)*, judgment of 5 February 1970, ICJ Rep. 1970, p. 3 et seq., at para. 34.
[68] *K. Doehring*, Völkerrecht, 2nd edition, Heidelberg 2004, at para. 986. *E. de Wet*, The Chapter VII Powers of the United Nations Security Council, 2004, poses the question, but leaves it open for discussion.
[69] Preambular paragraph 2 ICCPR.
[70] ECtHR, *Bankovic and others v. Belgium and 16 Other Contracting States*, Appl. no. 52207/99, 12 December 2001, at para. 59.
[71] *O. De Schutter*, International Human Rights Law, Cambridge, 2010, at p. 124. Art. 2 (1) ICCPR, art. 1 ECHR; art. 1 (1) American Convention on Human Rights of 22 November 1969, 144 UNTS 123; art. 26, 34 (5) Arab Charter on Human Rights of 22 May 2004, 12 Int'l Hum. Rts. Rep. 893 (2005). ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, ICJ Rep. 2004, p. 136 ff., at para. 112.

the ECtHR: "The concept of 'jurisdiction' under Article 1 of the Convention (art. 1) is not restricted to the national territory of the Contracting States. Accordingly, the responsibility of Contracting States can be involved by acts and omissions of their authorities which produce effects outside their own territory."[72] Thus, the term 'jurisdiction' is neither equivalent to nor interchangeable with 'attributability'[73] or 'territory'. But because these obligations are primarily territorial, other bases of jurisdiction are exceptional and require a special justification in the particular circumstances of each case.[74] Case law has identified two exceptions; one is determined by a spatial approach and the other by a personal approach to 'jurisdiction', each demanding 'effective control' over territory or, respectively, a person. Whether or not a state exercises effective overall control is a matter of fact, not a matter of law.[75] The ECtHR has held a state responsible "when the respondent State, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government."[76]

53 All aspects taken together, the protective dimension of human rights law and the pivotal concept of 'jurisdiction', based on the human dignity approach, ultimately lead one to start from the perspective of the protected individual. It is crucial to take the individual's interests into account, in order to assess who is bound by human rights law. And for the individual the character of the human rights violator as a state or a non-state actor is of no importance. Consequently, non-state actors are bound by human rights law when, through effective control of the relevant territory and its inhabitants (e. g. as a consequence of military action), exercises all or some of the public powers normally to be exercised by the government of the territory. In these cases, the non-state actor appears and acts like a state actor. This is especially evident if the criteria of art. 1 (2) Ap 2 are fulfilled.

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[72] ECtHR, *Loizidou v. Turkey*, Appl. no. 15318/89, 18 December 1996, at para. 52. Cf. also ECtHR, *Drozd and Janousek v. France and Spain*, Appl. no. 12747/87, 26 June 1992, at para. 91; CtHR, *Loizidou v. Turkey* (preliminary objections), Appl. no. 15318/89, 23 March 1995, at para. 62.
[73] *O. De Schutter*, International Human Rights Law, Cambridge, 2010, at p. 123; M. Milanovic, From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties, in: Human Rights Law Review 8 (2008), p. 436 et seq.
[74] ECtHR, *Banković and others v. Belgium and 16 Other Contracting States*, Appl. no. 52207/99, 12 December 2001, at para. 61.
[75] *M. Milanovic*, "From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties", in: Human Rights Law Review 8 (2008), at p. 436 423.
[76] ECtHR, *Banković and others v. Belgium and 16 Other Contracting States*, Appl. no. 52207/99, 12 December 2001, at para. 71.

54 To repeat, the ICIL stated that the former rebel forces in Libya, who later on became the new Libyan governement, were obliged to "respect the fundamental human rights of persons in areas where such actors exercise de facto control."[77] This conclusion differs only in a minor way from the proposal submitted here.

55 This reasoning applies to customary human rights law. It cannot be applied to treaty law, for non-state actors cannot become a party to these instruments.[78]

3) The Deaths of *Muammar al-Gaddafi* and *Mutassim al-Gaddafi*

a) The Deaths as Unlawful Killings

56 On 20 October 2011 *thuwar* forces captured *Muammar al-Gaddafi* and his son *Mutassim al-Gaddafi* separately. Both were alive and had minor injuries.[79] *Muammar al-Gaddafi* was put into an ambulance and driven to Misrata. However, he as well as *Mutassim al-Gaddafi* died within a few hours in *thuwar* capture.[80] The ICIL had not received any first-hand account of the two deaths and declined to confirm the deaths as unlawful killings.[81]

57 One wonders why the Commission is so reluctant in that regard. Taken into account together, the hard evidence as well as the circumstancial evidence raise the strong suspicion that both deaths were unlawful killings that may be considered war crimes under art. 8 (2) (c) (iv) ICC-Statute and art. 8 (2) (e) (ix) ICC-Statute. This merits a deeper analysis.

58 The ICIL established that *Muammar al-Gaddafi* and his son *Mutassim al-Gaddafi* were alive when they were captured. Hours after their capture, both detainees were dead. The Commission claimed that because it could neither find any eyewitnesses for the actual death nor could it determine the cause of death, no conclusion could be drawn. In doing so, the Commission neglects that all the evindence clearly points in one direction. First, there is an interview with a young man who claimes that he shot *Muammar al-Gaddafi* in the head and abdomen.[82] His claim is consistent with the report of the official autopsy,[83] so that it cannot be dismissed as bragging. Second, one must keep in mind that *Muammar al-Gaddafi* and *Mutassim al-Gaddafi* were both detainees of *thuwar* forces. Under no

[77] ICIL-Report, at para. 18.
[78] Throughout the ICCPR, for instance, the obligations of "State Parties" are mentioned.
[79] ICIL-Report, at para. 236.
[80] ICIL-Report, at para. 236.
[81] ICIL-Report, at paras. 248 et seq.
[82] ICIL-Report, at para. 242.
[83] ICIL-Report, at para. 247.

circumstances may detainees be killed (cf. art. 3 [1] [a] Geneva Conventions, art. 4 [1] [a] AP 2), at least not without any previous judgment by a regularly constituted court (cf. art. 8 [2] [c] [iv], art. 8 [2] [e] [ix] ICC-Statute). At the same time, there is no claim that neither one of the detaineed tried to escape or posed a danger to his capturers. Third, the ICIL itself states that it is "clear (is) that Qadhafi was alive when he was taken into custody and placed in an ambulance in Sirte by members of the Misrata *thuwar* and was seemingly dead when the ambulance arrived in Misrata."[84] How this alone does not raise any suspicion remains the secret of the Commission. Even if one takes into account that the Commission was not provided access to the autopsy-report, taken into account all (circumstancial) evidence, there is at least the strong suspicion of war crimes. Unfortunately, the Commission could not bring up the courage to say so.

59 True, the ICIL was not mandated to support any criminal convinction.[85] However, it was mandated to investigate alleged violations of human rights law and international humanitarian law. And there is a strong suspicion that human rights law and international humanitarian law were violated in regard to *Muammar al-Gaddafi* and *Mutassim al-Gaddafi* – and a strong suspicion is all the ICIL needed.

b) The NATO-Attack on *Muammar al-Gaddafi*

60 Prior to his capture by *thuwar* forces, *Muammar al-Gaddafi* tried to escape the city of Sirte in a heavily armed convoy of around 50 vehicles.[86] The approximately 200 men, together with women, children and wounded men, traveled in 50 vehicles east on the main road. Soon, they ran into a rebel ambush. During the firefight several men were injured and numerous cars were damaged. After the fight the convoy split up. "At this point a Toyota Corolla in front of Muammar Qadhafi's green Landcruiser was hit by a NATO airstrike, probably by a Predator drone, and exploded. The explosion set off the airbags in Qadhafi's car."[87] In the following minutes, Gaddafi took "refuge in a house as some of their bodyguards engaged in a fire fight with the rebel positions. Moments after Muammar Qadhafi entered the house, an airstrike hit the vehicles, setting off secondary explosions. The strike and subsequent explosions left many wounded lying on the ground. At this point the *thuwar* began shelling the house where Muammar Qadhafi was hiding. Mutassim Qadhafi took approximately 20 fighters and left to look for vehicles. Muammar

[84] ICIL-Report, at para. 244.
[85] Cf. supra at para. 3.
[86] ICIL-Report, at para. 237.
[87] ICIL-Report, at para. 238.

Qadhafi reportedly wanted to stay and fight but was persuaded to escape."[88] Subsequently, *thuwar* forces captured Gaddafi and the above mentioned events took place.

61 The ICIL did not addressed the question of whether or not the NATO-airstrike was legal, because it had no mandate to do so. Hence, it will be done here.

62 The Security Council authorized states to take all necessary measures to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya, while excluding a foreign occupation force of any form on any part of Libyan territory.[89] After the first days of military operations by several states, NATO assumed control of these operation.[90] These operations were limited by international humanitarian law and – maybe! – by human rights law.[91] It seems as if the attack itself was in conformity with both regimes.

63 The dilemma is the following. *Gaddafi* was the *de-facto*-head of Libya, he was in the position to give orders to the police and the armed forces. Put it bluntly, the gross and systematic human rights violations committed in Libya were committed because of his orders:[92] *Gaddafi* was the state of Libya.[93] There is a possibility that targeting *Gaddafi* would have stopped the conflict in Libya, consequently protecting civilians as envisaged by Res. 1973 (2011). On the other hand, some states wanted to achieve a regime change in Libya.[94] Such a regime change, in contrast, was not mandated by Res. 1973 (2011). In addition, international law prohibits the intervention of a foreign state in the internal affairs of another state.[95] Although it is not prohibited to criticize internal politics of another State, if this criticism is substantiated by facts,[96] the organization of its political system is part of the *domaine réservé* of a state and thus

[88] ICIL-Report, at paras. 238 et seq.
[89] UN Doc. S/RES/1973 (2011) of 17 March 2011, at para. 4.
[90] ICIL-Report, at para. 603.
[91] Cf. infra IV7) NATO's Operation 'Unified Protector' and Human Rights Law.
[92] Cf. ICC, Decision on the "Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar GADDAFI, Saif al-Islam GADDAFI and Abdullah AL-SENUSSI", 27 June 2011, Case-No. ICC-01/11-01/11, at paras. 17 et seq., 29, 72 et seq.
[93] Cf. *W. Lacher*, Libyen nach Qaddafi - Staatszerfall oder Staatsbildung?, SWP-Aktuell 2011/A 12, March 2011.
[94] Cf. Record of the 6498th Meeting of the Security Council, UN Doc. S/PV.6498 of 17 March 2011, at p. 4 (United Kingdom, Germany), p. 7 (Colombia), p. 8 et seq. (Portugal).
[95] Cf. *P. Kunig*, Intervention, Prohibition of, in: R. Wolfrum (ed.), The Max Planck Encyclopedia of Public International Law, Oxford, 2008, online edition, (www.mpepil.com).
[96] Cf. *P. Kunig*, Intervention, Prohibition of, in: R. Wolfrum (ed.), The Max Planck Encyclopedia of Public International Law, Oxford, 2008, online edition, (www.mpepil.com), at para. 24.

protected by the prohibition of intervention.[97] Thus, regime change by force is prohibited by international law.

64 Crucial is, that the killing of *Muammar al-Gaddafi* would have been lawful if it was done in order to protect civilians, but unlawful if it was done in order to achieve regime change. But this does not mean that the killing is unlawful. Both events, meaning the stop of the conflict as well as regime change, were two sides of the same coin. The killing of *Muammar al-Gaddafi* entails regime change, even if done solely to protect civilian population. Both aspects cannot be separated. This is unfortunate, for it combines the honorable goal of protection civilians with the unlawful wish for regime change.

65 In conclusion, the attack of NATO on the Gaddafi convoy was mandated by Res. 1973 (2011). Whether or not it was within the lines of international humanitarian law, meaning especially the rules of targeting, cannot be assessed.

4) Targeting of the *Tawergha* Community

66 Several communities have been targeted by *thuwar* forces. One example is the treatment of the Tawergha community.[98] Tawergha is a city to the south-east of Misrata, one stronghold of the rebels. In the course of the conflict, the relationship between the people of both cities deteriorated. This was due to several factors, including the economic capacities as well as the ethnic background of the respective population. In the course of the conflict, Misrata became scene of the "conflict's fiercest fighting."[99] Some members of the Gaddafi forces were residents of Tawergha. After the *thuwar* gained control over Misrata and fought back the Gaddafi forces, some of the latter retreated to Tawergha. The Misrata *thuwar* in turn attacked Tawergha, using weapons which could not be directed towards specific targets. When the thuwar finally succeeded and took over Tawergha, many residents fled town. The remaining residents stated that they were threatened and forced to leave the city. *Thuwar* forces conducted house-to-house raids, any male resident encountered was either beaten or detained. One female resident gave account on how she was humiliated by *thuwar* forces while the rebels insulted the Tawerghans as dogs who did not deserve to live. Libyan authorities have stated that Tawerghans left "perhaps out of fear, due to the crimes they committed."[100] The former Primeminister of the NTC claimed that "regarding Tawergha, my own viewpoint is that nobody has the

[97] Cf. *K. Ziegler*, Domaine Réservé, in: R. Wolfrum (Ed.), *The Max Planck Encyclopedia of Public International Law*, Oxford 2008, online edition, (www.mpepil.com), at para. 5 (f).
[98] The following facts are taken from ICIL-Report, at paras. 390-451.
[99] ICIL-Report, at para. 392.
[100] ICIL-Report, at para. 400.

right to interfere in this matter except the people of Misrata."[101] In the following days, *thuwar* forces looted and destroyed houses in the city. Until today, Tawergha remains an empty town. Residents of Tawergha were followed on their flight by *thuwar* forces. The ICIL gives an account of how Tawerghans were not safe from harrassment, including attacks and arrests, regardless of their whereabouts. The Tawergha community was not the only community targeted by *thuwar* forces. The pattern explained above can also be seen in other cities and communities.

67 The ICIL concludes that during the battle for Tawergha international humanitarian law was violated. Most prominently, the *thuwar* conducted indiscriminate attacks.[102] In addition, human rights law was violated. The report states that numerous Tawerghans have been arrested for unkown reasons. Some of those arrested were tortured and some have not been seen since. The city has been looted and destroyed since the *thuwar* assumed control of the area. Finally the ICIL points out that these actions may constitute war crimes and crimes against humanity.[103]

68 The findings of the Commission can be shared. The facts gathered by the ICIL give an account of how the perceived enemy was targeted and treated even after *thuwar* forces gained a military advantage. In other words, what happened in Tawergha and elsewhere is ethnic cleansing. It is troubling to see the lack of respect for international law by those responsible for these actions.

5) The Mahari Hotel Killings

69 In October 2011, close to the end of the armed conflict in Libya, a large number of bodies were discovered in the Mahari Hotel in Sirte. The bodies showed signs of violent deaths; some victims had their hands bound, some victims were inhabitants of Sirte, some were civilians and some were fighters.[104] The hotel itself was used as base for *thuwar* operations in Sirte. The ICIL refrains from giving a final account of what happened and how the killings could be assessed under international law. However, in its general conclusion on unlawful killings, the Commission suggests that killing fighters *hors de combat* or civilians may amount to war crimes. Consequently, this applies to the Mahari Hotel killings as well.

[101] ICIL-Report, at para. 449.
[102] ICIL-Report, at para. 394.
[103] ICIL-Report, at para. 488.
[104] ICIL-Report, at para. 217; Human Rights Watch, Libya: Apparent Execution of 53 Gaddafi Supporters, 24 October 2011, http://www.hrw.org/news/2011/10/24/libya-apparent-execution-53-gaddafi-supporters. Cf. Human Rights Watch, World Report 2012, at p. 599.

70 Again, the Mahari Hotel killings is one particular incident of violence that amounts to a breach of international law. Other instances can be found as well.

71 The Mahari Hotel killings as well as the targeting of several communities (the Tawergha community being the most prominent example) and the killings of both *Muammar al-Gaddafi* and *Mutassim al-Gaddafi* are likely candidates for further investigation by the ICC. The Commission has provided an excellent account of what happened and of the legal consequences of these actions. Now, it is for the ICC to take up the results and finally investigate actions by rebel forces during the conflict. Otherwise the ICC would repeat the Libyan legal system's mistake of focusing on crimes of Gaddafi forces.

6) Detainees

72 The ICIL's report explains in all detail the situation of the detainees in Libya. A special emphasis is put on the fact that these situations must be improved. Here the ICIL keeps in line with the International Committee of the Red Cross (ICRC), which recently stated that "international humanitarian law, in its current state, provides a suitable legal framework for regulating the conduct of parties to armed conflicts." But, in almost all cases, "what is required to improve the victims' situation is stricter compliance with that framework, rather than the adoption of new rules. If all the parties concerned showed perfect regard for international humanitarian law, most current humanitarian issues would not exist." Thus, "all attempts to strengthen humanitarian law should therefore build on the existing legal framework."[105] The situation in Libya is a highly illustrative example of the ICRC's call.

7) NATO's Operation 'Unified Protector' and Human Rights Law

73 As stated above, the ICIL's mandate included actions by foreign forces during the international armed conflict. It is regrettable that NATO did not provide sufficient information to the ICIL in order to enable the Commission to fully analyse NATO's actions. More troubling, however, is another aspect of NATO's involvement and the ICIL's failure to address the issues.

74 While the ICIL states that the legal framework for NATO's involvement is "based upon principles of international humanitarian law",[106] it fails to mention human rights law. Given that the territorial scope of application of human rights law is disputed, the Commission should have addressed this issue.

[105] *ICRC* Strengthening legal protection for victims of armed conflicts, Draft Resolution & Report, 31st International Conference 2011, Geneva, October 2011, at p. 4.
[106] ICIL-Report, at para. 613.

75 As stated above, human rights law applies extraterritorially when a state exercises jurisdiction, meaning effective control. While the predominant view has held that mere aerial bombings do not constitute jurisdiction,[107] new jurisprudence by the ECtHR[108] points in another direction. It may be maintained that under the new jurisprudence such aerial bombings may constitute jurisdiction. Legal scholarship is still divided on the question of whether or not this judgment changes the concept of 'jurisdiction' under human rights instruments.[109] Again, the ICIL missed an opportunity to take a stand and to facilitate the discussion regarding this question.[110]

76 Human Rights Watch has recently concurred with the ICIL's findings and demanded, that NATO paid "suitable compensation" for the civilian victims of its air campaign against Libya.[111]

8) Accountability and the International Criminal Court

77 All in all, the report exposes on twohundred pages the terrible compliance with the law by two parties to the conflict. Consequently, better compliance is badly needed. This does not only hold true for future conflicts in other countries, but for Libya as well. Perpetrators of serious crimes cannot go unpunished.[112]

78 The ICIL's assessment of the Libyan legal system cannot be admired enough. The Commission evaluates the law and its institutions from every angle, it evaluates the existing substantial law and critizes the unequal application of the existing framework. Very alarmingly is the total lack of accountability for violations of human rights law as well as international humanitarian law.

79 Why does this merit special attention? Because it shows that the current legal system of Libya is neither willing nor able to carry out any investigation or prosecution of alleged crimes. Any case before the ICC, which already has jurisdiction over the situation in Libya since 15 February 2011,[113] will *prima facie* be admissible.[114] The international community can therefore provide the missing accountability

[107] ECtHR, *Banković and others v. Belgium and 16 Other Contracting States*, Appl. no. 52207/99, 12 December 2001, at para. 71 et seq.
[108] ECtHR, *al-Skeini and others v. The United Kingdom*, Appl. no. 55721/07, 7 July 2011.
[109] Cf. only *M. Milanovic*, Al-Skeini and Al-Jedda in Strasbourg, in: EJIL 23 (2012), p. 121-139.
[110] For the record it should be noted that the present author doubts that human rights law applies in NATO's campaign. Cf. *R. Frau*, Unmanned Military Systems and Extraterritorial Application of Human Rights Law, forthcoming.
[111] Al Jazeera, NATO 'ignoring civilian deaths in Libya', 17 May 2012, http://www.aljazeera.com/news/africa/2012/05/201251416321904479.html.
[112] Cf. Preambular paragraphs 4 and 5 ICC-Statute.
[113] Security Council Resolution 1970 (2011), UN Doc. No. S/Res./1970 (2011), 26 February 2011.
[114] Cf. art. 17 ICC-Statute.

mechanisms, this is the *raison d'être* of the ICC. The ICIL's analysis is so well crafted that the Office of the Prosecutor as well as the chambers of the ICC could almost copy & paste the report into its applications and decisions.

V Conclusion

80 The ICIL-Report is a thouroughly researched analysis of the situation in Libya. In an almost flawless manner it addresses the various legal issues of the conflict. Not surprisingly, it fulfills its mandate in an exemplary fashion.

81 However, the Commission missed some opportunities to clarify matters in legal and factual terms. Most importantly, it did not take stand on legal obligations of non-state-actors, extraterritorial application of human rights law and the exact dates of the armed conflicts' commencement and ceasation.

82 Nevertheless, the report sets the standard for future investigations. It clearly shows which issues must be addressed within the next months, it provides basic facts and basic legal analysis for the international community's involvement in the reconstruction of the Libyan state. In addition, it provides the ICC with valuable informations to conduct further criminal investigations. The ICIL has shown that the Libyan conflict of 2011 is far away from being resolved.

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